

## Subsidiarity in the Jurisprudence of the Court of Justice of the European Union

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### Abstract

*This paper will analyze and evaluate the role of the Court of Justice of the European Union (the Court) on the interpretation and determination of the principle of subsidiarity, designed to regulate the proper balance between the EU institutions and Member States. The Court was left a very broad space in this direction also due to the lack of clarity in the legal provisions relating to the determination of "competence" before the Lisbon Treaty. The Court has been reluctant in the formulation of the principle of subsidiarity in terms of the distribution of powers between the Community (actually EU) and the Member States. In its jurisprudence the Court has recognized that subsidiarity is pertinent to how the Community has exercised the competences and not which are the competences of the Community. The Treaty of Lisbon clearly defines the areas where the EU has exclusive competence. Thus, The Court's approach to subsidiarity may change. Also, by determining the areas where powers of the EU are shared with the Member States will facilitate the judicial review in determining whether the action taken at EU level is fulfilled adequately and with good objectives.*

**Keywords:** subsidiarity, Court, jurisprudence, treaty

### 1. Introduction

The Court of Justice of the European Union (the Court), with its jurisprudence has played a fundamental role in the development of European Union (EU) law, as well as the institutional triangle Council-Commission-Parliament. This role is particularly evident in the elaboration and formulation of EU law principles.

Subsidiarity is a fundamental principle conceived in order to achieve the right balance between EU institutions and Member States.<sup>1</sup> The distinguishing feature of this approach is to determine the appropriate level of action across the whole spectrum of public activity, at the international level as well as in national, regional and local levels.<sup>2</sup>

The principle of subsidiarity was included in the European context to regulate the exercise of Community's competence. It was mentioned for the first time in the Single European Act, in 1986 and was reconfirmed in Article 5 of the Treaty of the European Economic Community.

An important act in the legal regulation of the principle of subsidiarity was the Protocol on the application of the Principles of Subsidiarity and Proportionality attached to the Amsterdam Treaty, under which the three institutions should take into account the principle of subsidiarity in the drafting of Community legislation. Protocol lists the guidelines to be followed in deciding whether action should be taken by the Community or by the Member States. The Commission should therefore ensure the explanatory memorandum to the proposed legislation reasons why objectives can be better achieved by Community.

In the Treaty of the European Union (TUE) the core principle of subsidiarity is defined in paragraph 3 of Article 5:

*"... in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."*

Also, to the Treaty of Lisbon was attached Protocol nr. 2 on the application of the Principles of Subsidiarity and Proportionality, which is draft under the earlier protocols. But this Protocol presents an innovative tool, which is the increase of the role accorded to the national parliaments to monitor the implementation and exercise of this principle. The Commission is obliged to send legislative proposals to the national parliaments at the same time as to the Union institutions

Under Article 8 of this Protocol, the Court shall have jurisdiction to rule on allegation of infringement of the principle

<sup>1</sup> H. Barnett, R. Jago (2011) "Constitutional and Administrative Law", pg. 193.

<sup>2</sup> Ibid, pg. 203

of subsidiarity by a legislative act.

In the analysis of this paper, through references to the Court's decisions will be presented its role in the elaboration of the scope and application of the principle of subsidiarity.

## 2. The Criteria of Subsidiarity

From the content of Article 5 of the TEU, the principle of subsidiarity does not apply in areas where the EU has exclusive competence. In the areas in which the EU has exclusive competence, to take the decision, cannot be raised the issue of whether other subjects exercise this power or to what extent they have the right to act. Article 3 of the Treaty on the Functioning of European Union provides a number of areas in which the Union shall have exclusive competence, such as: customs union, the competition rules necessary for the functioning of the internal market, monetary policy, the common fisheries policy and common commercial policy.

In areas where the EU does not have exclusive competence, in order to act in accordance with this principle, its actions have to meet these three conditions:

1. the Union shall act only if and insofar as the objectives of the proposed action cannot be achieved by the Member States;
2. the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States;
3. the proposed action, can rather be better achieved at Union level, by reason of the scale or effects.

This formulation entail what the Commission has termed a test of comparative efficiency: is it better for the action to be taken by the Community or the Member States.<sup>3</sup>

Thus, the principle of subsidiarity is based on the adequacy and effectiveness criteria, which allow a wide margin discretionary assessment to the community institutions.<sup>4</sup>

## 3. Subsidiarity in the Jurisprudence of the Court

The Court can adjudicate on the application of the principle of subsidiarity. So if the EU takes decisions in a particular field, a Member State may refuse the application of these decisions referring to the principle of subsidiarity and so the Court will have to take a decision.

In order to provide the effectiveness of the Community law the Court in its various decisions has gone beyond a narrow interpretation of the articles of the Treaties. But, it is clear from the case law of the Court the hesitancy in the judicial review concerning the principle of subsidiarity. This is apparent in substantive and procedural terms.

The difficulty of overturning a measure because of subsidiarity in material terms, clearly emerges in the case of *Working Time Directive*.<sup>5</sup> United Kingdom argued that the Directive infringed the principle of subsidiarity, since it had not prove that, the action at Community level would bring the full benefits compared with action at the national level.<sup>6</sup> The Court however stressed that: "...once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonise the conditions in this area, while maintaining the improvements made, achievement of that objective through the impositions of minimum requirements necessarily presupposes Community – wide action."

Compliance with subsidiarity in procedural terms is apparent in *Germany v European Parliament and Council*.<sup>7</sup> The court held that the duty to give reasons contained in Article 253 of European Community did not require that Community measures contain an express reference to the subsidiarity principle. It was sufficient that the recitals to the measure made it clear why the Community institutions believed that the aims of the measure could best be attained by Community action.<sup>8</sup>

In the *Tobacco Advertising Judgement*<sup>9</sup>, the Court's decision is related to the competence of the Community and the division of powers between the Community and the Member States and does not explicitly refers to subsidiarity. In the

<sup>3</sup> P. Craig (2006), "EU administrative Law", pg. 422

<sup>4</sup> G. della Cananea (2008) "Diritto Amministrativo Europeo-Principi e Istituti", pg. 24.

<sup>5</sup> Case C-841/94, *United Kingdom vs Council*

<sup>6</sup> P. Craig (2006), "EU administrative Law", pg. 426

<sup>7</sup> Case C-233/94

<sup>8</sup> *Ibid*, pg 426

<sup>9</sup> Case C-376/98, *Germany v Council*

opinion of the Court the tobacco advertising directive was not even supported by a proper legal basis and, for this reason, there was no reason to further examine Article 5, paragraph 2 of European Community.<sup>10</sup>

The Court referred to the general provision of Article 5 of European Community which emphasises the fact that the powers of the Community are restricted to those conferred by the treaty and. It concluded that the EU institutions had gone beyond those limits by regulating tobacco advertising, when in fact the case involved no real obstacle to free movement. The subsequent cases of the Tobacco Advertising saga demonstrate the tension within the European polity between the desire to adopt pan – European policies to protect public health and the will of Member States that the Community should respect the boundaries of its competence by limiting the harmonization of national public health legislation.<sup>11</sup>

The Court found no infringement of the principle of subsidiarity laid down in the second paragraph of Article 5 European Community in *Alliance for Natural Health*.<sup>12</sup> To leave Member States the task of regulating trade in food supplements which do not comply with the directive would perpetuate the uncoordinated development of national rules and, consequently, obstacles to trade between Member States and distortions of competition so far as those products are concerned. Thus, the objective pursued by the directive cannot be satisfactorily achieved by action taken by the Member States alone and requires action to be taken by the Community.

Thus, the Court disagreed that in areas of health policy national actions could pass better rules to food supplements, emphasizing the significance of public health harmonization in European integration.

In *Commission v Council*<sup>13</sup> the Court annulled the Framework Decision for being adopted on the wrong legal basis. Regarding the necessity test the Court stressed that: any use of measures of criminal law must be justified by the need to make the Community policy in question effective. In principle, responsibility for the proper application of Community law lies with the Member States. In some cases, however, it is necessary to direct the action of the Member States by specifying explicitly: a) the type of behaviour which constitutes a criminal offence and/or; b) the type of penalties to be applied and/or c) other criminal-law measures appropriate to the area concerned. Checks must be carried out to establish necessity and the observance of the principles of subsidiarity and proportionality at each of these stages.

#### 4. Conclusion

Subsidiarity is a fundamental principle conceived in order to achieve the right balance between the EU institutions and Member States. The distinguishing feature of this approach is to determine the appropriate level of action across the whole spectrum of public activity, at the international level as well as in national, regional and local levels.

Regarding the role of the Court, it has always been clear that it can adjudicate cases relating to the interpretation of subsidiarity. However, the real issue has been the intensity of the judicial review. In its jurisprudence the Court was limited to recognize that subsidiarity is pertinent to how the Community has exercised the competences and not which are the competences of the Community.

The situation may change after the entry into force of the Treaty of Lisbon in 2009. The Treaty of Lisbon clearly defines the areas where the EU has exclusive competence and those where it shares Competences with the Member States. By determining the areas where powers of the EU are shared with the Member States will facilitate the judicial review in determining whether the action taken at EU level is fulfilled adequately and with good objectives. Thus, The Court's approach to subsidiarity may change.

Finally, the new role of national Parliaments in monitoring and respecting the implementation and exercise of the principle of subsidiarity, after the Treaty of Lisbon, can balanced the minimalist judicial approach to actions based on compliance with this principle.

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<sup>10</sup> C. Ritzer, M. Ruttloff and K. Linhart "How to Sharpen a Dull Sword – The Principle of Subsidiarity and its Control", GERMAN LAW JOURNAL, Vol. 07 No. 09, pg 746

<sup>11</sup> K. Theodore (2009) "Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU and the Member States", pg 138

<sup>12</sup> Joined Cases C-154/04 and C-155/04, *The Queen, on the application of Alliance for Natural Health and Others vs Secretary of State for Health and National Assembly for Wales*.

<sup>13</sup> Case C-176/03.

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