



## The New Nuances of Subsidiarity Principle

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**Abstract:** Through this study we resume a topic analyzed by other authors as well, however we will highlight, based on analysis, observation and case study, the new nuances of subsidiarity principle after the entry into force of the Lisbon Treaty. Based on the historical perspective of the approach of this principle, we stopped on the subsidiarity's place and role in the European reorganization. Subsidiarity principle is now a way of resetting the EU's relations with the Member States, while respecting the democratic principles established by the Treaty on European Union, increasing the role of national parliaments in the proper functioning of the European Union.

**Keywords:** subsidiarity principle; the European Union; competences

### 1. Introduction

Transformed into the EU rule of law, the subsidiarity principle has experienced a difficult path, rooted in the Catholic social doctrine<sup>2</sup>, according to which the society should provide support to its weaker members, but must it take care that they retain their autonomy and self-esteem (De Vargas Rex, 2012, p. 255).

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<sup>2</sup> The subsidiarity principle is found in the encyclical "Quadragesimo Anno" of 1931 (Popa, 1997, p. 29). From the theological point of view the principle is formulated as follows: "As you cannot take from private companies to be transferred to the community, the tasks which they are able to pay on their own initiative and with their own means, it would be committed an injustice, at the same time disturbing the social order, if it would withdraw the inferior groups, in order to be entrusted to a larger and higher-level collectivity, functions that they would be able to achieve." (Nemery & Wachter, 1993, p. 86). Within the same document, Pope Pius the XI<sup>th</sup> said "It can neither change nor shake this principle so important to social philosophy. The natural object of any intervention in social matters is to help the members of the social body and not to destroy or absorb them." (B descu & Alexandru, 1997, p. 60)

Meanwhile, another sense, closer to the administration, is considering limiting the role of government in order to justify the place of other institutions, including the Church.

A fundamental instrument of organizing and reorganizing the European construction (Maftei & Coman, 2010) the subsidiarity principle has acquired new dimensions with the entry into force of the Lisbon Treaty and the subsequent adoption of the Protocol no 2 on subsidiarity principle and proportionality<sup>1</sup>, being considered “an indispensable tool of regulation”(Belanger, Gautron& Gard, 2001, taken from Veliscu, 2004, p. 66).

As mentioned in a specialized paper (Badescu& Alexandru, 1997, p. 59), the subsidiarity principle seeks to answer, on the one hand, the need for *institutional reshaping and social evolution, and on the other hand, a need for active participation of citizens in decision-making, by lowering the level of adopting them as close as possible to the concrete problems*, subsidiarity being based on the acceptance of plural society, but in a deeper sense than the meaning understood by the democracy (Veliscu, 2004, p. 173).

## 2. The Content Subsidiarity

The subsidiarity role in stimulating the interregional cooperation has led to the consideration of this principle as a pillar of the transformation and distribution of the competences on state power levels (Monjal, 2010, p. 59). Thus, article 4, paragraph (3) of the European Charter of Local autonomy adopted in Strasbourg in 1985, states: “*In general, the public affairs will be dealt with by administrative bodies closest to the citizens. Delegating the public affairs by other administrative bodies will depend on the nature and character of the task, i.e. the efficiency and economic requirements.*” And paragraph (4) provides: “*The duties of local authorities are generally full and exclusive. These tasks may be constrained by other regional or central bodies only under specific legal provisions.*”

Division of competences in the light of subsidiarity has evolved in relation to the European construction, conferring to the process a more democratic feature. (Veliscu, 2004, pp. 165-174)

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<sup>1</sup> The Lisbon Treaty replaced the 1997 Protocol on applying the subsidiarity and proportionality principle with Protocol no 2, taking into account, in particular, the role of national parliaments in monitoring the compliance of the subsidiarity principle by the European institutions. ([http://www.europarl.europa.eu/ftu/pdf/ro/FTU\\_1.3.5.pdf](http://www.europarl.europa.eu/ftu/pdf/ro/FTU_1.3.5.pdf)).

From the political point of view, subsidiarity is a dynamic, flexible concept (Veliscu, 2004, pp. 165-174), understood as an argument supporting the “*expanding community structures at the expense of the national ones*”, and as an argument against the “*expansion of Community competences and their location at the national or for local or regional communities*”(Popa, 1997, p. 30). It is justified in this way the intervention of other authorities when it is not carried out the effectiveness of local action. This argument has led to the consideration of the lack of effectiveness of local action as a basic criterion according to which the state can intervene at national level, as at the European Union level is sending its jurisdiction whenever a Member State cannot solve effectively specific problems. (Popa, 1997, p. 28)

Meanwhile, subsidiarity is regarded as “*the adequacy of political decision to the real pressures as permitted by pursuing the ideal and the suitability of the political decision to the current requirements within the limitations of the vision of the future.*” (Popa, 1997, p. 50)

Subsidiarity principle was revived at the European level, with the amendment of the Treaty of Rome, through the Maastricht Treaty, article 3B acquiring the following content: “*In areas which do not fall within its exclusive competence, the Community shall not take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, due to the dimensions or effects of the proposed action, be better achieved at Community level*”. Previously, the Single European Act had introduced this principle without naming it as such, in the environmental domain.<sup>1</sup>

From a legal perspective, subsidiarity is analyzed in the general context of the European Union, estimating that “*under the principle of subsidiarity, 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 achieved satisfactorily by the Member States or at the central, regional and local level, but due to the dimensions and effects of the proposed action, it can be better achieved at Union level*”(article 5 of the Treaty, i.e. article 5 TEC).

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<sup>1</sup> According to article 130R, SEA established environmental competence as: “*The Community shall act within the environment to the extent that the objectives can be better achieved at Community level rather than at the level of Member States, as isolated cases.*”

If in the first stage of its evolution the subsidiarity role was to “*regulate the exercise of competences of institutions*” subsequently, the European Council in Edinburgh in December 1992 has made some remarks<sup>1</sup>, thus placing the subsidiarity principle in the whole of community law (B descu & Alexandru, 1997, p. 62). However, the Court of First Instance of the European Communities established in 1995 that prior to the entry into force of the Treaty on European Union, the principle has not been a general principle of law that relates to European legislation.<sup>2</sup>

In June 1994 the European Council’s conclusions from Corfu underlined that “openness and subsidiarity represent essential concepts that require a careful preparation”, claiming that “the Union must be built with the contribution of its citizens”; it was concluded that the subsidiarity principle should not focus only on EU relations with the Member States, but it should also include other levels, i.e. regional and local level. By the Treaty of Lisbon (Maftai & Matei, 2010) subsidiarity principle acquires new meanings, thereby ending the different interpretations given to this principle because, as stated in article 5 paragraph (3) the intervention of EU institutions, according to the subsidiarity principle, occurs in the following conditions: the covered areas are not in the exclusive competence of the Union; the objectives of the proposed action cannot be achieved effectively by the Member States “*at the central, regional or local level*”; objectives can be better achieved at the Union level, considering the scale and the effects of the established action.

Regarding the first aspect, namely the exclusive competence, the Lisbon Treaty classified the EU competences into exclusive<sup>3</sup>, shared<sup>1</sup> and supporting

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<sup>1</sup>The statements regard the following: the principle of subsidiarity regulates the exercise of competences and not their distribution; application of subsidiarity should not alter the existing balance at Community level; subsidiarity must maintain “entirely the acquisitions of community law.” These clarifications were made in the context of the European Council finding, according to which the principle of subsidiarity has no direct effect on the Community legal order, “subsidiarity is a dynamic concept that allows broadening the Community action when circumstances require to, and conversely, which rejects it when it is not justified”. (B descu & Alexandru, 1997, p. 62)

<sup>2</sup>Decision of 21 February 1995 (T-29/92).

<sup>3</sup> The Union's competence is exclusive for the fields of: customs union; establishing rules on competition necessary for the functioning of the internal market; monetary policy for the Member States whose currency is Euro; the conservation of marine biological resources under the common fisheries policy; common commercial policy; an international agreement when its conclusion is provided for in a legislative act of the Union or it is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope (article 3 TEU).

competences<sup>2</sup>, specifying the areas where they apply (Title I of the TFEU) and the “limits of the Union competences are governed by the principle of conferral” (article 5, paragraph (1)). Therefore, the subsidiarity principle applies only to non-exclusive competences which it results from the treaty. Moreover, article 4 paragraph (1) states that “*any competence which is not conferred to the Union by the Treaties belongs to the Member States*”, and in turn “*the Member States shall facilitate the achievement by the Union of its mission and refrain from any measure which could jeopardize the attainment of the Union’s objectives.*”

It should be highlighted also that the principle of subsidiarity applies to all EU institutions (Article 1 of Protocol no. 2), and the Member States through national parliaments verify compliance with this principle, according to the procedure established by the Protocol no 2 regarding applying the subsidiarity and proportionality principles.<sup>3</sup> According to this procedure, the European Commission, the European Parliament, The Council shall forward their draft legislative acts and its amended drafts to national Parliaments (Article 4 of Protocol no. 2), by “draft legislative acts” shall mean proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a legislative act (Article 3 of the Protocol).

The protocol establishes, however, that the draft legislative acts, as defined, are motivated in accordance with the principles of subsidiarity and proportionality. In this sense, each draft legislative act should contain a statement that facilitates the assessment of conformity with the set principles, including the reasons based on

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<sup>1</sup> According to article 4 of the Treaty, shared competence are applied in the areas of: internal market, social policy, for the aspects defined in this Treaty; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; the environment; the consumer’s protection; transport; trans-European networks, energy, space of freedom, security and justice; common safety objectives in public health matters, for the aspects defined in the current Treaty.

<sup>2</sup> The EU actions of supporting, coordinating or supplementing the actions of the Member States are conducted in the areas of: protection and improvement of human health; industry; culture; tourism; civil protection; administrative cooperation; education; vocational training; youth and sport (Article 6).

<sup>3</sup>“National Parliaments ensure, regarding the proposals and legislative initiatives submitted under Chapters 4 and 5, the compliance with the principle of subsidiarity, in accordance with the Protocol on applying the subsidiarity and proportionality principles” (article 69 TEU). It should be noted that all draft legislative acts sent to the European Parliament and Council shall be notified to the national Parliaments (Article 2 of Protocol no. 1 on the role of national parliaments in the European Union).

qualitative and quantitative indicators leading to the conclusion that an objective of the European Union can better be achieved at the level of the Union.

According to Article 6 of the Protocol, the national parliaments or any chamber of a national Parliament may send to the European Parliament President, to the Council and to the Commission, within eight weeks from the date the draft legislative act, a reasoned notification stating the reasons for which it considers that the draft in question does not comply with article 5 of the EU Treaty. If at least one third of the votes allocated to national parliaments converge to a reasoned negative notification, the draft legislative act will be submitted for reviewing. The protocol provides that the initiator of the legislative act may decide, under the conditions specified therein, maintaining, amending or withdrawing the proposal.

An example of non-compliance of the draft legislative act with the principle of subsidiarity is the reasoned notification given in 2012 on the proposal of *European Commission Regulation concerning the exercise of the right to bring collective actions within the freedom of establishment and freedom to provide services*, known under the title of “Monti II Regulation” and it starts and for the first time the “yellow card procedure” (Article 7 paragraph 2 of Protocol no. 2). Following this result<sup>1</sup>, the European Commission withdrew the proposal. Another example of non-compliance with the subsidiarity principle is reflected in *the European Commission's annual report for 2012 on subsidiarity and proportionality*<sup>2</sup>, and it refers to *the Proposal for a Regulation on the European aid fund for the most deprived persons*.<sup>3</sup> In this case, the Commission explained that the proposed fund “will be based on national support schemes and it will be implemented through shared management” having the Member States the responsibility to identify the types of interventions and the target groups.

Verifying the compliance of the subsidiarity principle can be done after the adoption of the legislative act, according to the procedure of judicial review by the Court of Justice of the European Union, complying with “*the rules provided in*

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<sup>1</sup>The Commission received 12 reasoned opinions, representing 19 votes, the threshold being of 18.

<sup>2</sup><http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0566:FIN:RO:PDF>

<sup>3</sup>COM (2012) 617. The National parliaments that have sent reasoned opinions have emphasized that there are no sufficient justification regarding the compliance of the proposed regulation with the principle of subsidiarity. For example, the *DE Bundestag* has argued that the EU has, according to TFEU, no competence to fight against poverty, social policy and the taken measures belong to the Member States' competence.

*Article 263 of the Treaty on the Functioning of the European Union<sup>1</sup>, by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.” (Article 8 of the Protocol).*

According to article 263 TFEU, actions can be formulated also by the Committee of the Regions<sup>2</sup>, if the Treaty on the Functioning of the European Union provides consulting the committee in question on the adoption of legislative acts. (Monjal, 2010, p. 59)

Article 9 of the Protocol establishes that there should be submitted annually a report to the European Council, the European Parliament, the Council and national Parliaments on the application of Article 5 of the Treaty on European Union. This annual report will also be forwarded to the Economic and Social Committee and the Committee of the Regions.

### 3. Conclusions

The principle of subsidiarity is the result of applying three criteria<sup>3</sup> aiming at exercising the competences of the European Union: legality, opportuneness and proportionality. Thus, the EU institutions act within the limits of the established competences and objectives set by the Treaty on European Union. The criteria of opportuneness and necessity result from article 5, paragraph (3) recognizing the possibility of EU intervention “*only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States*” criterion of proportionality limits the EU intervention to “*what it is necessary in order to achieve the objectives of the Treaties*”.

<sup>1</sup> “The Court of Justice shall have jurisdiction to rule on actions brought by a Member State, by the European Parliament, by the Council or by the Commission on grounds of lack of competence, infringement of fundamental procedural norms, infringement of the Treaties or any rule of law relating to their application or misuse of power.”

<sup>2</sup>In order to strengthen the governance structure, the Committee on Regions adopted a new strategy in 2012 on the monitoring of subsidiarity principle, according to which the monitoring activities begin in the pre-legislative phase. The Committee on Regions concerns focused on compliance of the subsidiarity and proportionality principles within the following documents: Proposal for a *Regulation on the European Regional Development Fund*, the Seventh Environment Action Programme, the measures package regarding the public acquisitions, the measure package on the protection of data and workers’ transfer in the delivery of services.(<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0566:FIN:RO:PDF>) COM (2013) 566 final.

<sup>3</sup>Idem.

As stated in the *Annual Report of the European Commission on subsidiarity and proportionality*, in 2012 there were intensified the discussions on the two principles (subsidiarity and proportionality), insisting upon the necessity to define in a more clearer way the scope of the subsidiarity control.

Subsidiarity cannot affect the existing legal order (Popa, 1997, p. 31), the exclusive competence of the EU institutions being established by the Treaty. (Nicu, 2011, p. 79)

Freed by the historical and ideological contexts, the subsidiarity principle is now a way of resetting the Union's relations with the Member States, while respecting the democratic principles established by the Treaty on European Union and the growing role of the national parliaments<sup>1</sup> for the proper functioning of the European Union.

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<sup>1</sup>In this respect, Romania adopted Law no 373/2013 on cooperation between parliament and government in European affairs domain. This legislation creates the cooperation framework between the Romanian Parliament or one of its Chambers and the Government of Romania on Romania's participation in decision-making process within the European Union and monitoring the harmonization of the national legislation with the EU law, including the control of the compliance subsidiarity and proportionality principles (art. 14-15).



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