

**European and International Law****The Lisbon Treaty and the New Dimensions of the Principles  
of Proportionality and Subsidiarity**

**Professor Vasilica NEGRUȚ, PhD**  
*“Danubius” University of Galati*  
*vasilicanegrut@univ-danubius.ro*

**Abstract:** The general objective of the paper was constituted on an extremely present subject of real interest. Using the content analysis through a descriptive documentary research this study aims at identifying the new dimensions of the principles of proportionality and subsidiarity after the Lisbon Treaty. For this end, an analysis of the specific objectives was performed: the concept of proportionality, the evolution of subsidiarity and the new valences of the two principles in the framework of the modifications introduced by the adoption of the Lisbon Treaty. We assert thus that in virtue of these modifications, the application of the principles of proportionality and subsidiarity has the purpose of maintaining the institutional balance, as the subsidiarity establishes which of the competencies belongs to the state or community institutions and the proportionality indicates the dimensions of applying the legislative measures.

**Keywords:** proportionality; subsidiarity; Lisbon; protocol

**Introduction**

The debates determined by the European principles of subsidiarity and proportionality occupy a very important place in the present context and are concretized in a vast specific literature.

The theoretical assets in this field underline multiple perspectives of approach but also the difficulty of characterizing the aspects related to the application of the two European principles as this problematic does not belong to a sole scientific field. Although there is an important number of works and studies consecrated to this subject, we have the purpose of underlining the premises of applying the principles of proportionality and subsidiarity according to the modifications produced after the entering into force of the Lisbon Treaty.

The consecration of the two principles, in distinct manners, in the Treaty on the European Union demonstrates their role and functions on the organization and reorganization of the European construction. If according to the principle of

proportionality the means used by authorities have to be proportional with their purpose, subsidiarity is a manner of proximity political organization, that merges the necessity of sovereignty respecting the autonomy and is the only that can assume the diversities of the European Union and the simultaneously objectives of extension and thoroughgoing of the process of integration and preservation of member states' sovereignty (Veliscu, p. 174).

### **1. The Concept of Proportionality**

The principle of proportionality is expressly consecrated in article 5, paragraph (3) in the Maastricht Treaty<sup>1</sup> but in the literature (Jacobs, 1999, p. 23) it is asserted that the origin of this principle is found in article 40, paragraph (3) of the Treaty Establishing the European Economic Community, signed in Rome on March 25<sup>th</sup>, 1957.

According to the German perception (Schwarze, 1992, p. 687) the principle of proportionality has three dimensions: the measure has to be adequate to the purpose intended; the measure has to be necessary and there is not another way to solve a problem; the measure has to be proportional with the purpose intended.

A very special role in developing the principle of proportionality belongs to the European Court of Justice that initially followed the path of the German legislation and then, thorough the legislation of the European Community penetrated most of the European administrative systems. The Court approaches proportionality as a general principle of law<sup>2</sup> which, together with the other general principles of law (Apostol Tofan, 2006, p. 29) has the purpose of controlling the community actions where there are express regulations in the specific field at European level (Jacobs, 1999, p. 3). According to this principle, the means used by the authorities have to be proportional with their purpose (Manolache, 2006, p. 43). The administrative action has to be performed in a proportional manner with the process, not depriving the citizens of any right that would lead to the reaching of the purpose

The principle is imposed especially in applying administrative or criminal measures. Considering this aspect, it has been established that any measure that surpasses what is strictly necessary for the purpose of giving the member state the possibility of reasonably obtaining complete information on the movement of goods that belong to the specific frame of the commercial policy measures has to be interpreted as being a measure with the equivalent effect of a quantitative restriction forbidden by the Treaty.

---

<sup>1</sup> According to the provisions of the Treaty, "the community's action must not surpass what is necessary for achieving the objectives of the present treaty".

<sup>2</sup> The general principles of law give the measure of the system. Under their subordination there is the structure as well as the development of the system of law.

The literature indicates that the principle of proportionality is present in the public law of most of the member states<sup>1</sup> of the European Union (Ziller, 1996, p. 185). At the same time it is stated that there should be a distinction between the states in which this principle is applied in the administrative law (Germany, Portugal, Austria and The Netherlands) and those in which its use is limited to the field of applying the community law.

The nature of the principle of proportionality differs according to the state because of its formal origin<sup>2</sup> as well as because of the functions it fulfils (Ziller, 1996, p. 186). The principle of proportionality is found also in the European Code of Good Administrative Conduct that stipulates that *“in adopting decisions, the public servant will make sure that the measures taken are proportional with the purpose”*. Also, *“the public servant will avoid the limitation of citizens’ rights or imposing obligations to the citizens, in case such limitations or obligations are not in reasonable relation with the purpose of the action”*. In the decision making, the public servant has to respect the right balance between the interest of private persons and the general public interest.

If in the national law, the principle of proportionality is applied in fields such as expropriation, legitimate defense, power abuse, in the community law its application is related to the limitation of the community competencies and the means used for accomplishing it.

In the community law, the principle of proportionality has the role of identifying the substance and the sense of fundamental liberties declared in the constitutive treaties, complementary with the principles of justice and equity. The principle of proportionality has a considerable importance in protecting the individual due to its role of “guarantee of substance” regarding the protected fundamental rights (Alexandru, 2005, p. 221). Also, proportionality is in strong connection with the reasonable and it also means that is illegal to apply the law only when it appears to be in advantage unintentionally omitted by the law (Apostol Tofan, 2006, p. 40). As indicated in the literature (Apostol Tofan, 1999, p. 46) proportionality is not appreciated only depending on the means of action and the purpose. It is necessary the establishment of a balance between the situation, the finality and the decision (Guibal, 1978, p. 478).

The principle of proportionality is one of the principles illustrating best the phenomenon of mutual inspiration of states’ judicial inspiration, belonging to the same community of law that develops in the present (Ziller, 1996, p. 188).

---

<sup>1</sup> The principle of proportionality is provisioned in the Romanian Constitution in article 53, regarding the restraints in exerting some rights and liberties.

<sup>2</sup> In many states the only source of this principle is the jurisprudence.

Under the aspects of its components, the principle of proportionality aims at the degree of adequacy and the necessity. At the same time, the measure taken based on this principle has to be in an equitable relation with the prejudice brought to the rights of the particulars (proportionality is restraint meaning) (Alexandru, 2007, p. 382).

In what concerns the adequacy, a community measure is in accordance with the principle of proportionality only when the method used is adequate to the purpose of accomplishing the objective. In this context, the European Court of Justice limits its review or supervision powers to the evaluation of the situation if at the time it was adopted a certain measure was inadequate for accomplishing the objective (Alexandru, 2007, p. 683).

If we are considering the necessity, the measure has to be necessary in order for the purpose to be accomplished without imposing an excessive burden on the person, the measure being allowed in case there isn't another measure less restrictive for the accomplishment of the objective. Also, the literature states that not the method used has to be necessary "*but the excessive restriction of liberties involved in choosing the method*" (Schwarze, 1994, p. 683).

Finally, proportionality in a restraint meaning aims at evaluating the utility of the measure for the general good on one side, towards the restraint of the protected rights of the citizens of the member states of the European Union on the other side. The final purpose of the principle of proportionality is represented by the protection of the individual rights and liberties against the restrictions imposed by the public authorities (Alexandru, 2007, p. 384).

## **2. The Concept of Subsidiarity**

From the perspective of enlarging the process of integration and preservation of the states' sovereignty, subsidiarity has become a concept with a permanent presence in the European debate. The preoccupation of the member states of the European Union for their own independency and sovereignty represents an important issue and subsidiarity has the role of eliminating those speculations according to which subsidiarity would be a subtle form of eluding the principle of sovereignty (Zapartan, 2000, p. 7).

One of the main issues solved at European level was the one of sharing the competencies at different levels (individual, state, supra national institutions). Each of the levels was attributed only the competencies that it could fulfil together with respecting the following exigencies: the state cannot impede the persons or social groups to perform their own activities through both the particular interest is accomplished as well as the general one; each authority is responsible for

defending the general interest, maintaining solidarity and economic and social cohesion, intervening only when it can be more effective than the inferior levels (Catana, 2009, p. 212).

The doctrine states that the principle of subsidiarity derives from the roman-catholic ideas according to which, the social, political and human issues have to find a solution closer to the individual, inside the community they belong to and when this level is surpassed, the superior one can be appealed (Barber, 2005, p. 308).

The principle of subsidiarity<sup>1</sup> is the principle according to which the competencies are delegated at a superior level only if they can have a bigger efficiency. This principle had, even from the beginning of the European construction, a wide field of action, as the idea of subsidiarity is founded on accepting plural society, possible to apply following the acceptance of a European “common good”.

The European nations have accepted to participate at this construction to solve the problems that were very difficult to solve separately. But the essential premise of European construction is represented by the conscience of belonging to a common space of values.

As underlined in the literature (Catana, 2009, p. 213) “*subsidiarity is a method or proximity political organization that combines the necessity of sovereignty with the respect of autonomies being the only one that can assume the diversities of the European Union and the simultaneously objectives of enlargement and thoroughgoing of the process of integration and preservation of sovereignty of the member states*”.

The principle of subsidiarity was and still is very controversial which determined the formulation of certain clarifications from the community institutions. Thus, the Communicate of the Commission on October 17<sup>th</sup>, 1992 circumscribes the idea that the principle of subsidiarity does not determine the competencies and this aspect belongs to the Treaty. According to article 3B (5), the principle of subsidiarity is not applied to the fields belonging to the exclusive competence of the Community, without explicitly defining these competencies. Regarding the shared competencies, that are not defined either, the Communicate states that subsidiarity aims only aspects: the necessity of the intervention<sup>2</sup> and the equal efficiency.

---

<sup>1</sup> The literature makes a *horizontal* classification of subsidiarity- when drawing a separation line between the public power and the civil society- and vertical when, at each hierarchic level the decisions that can be taken with greater efficiency are placed. For details, Catana, Emilia-Lucia (2009), p. 212.

<sup>2</sup> The necessity of the intervention is evaluated comparing the means and instruments the community and the member states have at their disposal and the equal efficiency is appreciated depending on the intervention manner that grants more discretion to the states, private persons and enterprises.

In 1992, the *European Council in Edinburgh* on December 11-12 formulated, in a global approach, a series of conclusions regarding the principle of subsidiarity. According to these, the application of the principles takes into consideration respecting the national identity and maintaining the national competencies, considering the involvement of the citizens in the decision making process. Also, it has been stated that article 3 B (5) focuses on three elements: the limitation of the community action, the obligation to act, the nature and intensity of the action. Also, an essential role in applying these rules belonged to the Commission, which was invested with the right of initiative by the Maastricht Treaty. To this end, the Commission has to proceed in wider consultations before proposing legislative measures or refer to the basic documents and justify, in some of its considerations, the opportunity of the initiative regarding the principle of subsidiarity.

A distinct chapter in the *Inter institutional Declaration of the Council Parliament and Commission on democracy, transparency and subsidiarity* (Luxemburg, October 25<sup>th</sup>, 1992) is meant for the Inter institutional Agreement (Council, Parliament, Commission) regarding the procedure for the application of the principle of subsidiarity. This agreement included the convention according to which the exertion of the right to initiative of the Commission has to take the principle of subsidiarity into account and expose the motives of each proposal together with the justification of the proposal regarding this principle. More than that, the three institutions, within their internal procedure, will verify the conformity of the specific action with the dispositions regarding subsidiarity, both in what concerns the choice for the judicial instruments as well as the content.

In *Resolution on April 20<sup>th</sup> 1994*, the Parliament observed that the principle of subsidiarity acquired the statute of mandatory judicial norm whose practical application is subordinated to the Court of Justice.

Without modifying the terms of the principle of subsidiarity provisioned in article 5 of the second paragraph of the EC Treaty, the Amsterdam Treaty annexed the *Protocol on the application of the principle of subsidiarity and proportionality* to the CE Treaty. The rules of application that haven't been provisioned in the treaties but that have been approved within the global demarche on the application of the principle of subsidiarity (1992) established in Edinburgh have become mandatory and verifiable from a judicial point of view.

In its *Resolution on April 8<sup>th</sup>, 2003* the Parliament considers that the solution to the controversies regarding the application of the principles of subsidiarity and proportionality should be provided at a political level, in virtue of the inter institutional agreement on October 25<sup>th</sup> 1993 but takes into account the proposals of the Convention of the Future of Europe that focused on attributing a role to national parliaments in monitoring the issues referring to subsidiarity through a precocious alert system. This underlined that the competence of ensuring a

permanent monitoring of the application of the principles of subsidiarity and proportionality belongs to the institutions of the European Union and the member states.

### **3. New Dimensions of the Principles of Subsidiarity and Proportionality**

The Lisbon Treaty abrogates article 5 in the CE Treaty and introduces the principle of subsidiarity in article 5 of EU Treaty, which, maintaining the terms of the abrogated article, adds an explicit reference to the regional and local dimension of the principle of subsidiarity. Also, the Lisbon Treaty replaces the protocol in 1997 regarding the application of the principles of subsidiarity and proportionality with a new protocol with the same title, whose new aspects refer to a new role of the national parliaments in controlling the respect of the principle of subsidiarity (Protocol no. 2). According to this Protocol, each of the institutions of the European Union permanently ensures the respect of the principles of subsidiarity and proportionality as they are defined in the Treaty on the European Union. Also, it is stated that before proposing a legislative act, the Commission proceeds to extended consultations that have to consider the regional and local dimension of the actions. But, in case of exceptional urgency, the Commission does not perform the abovementioned consultations but motivates its decision within the proposal. At the same time, the Protocol states that the projects of legislative acts are motivated in relation to the principles of subsidiarity and proportionality. In this context, any draft of legislative act<sup>1</sup> should comprise a detailed datasheet that allows the evaluation of the conformation to the principles of subsidiarity and proportionality. The datasheet has to mention elements that allow the evaluation of the financial impact of the project and in case of a directive, the evaluation on the regulations that will be applied by the member states, including on the national legislation, according to each case. In order to underline the importance of the two principles, the Protocol states the reasons that lead to the conclusion that an objective of the EU can be better accomplished at the level of the EU is based on qualitative indicators and, whenever possible, on quantitative indicators. At the same time, it is shown that the legislative acts drafts take into account the necessity to proceed so that any obligation, financial or administrative that belongs to the Union, national governments, regional or local authorities, economic operators and citizens is reduced as much as possible and is proportional with the objective.

Analyzing the provisions of the Protocol, it can be observed that in virtue of proportionality, the content and the form of the Union's action do not surpass what

---

<sup>1</sup> According to article 3 in the Protocol "legislative act draft" represents the propositions of the Commission, the initiatives of a group of member states, the initiatives of the European Parliament, the requests of the Court of Justice, the Recommendations of the Central European Bank and the requests of the European Investment Bank regarding the adoption of a legislative act.

is necessary for the attain the objectives of the treaty. To this end, the form of the community action will be as simple as the effective accomplishment of the measure and the necessity of a sufficient execution allows it (Catana, 2009, p. 220).

In our consideration, the provisions of this Protocol have to be correlated with the norms of the Protocol on the role of the national parliaments in the European Union. Thus, according to article 3, paragraph 1, the legislative acts drafts addressed to the European Parliament and the council are transmitted to the national parliaments and they can address to the president of the European Parliament, the Council and the Commission with a motivated notice regarding the conformity of a legislative draft with the principle of subsidiarity according to the procedure provisioned in the Protocol on the application of the principles of subsidiarity and proportionality.

The Lisbon Treaty introduces a mechanism of precocious alert according to which the national parliaments have a period of time of eight weeks in order to notify the Commission on the drafts of legislative acts that have to be sent to the national parliaments at the same time and also the European Parliament and Council. If a third of the national parliaments contest the conformity of a legislative act draft with the principle of subsidiarity, in case of moticated notifications, the Commission has to reexamine the draft and motivate the eventual maintenance of it. The threshold has to be represented by a quarter of the national parliaments in case of a legislative draft regarding the liberty, security and justice space. On the other side, if the simple majority of the national parliaments contest the conformity of a draft with the principle of subsidiarity and if the Commission maintains its proposal, the case is forwarded to the Council and European Parliament that will decide upon first lecture. If the Council and the Parliament assert that the legislative proposal is not compatible with the principle of subsidiarity, they can reject it with a majority of 55% of the members of the Council or with majority of votes expressed by the European Parliament.

In what concerns the jurisdictional control, it can be said that the principle of subsidiarity is a principle susceptible to such a control. All considered, the application of the principle of subsidiarity grants the Union's institutions a quite large discretion that the European Court of Justice has to respect. The Lisbon Treaty in the Protocol regarding the application o the principles of subsidiarity and proportionality states that within the control of the legality of the legislative acts, the Court of Justice has the competency to decide on the appeal regarding the breach of subsidiarity. Such an appeal can be introduced by a member state, possibly on behalf of its parliament if its internal constitutional order provides this aspect. The same appeal will be opened at the Committee of the Regions if the consultation of this organism is provisioned.



#### 4. Conclusion

In conclusion, we can say that the high degree of influence of the analyzed European principles on the national legislations and their presence in the activity of the public authorities are correlated to the capacity of the country to adopt and implement the European legislation.

The European recognition of the principles of subsidiarity and proportionality has a special meaning in changing the mentality related to the responsibilities of the member states of the European Union, which should understand that they are the most qualified in finding solutions for the national problems, in the name and in the interest of the collectivities they represent.

#### References

- Alexandru, I. & collaborators (2005). *European administrative law*. Bucharest: Lumina Lex.
- Alexandru, I. & collaborators (2007). *Administrative law in the European Union*. Bucharest: Lumina Lex.
- Apostol Tofan, D. (1999). *Discretionary power and the excess of power of public authorities*. Bucharest: All Beck, Studii Juridice Collection.
- Apostol Tofan, D. (2006). *European administrative institutions*. Bucharest: C. H. Beck.
- Barber, N. W. (2005). *The limited Modesty of Subsidiarity*, European Law Journal, vol. 11, apud Bercea, R. (2007). *Community law. Principles*. Bucharest: C. H. Beck.
- Catana, E. L. (2009). *Principles of good government*. Bucharest: Universul Juridic.
- Guibal, M. (1978). De la proportionnalité, L'Actualité juridique. *Droit administratif*, no. 5/1978.
- Jacobs, F. G. Recents developements in the Principle of Proportionality in European Community Law, in Ellis, E. (1999). *The Principle of Proportionality in The Laws of Europe*. Hart Publishing.
- Manolache, O. (2006). *Treaty of community law*. 5<sup>th</sup> Edition. Bucharest: C. H. Beck.
- Schwarze, J. (1992). *European Administrative Law*. London: Sweet&Maxwell.
- Schwarze, J. (1994). *Droit administratif européen*, volume I, Office de publications officielles de Communautés Europeenes. Paris: Bruylant.
- Veliscu, R. The principle of subsidiarity in community law. In *Revista Transilvană de Științe Administrative*, no. 2 (11).
- Zapartan, L. P. (2000). *European construction*. Oradea: Imprimeria de Vest.
- Ziller, J. (1996). Le principe de proportionnalité en droit administratif et en droit communautaire. In *Actualité juridique – Droit administratif*, on June 20th 1996, special edition.