**4 - The European integration process and the European legal order (overview)**

1. **On which conditions is the EU entitled to act?**

Article [5](http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML) of the Treaty on European Union defines the share of competences between the Union and the Member States. The main principles governing the scope of powers granted to the European Union are as follows:

* According to the principle of conferral, the Union has only those competences that are conferred upon it by the Treaties. Any policy areas which are not explicitly contemplated by the treaties as falling under the scope of powers of the EU remain within the domain of the Member States. In broad terms, powers conferred on the Union may be either exclusive (*i.e*., the Union is the only subject entitled to exercise those powers) or “shared” (*i.e*., the relevant competences are shared between the Union and Member States).
* According to principle of subsidiarity, *in areas regarding “shared” competences*, the Union may take action only if the objectives of the proposed action (*e.g*., regulating a certain matter or policy area) cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Union. In other words, the principle of subsidiarity is “satisfied” (and the Union is entitled to legislate) if an action at the EU-level may provide some “added value” (as opposed to the action which Member States would be able to take).

The principle of subsidiarity does not apply to exclusive competences of the Union (as far as those powers are concerned, there is no need to evaluate whether the Member States could take adequate steps to meet their purpose, since, under the Treaties, the Union is the only subject entitled to act).

* by virtue of the principle of proportionality, the means used by the EU in order to meet the objectives set by the Treaties cannot go beyond what is necessary to achieve the relevant purpose or goal. In particular, in establishing whether the EU may legislate by virtue of a regulation or a directive, the most appropriate kind of legislation will have to be identified, provided that the latter could not exceed what is necessary to meet the purpose. Therefore, it the purpose of the EU legislation is just to harmonize the Member States’ legal orders, a directive will be sufficient (unless specific aspects lead to believe that a direct-effect instrument, such as regulations, is needed).

The *Protocol (N.2) on the application of the principles of subsidiarity and proportionality* lays down three criteria, aimed at establishing when the intervention at the European Union level may be held as “appropriate”. In essence, under the Protocol, an answer should be given to each of the following questions:

1. Does the action have transnational aspects that cannot be resolved by Member States?
2. Would national action (or an absence of action) be contrary to the requirements of the Treaty?
3. Does action at European level have clear advantages?

The principle of subsidiarity also aims at bringing the EU and its citizens closer to one another, by guaranteeing that action is taken at local level, where it proves to be necessary (however, the principle of subsidiarity does not mean that action must always be taken at the level that is closest to the citizen).

The Protocol on the principles of subsidiarity and proportionality also puts in place mechanisms to monitor the principle of subsidiarity. Under the Protocol, before proposing the adoption of new acts at the European level, the Commission must arrange consultations, in order to collect opinions from national and local institutions on the proposal at stake, in particular in respect of the principle of subsidiarity.

The Treaty of Lisbon reformed the above Protocol in order to improve and reinforce monitoring of the application of the principle of subsidiarity by national Parliaments. National Parliaments now exercise twofold monitoring functions:

* they have a right to object when EU legislation is drafted (but not yet adopted). They can dismiss a legislative proposal before the Commission if they consider that the principle of subsidiarity has not been observed.

Any national Parliament or any Chamber of a national Parliament may, within eight weeks from the date of transmission of a draft EU act, send an opinion to the Presidents of the European Parliament, the Council and the Commission, explaining why the draft act should be considered as in breach of the principle of subsidiarity.

Each national Parliament is entitled to cast two votes.

Where such opinions represent at least one third (1/3) of all votes allocated to national Parliaments, the draft *must* be reviewed by the EU institutions before adoption. After such review, the Commission or, where appropriate, the Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft act belongs to their respective scope of functions, may decide to maintain, amend or withdraw the act. Any such decision must be supported by specific grounds.

Furthermore, the proposed act must be also reviewed in case that, under the ordinary legislative procedure, said opinions (highlighting a breach of the principle of subsidiary) represent at least the simple majority of votes allocated to the national Parliaments.

* through their Member State, they may challenge an act before the EU Court of Justice if they consider that the principle of subsidiarity has not been observed. Similarly, the Committee of Regions (which is a body created within the framework of the EU legal order) may also challenge an EU act before the EU Court of Justice, claiming that does not comply with the principle of subsidiarity.