

THE PRINCIPLE OF SUBSIDIARITY IN THE EUROPEAN UNION: 'GOBBLEDYGOOK' ENTRAPPED BETWEEN JUSTICIABILITY AND POLITICAL SCRUTINY? THE WAY FORWARD

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The principle of subsidiarity in the European Union confines the policy-making and law-making competences of Union authorities to situations where the designated policy aims cannot be more effectively achieved at lower (i.e. national, regional or local) levels of governance. There are two institutionalised avenues envisaged to safeguard the EU institutions' compliance with this principle. Besides the jurisdiction of the Court of Justice in ruling on all legal questions arising from the application and interpretation of the Treaties, another important instrument is entrusted to the Member States' parliaments. This consists of the political scrutiny of the proposed EU laws with regard to compliance with subsidiarity. This paper intends to juxtapose these institutionalised avenues through an analysis of the principle of subsidiarity as it appears throughout the case law of the Court of Justice and within the subsidiarity monitoring procedure performed by the national parliaments. The aim is to assess the suitability of the judicial and parliamentary procedures for ensuring compliance with subsidiarity, and whether the principle, owing to its dual nature, i.e. both legal and political, can be efficiently complied with at all in the course of EU regulatory practice, either as being judicially enforced or politically safeguarded. After identifying the key shortcomings of both procedures, it will be shown that the present system is rather complex and ineffective. Such a system is unsatisfactory when compared with the constitutional importance of the principle of subsidiarity, and, furthermore, when the EU continues to expand its regulatory practices to sensitive socio-political spheres usually understood as national competences. Finally, novel institutional arrangements, addressing the main criticism and combining the features of both judicial and political systems in safeguarding the principle of subsidiarity, are proposed.

Keywords: subsidiarity, European Union, justiciability, political scrutiny, Court of Justice, national parliaments

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1. INTRODUCTION

The general idea of subsidiarity is derived from the political concept of decentralisation. It mandates that community actions ought to be taken at the most immediate level of governance, for the sake of the efficiency and consistency of the action, higher accountability and transparency of the public authorities, and increased civic inclusion in decision-making. Subsidiarity is thus essential for the regulation of the division of competences between the central and state (regional or local) levels. Power-sharing and institutional balance in the federal systems predicate its application. Its rationale is to guarantee “a degree of independence to a lower authority in relation to the higher one, i.e. for a local government in relation to the central government”.¹ As one of the general principles of European Union (hereinafter “the EU” or “the Union”) law, subsidiarity is a strongly politically driven concept. In a quasi-federal EU system, it enjoys the status of a fundamental constitutional principle of the European constitutional space. In practice, subsidiarity confines EU policy- and law-making competences to cases in which the designated policy aims cannot be more effectively achieved at lower (i.e. national, regional or local) levels of governance. Besides limiting EU decision-making powers, the principle of subsidiarity at the same time democratically legitimises the Union’s actions, when EU competence to act and the appropriateness and rationality of such action are established.²

However, the EU principle of subsidiarity until today has remained a rather vague, ambiguous and fluid concept, which initially sparked numerous academic and political debates. It is perhaps surprising that, after extensive and fierce discussions during the 1990s and early 2000s following its codification in EU primary law, subsidiarity somewhat managed to escape the attention and interest of both scholars and politicians. As presented in this paper, early general consensus on the weaknesses of subsidiarity as a legal and political principle has persisted. Despite the constitutional importance of the principle of subsidiarity, the numerous political crises faced by the Union during the last decade, and the expansion of EU regulation into sensitive socio-political spheres, political and scholarly elites have failed to explain satisfactorily and offer new solutions to the “subsidiarity conundrum”. Other important topics of EU constitutional law, such as general legal principles or the legitimacy of judicial decision-making, have similarly been absent from the discourse at the EU level for a significant period. Only recently has scholarly interest in these topics re-emerged. Therefore, this contribution highlights the need to re-introduce discussion on subsidiarity to contemporary EU legal and political thought.

Almost thirty years after its first appearance, there is still no clear, detailed or widely accepted definition in the EU of the legal substance of subsidiarity, or what the enforceability criteria are for assessing compliance with and potential violations of the

¹ Raffaelli R., *The Principle of Subsidiarity*, European Parliament - Fact Sheets on the EU, 2016, available at: http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.2.2.html.

² Mataija, M., *The Role of the National Parliaments*, in: *Reform of the European Union - The Lisbon Treaty*, Rodin, S., Čapeta, T. & Goldner Lang, I. (Eds.), Narodne novine, 2009, p. 153.

principle.³ What is more, some critics have even rejected the appropriateness of subsidiarity for steering the division of powers in the EU federal setting, where two (or more) levels of legitimate legislators operate, with overlapping competences and with each legislator's "conflicting policies and interests".⁴ Notwithstanding the lack of definition and its alleged normative inappropriateness, subsidiarity as a multifaceted principle relates to many other important legal and political issues and concepts. Their interplay is likewise worth exploring. Perhaps it stands most saliently within the debate on the "creeping competences" of the EU, i.e. the claim that Union regulation encroaches on national legal orders and covertly seizes ever more competences from domestic levels. This was the main driver for devising two institutionalised avenues in the EU for safeguarding the application of and compliance with the principle of subsidiarity. Besides the jurisdiction of the Court of Justice (hereinafter "CJEU" or "the Court") to rule on all legal questions arising from the application and interpretation of the Treaties, another important procedure is performed by the Member States' parliaments. This consists of political scrutiny of proposed EU laws relating to their compliance with subsidiarity. Through this "pre-legislative constitutional intervention device",⁵ national parliaments, often described as the greatest losers in the Europeanisation process, appear essentially as the "watchdogs" of the principle of subsidiarity, and implicitly of their own competences.

The present paper intends to juxtapose these two institutionalised avenues through an analysis of the principle of subsidiarity as it appears throughout the CJEU case law and within the subsidiarity monitoring procedure performed by the national parliaments. The aim is to assess whether either the judicial or the parliamentary procedure is better suited for ensuring compliance with subsidiarity, and whether the principle, owing to its dual nature, i.e. both legal and political,⁶ can at all be efficiently respected in the course of EU

³ Ex-president of the European Commission Jacques Delors thus once famously and in jest offered a "prize of 200 000 pound for a clear definition of subsidiarity", and argued firmly that "it only makes sense in a clear federal approach", in sharp contrast to the EU's dynamic *sui generis* nature. See Jensen, M. D. & Martinsen, D. S., *Out of Time? National Parliaments and Early Decision Making in the European Union*, OPAL Online Paper Series, Vol. 8, 2012, p. 7., available at: http://www.opal-europe.org/index.php?option=com_content&view=article&id=76&Itemid=108.

⁴ Davies, G., *Subsidiarity: The Wrong Idea, in the Wrong Place at the Wrong Time*, Common Market Law Review, Vol. 43, No. 1, 2006, p. 78-80. The historical origins of the notion of subsidiarity are traced back to the Roman Catholic doctrine and German legal thinking. The main claim is that the function of subsidiarity is only fulfilled in the spheres of homogenous nation-states or non-governmental entities such as religious organisations. In this context, subsidiarity regulates the appropriate level of action while assuming that "all levels [of governance] are united in wishing to achieve certain goals and that none has any other interests or objectives which conflict with [the former]". Therefore, according to these views in a federal setting (or functional, quasi-federal entities such as the EU), where the central level legislates on the "most sensitive and traditional national competences (criminal law, welfare state, taxation and economic policy) that encompass almost all aspects of socio-economic activity", and in which strong tension between the Member States and the EU authority exists, the application of subsidiarity seems to be untenable.

⁵ Cygan, A., *The Parliamentarisation of EU Decision-making? The Impact of the Treaty of Lisbon on National Parliaments*, European Law Review, Vol. 36, No. 4, 2011, p. 484.

⁶ The other dimensions of subsidiarity, e.g. economic ones, which are reflected in the comparative weighing of cost-effectiveness, are largely left out of the discussion in this paper. For more insights on the notion of subsidiarity as an economic principle, see Meuwese, A. C. M., *Impact Assessment in EU Lawmaking*, Kluwer

regulatory practice, either as being judicially enforced or politically safeguarded. The main finding is that both procedures are plagued with shortcomings that render the entire system of safeguarding subsidiarity as rather complex and ineffective, thus downplaying the practical importance and status of the principle itself. The theoretical framework for the critical assessment of the two institutionalised avenues for safeguarding subsidiarity is found in the seminal academic contributions discussing the legal⁷ and political⁸ essentials of the subsidiarity principle. A group of authors wrote critically on the CJEU's role in the legal exercise of subsidiarity monitoring, and in general questioned the justiciability of the principle, from the time when the Maastricht Treaty first explicitly introduced the principle and when the topic was strongly debated by academics and politicians alike. Similarly, other authors observed the role of national parliaments in the political exercise of subsidiarity monitoring after the Lisbon Treaty had introduced this mechanism, and immediately identified the main shortcomings of the procedure that still exist today. In the present paper, all these arguments are systematised, compared and re-assessed in the new context of the Union, with all the novel challenges it is facing, and with old unanswered questions, such as subsidiarity, slowly re-emerging.

The paper's structure is as follows. In Part 1, the origins, historical development, rationale and nature of the principle of subsidiarity are addressed in brief, providing a background for further discussion. After reflecting on the limited and vague legal phrasing of subsidiarity, additional far-reaching issues and debates connected with the principle of subsidiarity are introduced. These issues are of significant political and legal importance in the contemporary academic and political discourse in the EU. After setting the stage in this opening part, Part 2 proceeds by defining the concepts of subsidiarity as presently stated in the EU Treaties, justiciability as defined in the legal theory, and parliamentary scrutiny as a political mechanism for controlling decision-making. Hence, we first turn to the practice of the Court of Justice and in selected instances observe its assessment of the principle of subsidiarity. The present discussion is also extended to the more general issue of the justiciability of the principle. The following section opens with a description of the mechanisms devised by the Lisbon Treaty, which ensure the participation of the Member States' parliaments in the decision-making processes at the EU level, and their role in ensuring the compliance of all legislative acts with the principle of subsidiarity. Similarly to the previous section, the suitability of the political monitoring of the principle by the national legislators is observed in general terms. In conclusion, Part 3 highlights the present state of affairs regarding the status of the principle of subsidiarity in the EU and offers new institutional solutions.

Law International, 2008. For an account of the private dimension of the subsidiarity debate which is also important in economic terms, see Craig, P., *Subsidiarity: A Political and Legal Analysis*, *Journal of Common Market Studies*, Vol. 50, No 1, 2012, pp. 72-87.

⁷ For instance, Toth, A. G., *Is Subsidiarity Justiciable?* *European Law Review*, Vol. 19, No. 3, 1994.

⁸ For instance, Kiiver, P., *The Early-warning System for the Principle of Subsidiarity: the National Parliaments as a Conseil d'Etat for Europe*, *European Law Review*, Vol. 36, No. 1, 2011.

After providing an overview and critique of the substantive, procedural and institutional elements of subsidiarity, the main argument will be that the present EU legal framework for safeguarding subsidiarity is highly complex and ineffective. The previous literature on the topic was similarly critical and uncertain about the prospects of having a fully functioning legal and political system of subsidiarity monitoring. However, the vast majority of that scholarship was exhausted by merely describing the system as inefficient, accepting the Court's reluctance to engage in subsidiarity as a legal principle, and the national parliaments' inability to engage properly with subsidiarity as a political principle. In addition, subsidiarity debates declined in number and vigour following the emergence of the subsequent financial, humanitarian and political crises plaguing the EU. The diminished discursive and practical importance of the subsidiarity principle as we witness it today is diametrically opposed to its constitutional rank. Such an absence of subsidiarity-related arguments from political and academic focus is unsatisfactory, especially given the increasing contemporary discussions on the future "variable geometry" or "multiple speed" of EU integration.

For all these reasons, novel institutional arrangements that would combine the features of both the judicial and political system in observing the principle of subsidiarity are proposed. This suggestion of a new arrangement for ensuring the effective application of subsidiarity, together with an assessment of the principle in the contemporary context, is the main contribution of the present paper. By offering unique *lex ferenda* solutions, the paper departs from the previous literature that mostly remains satisfied with unravelling *lex lata*. The relevance of this proposal is also found in the recently renewed legal and political interest in subsidiarity in the EU. The EU institutions have already put forward ideas on possible institutional reforms.⁹ During a recent EU summit, the Benelux countries made an official statement calling for the strengthening of the subsidiarity principle, which would endorse EU action only "in areas of clear European added value and when Member States themselves are not able to deliver for their citizens".¹⁰ Finally, the "Rome Declaration on the Future of the EU", which marked the anniversary of the adoption of the founding Treaty of Rome, indirectly refers to the importance of the principle of subsidiarity, in the part where it declares the intention to have the EU "big on big issues and small on small ones" and to "enhance cooperation with national parliaments".¹¹ This slowly but steadily emerging awareness of the importance of subsidiarity proposes a novel institutional arrangement, reconceptualising the legal and political procedures for safeguarding the principle of subsidiarity, both in a timely and warranted manner. Moreover, the timing for the re-analysis of subsidiarity is apt, given the unprecedented

⁹ See, for example, *European Parliament resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union (2014/2248(INI))*, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-20170048&language=EN&ring=A8-2016-0390>.

¹⁰ FPS Chancellery of the Prime Minister of Belgium, *Benelux vision on the future of Europe*, Press Release, 2017, available at <http://premier.fgov.be/en/benelux-vision-future-europe>.

¹¹ European Council, *Declaration of the leaders of 27 member states and of the European Council, the European Parliament and the European Commission*, 2017, available at: <http://www.consilium.europa.eu/en/press/press-releases/2017/03/25-rome-declaration/>.

challenges the EU is nowadays facing, the uncertainties about the proper course and level of action to address them, and the different political climate and legal state of affairs in the Union when compared with the period between the Maastricht and Lisbon Treaties when the leading explanations of subsidiarity-related issues first appeared.

2. SUBSIDIARITY BEFORE THE EU COURTS AND THE MEMBER STATES' PARLIAMENTS: SUBSTANTIVE AND PROCEDURAL ESSENTIALS OF THE PRINCIPLE

2.1. Origins, historical development, rationale and nature of the principle of subsidiarity

With no mention of the principle in the original founding Treaties,¹² the official genesis of subsidiarity in the EU began with the adoption of the Single European Act, albeit only with a reference to a particular policy area – environmental protection – and without being named as such.¹³ The constitutionalisation of the principle of subsidiarity then further proceeded in parallel with the expanding scope of EU policy competences and the increasing exercise of powers by the Union authorities.¹⁴ Since the EU law-making powers grew through successive Treaty amendments, and were exercised by “qualified majority voting in the Council, combined with an increased co-legislative role for the European Parliament”,¹⁵ Member States tried to compensate for the loss of the right to veto EU action by instituting protective political safeguard clauses. The original unclear division of competences between the EU and Member States called for a more precise “assignment of subject matter areas to respective spheres of government”,¹⁶ which was to be complemented by subsidiarity. When the political consensus for achieving this was finally reached, subsidiarity was explicitly enlisted as a general principle of EU law in the Treaty of Maastricht.¹⁷ The legal framework of subsidiarity was thus gradually constructed and developed in-depth proportionally to this increase of the competences transferred to the

¹² However, the 1957 Treaty of Rome did incorporate fragments of the idea of subsidiarity, albeit in terms and forms different from those that we know today. For the development of the idea of subsidiarity in the EU preceding the 1992 Treaty of Maastricht, see Lenaerts, K., *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, Fordham Journal of International Law, Vol. 17, No. 4, 1993.

¹³ Constantin, S., *Rethinking Subsidiarity and the Balance of Powers in the EU in Light of the Lisbon Treaty and Beyond*, Croatian Yearbook of European Law and Policy, Vol. 4, 2008, p. 154.

¹⁴ de Burca, G., *Reappraising Subsidiarity's Significance after Amsterdam*, Harvard Jean Monnet Working Paper, No. 7/99, 2000, p. 20, available at: <http://www.jeanmonnetprogram.org/papers/99/990701.html>.

¹⁵ Lenaerts, *op. cit.* (n. 12), p. 851.

¹⁶ Craig, *op. cit.* (n. 6), p. 73.

¹⁷ Wyatt, D., *Could a “Yellow Card” for National Parliaments Strengthen Judicial as well as Political Policing of Subsidiarity?* Croatian Yearbook of European Law and Policy, Vol. 2, 2006, p. 2. Interestingly, the then-Court of First Instance of the European Communities in Case T-29/92 *Vereniging van Samenwerkende v. the Commission* ECLI:EU:T:1995:34 (paras. 330-331) ruled that the “principle of subsidiarity did not, before the entry into force of the Treaty on European Union, constitute a general principle of law by reference to which the legality of Community acts should be reviewed”.

EU level: more competences for the EU meant greater prominence for subsidiarity.¹⁸ Therefore, subsidiarity was envisaged to operate as a “mediating concept” that aims to “arbitrate the tension between [the dynamics of political] integration and [decision-making] proximity”.¹⁹

Subsidiarity was originally viewed as a “dynamic concept”, dependent on the ever-changing and adapting relationship between the Union and Member States. It was envisaged as flexible enough to be “expanded if the circumstances require so”, as well as “restricted or discontinued when it is no longer justified”.²⁰ Put differently, subsidiarity was meant to allow the Member States to “create more Europe in some areas and less Europe in others”,²¹ depending on their immediate interests and practical realities. However, one element remained at the core of the “normative mismatch” surrounding subsidiarity, which will be addressed in more detail under the next two subheadings. It was the “fact that the [Union’s] competences tend to be defined in terms of objectives to be achieved”, reflecting the functional nature of the EU as an international organisation, “rather than in areas of activity to be regulated”, which would be the case in a classic federal setting.²² Such a goal-oriented definition of EU competences made it more difficult to put the principle of subsidiarity into operation.

At present, every analysis of subsidiarity inevitably departs from the current definition of the principle as contained in Article 5 of the Treaty on the European Union (TEU).²³ By default, this definition spells out a presumption against EU action in favour of decentralisation,²⁴ similarly to what the previous versions of the same definition asserted. It may thus be considered as counterintuitive that ever since subsidiarity has been codified in EU law, the “excessive and increased centralization in various policy areas at the EU level” has kept occurring, which could not be “justified or politically legitimized by the characteristics or goals of the respective policy areas” but rather with the need to respond *ad hoc* to particular crises.²⁵ Therefore, despite the strict language of the Treaty-based definition (“the EU shall...”), the application of subsidiarity to the delineation of competences between the EU and its Member States is still rather problematic. It is likewise contested whether compliance with the principle indeed only affects the allocation of the exercise of the already established EU competences,²⁶ and does not

¹⁸ Constantin, *op. cit.* (n. 13), p. 155.

¹⁹ Lenaerts, *op. cit.* (n. 12), p. 856.

²⁰ Toth, *op. cit.* (n. 7), p. 281.

²¹ Constantin, *op. cit.* (n. 13), p. 159.

²² Davies, *op. cit.* (n. 4), p. 72.

²³ Article 5(3) TEU, 2012, OJ C 326, provides that “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”.

²⁴ Cygan, *op. cit.* (n. 5), p. 483.

²⁵ van Zeben, J., *Research Agenda For a Polycentric European Union*, The Vincent and Elinor Ostrom Workshop in Political Theory and Policy Analysis Working Paper Series No. W13-13, 2013, p. 7.

²⁶ Toth, *op. cit.* (n. 7), p. 272. It is also important to highlight in this context that in theory the principle of subsidiarity can be breached not only when the EU acts *ultra vires*, but also if the Member States exceed their competences in regulating the area within shared competences.

expand EU competences at the expense of exclusive national competences, as the EU increasingly encroaches on more regulatory sovereignty of the national legislators.

In the new version of the definition of subsidiarity, for the first time an explicit reference is made to the regions and local communities in the context of the application of the principle. This is especially relevant for the newly emerged policy areas such as energy, environmental protection and climate change.²⁷ It is also important in the sense of acknowledging that the vertical allocation of competences does not involve only EU and Member States' central governments, but also a variety of regional and sub-regional levels of governance. In addition, the application of the principle of subsidiarity concerns only areas falling outside exclusive EU competences, i.e. shared or concurrent competences.²⁸ If this is established, the following check is at which level of governance the Union or national objectives are better achieved in accordance with the principle of effectiveness.²⁹ Three general criteria for assessing the suitability of the proposed EU action in the light of subsidiarity are thus recognised: (i) the transnational element and the Treaty basis; (ii) necessity; and (iii) scale or effectiveness (i.e. the "added value").³⁰ In EU political discourse, subsidiarity is most often associated with delivering policy and making decisions "as closely as possible to the citizens",³¹ a reference contained in the Treaties and explicitly highlighted in the so-called "proximity principle".³² However, besides "democratic subsidiarity", the theory also distinguishes what may be referred to as "executive subsidiarity" and "utilitarian subsidiarity", with each conception reflecting a different view about the aims and purposes of the principle.³³ The democratic argument for appropriate distribution of powers between levels of government in the EU emphasises protection of citizens' rights and the closeness of the decision-making to the citizens. An executive version of the argument stresses the importance of the protection of Member States' executive prerogatives against encroachment by the EU regulator. The

²⁷ Arribas, G. V. & Bourdin, D., *What Does the Lisbon Treaty Change Regarding Subsidiarity within the EU Institutional Framework?*, European Institute of Public Administration Bulletin, Vol. 2, 2012, p. 13, available at: <http://publications.eipa.eu/en/eipascope/search/&tid=1720>.

²⁸ The Lisbon Treaty also for the first time introduced a clear demarcation between the EU and Member States' competences, dividing them into three categories: exclusive EU competences, competences shared between the EU and Member States, and EU supporting competences. See Articles 3 to 6 of the TFEU.

²⁹ Lenaerts, *op. cit.* (n 12), p. 875-876. Lenaerts argues that this essentially indicates, as the crucial criterion for ascertaining effectiveness, assessment of the "means at the disposal of the Member States". This can result in two scenarios: (i) if the "means at the disposal of at least one Member State prove to be ineffective to sufficiently achieve the objectives of the proposed action, the need for some [EU] action will be established, as these objectives will then indeed be 'better achieved' by the [Union]"; or (ii) if the "means available to all Member States are perfectly effective in order to sufficiently achieve the objectives of the proposed action, but the [EU] is more efficient in achieving these objectives", the Union action in those cases should still not be disregarded from the outset, if the action in question can "benefit from economies of scale when undertaken at the EU level". On the contrary, Wyatt proposes that assessing the compliance with subsidiarity should be in fact a single-step test: determining whether the "objectives of the proposed action can *only* be achieved by the EU-wide action" (emphasis added). See Wyatt, *op. cit.* (n. 17), p. 5.

³⁰ Toth, *op. cit.* (n. 7), pp. 270-271

³¹ Arribas & Bourdin, *op. cit.* (n. 27), p. 15.

³² Article 10(3) TEU: "Decisions shall be taken as openly and as closely as possible to the citizen."

³³ de Burca, *op. cit.* (n. 14), pp. 14-15.

utilitarian argument favours the interests of the policy-making *per se*, i.e. efficiency, consistency, and comprehensiveness of actions and outcomes.³⁴

Horizontally, the principle of subsidiarity extends in its significance to many other concepts and issues of essential importance for the governance and institutional framework of the EU. First, as indicated above, it stems from a wider background of democratic theory, which demands greater inclusion of the political *demos* in decision-making affairs. Arguably, it is most efficiently achieved at the lowest levels of governance where feasible. This also addresses concerns of the Union's democratic deficit that has shadowed the EU integration project from the very beginnings. However, for some commentators the intention to bring citizens closer to the Union stands distinct from the desired stronger integration at the EU level in certain policy areas. Their argument is that greater application of the subsidiarity principle will strengthen the European nation-states, and inevitably come at the expense of the EU central level. Thus, this trade-off between the "stronger Union vs. effective subsidiarity" has been addressed through different mechanisms, which will be presented later in the article.

Another important issue deals with the democracy and input legitimacy of the proposed EU actions. Introducing directly elected national parliaments as guardians of subsidiarity along with the EU "legislative triangle" (the European Commission, the Council of Ministers, and the European Parliament) bestows more legitimacy on the EU acts. It bridges the democratic gap that emerged from the technocratic characteristic of EU decision-making, pictured in the unelected Commission with a monopoly of legislative initiation, and informal "comitology" and "trialogue" procedures for the adoption and implementation of EU regulations as methods of inter-institutional negotiation behind closed doors.

The principle of subsidiarity is moreover inherently intertwined with two other fundamental principles essential to EU decision-making,³⁵ with which it jointly forms Article 5 TEU, namely the principles of conferral³⁶ and proportionality.³⁷ Their interplay is confirmed in the case law of the Court of Justice, which has held that the subsidiarity check includes a necessity test, i.e. the element of proportionality.³⁸ Some authors thus argue that since there is an evident convergence and functional overlap between the

³⁴ *Ibid.*

³⁵ Lenaerts, *op. cit.* (n. 12), p. 850 and 875. He holds that not only does Article 5 "[determine] conditions that must be met for the Union to be able to take action under one of its powers ('only if' question, i.e. the assessment of the need for EU action or subsidiarity *sensu stricto*)" but it "also indicates the permissible extent of such action ('insofar as' question, i.e. the assessment of the nature and intensity of EU action or subsidiarity *sensu lato*)", which is covered by the proportionality principle.

³⁶ Article 5(2) TEU: "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

³⁷ Article 5(4) TEU: "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."

³⁸ Louis, J. V., *National Parliaments and the Principle of Subsidiarity - Legal Options and Practical Limits*, European Constitutional Law Review, Vol. 4, No. 3, 2008, p. 443.

principles, it will be difficult in practice to separate their scrutiny, and the designated procedure for safeguarding the particular principle individually will inevitably come with many shortcomings.³⁹ However, an important difference to note is that proportionality, unlike subsidiarity, applies even in cases where EU competence is exclusive.⁴⁰

As will be assessed in more detail later in this article, the concept of subsidiarity, as a multifaceted notion, is normatively filled with both legal and political substance. Thus, possible inconsistencies in assessing the principle partially, i.e. only through the lens of one or the other approach, further complicate its interpretation and application in practice. Academics, legal practitioners and politicians have from the early days developed diverging concepts on subjecting the control of application of subsidiarity to a particular institution or body, whether national or supranational. Therefore, we have seen proposals for judicial (substantive and procedural) guarantees, in contrast to advocating the complete exclusion of the principle from the Treaties, and endorsing legislators with such responsibility.⁴¹ Those who insist on the legal nature of the principle have brought forward suggestions for the creation of a special advisory/judicial body, i.e. subsidiarity tribunals operating with an *ex post* legally binding perspective, or a special chamber on subsidiarity within the Court of Justice.⁴² Those advocating the political feature of the principle propose the creation of a consultancy committee, formed of national parliamentarians or “wise men”.⁴³ Earlier Treaty revisions indeed considered some institutional solutions for safeguarding the principle of subsidiarity, but eventually avoided them. Here was another compromise on subsidiarity and a trade-off in weighing conflicting interests: not burdening the legislative procedure and preserving the institutional balance on the one hand, and ensuring a more comprehensive and balanced approach on subsidiarity on the other.

Finally, the Protocol on subsidiarity and proportionality⁴⁴ attached to the Treaty of Lisbon came with guidelines for assessing the subsidiarity-specific justifications of EU-wide action. It mandates the EU legislative triangle to ensure compliance with the principle of subsidiarity at each stage of the legislative process.⁴⁵ The Commission, tabling draft legislative proposals and justifying EU-level actions in the light of subsidiarity demands, must include qualitative and quantitative indicators to “substantiate reasons for

³⁹ *Ibid.*

⁴⁰ Furthermore regarding exclusive EU competences, subsidiarity is important for the maintenance and ongoing justification of the principle of the supremacy of EU law, where we have a possible conflict between the earlier regulations already in place, and newly-emerged modern regulatory areas where the principle of subsidiarity may come into play *de novo*. See Cygan, *op. cit.* (n. 5).

⁴¹ Toth, *op. cit.* (n. 7), p. 270.

⁴² Louis, *op. cit.* (n. 38), p. 435.

⁴³ *Ibid.* Some imaginatively went even further and suggested the appointment of a “Mr. or Mrs. Subsidiarity” who would serve as one of the Commissioners.

⁴⁴ Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union by the Treaty of Lisbon of 13 December 2007 (2012) OJ C 326, pp. 206-209.

⁴⁵ Wyatt, *op. cit.* (n. 17), pp. 9-10.

concluding that a determined objective can better be achieved at the Union level”.⁴⁶ This concerns both the choice of instruments and the content of the proposal.⁴⁷ The European Parliament’s Rules of Procedure likewise provide that “during the examination of a proposal for a legislative act, Parliament shall pay particular attention to respect for the principle of subsidiarity”.⁴⁸ These dynamics are further regulated by various inter-institutional agreements concluded by the Commission, the Council and the Parliament. An example is the recent agreement on “Better Law-making”, which mandates the Commission to clarify “in its explanatory memoranda how the proposed measures are justified in the light of the principle of subsidiarity” and to “take this into account in its impact assessments”.⁴⁹ In these impact assessments, the Commission ought to provide “justification for EU action in terms of the need for harmonization, and the [explicit] subsidiarity calculus”, which “should in turn facilitate judicial review”.⁵⁰ We turn to the latter in the following part of this article.

2. 2. Subsidiarity as a legal concept in the case law of the EU Court of Justice

Procedurally, subsidiarity can be invoked either upon referral from the national courts to the Court of Justice in the preliminary ruling procedure or through direct action (for infringement). More specifically regarding the latter, Article 8 of the Protocol on subsidiarity and proportionality institutionalises the procedure for challenging the (non)application of the principle before EU judicial instances. Directly mentioning Article 263 of the Treaty on the Functioning of the EU (TFEU), it establishes the CJEU’s jurisdiction for ruling *ex post* in actions on the grounds of infringement of the principle of subsidiarity by a legislative act.⁵¹

The first important observation in this context relates to the interpretation of the legal basis selected for a particular regulatory act. Dependent on this, and on a subsequent justification of the regulatory choice, is the Court of Justice’s assessment of subsidiarity compliance. However, this may be especially complicated in interrelated and overlapping regulatory areas and levels of competence. In other words, pursuing a particular aim could be legally sound under one particular legal basis but not under another. The problem lies in the uncertainty surrounding certain policy areas – do they fall within or outside the sphere of EU competence? Some authors hold that there are in fact no clear limitations to the EU’s potential competence. De Burca thus argues that any formally

⁴⁶ Louis, *op. cit.* (n. 38), p. 436.

⁴⁷ Raffaelli, *op. cit.* (n. 1). Regarding the choice of the regulatory instruments, it is usually contended that the EU has preferred regulation by directives, which are “designed to foster subsidiarity” since they, according to Article 288 TFEU, leave space for the national regulatory choice of form and methods for reaching the prescribed obligatory goal. See Craig, *op. cit.* (n. 6), p. 75.

⁴⁸ Raffaelli, *op. cit.* (n. 1).

⁴⁹ *Ibid.*

⁵⁰ Craig, *op. cit.* (n. 6), p. 78.

⁵¹ The same article entrusts the EU Committee of the Regions with a special right to bring such actions, in order to safeguard its institutional prerogatives, against legislative acts, regarding the procedures in which it ought to participate in its consultancy capacity.

established legalistic boundaries would inevitably be in constant shift and change, downplaying the practical utilisation of the principle of subsidiarity.⁵² Moreover, EU-proposed actions usually envisage multiple objectives to be achieved. Some of those objectives may, and others may not, require EU-wide action. This is especially relevant for measures allegedly contributing, whether modestly or substantially, to the “establishment and functioning of the internal market”.⁵³ Here, balancing of the comparability and significance of these goals in relation to those that may be a matter for national authorities presents a politically salient issue and ultimately a challenging task for the CJEU.⁵⁴ It is even more difficult to strike a proper balance in situations where an EU objective could be sufficiently achieved through regulation at the EU level,⁵⁵ but some other aspects, like implementation, monitoring and enforcement, are better attained at the level of Member States.⁵⁶

The second important observation relates to the question of justiciability of the subsidiarity principle. In more general terms, justiciability implies the following quality of a rule or a principle: its judicial enforceability or “solvability” by judicial intervention. The classic EU law doctrine would add to this the requirements of sufficient clarity, precision and unconditionality. Three comprehensive criteria for assessing whether the issue is capable of judicial resolution in the EU are thus proposed: (i) the question of the CJEU’s jurisdiction – is it envisaged or not? (ii) the question of admissibility – does an action for bringing an issue before the Court exist, and who has the active legitimation to bring such action? and (iii) the question of substance – does the Court’s power to determine the issue on the merits exist?⁵⁷ It is asserted that the first two steps comprise legal procedural exercises, which are properly vested in the jurisdiction of the Court of Justice. On the other hand, the third substantive step comprises a material assessment of the objectives of a particular proposed act, and amounts in essence to answering the question concerning at which level they are better achieved. It therefore requires “mainly political or economic assessments that exceed the proper judicial functions”.⁵⁸ This third criterion represents the crux of the “subsidiarity conundrum” in its legal dimension. In the remainder of this part, the main issues that aggravate determining on the merits subsidiarity cases are reviewed. These issues determine the subsidiarity principle’s justiciability before the CJEU.

It has been recognised from the outset that, in the formulation and implementation of functional or sectoral policies (e.g. internal market regulation), the exercise of EU competences involves “an evaluation of complex economic facts and market conditions”.⁵⁹

⁵² de Burca, *op. cit.* (n. 14), p. 19.

⁵³ Such as, for instance, in the Tobacco Advertising case, C-376/98 *Germany v. European Parliament and the Council* ECLI:EU:C:2000:544.

⁵⁴ Wyatt, *op. cit.* (n. 17), p. 9.

⁵⁵ Craig, *op. cit.* (n. 6), p. 75.

⁵⁶ *Ibid.*

⁵⁷ Toth, *op. cit.* (n. 7), p. 279.

⁵⁸ *Ibid.*, p. 280.

⁵⁹ *Ibid.*

Within the EU institutional architecture, the CJEU was deemed unsuitable in terms of “staff, facilities and expertise” to examine whether the proposal is “good, appropriate or adequate” and thereby undertake research to deliver “complex economic and political judgments”.⁶⁰ The scenario in which the Court would nevertheless use its discretion in substantively assessing the objectives of proposed EU acts opens the floor for judicial activism and law-making. The Court of Justice has indeed been strongly accused of such practice.⁶¹ In effect, it amounts to replacing the legislative discretion of the Commission, the Council and the Parliament under the guise of judicial review, thus interfering with the principles of separation of powers and institutional balance in the EU.

The judicial activism objection seems particularly important regarding the principle of subsidiarity. In certain instances, the CJEU, through its jurisprudence, has arguably enlarged EU powers, e.g. by defining the principles of implicit and pre-emptive competences.⁶² This might explain in part the Court’s restrictive approach to assessing the compliance of EU acts with subsidiarity. It has been argued that despite the CJEU’s declared intention to approach subsidiarity-policing in a balanced and neutral way, its position is rather “one-sided” in favour of EU competence. In reality, the Court faces a “conflict between the constitutional imperative to be neutral between Member States and the [Union], and the law which gives shape and existence to the Court and its jurisdiction”.⁶³ The outcome of this conflict – so it is suggested – will inevitably lead to greater leeway for the EU regulator.

Similarly, subsidiarity has tended to diminish in importance in the CJEU’s jurisprudence when faced with the Court’s logic of “economic constitutionalism” coupled with integrationist and expansionist bias.⁶⁴ In selected examples,⁶⁵ de Burca argued that there is the obvious phenomenon of the Court refusing to engage with the subsidiarity argumentation, by assessing or questioning the appropriateness of the EU economic norms in light of their aims and the principle of effectiveness. Such a position of the Court ultimately leads to the encroachment of the EU’s regulation into areas of national competences originally intended to stay outside its reach. How does the CJEU justify its position? First, it opts for a strict textual interpretation of economic rules as being

⁶⁰ *Ibid.* This account, however, disregarded the added value of contributions of the parties to the proceedings and representatives of various interveners (Member States’ governments and institutions), together with the assistance of the Advocates General, for the Court’s capacity to effectively assess these issues.

⁶¹ Davies, *op. cit.* (n. 4), p. 65. The argument is that if a situation requires the CJEU to “consider alternatives”, it will inevitably be involved in “policy-making considerations”.

⁶² Mataija, *op. cit.* (n. 2), p. 151.

⁶³ Davies, *op. cit.* (n. 4), p. 66.

⁶⁴ This means that the Court “prioritize[d] and privilege[d] market liberalization norms” while adopting EU-friendly interpretation of the division of competences. See de Burca, *op. cit.* (n. 14), p. 37. Only recently has this characterisation of the CJEU as “pro-integrationist” been challenged, but with no immediate changes in the Court’s approach to subsidiarity.

⁶⁵ In the earlier case law, prior to the introduction of subsidiarity into the Treaties, see, for instance, Case 9/74 *Casagrande* ECLI:EU:C:1974:74, and Case 65/81 *Reina* ECLI:EU:C:1982:6. For a post-Maastricht example of the Court refusing to engage with subsidiarity argumentation, see Case C-415/93 *Bosman* ECLI:EU:C:1995:463.

More in de Burca, *op. cit.* (n. 14), pp. 37-38.

inherently far reaching. The implication of this is that no area of domestic policy, even exclusive national competences, can ever be definitively understood as being “beyond the reach of the EU’s economic norms”.⁶⁶ Therefore, what the Court did is to affirm and repeatedly support what is essentially an irrefutable presumption: the objectives of internal market measures can only be better achieved at the EU level.⁶⁷ The argument often entertained by the CJEU is that any differences in the Member States’ laws are likely to cause distortions in competition and thus erect barriers to the effective functioning of the EU market.⁶⁸ Such a judicial construct in effect undermined the practical value of subsidiarity in the Court’s assessments – it lost all strength when faced with market priorities.

The Court’s perspective on subsidiarity can be conceptualised as follows. Imagine a harmonising measure being challenged for annulment. A Member State bringing the challenge would have to establish that a regulated area – for instance, occupational safety,⁶⁹ public health,⁷⁰ or food safety,⁷¹ all primarily national competences – would be just as well (or even better) regulated by the Member States acting alone; therefore, subsidiarity should prevent the EU from acting.⁷² However, the goals of those “challenged or interpreted [measures] are not exclusively, generally not even primarily, that of regulating the substantive area of law in question”; instead, the goal is pursuing “one of the [EU’s] functional competences – in most cases it is removing obstacles to free movement or distortions of competition”.⁷³ The Court would then accept the necessity of the EU harmonising measure for attaining the stated goals, “since it is manifestly the case that Member States acting alone will never be able to achieve the goals pursued by harmonization, and hence there is no subsidiarity criticism to be made”.⁷⁴ This way, there was a risk of subsidiarity becoming redundant and irrelevant altogether, since, where uniformity is deemed necessary for the functioning of the internal market, only the EU would be able to act.⁷⁵ Such an option would run counter to the intention of the creators of the Treaties: there was a reason why the functional competences, including the internal

⁶⁶ *Ibid*, p. 39. In other places, the author puts it differently: it is “virtually impossible to assert with confidence whether there exist a policy area which completely remains outside the EU regulatory grip”.

⁶⁷ See, for example, Case C-491/01 *British American Tobacco* ECLI:EU:C:2002:741, para. 180, as cited in Wyatt, *op. cit.* (n. 17), p. 11.

⁶⁸ Few authors have recognised this as problematic, even before the subsidiarity principle was incorporated in the Treaties. They claimed that since only the EU could adopt market harmonisation measures, the internal market competences should be enlisted as exclusive EU competences. Therefore, subsidiarity could not be applicable to the exercise of these powers. These views were eventually rejected in the final version of the Treaty of Maastricht, which designated the internal market as a competence shared between the EU and Member States, where it has remained until today. For more, see Toth, A. G., *The Principle of Subsidiarity in the Maastricht Treaty*, Common Market Law Review, Vol. 29, No. 6, 1992, p. 1079.

⁶⁹ Case C-84/94 *UK v. Council* (Working Time Directive) ECLI:EU:C:1996:431.

⁷⁰ *British American Tobacco*, *op. cit.* (n. 67).

⁷¹ Case C-154/04 *Alliance for Natural Health* ECLI:EU:C:2005:449; Case C-377/98 *Netherlands v. Parliament and Council* (Biotechnology Directive) ECLI:EU:C:2001:523.

⁷² Davies, *op. cit.* (n 4), p. 73.

⁷³ *Ibid*.

⁷⁴ *Ibid*, p. 74.

⁷⁵ *Ibid*.

market, where “national and EU powers become inextricably entwined”, were constitutionally envisaged as shared competences where a subsidiarity check is intended to apply.⁷⁶

In any event, what indeed happened in the early case law, in which the CJEU explicitly engaged in assessing the legislative proposals in the light of the principle of subsidiarity, was the Court’s adoption of in general restrictive yet inconsistent interpretation of subsidiarity. This was a standard critique coming from the legal commentators. An almost unanimous claim was that the “EU courts do not take subsidiarity seriously” but rather engage in a “low-intensity judicial review of the principle”.⁷⁷ This was due to both objective difficulties to operationalise the vague legal principle and the Court’s refusal to engage in strict and homogeneous subsidiarity scrutiny.⁷⁸ Another “political” explanation for the Court’s avoidance of wrestling with the justiciability of subsidiarity is its alleged deference to the Union legislators. In simple terms, the Court respects the nature and outcomes of EU decision-making, where the act is adopted if a qualified majority backs it in the Council and hence implicitly rejects any subsidiarity-related objections.⁷⁹ All these observations will be further addressed when particular cases are discussed below.

Since many uncertainties regarding subsidiarity in the judicial process have remained, a decision on the aims and appropriateness of the proposed EU action has shifted more towards the political arena.⁸⁰ In the post-Lisbon era, subsidiarity is still considered by many as not justiciable in its entirety, despite being laid down in the Treaty. Put differently, although constitutionally articulated, the principle of subsidiarity is not normatively “filled with substance”. This is why it was hitherto interpreted and

⁷⁶ *Ibid*, p. 75.

⁷⁷ This notwithstanding the lack of research on how many subsidiarity cases have actually been brought before the Court of Justice since the constitutionalisation of the principle. See Craig, *op. cit.* (n. 6), p. 80. Furthermore, Craig has estimated that in more than twenty years after the subsidiarity was introduced in the Treaty of Maastricht, there have been only around a dozen cases dealing with genuine subsidiarity challenges. Comparing that with the vast amount of EU regulation during the same period, he concludes that it demonstrates the limitation of the Court’s assessment of the legal dimension of subsidiarity.

⁷⁸ The latter position of the CJEU was seen in the Tobacco Advertising case, *op. cit.* (n. 53). The German government initiated an action before the Court following the subsidiarity objections raised by the Bundestag. However, the Court did not delve deeper into the question of subsidiarity. It rather annulled an EU directive for the reason of an improper legal basis, even though there were references to the question of the level of governance at which the action could be better performed. This judgment seems to indicate that where an EU act is found invalid for whatever reason, the subsidiarity issue will not arise and be taken into consideration in proceedings before the Court. Since subsidiarity sets a limit on the exercise of EU competence, the assessment of subsidiary is unnecessary when there is no competence to act at all. I am grateful to an anonymous reviewer for drawing my attention to this last point.

⁷⁹ Craig, *op. cit.* (n. 6), p. 81. He holds that the reason for the “relative lack of [subsidiarity] challenges, and the weakness of the challenges [brought before the Court]”, lie in the fact that the act’s “enactment attests that there was a sufficient number of Member States to secure a qualified majority, which believed that action at EU level was required in accordance with the subsidiarity calculus”. Thus, Member States that base their legal action principally on subsidiarity infringement will have to face opposition by Member States intervening before the Court and contending that action at the EU level was indeed warranted, as confirmed by their vote in favour of the adoption of the contested act.

⁸⁰ Constantin, *op. cit.* (n. 13), p. 152.

understood primarily as a political “brake” to breaches of competence at the Union level.⁸¹ The political dimension of subsidiarity is increasingly being highlighted, while its legal character remains questionable. Therefore, the situation has not changed much since perhaps the most famous criticism of the judicial assessment of the principle of subsidiary was delivered. The then-President of the Court of Justice, Lord Mackenzie Stuart, termed subsidiarity as a “rich and prime example of ‘gobbledygook’ which simultaneously embraces two opposed concepts”,⁸² i.e. the political and the legal.⁸³ As it turns out, the CJEU did not manage to make the term more comprehensible.

To the author’s knowledge, there have still been no judgments on the annulment of EU acts for breaching the subsidiarity principle.⁸⁴ As mentioned before, subsidiarity has appeared before the CJEU only in a limited number of cases. It has been invoked by the parties, rather unsuccessfully, either as a reason for requesting annulment or as an aid for interpretation of EU legislation. On the other hand, the Court has only gradually and timidly come to address subsidiarity in its case law. The very first hint that the principle might be justiciable, at least in principle, came in the case *United Kingdom v. Council*.⁸⁵ The judgment was welcomed with the caution that subsidiarity is “justiciable, although not with mathematical certainty”.⁸⁶ However, can we ever consider a principle as fully justiciable if it cannot be definitively and “with mathematical certainty” interpreted and applied? The CJEU’s consistently simplistic and vague argumentation,⁸⁷ as reiterated in

⁸¹ Zalewska, M. & Gstrein, O. J., *National Parliaments and their Role in European Integration: The EU’s Democratic Deficit in Times of Economic Hardship and Political Insecurity*, Bruges Political Research Papers, No. 28, 2013, p. 24., available at: <https://www.coleurope.eu/study/european-political-and-administrative-studies/research-publications/bruges-political-research>.

⁸² Jensen & Martinsen, *op. cit.* (n. 3), p. 14. Oxford Living Dictionaries (<https://en.oxforddictionaries.com/>) define “gobbledygook” as “language that is meaningless or is made unintelligible by excessive use of technical terms”.

⁸³ The same was subsequently criticised by many authors as an attempt to elevate the maxim of sound administration and a policy principle into a legal rule, or in other words to turn a “rule of institutional conduct into a fundamental [legal] principle of the EU law”. See Constantin, *op. cit.* (n. 13), p. 158.

⁸⁴ In theory, a binding EU act failing to comply with an essential procedural requirement related to the application of the principle of subsidiarity is a more likely possibility than its annulment for manifest error of assessment. See Wyatt, *op. cit.* (n. 17), p. 12. Cf. with the already discussed difference in subsidiarity’s formal/substantive as opposed to its procedural dimension, in Toth, *op. cit.* (n. 7), p. 279-280.

⁸⁵ Case C-84/94 *UK v. Council* (Working Time Directive), *op. cit.* (n. 69).

⁸⁶ Constantin, *op. cit.* (n. 13), p. 163.

⁸⁷ A more detailed example of the Court’s reserved approach towards subsidiarity is the early judgment in the Case C-233/94 *Germany v. European Parliament and the Council* ECLI:EU:C:1997:231. Answering, and eventually rejecting, the German government’s plea on infringement that the adopted directive did not contain a thorough explanation of how it was compatible with the principle of subsidiarity, the Court held that: “in the Union legislature’s view, the aim of its action could, *because of the dimensions of the intended action*, be best achieved at Community level” (para. 26, emphasis added). The Court then found that in response to the Commission’s earlier recommendations via national measures, Member States did not fully achieve the desired result. Thus, it was concluded that the “objective of its action could not be achieved sufficiently by the Member States” (para. 27). Consequently, the Court viewed it as “apparent that the Parliament and the Council did explain why they considered that their action was in conformity with the principle of subsidiarity, and that an *express reference to that principle cannot be required*” (para. 28, emphasis added).

the more recent *Inuit* case,⁸⁸ has kept raising objections to the principle's full justiciability. The Court primarily observes compliance with subsidiarity as one of the conditions covered by the requirement to state reasons for EU acts.⁸⁹ However, even then it takes a restricted and undemanding approach and simply checks whether motivation has been indicated in the preamble of the adopted legal acts.⁹⁰ The Court will find the requirement to be satisfied if "it is clear from reading the recitals that the principle has been complied with".⁹¹

On the other hand, the Advocate General in the *Vodafone* case⁹² proposed to the Court not to consider the "legislative authority's intent" as an exclusive guarantee of a "sufficient justification" that warrants action by the Union.⁹³ In the subsequent judgment, the Court moved away from reading only the preamble to taking an "indirect account of the relevant impact assessment to establish the grounds [for EU action], which are largely based on the transnational nature of the proposed action".⁹⁴ Nevertheless, in recent cases the Court came back to a more formalistic and reserved assessment of subsidiarity compliance when it affirmed its mandate to verify only "whether the Union legislator was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at Union level".⁹⁵

What can, if anything, be concluded from these examples of the CJEU's inconsistent examination of the compliance of EU regulatory practice with the principle of subsidiarity? First, the Court usually does not require a detailed explanation of the proposed legislation. It is enough that the EU institutions claim that for some reason national legislation seems inadequate and that Union action brings added value. As previously elaborated, this remains highly problematic, especially in the internal market sphere. By default, there exists a presumption that the EU is the only one able to efficiently harmonise and ensure the functioning of the internal market, while the Member States on their own are unable to do so. The Court's apologists defend such "judicial scrutiny of the appropriateness of reasons" invoked in favour of the EU action as the only "practical route

⁸⁸ Case T-526/10 *Inuit* ECLI:EU:T:2013:215, paras. 79-86; appealed Case C-398/13 P *Inuit* ECLI:EU:C:2015:535.

⁸⁹ Wyatt, *op. cit.* (n. 17), pp. 11-12.

⁹⁰ Constantin, *op. cit.* (n. 13), p. 163.

⁹¹ Raffaelli, *op. cit.* (n. 1).

⁹² Case C-58/08 *Vodafone*, Opinion of the Advocate General Maduro ECLI:EU:C:2009:596, as cited in Raffaelli, *op. cit.* (n. 1).

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ C-547/14 *Philipp Morris* EU:C:2016:325, para. 218.

Along these lines of the Court's lenient approach is the judgment in the ESMA case (C-270/12 *UK v. European Parliament and the Council* ECLI:EU:C:2014:18). There, the Court formalistically accepted that the objectives of the proposed action through the established EU agency could not be sufficiently achieved by the Member States individually, without going into a more detailed analysis of that proposition. It additionally confirmed that the regulation in question placed enough criteria and limitations for judicial review and political control of the exercise of the EU authority in question, meaning that the powers vested in the agency were compatible with the Treaties. For more details, see Tridimas, T., *Financial Supervision and Agency Power: Reflections on ESMA*, in: Shuibhne, N. N. & Gormley, L. W. (Eds.), *From Single Market to Economic Union: Essays in Memory of John A Usher*, Oxford University Papers, 2012.

for the Court of Justice to supervise the respect by the political institutions [of the subsidiarity requirements]”.⁹⁶ Second, the annulments of EU acts for breaches of the subsidiarity principle are hardly expected. The CJEU recognises the EU decision-makers’ “wide discretion or margin of appreciation in making complex policy assessments”⁹⁷ when deciding on the appropriate level of action for achieving the designated aims. Third, the Court at the same time tries to safeguard its institutional status as an ultimate adjudicator and interpreter of EU law. Albeit marginally, it preserves the entitlement to examine the “accuracy of the findings of fact and law in the acts involving complex assessments, and [to] address the question whether the objective of the proposed action could be better achieved at the EU level”.⁹⁸ However, due to the political sensitivity attached to subsidiarity, the Court maintains a cautious approach even concerning the procedural scrutiny of the principle.⁹⁹ The Court’s undemanding approach led to a low threshold for satisfying subsidiarity’s procedural requirements of stating and substantiating reasons in favour of EU action. This remains unsatisfactory not least because “texts of explanatory memoranda accompanying legislative proposals invariably contain brief and self-serving references to subsidiarity, as do references to subsidiarity in the preambles of legislation”.¹⁰⁰ The Court’s approach lays the greatest burden for ensuring compliance with subsidiarity on the Commission, which holds the monopoly of legislative initiation. However, the Commission’s motivation to dedicate full attention to procedural requirements has remained strongly questionable, possibly due to its limited capacity and institutional constraints to engage thoroughly with subsidiarity assessment. After all, the Commission itself is of the opinion that although subsidiarity has application in law, it remains an “essentially political principle”.¹⁰¹

As a final remark, the Court of Justice’s case law on subsidiarity seems largely to uphold the initial argument of the principle being justiciable only to a “certain point and subject to restrictions”.¹⁰² This may be the result of either internal judicial reservations, uncertain

⁹⁶ Lenaerts, *op. cit.* (n. 12), p. 894. The argument goes that the EU political institutions, faced with the possibility of a “direct ‘political’ control of the Member States, their subnational authorities and interested citizens”, will be “forced to think thoroughly before acting” and will thus invest effort to “express the [appropriate and convincing] reasoning with regards to the operation of subsidiarity as limit *intra vires* to [the Union’s] action”.

⁹⁷ Wyatt, *op. cit.* (n. 17), p. 11.

⁹⁸ Case *British American Tobacco*, *op. cit.* (n. 67), para. 180.

⁹⁹ Wyatt, *op. cit.* (n. 17), p. 12.

¹⁰⁰ *Ibid.*

¹⁰¹ Constantin, *op. cit.* (n. 13), p. 161. The EU political institutions have similarly taken on the scope of subsidiarity. The Commission held at the very beginning that subsidiarity “is first and foremost a political principle, a sort of rule of reason. Its function is not to distribute powers. That is a matter for the authors of the Treaty. The aim of the subsidiarity principle is, rather, to regulate the exercise of powers and to justify their use in a particular case”. The European Council also remarked early that “the principle of subsidiarity does not relate to and cannot call into question the powers conferred on the [EU] by the Treaty as interpreted by the Court. The *acquis communautaire* as well as the balance between the [Union] institutions do not therefore come under pressure as a consequence of the statement of the principle of subsidiarity in the Treaty. There is no separate decision on subsidiarity preceding the decision on the substance of [Union] action. Subsidiarity and substance are necessarily and inextricably intertwined and thus must be part of a single decision-making process”. For more details, see Lenaerts, *op. cit.* (n. 12), pp. 893-894.

¹⁰² Toth, *op. cit.* (n. 7), p. 272.

delineation of exclusive and shared competences, or external shortcomings of subsidiarity's legal framework, even after the introduction of a distinct procedure in the Protocol on subsidiarity and proportionality specifically designed for bringing subsidiarity issues to the Court's *ex post* assessment. Therefore, the subsidiarity check in the form of a judicial procedure proved to have a rather limited influence on EU law-making practices, both substantially (regarding the quality of proposals in light of the appropriateness of the action) and quantitatively (the frequency and amount of Union-level regulation).¹⁰³ Three reasons for this outcome were offered: (i) failures in the substantial and procedural design of the principle; (ii) political indifference towards the principle or even "antipathy on the part of the EU institutions and some Member States"; and (iii) "constitutional indifference or antipathy on the part of the Court of Justice".¹⁰⁴ This led some authors to argue that the judicial review of subsidiarity is defective, since the principle itself is ill-suited to provide legal answers to the political problems of the demarcation of competences. For them, it essentially remains "the wrong rule, in the wrong place, at the wrong time", which "serves primarily as a masking principle, presenting a centralizing polity in a decentralizing light".¹⁰⁵

However, such a bleak and fatalistic depiction of subsidiarity does not suffice in itself. A reflection on this criticism is indeed necessary to concretise and refine the status of subsidiarity before the CJEU and to look for possible ways forward. This is important for ensuring the interests of legal certainty, institutional trustworthiness, consistency in the Court's case law, principles of good administration and inter-institutional balance, and more democratic and inclusive decision-making in the EU. All these interests are laudable and worth pursuing, notwithstanding the unsatisfactory record of the judicial oversight of subsidiarity that is unlikely to improve significantly in the near future.¹⁰⁶ Seeking to address these challenges by striking an appropriate balance between judicial control and the political safeguarding of subsidiarity, the EU entrusted national parliaments with responsibility to monitor the application of the principle in the pre-legislative stages of EU decision-making. This political procedure, to which we turn in the following part, arrived with the promise of reinforcing and provoking an appropriate judicial response to subsidiarity, and thus of "increasing the accountability and legitimacy of the EU law-

¹⁰³ Actually, the amount of EU regulation has decreased recently. However, this was due to neither the increased judicial scrutiny of the principle of subsidiarity, nor the national parliaments' engagement in policing compliance with the principle, as will be explained in the following part. It was rather the result of the Juncker Commission's new general strategy of "better regulation", i.e. smaller in amount but greater in impact, as a response to political crises in the EU and a lack of popular support for EU regulatory initiatives. See European Commission, *Speech of the President Jean-Claude Juncker – State of the Union Address, 2017*, available at http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm.

¹⁰⁴ Wyatt, *op. cit.* (n. 17), p. 4.

¹⁰⁵ Davies, *op. cit.* (no. 4), p. 66 and p. 77. Davies argues that subsidiarity's main shortcoming is that "instead of providing a method to balance between Member State and [EU] interests, it assumes the [primacy of EU] goals, absolutely privileges their achievement, and simply asks who should be the one to do the implementing work" (pp. 67–8). For a critique of Davies' argument, see Craig, *op. cit.* (n. 6).

¹⁰⁶ Craig, *op. cit.* (n. 6), p. 84.

makers, [while] in an unprecedented way enhancing the sense of ‘ownership’ of the European project at national level”.¹⁰⁷

2. 3. Subsidiarity as a political concept in the Early Warning System mechanism exercised by the national parliaments

National parliaments were for a long time seen as the main losers and victims of the EU’s deepening integration project, which favoured the national executives, and the Council and the European Parliament at the supranational level.¹⁰⁸ Theses of the “de-democratisation” and “de-national-parliamentarisation” of the EU, both substantive – national parliaments losing their competences, and procedural – national parliaments being left outside EU decision-making, were employed for explanations.¹⁰⁹ Therefore, national parliaments as domestic sovereigns ceded regulatory powers to the EU. Political balance shifted away from them with a growing number of policy areas being regulated at the EU level and procedures of supranational decision-making increasingly being used. The national parliaments hence appeared as mere spectators in EU political life and acted as “rubber-stampers” of the proposals being mailed to them from Brussels.¹¹⁰

The Working Group on Subsidiarity at the Constitutional Convention on the Future of Europe, which drafted the infamous Treaty Establishing a Constitution for Europe, recognised that subsidiarity is substantively of a political nature, its implementation includes a wide margin of discretion, and therefore the monitoring compliance-ensuring procedure should be conducted through an *ex ante* political mechanism.¹¹¹ The Lisbon Treaty, which built upon these findings, therefore came as a paradigm-changer in this respect, at least formally. Protocols attached to the final version of the Treaty contained references to the new role of national parliaments in EU decision-making. This introduced a certain shift from the judicial oversight of subsidiarity to parliamentary policing of the principle. The above-described weak and perplexed *ex post* judicial control of subsidiarity has been reinforced with an *ex ante* political mechanism for increased scrutiny of the principle.¹¹² At the time, it was enthusiastically described as an “indication of, or a way to, a paradigm shift towards a kind of polycentric Union”.¹¹³ With these novelties in place, the EU aimed at increasing the input and output legitimacy of Union-level actions through the newly established collective subsidiarity monitoring mechanism.

National parliaments after Lisbon hence possess twofold privilege. It embodies in them elements of both institutional approaches for safeguarding subsidiarity: *ex ante* political

¹⁰⁷ Wyatt, *op. cit.* (n. 17), p. 17.

¹⁰⁸ Cygan, *op. cit.* (n. 5), p. 481.

¹⁰⁹ *Ibid.*

¹¹⁰ Jensen & Martinsen, *op. cit.* (n. 3), p. 4.

¹¹¹ Working Group I - Subsidiarity, *Conclusions of Working Group I on the Principle of Subsidiarity (CONV 286/02)*, 2002, available at http://european-convention.europa.eu/EN/doc_register/doc_register0d9a.html?lang=EN&Content=WGI.

¹¹² Constantin, *op. cit.* (n. 13), p. 166.

¹¹³ Louis, *op. cit.* (n. 38), p. 434.

control through the Early Warning System (“EWS”), and the *ex post* legal control through mandating their governments to initiate infringement proceedings before the CJEU. The latter option in general has remained a major political issue for the majority of national governments given the usual resistance on their part to allow access to the Court for other national institutions or decentralised entities other than themselves.¹¹⁴ For this reason, the former political procedure has come into focus.

Before the Lisbon developments, domestic ministerial scrutiny and holding the national executive accountable were the dominant influence of national parliaments on European affairs. Nowadays, domestic legislatures have as a matter of principle an interest in retaining competences at domestic level, and in acting as a “decentralizing corrective vis-à-vis Brussels” by exercising their prerogatives.¹¹⁵ These new powers granted to national parliaments by the Protocol on subsidiarity and proportionality allow them precisely to do so. More specifically, the EWS mechanism gives them a powerful tool to object to an EU proposal on the grounds that it breaches the principle of subsidiarity. If a sufficient number of national parliaments object, the proposal has to be reviewed, and may consequently be maintained, amended or withdrawn by the Commission or blocked by the European Parliament or the Council. This procedure will be explained in more detail below. The Protocol also provides that, in the case of a breach of the principle of subsidiarity, the Committee of the Regions or the Member State(s) may challenge the adopted act directly before the CJEU.¹¹⁶

The most important procedure in this context – the EWS mechanism – is exercised collectively by all national parliaments in the EU acting through a specific voting system.¹¹⁷ Within the ordinary legislative procedure, any national parliament or parliamentary chamber (in the case of bicameral national legislators) may object to a draft legislative act by submitting a “reasoned opinion” within eight weeks from receiving the draft proposal. In that opinion, reasons for considering why the draft act does not comply with subsidiarity are stated. When the votes are counted, each national parliament is allocated two votes, whereas bicameral parliaments split the votes between the chambers.¹¹⁸ If reasoned opinions against an EU draft act represent at least one-third (the threshold in the area of freedom, security and justice is one quarter) of the total number of votes allocated to national parliaments and their chambers, a so-called “yellow card” is issued. If over half of the legislatures issue an opinion, an “orange card” is instituted. The

¹¹⁴ *Ibid*, p. 438.

¹¹⁵ Kiiver, *op. cit.* (n. 8), p. 100.

¹¹⁶ With this, the position of the Committee of the Regions in the EU institutional framework is slightly improved. However, the self-proclaimed “guardian of the principle of subsidiarity” remains on the margins of the decision-making processes and of the procedural scrutiny of subsidiarity, since it can only act in an advisory capacity to legislative proposals initiated by the Commission. It is also interesting to note that the Committee “acknowledged the fundamentally political nature of subsidiarity”, and took a stance that it is a dynamic principle which can serve both to extend and limit EU powers at the same time. See more in Constantin, *op. cit.* (n. 13), pp. 161-162.

¹¹⁷ Kiiver, *op. cit.* (n. 8), pp. 102-103.

¹¹⁸ Raunio, T., *National Parliaments and European Integration: What We Know and What We Should Know*, ARENA Working Paper, No. 2, 2009, p. 23, available at: <http://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2001-2010/2009/>.

consequence of these actions, borrowing their name from football jargon, is explained below. The institution from which the act originates – in the majority of situations the Commission – must review its proposal. Afterwards, the initiator may decide to maintain, amend or withdraw the draft proposal, providing a reason for the decision.

Although national parliaments cannot expressly block a legislative proposal but only provoke a review, the objections raised by a significant number of national parliaments could have great influence on the institution from which the proposal originates. It is hard to imagine that, for example, the Commission would completely disregard the objections from the national parliaments and risk a political backlash.¹¹⁹ However, if the Commission decides to maintain the proposal unchanged, it has to submit its own reasoned opinion explaining why the proposal complies with subsidiarity in its view. Before concluding the first reading in the legislative procedure, the EU co-legislators will have to consider the reasoned opinion of the Commission and those of the national parliaments within a special procedure, and subsequently decide whether the proposal complies with subsidiarity.¹²⁰ If a majority of 55 percent of the members of the Council or, alternatively, a majority of the votes cast in the European Parliament opine that the legislative proposal is not compatible with subsidiarity, it will not be given further consideration.

As previously mentioned, the Protocol on subsidiarity and proportionality also designated reinforced judicial control, whereas national parliaments (via their respective governments) may decide to bring a case to the CJEU in order to adjudicate a possible breach of subsidiarity *ex post*. This (as of yet unprecedented) scenario is often referred to as the “red card”.¹²¹ A direct “red card” by national parliaments was discussed but nevertheless rejected since the very inception of the EWS mechanisms in order to preserve the constitutional prerogative of the Commission over legislative initiation, and of the Council over unanimous amendment of the Commission’s proposals.¹²²

The first eight years of the EWS’s application have shed some light on its usefulness and shortcomings. In total, the mechanism has been successfully triggered only three times. In 2012, the very first “yellow card” was issued against the Commission’s proposal for a

¹¹⁹ The early indications showed that the Commission is willing to take into account opinions submitted by national parliaments, even when the number of parliaments expressing concerns about subsidiarity compliance by the EU proposals has not reached the threshold to formally trigger the “yellow” or the “orange” card procedure. The Commission has replied regularly to a great number of submitted opinions “within the broader context of the political dialogue that it engages in with national parliaments on policy proposals”. See Craig, *op. cit.* (n. 6), p. 79.

¹²⁰ Constantin, *op. cit.* (n. 13), p. 166.

¹²¹ Jensen & Martinsen, *op. cit.* (n. 3), p. 9.

¹²² Louis, *op. cit.* (n. 38), p. 436. However, since subsidiarity monitoring has been continuously debated after the Lisbon Treaty entered into force, recently we have come close to having a stronger national parliaments’ “red card” prerogative. In 2016, the UK Prime Minister managed to negotiate a deal with his EU counterparts, which would allow 55 percent of national parliaments to block fully, within twelve weeks, proposed EU acts for their non-compliance with subsidiarity. This arrangement was soon dropped after the referendum vote in the UK to leave the EU. See more in Booth, S., *What did the UK achieve in its EU renegotiation?*, Open Europe, available at: <http://openeurope.org.uk/today/blog/what-did-the-uk-achieve-in-its-eu-renegotiation/>.

regulation concerning trade union rights and the right to strike (the so-called Monti II Regulation). Twelve out of forty national parliaments or chambers thereof (19 out of 54 of the total votes allocated) considered that the content of the proposal did not conform to the principle of subsidiarity.¹²³ The Commission subsequently dropped the proposal. However, the Commission took the view that the subsidiarity principle had not been infringed, but rather that it was aware of the lack of the necessary political support for the proposal in the Council and the Parliament.¹²⁴ In 2013, another “yellow card” was issued by fourteen chambers of national parliaments in eleven Member States (18 votes in total) following the proposal for a regulation on the establishment of the European Public Prosecutor’s Office (“EPPO”).¹²⁵ After examining the reasoned opinions received from the national parliaments, which are traditionally sensitive to any attempt of harmonising national criminal justice systems, the Commission decided to maintain the proposal, stating that, in line with the subsidiarity principle, it would “probably be implemented through enhanced cooperation”.¹²⁶ Finally, in 2016, the third and so far last “yellow card” was issued again by fourteen chambers in eleven Member States, in protest against the proposal for a revision of the Posted Workers Directive.¹²⁷ Unsurprisingly, the Commission again decided to proceed with the proposal, arguing that the posting of workers between different Member States is in essence a transnational issue, and therefore in accordance with the principle of subsidiarity. This issue remains to be resolved.¹²⁸

¹²³ Raffaelli, *op. cit.* (n. 1).

¹²⁴ Fabbrini, F. & Granat, K., “Yellow card, but no foul”: *The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike*, *Common Market Law Review*, Vol. 50, No. 1, 2013, p. 139.

¹²⁵ Raffaelli, *op. cit.* (n. 1).

¹²⁶ *Ibid.* The political signals in favour of this scenario indeed occurred earlier this year, when thirteen Member States at the Council’s meeting of justice and home affairs ministers formally declared their intention to take part in establishing the EPPO, which would have jurisdiction to investigate cross-border criminal acts against the financial interests of the EU. See Nielsen, N., *Thirteen states join EU prosecutor’s office*, *EUobserver*, 2017, available at: <https://euobserver.com/justice/137421>. After that, a total of twenty Member States convening in the Justice Council endorsed a political agreement on the establishment of the new EPPO under the provision on enhanced cooperation. See European Commission, *Press release: Commission welcomes decision of 20 Member States to establish the European Public Prosecutor’s Office*, 2017, available at: http://europa.eu/rapid/press-release_IP-17-1550_en.htm.

¹²⁷ Raffaelli, *op. cit.* (n. 1).

¹²⁸ *Ibid.* Legislative procedure on the proposal for the new Directive concerning the posting of workers in the framework of the provision of service (COM (2016) 128) is still ongoing. See <http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52016PC0128>. In late 2017, EU employment ministers reached an agreement on reforming the Posted Workers Directive. The Council thus endorsed the Commission’s proposal which contained the principle of “the same pay for the same work in the same place”, itself contested earlier by the Member States’ parliaments as expressed in their reasoned opinions on the Commission’s proposal. Negotiations on the final version of the Directive’s revision with the Parliament are now in process. Difficulties are expected to emerge between the Member States’ representatives and MEPs, especially on the question of the legal basis, with Parliament aiming to expand the legal basis to the social legislation provisions, besides provisions related to the free movement of services. See Tani, C., *EU overcomes divisions on posted workers*, *EUobserver*, 2017, available at: <https://euobserver.com/social/139599>. In any event, during negotiations on the new Directive there were no new arguments from Member States that the EU cannot legislate in this area due to a breach of the subsidiarity principle.

The EWS was initially considered as a welcome novelty addressing two separate issues in an optimal and “median” way: it offered a technical response to the question of subsidiarity control and inclusion of national parliaments in EU affairs, without further “complicating the institutional structure and burdening the legislative procedure”.¹²⁹ It was also underpinned by the idea of facilitating multi-level dialogue and inclusive EU decision-making, fostering the culture of European debate, and ensuring the existence of a functioning and tolerant “constitutional pluralism” and advanced multi-level governance. However, the new mechanism was plagued with many difficulties that diminished its practical value and resulted in a negligible number of successful applications. The majority of national parliaments proved to be ineffective in conducting pre-legislative scrutiny of EU acts for different reasons. Some of these structural shortcomings were identified in the literature at the very beginning and remain relevant in the present context.¹³⁰ The first group of problems relates to internal institutional elements, e.g. the limited availability of personnel and resources in national parliaments for their engagement in subsidiarity monitoring. The second group relates to the internal political situation, e.g. the lack of general interest of national parliamentarians in European affairs. The third group relates to the shortcomings of the mechanism itself, e.g. the inadequate procedure for issuing reasoned opinions, or insufficient horizontal coordination between the national parliaments.

One particular internal issue, initially considered as perhaps the greatest political challenge for the new mechanism, was the power-plays between the national parliaments and their respective governments. Introducing this parallel channel to voice a national position through national parliaments, possibly divergent from the Member State’s position communicated by the respective government through the core procedure in the Council, was seen as a risk for the EU political arena which was designated as a “political football field in a domestic dispute between the government and the parliament”.¹³¹

¹²⁹ Louis, *op. cit.* (n. 38), p. 432.

¹³⁰ These problems of the political monitoring of subsidiarity, which render the exercise of the EWS mechanism ineffective, have been enumerated in various academic contributions. They include: illogical omission of the assessment of proportionality from the EWS, based on the acknowledgment that the two principles significantly overlap; an information gap on the side of national parliaments and their overload with EU documents; national MPs consider that time- and resource-wise there is nothing politically to be gained from subsidiarity monitoring, as EU politics is still not a “vote winning issue” in national parliamentary elections; the general public remains detached from the EU, as embodied in the constantly diminishing voters’ turnout in elections for the European Parliament; inadequate time allocated for the procedure, with an unattainably high threshold to reach at least the “orange card”, which has never been issued so far; the different lengths of sessions in Member States’ parliaments are not taken into account, and there are divergent political capacities and parliamentary cultures; power-play and collaboration of inter-parliamentary committees dealing with subsidiarity in particular cases; concerns over autonomy and preservation of tradition arising from any institutionalised cooperation of national parliaments, etc. For a detailed overview, see Louis, *op. cit.* (n. 38), Jensen & Martinsen, *op. cit.* (n. 3), Raunio, *op. cit.* (n. 118), Cygan, *op. cit.* (n. 5), pp. 498-500, Kiiver, *op. cit.* (n. 8), pp. 97-99.

¹³¹ Louis, *op. cit.* (n. 38), p. 44. This critique pointed to the problem of the overlapping national polity’s interests: if national representatives in the Council that are directly accountable to national legislators have an opportunity to influence both formal and substantive elements of legislative proposals, what is the purpose of including the national parliaments’ critical voice? In other words, reflecting on the intention to somehow further tackle the problem of democratic deficit in EU law-making, the question was raised

However, from this time distance, it seems that this particular scenario has not materialised. On the contrary, what has been demonstrated is the domination of the executive (even weaker coalition governments) over the legislative branches in many EU Member States, and the ability of the former to either domestically maintain consensus over EU issues in their national parliaments, or to completely exclude national legislators from having a say on EU affairs. The aforementioned lack of subsidiarity objections by national parliaments suggests that they have not only remained rather isolated from EU decision-making, but also that the EWS has not given them any new leverage over their domestic executives.

Conceptually, national parliaments using the EWS mechanism resemble a French-style *Conseil constitutionnel*, acting as a quasi-institutional organ alongside the EU legislative triangle and “exercising an advisory role in the EU legislative process”.¹³² However, a substantive critique of the mechanism asserts that within this procedure national parliaments enter the arena of judicial assessment of lawfulness. In this uncharted territory, they issue opinions on the proposals’ compliance with subsidiarity, rather than political desirability, which would be a typical consultative task of a council of state. In the EWS, the formal admissibility check is based on the legal criteria, contrary to the policy analysis that discusses the political desirability of legislation (i.e. the necessity and effectiveness of the law).¹³³ In favour of this argument is the finding that national parliaments usually challenge the justification rather than the merit of the proposal when assessing its compliance with subsidiarity. Since the Parliament and the Council often significantly amend the Commission’s proposals later in the process in a way not presented before the national parliaments, it was proposed that under the EWS a formal check of justification be performed, rather than a content of proposals.¹³⁴ In the present system, national parliaments “keep engaging in a legal review, behave in a court-like manner, and attempt to use subsidiarity as a legal principle”.¹³⁵ Put differently, it is the wrong procedure involving the wrong actors.

Confirming this criticism, one of the first studies of the application of the EWS mechanism indeed demonstrated that national parliaments misused it and overstepped their assigned mandate.¹³⁶ The analysis of the first successful “yellow card” showed that national parliaments failed to identify any subsidiarity violation in the proposed

whether the EWS “alleviate[d] democratic deficit or further obfuscate[d] representative democracy?”. See more in Christiansen, T., Högenauer, A. L. & Neuhold, C., *National Parliaments in the post-Lisbon European Union: Bureaucratization rather than Democratization?*, OPAL Online Paper Series, No. 11, 2012, p. 22., available at: www.opal-europe.org/index.php?option=com_content&view=article&id=76&Itemid=108

¹³² Such status is confirmed in a highly formalised procedure that includes: the obligation to send proposals to national parliaments; the obligation to wait a certain period for reasoned opinions; counting and weighing inputs; and the obligation to re-justify the proposal if the necessary threshold is reached. See Kiiver, *op. cit.* (n. 8), pp. 98-103.

¹³³ *Ibid.*, p. 104.

¹³⁴ *Ibid.*, p. 105.

¹³⁵ *Ibid.*, p. 108.

¹³⁶ Fabbrini & Granat, *op. cit.* (n. 124).

regulation but rather “reacted to an issue of great political saliency”.¹³⁷ They instead assessed and commented on “other aspects of the proposal, such as the legal basis, violation of the principle of proportionality or its content”.¹³⁸ The Commission’s proposal had “raised a number of critical questions regarding its content and legal basis, but could not be attacked on grounds of subsidiarity concerns since it addressed an issue – transnational labour disputes – that by definition falls outside the regulatory powers of individual Member States”.¹³⁹ Thus, the EWS in effect presents national parliaments with a possibility to perform a “negative” constitutional check on the EU legislative initiatives.¹⁴⁰ In other words, they have the authority to put the “brakes” on EU legislative proposals and justify their actions with a legal-constitutional rationale. Arguably, this is not an appropriate function for national parliaments to perform. It, in addition, draws their resources away from the core democratic functions – controlling their national governments and retaining direct links with their citizens.¹⁴¹ Therefore, from both the external (regarding the efficiency of supranational decision-making) and internal (regarding national democratic processes) perspective, the EWS mechanism seems displaced.

In conclusion, the political scrutiny of subsidiarity operated by the national parliaments in practice has proved to have an extremely limited influence on EU law-making, both substantially (regarding the quality of proposals in light of the subsidiarity requirements) and quantitatively (the frequency and amount of EU regulation).¹⁴² This observation is remarkably similar to the conclusion on the judicial safeguarding of subsidiarity offered in the previous part. Various academic contributions referred to in this article have almost consensually held that national parliaments, when performing a legal check through the EWS, assess whether the EU has competence to engage in a certain regulatory practice. This practice amounts to a constitutional function that would be better performed, individually or collectively, by either the EU courts, national constitutional courts or specific constitutional councils. Given that the principle of subsidiarity to a certain extent inevitably bears a political weight, the part where the national parliaments are rightfully engaged, i.e. in discussing at which level to implement certain policies, is disconnected from the more legal and judicial exercise of prioritising how to best implement them.¹⁴³

¹³⁷ *Ibid*, p. 116.

¹³⁸ *Ibid*, p. 138.

¹³⁹ *Ibid*, p. 116 and p. 142. Since the Commission eventually decided to withdraw the proposal faced with the national parliaments’ revolt, it has been argued that it had negatively affected the institutional balance in the EU by giving national parliaments a false impression about their actual role in the EU legislative process, and possibly “inadvertently encouraged a further misuse of the subsidiarity review by the national parliaments with potentially negative effects on the delicate balance of powers between the Member States and the EU”.

¹⁴⁰ Crespo, E. B., *Parliamentary Democracy and the Treaty of Lisbon*, OPAL Online Paper Series, No. 1, 2012, p. 13, available at: http://www.opal-europe.org/index.php?option=com_content&view=article&id=76&Itemid=108.

¹⁴¹ Jensen & Martinsen, *op. cit.* (n. 3), p. 12.

¹⁴² Regarding the amount of recent EU regulation, see n. 103.

¹⁴³ Louis, *op. cit.* (n. 38). In relation with the issues introduced in the first part of the article, even such comprehensive parliamentary scrutiny would not have enough reach in controlling the gradual expansion of EU competences. The EWS is designed only to monitor the proposals of legislative acts that are usually

Therefore, what we are left with is a “subsidiarity stalemate” where neither the judicial nor the political avenue is fully appropriate for genuinely ensuring that the EU institutions comply with the principle of subsidiarity. For this reason, the “S-word” still remains for many mere “gobbledygook” – a fancy yet meaningless, normatively void, term. At this point, is there a possible way forward?

3. CONCLUSIONS

Throughout this overview of the issues surrounding the interpretation and application of the principle of subsidiarity, what has become even more obvious is the fundamental tension within the complex nature of the concept itself, and within both institutionalised avenues designated in the EU for addressing it efficiently. The vagueness, the interrelation with other principles, the broader political significance and the clash between legal and political essentials of the principle all burden the substantive perception of subsidiarity in the EU political arena. On the one hand, the judicial avenue for safeguarding the principle suffers from numerous problems. These include, to name a few: the CJEU’s restrictive and undemanding approach in the face of the political sensitivity of the principle; all the procedural and substantive limits of the concept of subsidiarity; and the judicial inappropriateness and incapacity in terms of expertise, time and resources to address the parts of the principle which require complex socio-political and economic/technical exercises. On the other hand, the political avenue, envisaged as the Member States’ parliaments acting in concert as the guardians of subsidiarity, is stuffed with another set of shortcomings. Most importantly, national legislators appear inefficiently equipped, engaged and inappropriately coordinated to exercise their monitoring responsibilities in the best possible manner.

However, it is still left to assess from the future case law and parliamentary practice whether such a constellation of roles in subsidiarity monitoring will be confirmed. In other words, will the Court preserve its self-restrained approach to subsidiarity, or will it move from exercising mostly a formal check on the EU’s justification for action to delve into the substance of the proposed actions?¹⁴⁴ At the same time, will the national parliaments learn how to make the best use of the existing procedural mechanism for safeguarding subsidiarity? Contemporary EU legal scholarship has paid strong attention

amended later in the procedure. What is evident in the current state of affairs is the extension of regulatory tools through either the use of soft-law instruments or the Court of Justice’s pro-EU integrationist judgments, at least in the core areas attached to the internal market regulation, which always remain out of reach of the national parliaments’ scrutiny. *Cf.* n. 64 for a remark on the characterisation of the CJEU as “pro-integrationist”.

¹⁴⁴ Wyatt, *op. cit.* (n. 17), p. 17. The author puts special emphasis on the Court’s role and sees it as decisive for subsidiarity. The CJEU had devised and refined numerous legal principles aimed at attributing authority and supremacy to EU institutions, and effectiveness and credibility to EU laws. However, the Court still struggles to accept the legitimacy of subsidiarity as a fundamental principle of the EU legal order, incorporated in the Union’s “normative constitution” by the Member States, and at the same time rejects the principle’s part in the “ideological constitution”, which the Court itself is envisaged to observe as the guardian of the Treaties.

to analyse subsidiarity extensively, but the practice has demonstrated its low efficiency in achieving its envisaged role.¹⁴⁵ Initial research has indicated serious shortcomings and limitations of both legal and institutional frameworks, with subsidiarity up until now being applied rather ineffectively in withholding excessive EU actions and balancing the allocation of power between the Union and its Member States. However, the vast majority of that scholarship remains descriptive, and subsidiarity has gradually escaped its attention – it was as if all the issues had been identified and definitively discussed. Academic debate and political reality have reached a dead-end where the status quo is assumed to be insurmountable. To maintain this “subsidiarity stalemate” would be unsatisfactory when considering the principle’s constitutional importance. Therefore, this contribution has aimed to re-introduce discussion on subsidiarity and offer new solutions to the “subsidiarity conundrum”.

The necessity of having and pursuing an effective system of subsidiarity protection in a complex political entity such as the EU still holds massive significance.¹⁴⁶ New critical ideas are worth continuously exploring while searching for novel institutional mechanisms to refine the principle’s interpretation and application. To paraphrase the CJEU’s current president, EU action must not adversely affect national democracies, and a variety of EU institutions and bodies – be it political, judicial or technocratic – ought to devise mechanisms to accommodate the decision-making process so as to create “more democracy”,¹⁴⁷ where the principle of subsidiarity plays a prime role. Along these lines, the Commission’s president has recently announced “setting up a Subsidiarity and Proportionality Task Force [...] to take a very critical look at all policy areas, to make sure we are only acting where the EU adds value”.¹⁴⁸

¹⁴⁵ Constantin, *op. cit.* (n. 13), p. 177.

¹⁴⁶ Subsidiarity as a concept has, moreover, a wider rationale and logic that is important to observe in an increasingly complex, interrelated and interconnected international political and economic environment. De Burca, *op. cit.* (n. 14), explains how it poses not only a dilemma of the EU against national/local action, but also a question of concerted international action within a global patchwork of institutions, e.g. in the World Health Organisation or the World Trade Organisation (p. 6). Therefore, subsidiarity relates to the broader contemporary debate about “fundamental questions of political authority, government and governance”, in which it oscillates between the two dynamic poles: the weakening of nation-states and their porous borders in face of globalisation trends versus the stronger impetus for regionalisation and localisation with reinforced direct democratic participatory mechanisms (pp. 2-3). The author further argues that the process of economic globalisation has resulted in an “unprecedented emergence of an expanding and strengthened ‘market without state’, with inevitable loopholes for democracy and legitimacy” (p. 12). The EU, embedded in the framework of multi-level governance, power-diffusion among different actors and its heterogeneous (historically, culturally and ideologically) constituent units, nowadays faces the same dilemmas. Therefore, the EU constitutional law remains in constant search of “ways of resolving the tensions and balancing the interests of integration and differentiation, of harmonisation and diversity, of centralisation and localisation or devolution” (p. 10). Here, subsidiarity as a fundamental concept goes to the very heart of the political debate about the existence and purpose of the European enterprise itself: is there more of the EU than its strict economic essentials, and how far should the internal market logic be expanded? (p. 27).

¹⁴⁷ Lenaerts, K., *The Principle of Democracy in the Case Law of the European Court of Justice*, International & Comparative Law Quarterly, Vol. 62, No. 2, 2013, p. 303.

¹⁴⁸ European Commission, *op. cit.* (n. 103).

Leaving aside a more abstract and theoretical narrative, subsidiarity in some future development phases of the EU may catalyse many concrete positive dynamics: from mainstreaming EU affairs within national parliaments, to possibly having spill-over effects in increased resources being invested in EU affairs at national levels.¹⁴⁹ Some commentators, however, see the recent developments of including lower levels of governance in the EU integration process as a sign of the re-emergence of the importance of nation-states in Europe, with parliaments representing the “most tangible embodiment of the state”.¹⁵⁰ Reconciling a more effective principle of subsidiarity with prospects for deeper and faster integration at the EU level, while ensuring that the former does not threaten or undermine but rather strengthens the latter, is perhaps the most salient challenge faced nowadays by the EU political elites. The basic distinction in character between the numerous policy areas, which are precisely on the basis of subsidiarity better tackled at either the EU level (external trade, internal market, environmental protection) or national or even sub-regional levels (culture, language, primary education) should be recalled here. In Hayekian terms, the heterogeneity of preferences within the EU presumes decentralised decision-making, while economies of scale and interregional externalities push for the centralisation of regulatory powers.¹⁵¹ Until now, however, this is not what has happened in the EU.¹⁵² In the words of the German Federal Constitutional Court in its landmark Lisbon Treaty judgment, the exercise of EU powers should occur where there is a “genuine cross-border dimension which necessitates harmonized action, and parliaments have a responsibility to remain vigilant and guard against unnecessary EU legislation”.¹⁵³ Hence, harmonised operation and coexistence between subsidiarity and the “ever closer Union” remains the Holy Grail of EU law and politics.¹⁵⁴ For many authors, the operationalisation of the principle of subsidiarity, so far underused institutionally, albeit much exploited in political debates,¹⁵⁵ is essential for reinventing the democratic legitimacy of the EU and ensuring its future existence. The latter has been in an unprecedented way threatened by the recent rise of nationalist, populist and illiberal political rhetoric in the post-Brexit era.

Finally, going back to institutional arrangements in search of the optimal mechanism for safeguarding subsidiarity, throughout the literature certain scenarios have appeared that

¹⁴⁹ Cygan, *op. cit.* (n. 5), p. 485.

¹⁵⁰ *Ibid.*, p. 481.

¹⁵¹ Hayek, F. A., *The Use of Knowledge in Society*, American Economic Review, Vol. 35, 1945.

¹⁵² What we have actually seen is “substantial harmonization and centralization occurring in areas where heterogeneity of preferences is predominant (such as social protection or agricultural policy), whereas other areas characterized by strong economies of scale (such as defence and environmental protection) have remained in the local domain”. See van Zeven, J., *Subsidiarity in European Environmental Law: A Competence Allocation Approach*, Harvard Environmental Law Review, Vol. 38, 2014, fn 19, p. 418.

¹⁵³ As cited in Cygan, *op. cit.* (n. 5), p. 489.

¹⁵⁴ In addition, the reinforced principle of subsidiarity implies taking into account regional and local information and knowledge in the quest for increased welfare and a more cohesive and inclusive Europe. This signifies more experimentation and more quality inputs, but also greater engagement from the local levels in EU affairs, from citizens who appear disenfranchised from domestic political life in general, let alone from distant EU politics. In parallel with this goes the potential for the cultivation of political awareness and civic participation and activism. See Arribas & Bourdin, *op. cit.* (n. 27), p. 16.

¹⁵⁵ van Zeven, *op. cit.* (n. 25), p. 38.

are possible, yet distant, future novelties for resolving the “subsidiarity conundrum”. A more modest idea would look for an improvement of the present “mixed” system of binding judicial *ex post* and consultative political *ex ante* scrutiny. It would include the reinforced role of the CJEU, engaging with subsidiarity as a procedural norm, and the operative coalition of active national parliaments or chambers, supported by a technical organ representing their interest in Brussels, and selecting a controversial proposal for collective scrutiny under the EWS, in the fashion of an advisory, but not co-legislative, informal forum. A more far-reaching idea would see the emergence of a special EU subsidiarity tribunal, with an *ex post* legally binding perspective and capacity to rule on the compatibility of EU legislation with the principle of subsidiarity. This would be coupled with a second/federalist chamber of the European Parliament, representing the Member States like the upper chambers in federal states. As a counterpart to the Parliament that represents “Europeans as a single entity”, here we would have an institutional representation of the “Europe of different peoples”, a kind of EU Chamber of Parliaments.

Along these lines and inspired by the insights of the research leading to the completion of the present article, the following institutional arrangement is proposed, which would essentially be a combination of the present procedural mechanisms for safeguarding subsidiarity with slight modifications. It stays in line with the fundamental principles of EU governance, institutional balance and democratic theory in general, but flexibly addresses divergences between the Member States and the complex nature of the principle of subsidiarity itself. It entails the creation of a new supranational body – the Committee of National Legislators, composed of directly elected national MPs, regional or local parliamentarians, or national constitutional or supreme court judges, all with a proven record in subsidiarity expertise. The exact qualification of the members (s)electd would differ in each Member State, depending on the depth and level of their EU integration and awareness, scrutiny propensity, institutional capacities, legal history, and political culture. The proposed Committee would convene *ad hoc*, with the right to be consulted on certain legislative proposals. It would respond on a case-by-case basis to particular policy issues as they arise, providing *ex ante* binding opinions,¹⁵⁶ and with a similar but more prominent role than the Committee of the Regions and the Economic and Social Council.

In addition, this proposal addresses another fundamental concern: the issue of judicial activism and the “judicialisation” of policy-making. From the point of view of legal philosophy and political theory, it is observed how the courts in general, and in the EU context the Court of Justice, too often usurp democratic decision-making when rendering complex political decisions, in which they rule on the basis of societal and moral norms, natural law, economic assessments, technological expertise, etc.¹⁵⁷ This criticism

¹⁵⁶ Something of an EU Conseil d’Etat. See Kiiver, *op. cit.* (n. 8).

¹⁵⁷ See, for illustration, Alter, K. & Kelemen, D., *Understanding the European Court’s Political Power*; and Rabkin, J., *A Strange Institution*, in: Zimmermann, H. & Dür, D. (Eds.), *Key Controversies in European Integration*, Chapter 5 - Too Much Power for the Judges?, Palgrave MacMillan, 2012; Alter, K., *The European*

questions the appropriateness of the judiciary to engage in such exercises, and proposes other categories of professionals to be included in these decision-making processes, e.g. philosophers, political scientists, sociologists, economists, etc. The composition of a new supranational body proposed here, with quasi-judicial competences and accommodating a wide variety of actors, would effectively respond to this principal criticism of contemporary judicial politics. In any event, novel institutional arrangements, reconceptualising the fundamental constitutional principles of EU law, reflecting the dynamic and flexible nature of EU law, and adaptable to the newly emerging challenges and designated objectives of European integration, are expected from academia and policy-makers alike.

Court's Political Power. Selected Essays, Oxford University Press, 2009; Adams, M., de Waele, H., Meeusen, J. & Straetmans, G. (Eds.), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice*, Hart Publishing, 2013; Dawson, M. & De Witte, B. (Eds.), *Judicial Activism at the European Court of Justice*, Edward Elgar Publishing, 2013.

NAČELO SUPSIDIJARNOSTI U EUROPSKOJ UNIJI: “KOJEŠTARIJA” ZAROBLJENA IZMEĐU PRESUDIVOSTI I POLITIČKOG NADZORA. POSTOJI LI RJEŠENJE?

Načelo supsidijarnosti u Europskoj uniji ograničava ovlasti kreiranja politika i prava tijela Unije na situacije u kojima postavljeni ciljevi politika ne mogu biti efikasnije ostvareni na nižim (tj. nacionalnim, regionalnim ili lokalnim) razinama vlasti. Postoje dva institucionalna mehanizma koji nastoje osigurati poštovanje tog načela od strane institucija Europske unije. Pored nadležnosti Suda Europske unije u svim pravnim pitanjima koja se tiču primjene i tumačenja odredaba Osnivačkih ugovora, drugi je važan mehanizam povjeren parlamentima država članica i odnosi se na politički nadzor prijedloga zakonodavnih akata Europske unije u pogledu njihove usklađenosti s načelom supsidijarnosti. U ovom se radu uspoređuju ta dva institucionalna mehanizma te se analizira načelo supsidijarnosti u praksi Suda Europske unije i u proceduri nadzora poštovanja supsidijarnosti koju provode državni parlamenti. Cilj je rada ocijeniti prikladnost sudske i parlamentarne procedure za osiguravanje poštovanja načela supsidijarnosti te raspraviti može li to načelo zbog svoje dvostruke naravi, tj. pravne i političke, uopće biti učinkovito primijenjeno na regulatorne aktivnosti Europske unije kroz pravosuđenje ili politički proces. Nakon identificiranja glavnih nedostataka navedenih dvaju mehanizama argumentirat će se zašto je postojeći sustav pretjerano složen i neučinkovit i kao takav neodgovarajući u uspoređi s ustavnom važnošću načela supsidijarnosti te posebno u razdoblju u kojem Europska unija nastavlja širiti svoje regulatorne aktivnosti na osjetljiva socio-politička područja, koja su inače smatrana ovlastima država članica. Na kraju, uzimajući u obzir glavne nedostatke i kritiku postojećeg sustava, rad predlaže nova institucionalna rješenja, koja kombiniraju elemente sudske i parlamentarne procedure nadzora načela supsidijarnosti.

Ključne riječi: supsidijarnost, Europska unija, presudivost, politički nadzor, Sud Europske unije, državni parlamenti

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