

The Principle of Subsidiarity:  
an Introduction

1. In the early nineties of the past century, the European Community, and in particular its legislative activities, moved to the focal point of criticism by the media and experts in constitutional law. Flood of laws, over-regulation and democratic deficit were popular catch phrases.

At legal congresses and in the German media, there was much talk about the risk that the political system of the Community might change, about a deficit in democratic legitimacy and the disempowerment of national parliaments: there was even talk about a cold “revolution”. The Community was accused of developing an inherent dynamism towards expanding and exceeding its powers.

In fact, the mounting criticism of the European Community’s “regulatory frenzy” resulted in the principle of subsidiarity being firmly enshrined in the Maastricht Treaty on European Union.

The principle of subsidiarity was believed to be an effective cure for the hypertrophy that had been diagnosed in EC lawmaking.

2. As a socioethical principle, subsidiarity is a creation of Catholic social doctrine. The great social Encyclical *Quadragesimo anno* (1931) describes “every social activity” as subsidiary by its very nature.

In terms of its general meaning as an organisational principle for a body politic, subsidiarity requires that every government decision must be taken as closely as

possible to the citizens. The decision-making competence therefore ought to be vested in the unit closest to the people, i.e. the parish, local authority, county, district, region, national government, unless there are factual reasons that demand that the next-higher government level should decide.

3. In article 5(2) of the Treaty Establishing the European Community (ECT) as amended in 1992, the principle of subsidiarity was laid down in the following terms:

“In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”

4. The preamble of the Treaty on European Union defines the principle of subsidiarity, in a more far-reaching manner, as a guiding principle that requires decisions of the Union to be made as closely as possible to its citizens. Article 2(2) of the Treaty on European Union requires the Community to respect the principle of subsidiarity in achieving all its objectives.
5. The principle of subsidiarity is of considerable political importance in the European Union. The Community has comprehensive legislative powers. Surveys and estimates show that up to 80% of national law-making activities are nowadays directly or indirectly concerned with transposing Community law into national law. The powers of the Community are not laid down in any catalogue, similar to the German Basic Law, for example, but mainly derive from the objectives and tasks assigned to the Community. However, the Treaty on a Constitution for Europe, which has been stalled for the time being by the negative referenda in France and the Netherlands, contains a list of competences for the Community.

Under the current system distinguishing between the powers of the Community and those of the Member States poses considerable problems.

There is in addition a wide-spread belief in the Member States that the institutions of the Union, including the European Court of Justice, purposefully pursue a policy of stealthily expanding the powers of the Community.

Against this backdrop, the principle of subsidiarity had high expectations attached to it mainly in the Member States. On the other hand, however, some isolated voices also warned against “balkanization of the European Community” (*Pescatore*), that is to say destabilisation and ‘renationalisation’.

6. The subsidiarity principle as set out in article 5(2) ECT does not apply to the conferring of powers but just to the exercise of existing Community powers that are not exclusively vested in the Community. What does, and what does not, fall within the exclusive competence of the Community is not set out expressly but follows from the nature and objectives of the tasks assigned to it.

The principle of subsidiarity is addressed to all institutions of the Community, within the framework of their respective tasks and authorities. It applies to all forms of actions and measures taken by these institutions.

7. When the Treaty of Amsterdam (of 2 October 1997) was adopted, the principle of subsidiarity was defined more precisely in a “Protocol on the application of the principles of subsidiarity and proportionality”.

This protocol states that the principle of subsidiarity is not meant to call into question the powers conferred on the Community. The protocol requires the *acquis communautaire* to be maintained in full. It says that the Union continues to provide itself with the means necessary to attain its objectives and carry through its policies. The primacy of Community law is maintained.

8. The principle of subsidiarity according to article 5(2) ECT is more than just a programmatic provision: it is a legal rule, and is therefore in principle subject to judicial review. Yet this provision contains vague legal concepts (the action “cannot be sufficiently achieved” by the Member States and can be “better achieved by the Community”) that give room for discretion. Article 5(2) ECT requires an assessment of

the effectiveness of the action to be taken. This is, as a matter of principle, not a task for the Court but for the competent Community institutions.

The European Court of Justice consequently grants (wide) scope for discretion in judging the facts of the situation and defining the appropriate action. Judicial review is limited to the question of whether the limits of this room for discretion have been obviously exceeded. The justiciability of the subsidiarity principle is therefore narrowly confined.

However, the institutions of the Community must give the reasons why they adopt a certain legal instrument with a view to subsidiarity. These reasons form the basis for and are also the subject of judicial review.

9. In conclusion, we can say with certainty that the principle of subsidiarity limits the Community in exercising the powers conferred on it that are not in its exclusive competence, to taking action only if actions taken by the Member States will not be sufficient to achieve the purpose and if such purpose can be better achieved by the Community. The subsidiarity principle has legal quality, not just an appeal function.

Its primary importance, however, is political: it is aimed at procuring voluntary restraint on the part of the Community.

While the principle is subject to judicial review, the latter is limited to obvious violations.