
Subsidiarity as a Principle of EU Governance

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I Introduction

Today's European Union (EU) has a complex structure of cooperative federalism that raises substantial challenges of governance. The subsidiarity principle has emerged as the pre-eminent organising principle for the allocation of powers among the EU's different levels of government; that is, among the European institutions such as the Commission, the Council and the Parliament, and the Member States and their regional or local government structures.

Following its introduction in the Maastricht Treaty, the subsidiarity principle has been elevated in status by the Lisbon Treaty through the introduction of a specific, formal protocol for the assessment and enforcement of subsidiarity in all EU legislation. Commensurate with its increased legal status, the subsidiarity principle and the issues it raises have kept both scholars and practitioners in institutions, parliaments and governments engaged in recent years.

Against this background, this chapter describes the key aspects of the subsidiarity principle, including its roots and substantive content and shows subsidiarity at work in specific cases of governance. The chapter highlights the contribution of subsidiarity to the European project but also underlines its shortcomings and presents proposals for reform.

At its core, the principle of subsidiarity raises questions about the appropriate place for political and legal power.¹ It is applicable to the exercise of competences in areas shared between Member States and the EU.² Subsidiarity is 'called upon to arbitrate the tension between integration and

¹ G. de Búrca, 'Re-Appraising Subsidiarity's Significance after Amsterdam', Harvard Jean Monnet Working Paper 7/99, 43.

² A. G. Toth, 'Is Subsidiarity Justiciable?' (1994) 19 *EL Rev* 268, 269.

proximity in all matters dealt with by the Union and its Member States.³ Being a ‘constitutional safeguard of federalism’, subsidiarity attempts to restrain the EU’s exercise of shared powers.⁴ In other words, subsidiarity ‘only determines whether in a particular case, which is already within Community competence, action should be taken at the Community or at the national level.’⁵

II Background of the Subsidiarity Principle

The principle of subsidiarity expressed in Article 5(3) of the Treaty on European Union (TEU) organises the system of EU governance by declaring that ‘in areas which do not fall within its exclusive competence, the Union shall act only if and in so far 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’. As further detailed in that provision, the EU institutions apply subsidiarity in the legislative process and the national parliaments ensure its compliance in accordance with Protocol No. 2 on the application of the principles of subsidiarity and proportionality included in the Lisbon Treaty.

III Origins of the Idea of Subsidiarity

The roots of the modern notion of subsidiarity can be traced to Pope Pius XI’s Encyclical *Quadragesimo Anno* (1931).⁶ In the Encyclical the Pope discusses a principle of social order that reflects the principle of subsidiarity:

Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very

³ K. Lenaerts, ‘The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism’ (1993) 17 *Fordham International Law Journal* 846, 848.

⁴ R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press, 2009), 247.

⁵ A. G. Toth, ‘The Principle of Subsidiarity in the Maastricht Treaty’ (1992) 29 *CML Rev* 1079, 1082.

⁶ See e.g. J. Isensee, *Subsidiaritätsprinzip und Verfassungsrecht* (Duncker & Humblot, 2001), 18 et seq.; D. Z. Cass, ‘The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community’ (1992) 29 *CML Rev* 1107, 1110.

nature to furnish help to the members of the body social, and never destroy and absorb them.⁷

The quote expresses a preference for allocating responsibilities to the lower levels of organisation, as long as they are capable to exercise them effectively, mirroring the two key elements of subsidiarity as known in the EU.

Still, important differences between the European and the Catholic versions of subsidiarity remain. The EU subsidiarity is narrowly focused on democratic public bodies; the Catholic version considers society as a whole.⁸ Moreover, the EU subsidiarity principle is not a derivative of its Catholic understanding, but might have developed independently from *Quadragesimo Anno*.⁹

Federalism and liberalism, especially in the German tradition, provide alternative intellectual roots of subsidiarity.¹⁰ The German federalist notion of the state focuses on the different components of the state, their functions and relationships amongst each other. For example, the work of Althusius, von Humboldt and Hegel offers clues of the subsidiarity principle.¹¹ Liberalist theory, in turn, contains elements of subsidiarity as an organising principle: in the liberalist tradition the state is legitimate only to the extent it is organised from the bottom up and thus in accordance with the principle of subsidiarity.¹² However, there are limits to this parallel as the liberalist perspective focuses on the relation of the individual and the state, and arguably has less to say on intermediary levels of organisation, while the subsidiarity principle can be applied to each layer of government.¹³

IV Development of Subsidiarity in German and EU Law

A Germany

From the German scholastic tradition, the subsidiarity principle found its way into the German Basic Law and from there into the EU. Although the subsidiarity principle is not explicitly included in the Basic Law the argument can be made that it is part of the German constitution.

⁷ *Quadragesimo Anno*, point 79, English translation available at http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html.

⁸ N. W. Barber, 'The Limited Modesty of Subsidiarity' (2005) 11 *ELJ* 308, 310.

⁹ *Ibid.* See also Isensee, *Subsidiaritätsprinzip und Verfassungsrecht* (above n. 6), 71.

¹⁰ Isensee, *Subsidiaritätsprinzip und Verfassungsrecht* (above n. 6), 35.

¹¹ *Ibid.*, 37.

¹² *Ibid.*, 45.

¹³ *Ibid.*, 46.

The historical background to the creation of the Basic Law of 1949 suggests an environment receptive to the subsidiarity principle even though it did not enter the constitutional text itself. The draft prepared by the Constitutional Convention at Herrenchiemsee in 1948 tried to introduce formally the subsidiarity principle, an attempt that ultimately failed for several reasons.¹⁴ The drafters at Herrenchiemsee shied away from using the term subsidiarity because of its potential religious connotations.¹⁵ Furthermore, it was felt that there was no need to explicitly introduce subsidiarity because Article 1 of the proposed draft already included a firm commitment against an overreaching state.¹⁶

Following the convention at Herrenchiemsee the final text of the Basic Law was prepared and approved by the Parliamentary Council of 1949. Again no explicit reference to subsidiarity was made but arguably this should not be interpreted as a rejection of the principle.¹⁷ Instead, the Council expected the Basic Law to be of a provisional nature and thus refrained from entering areas that were not yet fully developed such as the developing economic and cultural elements of nascent post-war Germany.¹⁸ However, overall, the drafters of the Basic Law were driven by the general idea of moving away from the collectivist state of the recent past to an order based on ethical individualism.¹⁹

Finally, the Basic Law created a state structure that was inherently federal and this federalist outlook carried with it the idea of subsidiarity.²⁰ The *Länder* that were part of the process of creating and approving of the constitution had an interest in limiting the powers of the federal level to the necessary minimum.²¹

Beyond these indications for the presence of the subsidiarity principle in the minds of the drafters of the Basic Law at the time we can also consider the text itself and look for provisions reflecting that principle.²² For example, and most fundamentally, the federal structure of the German state is built up from below. Article 30 of the Basic Law on the sovereign powers of the *Länder* states that the *Länder* exercise the state powers unless specifically provided otherwise by the Basic Law. Certain areas are explicitly

¹⁴ *Ibid.*, 143.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*, 145.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, 146.

²⁰ *Ibid.*, 147.

²¹ *Ibid.*, 147.

²² *Ibid.*, 223 et seq.

allocated to the federal level (Article 73), whilst in other cases the Basic Law establishes certain conditions that determine whether the *Länder* or the state should act (Article 72).

Article 72 of the Basic Law in its original form simply required that a law met certain conditions specifically relating to 'the uniformity of living conditions beyond the territory of any Land' for the federal level to be able to act in that matter. This original wording was found to be non-justiciable as any law could easily be drafted such as to fulfil this requirement.²³

Since 1994 Article 72(2) of the Basic Law provides that in the field of concurrent legislative competences the Federation should act 'if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest'. In particular, the newly added necessity clause has proved to carry a restrictive force for federal legislation requiring in each case the state to demonstrate a specific need to act. This amended provision can thus be seen as a prototypical expression of the subsidiarity principle in constitutional law.²⁴ It grants primacy to the federal level in the exercise of competence shared with the *Länder*, in the sense that when the conditions of Article 72(2) of the Basic Law are fulfilled and the federal level decides to act then this matter is closed to the *Länder*.²⁵ However, the federal government is required to justify its actions with reference to the conditions enumerated in Article 72(2) of the Basic Law.²⁶ Note that the federal government is not obligated to act in all matters that concern equivalent living conditions and legal or economic unity: if the *Länder* can achieve the relevant objectives themselves, for example by adjusting their respective laws or jointly coordinating new legislation, then this is a valid alternative to the action at the federal level.²⁷ Both these aspects are arguably also present in the EU subsidiarity principle: first, once the EU decides to act and the conditions are met then the Member States can no longer regulate on their own and, second, there is no compulsion on the EU to act in all cases where the national level cannot achieve the objective sufficiently and where it would be better achieved at the EU level.

Article 72(2) of the Basic Law prescribes certain limits to the applicability of the subsidiarity principle. First, it speaks to the exercise of

²³ Ibid., 230.

²⁴ Ibid., 358.

²⁵ Ibid., 359.

²⁶ Ibid.

²⁷ Ibid., 360.

competence by two levels only – the federal and the *Länder* level – thereby excluding other units of government such as municipalities, and civic organisations.²⁸ In comparison, the Lisbon Treaty included for the first time as the locus of the exercise of competence the ‘central level or at regional and local level’ of the Member States, establishing a distinction that was missing in the Maastricht Treaty which simultaneously highlights that the national level itself is multilayered.²⁹ Second, Article 72(4) of the Basic Law leaves discretion to the federal level about returning competences to the lower level if and when the conditions of Article 72(2) of the Basic Law are no longer fulfilled, instead of automatically returning such matters to the *Länder*.³⁰ In contrast, the TEU does not provide for a similar provision on when the competence should be returned to be exercised by the Member States.

Hence Article 72(2) of the Basic Law requires a dual test examining whether there is a case for legislation at the federal level in addition to reviewing whether the legislation goes beyond what is necessary to achieve the objectives set in that provision.³¹ The Basic Law granted the Federal Constitutional Court a possibility to review the compatibility of federal legislation with the subsidiarity principle, on the application of the *Bundesrat* or of the government or legislature of a *Land*.³² In contrast to the judicial review, a political safeguard of subsidiarity, which would have included granting the *Bundesrat* a role as a parliamentary watchdog of subsidiarity principle, did not gain the necessary support.³³

The Federal Constitutional Court has actively fulfilled its role, building case law on the enforcement of the subsidiarity principle. However, the Court’s interpretation of the tests involved in Article 72(2) of the Basic Law remains unclear, in the sense that the Court has not given precise criteria as to what the ‘equal living conditions’ or ‘national interest’ are.³⁴

²⁸ Ibid.

²⁹ De Búrca, ‘Re-Appraising Subsidiarity’s Significance after Amsterdam’ (above n. 1), 16.

³⁰ Isensee, *Subsidiaritätsprinzip und Verfassungsrecht* (above n. 6), 360.

³¹ G. Taylor, ‘Germany: The Subsidiarity Principle’ (2006) 4 *International Journal of Constitutional Law* 115, 120.

³² Article 93(2a) of the Basic Law. This judicial safeguard did not exist before 1994 since both the German scholarship and the Federal Constitutional Court perceived Article 72(2) of the Basic Law as expressing a political decision of the federal legislator to legislate. See M. Rau, ‘Subsidiarity and Judicial Review in German Federalism: The Decision of the Federal Constitutional Court in the Geriatric Nursing Act Case’ (2003) 4 *GLJ* 223, 227.

³³ Deutscher Bundestag, Bericht der Gemeinsamen Verfassungskommission, Drucksache 12/6000, 5.11.93, 33.

³⁴ Rau, ‘Subsidiarity and Judicial Review in German Federalism’ (n. 32), 233.

This state of affairs resembles the European discussion on the subsidiarity jurisprudence of the Court of Justice of the European Union (CJEU) discussed below. Despite such limitations, a series of cases where the Court has found the federal legislation incompatible with the subsidiarity principle (e.g. the ‘Junior Professors’ case³⁵) have led to a further amendment of Article 72(2) of the Basic Law in 2006, restricting its applicability to a limited number of subject areas of concurrent competence.³⁶ Specifically, the subsidiarity test now only applies to subjects such as, for example, residence of foreign nationals, public welfare, law relating to economic matters (mining, industry, trade, commerce etc.), regulation of educational training or state liability.

B EU

The idea of subsidiarity in the EU can be traced back to the Treaty of Rome of 1957.³⁷ Some of the provisions of the European Economic Community (EEC) Treaty deal with questions concerning the distribution and exercise of competences between the Community and the Member States and explore possible approaches and criteria that are reminiscent of the later subsidiarity principle. For example, Article 100 EEC Treaty concerning the approximation of laws granted the Council a competence regarding laws that ‘have a direct incidence on the establishment or functioning of the Common Market’. In addition, Article 235 EEC Treaty allowed the Council to legislate in areas where the Treaty does not explicitly give it a competence when it ‘appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community’.

Scholars have found in these provisions reflections of the idea of subsidiarity as well as aspects of its later implementation such as conditions setting out necessity for the EU to act.³⁸ Similarly, the concept of directives established in Article 189 EEC Treaty incorporates aspects of subsidiarity: the EU level sets out the overall objective and leaves it to the Member States to implement laws to achieve the objective.³⁹ However, overall these

³⁵ G. Taylor, ‘Germany: A Slow Death of Subsidiarity?’ (2009) 7 *International Journal of Comparative Law* 139, 143.

³⁶ *Ibid.*, 146.

³⁷ Lenaerts, ‘The Principle of Subsidiarity and the Environment in the European Union’ (above n. 3), 852.

³⁸ C. Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* (Nomos, 1996), 31–5.

³⁹ *Ibid.*

connections appear peripheral and do not present tangible direct evidence of the presence of the subsidiarity principle as early as the Rome Treaty.⁴⁰

This changed later on in the run-up to the reforming treaties and later the Maastricht Treaty. An early draft proposal for an EU Treaty by the European Parliament (EP) in 1984 both emphasized the multilayered nature of the EU as well as explicitly called upon the subsidiarity principle in circumscribing its competences.⁴¹ Subsidiarity as such was first included in the Treaty text in the Single European Act of 1987, where it concerned Community action in the area of environmental policy and limited Community action in that field to cases where the objectives of the policy can be better achieved at the Community level than by Member States individually.⁴²

The Maastricht Treaty subsequently took the notion further and first defined the ‘clear legal core of subsidiarity’, that forms the basis of subsidiarity today.⁴³ During the negotiations of the Maastricht Treaty the Member States adopted different stances towards subsidiarity reflecting their idiosyncratic interests and political conditions, which can be illustrated with reference to the positions of the UK and Germany. In the UK, subsidiarity was primarily seen as a restraint on what was perceived as an excessive tendency towards political integration, which clashed with the strong established notion of primacy of the UK Parliament in all matters.⁴⁴ In contrast, the debate in Germany was driven by the *Länder* and their fear of losing powers relative to the federal state and the EU. As such, subsidiarity was viewed mostly as a tool for implementing the German federalist model in the EU.⁴⁵ Furthermore, the *Länder* together with the European organisations of the regions pushed for recognition of the three levels of organisation (Union, national state and region) that appeared only in the subsequent Lisbon version of the subsidiarity principle.⁴⁶

At its introduction with the Maastricht Treaty, subsidiarity was welcomed as ‘an important, if undervalued’ part of the relation between Community and Member States and a form of division of power between them,⁴⁷ yet it was simultaneously criticised as a step back, weakening the

⁴⁰ Ibid.

⁴¹ Ibid., 36.

⁴² Article 130r(4) EEC Treaty.

⁴³ De Búrca, ‘Re-Appraising Subsidiarity’s Significance after Amsterdam’ (above n. 1), 14.

⁴⁴ Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* (above n. 38), 51 et seq.

⁴⁵ Ibid., 53.

⁴⁶ Ibid., 54.

⁴⁷ Cass, ‘The Word that Saves Maastricht?’ (above n. 6), 1134.

Community and slowing down European integration.⁴⁸ Although some indicated that even without subsidiarity ‘one could [also] have lived quite happily and in peace in the European home,’ the principle was here to stay.⁴⁹

C Reimport of EU Subsidiarity to the German Basic Law

Article 23 of the German Basic Law, which was introduced in 1992 before the ratification of the Maastricht Treaty by Germany, establishes the principles of participation of Germany in the EU and is a reimport of the subsidiarity principle to the German constitutional system.⁵⁰ According to this provision, Germany participates in the development of an EU ‘that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law’.

The article establishes the subsidiarity principle as an important tie between German law and EU law, working in both directions at the same time. It provides a policy framework for Germany’s participation in the EU. For instance, the representatives of Germany at the EU level have to adhere to the subsidiarity principle in both the division and the exercise of competences.⁵¹ Furthermore, by committing Germany to a Europe based on subsidiarity, it reflects and re-emphasises the prominence of the principle for German constitutional law.⁵² Embedding subsidiarity in the EU Treaties, Germany’s own commitment to the principle for the organisation of the federal state received renewed attention.⁵³

V Components of the Subsidiarity Principle

The EU principle of subsidiarity has two dimensions: a material and a procedural one.⁵⁴ There are two prongs to the verification of material subsidiarity, labelled the *national insufficiency test* and the *comparative efficiency test*.⁵⁵ The first test – the Union shall act ‘only if and in so far as the

⁴⁸ Toth, ‘The Principle of Subsidiarity in the Maastricht Treaty’ (above n. 5), 1105.

⁴⁹ P. Pescatore, ‘Mit der Subsidiarität leben’ in Ole Due et al. (eds.), *Festschrift für Ulrich Everling* (Nomos, 1995), 1094.

⁵⁰ Isensee, *Subsidiaritätsprinzip und Verfassungsrecht* (above n. 6), 334.

⁵¹ *Ibid.*, 371.

⁵² *Ibid.*, 371.

⁵³ *Ibid.*, 334.

⁵⁴ A. E. de Noriega, *The EU Principle of Subsidiarity and its Critique* (Oxford University Press, 2002), 105.

⁵⁵ Schütze, *From Dual to Cooperative Federalism* (above n. 4).

objectives of the proposed action cannot be sufficiently achieved by the Member States' – means that a Member State has 'inadequate means at its disposal for achieving the objectives of the proposed action'.⁵⁶ The second test requires that the Union shall act if the objectives of the proposed action can rather 'by reason of the scale or effects of the proposed action, be better achieved at Union level'. Hence, the EU should not act 'unless it could *better* achieve the objectives of the proposed action'.⁵⁷

The principle of subsidiarity in the EU is based on a test that is different from that in German law. In comparison to the German Basic Law, which recognises the 'necessity' of federal action for the achievement of equivalent living conditions and legal and economic unity, the TEU looks at the insufficient achievement of the objective of the action at the national level and their comparatively more efficient achievement at the EU level. This can be contrasted with Article 72(2) of the Basic Law which in principle allows the federal level to act even if the *Länder* could achieve the relevant objective as long as the action concerns the establishment of equivalent living conditions or the maintenance of legal or economic unity.

In addition, the EU version of subsidiarity does not refer to the notion of 'necessary in the national interest' indicated in Article 72(2) of the Basic Law. Instead it assesses which level of government is better placed to achieve the objective of the legislation, thereby allocating powers by comparison rather than exclusion. In this sense, the EU subsidiarity principle can be seen to embody federal proportionality, asking whether EU action 'unnecessarily restricts national autonomy',⁵⁸ that is, without providing sufficient benefits.

Finally, within the criteria justifying federal action, the EU notion of subsidiarity does not require legislation to necessarily be in the interest of the nation, like in Germany, or rather the Union; however, it has to aim at achieving one of the objectives of the Treaties. Nonetheless, the objective of the legislation is not questioned per se by subsidiarity, only at what level of government a given objective can be best achieved.

Since the EU subsidiarity principle was first introduced by the Maastricht Treaty, the tests have been elaborated on. First, the 'Overall Approach' annexed to the Conclusions of the European Council meeting in Edinburgh established guidelines providing for more clarity in answering

⁵⁶ K. Lenaerts, 'Subsidiarity and Community Competence in the Field of Education' (1994) 1 *Columbia Journal of European Law* 1, 22.

⁵⁷ Schütze, *From Dual to Cooperative Federalism* (above n. 4), 250.

⁵⁸ *Ibid.*, 263.

the question of whether the Community should act.⁵⁹ These include, first, testing whether the issue at stake has transnational aspects that cannot be satisfactorily regulated by Member States.⁶⁰ Second, the guidelines suggest that a Community action satisfies the subsidiarity principle when ‘actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty ... or would otherwise significantly damage Member States’ interests’. Three examples are given in the text: the need to correct distortion of competition; avoidance of disguised restrictions on trade; and strengthening of economic and social cohesion. The final guidance principle makes the compliance with the subsidiarity principle conditional on the ‘clear benefits [of Community action] by reason of its scale or effects compared with action at the level of Member States’. In addition, the ‘Overall Approach’ provides that subsidiarity reasoning has to be ‘substantiated by qualitative or, wherever possible, quantitative indicators’.⁶¹ The ‘Overall Approach’ also instructs the EU institutions to observe the subsidiarity principle when they examine Community proposals. Specifically, the Commission is obliged to include a subsidiarity assessment in its pre-legislative consultations, as well as a recital in the proposal that assesses the compatibility with the principle of subsidiarity and, where necessary, provide more detail in an explanatory memorandum.⁶²

Second, the Inter-Institutional Agreement established that the Commission, while exercising its right of initiative, and the EP and the Council, while exercising their respective powers, should ‘take into account’ the subsidiarity principle.⁶³ In addition, the agreement provides that the explanatory memorandum in any Commission proposal should include a subsidiarity assessment.

The development of these guidelines culminated in the protocol ‘on the application of the principles of subsidiarity and proportionality’ added to the Amsterdam Treaty, which borrows the idea of subsidiarity as a ‘dynamic concept’⁶⁴ from the Edinburgh Conclusions and restates that compliance with subsidiarity must be demonstrated by ‘qualitative or, wherever possible, quantitative indicators’.⁶⁵ The Amsterdam Protocol

⁵⁹ European Council in Edinburgh, 11–12 December 1992, Conclusions of the Presidency.

⁶⁰ *Ibid.*, 20.

⁶¹ *Ibid.*

⁶² *Ibid.*, 23.

⁶³ Inter-institutional declaration on democracy, transparency and subsidiarity, Bull. EC 10–1993, 119. The declaration is referred to rather by scholars than by the EU institutions themselves.

⁶⁴ Article 3, Protocol on the application of the principles of subsidiarity and proportionality.

⁶⁵ *Ibid.*, Article 4.

echoes the requirement that both the 'national insufficiency test' and the 'comparative efficiency test' must be met for subsidiarity compliance.⁶⁶

In addition, the Amsterdam Protocol repeats the provisions regarding the form of action, which should be 'as simple as possible', and more specifically fulfil the requirement of choosing directives over regulations.⁶⁷ This provision is placed in the Amsterdam Protocol alongside the guidelines for the assessment of subsidiarity. In fact, the choice of the type of legal act can be seen to be much closer to the idea of a proportionality principle, as it rather concerns a 'how' question.⁶⁸ The 'General Approach' of the Edinburgh Council is hence more accurate in this respect, as it placed the provision on the form of action under the third paragraph of Article 3b EC Treaty ('nature and extent of Community action'), wherein the proportionality principle is currently enshrined.⁶⁹

At the time, the Edinburgh Guidelines and the Inter-Institutional Agreement were perceived as 'vague and only indicative'.⁷⁰ They did however represent an effort to make subsidiarity 'operational',⁷¹ suggesting a procedural dimension to the subsidiarity principle and demanding that the Community conducts an inquiry before undertaking legislative steps.⁷² Similarly, the Amsterdam Protocol was also often regarded as a mere extract of the central principles established in the Edinburgh 'Overall Approach', thereby not adding much value in itself.⁷³ Nonetheless, the Amsterdam criteria are today still referred to in the subsidiarity assessments of the Commission⁷⁴ and national parliaments alike.⁷⁵ Neither

⁶⁶ *Ibid.*, Article 5.

⁶⁷ *Ibid.*, Article 6.

⁶⁸ So also qualified in Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* (above n. 38), 567. De Búrca sees these provisions as 'the linkage' between subsidiarity and proportionality. See also de Búrca, 'Re-Appraising Subsidiarity's Significance after Amsterdam' (above n. 1), 30.

⁶⁹ Conclusions of the Presidency (above n. 59), 212.

⁷⁰ I. Pernice, 'Framework Revisited: Constitutional, Federal and Subsidiarity Issues' (1995) 2 *CJEL* 403, 408.

⁷¹ C. Timmermans, 'Subsidiarity and Transparency' (1999) 22 *Fordham International Law Journal* 106, 108.

⁷² P. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford University Press, 2010), 195.

⁷³ Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* (above n. 38), 66.

⁷⁴ Report from the Commission on Subsidiarity and Proportionality, 18th Report on Better Lawmaking covering the year 2010, COM (2011) 344, 2.

⁷⁵ See e.g. House of Commons, 'Reasoned Opinion on the Draft Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures', COM (2012) 614.

the Lisbon Treaty nor the Inter-Institutional Agreement on Better Law-Making of 2016 have provided any new criteria in this respect.

VI Enforcement within the EU

Whilst the Amsterdam Protocol established the conceptual criteria against which subsidiarity should be assessed in any given case, the role of subsidiarity in the EU's governance is also shaped by its enforcement, primarily through the CJEU and national parliaments. This section discusses the relevant mechanisms for both institutions and highlights their limitations.

A *Enforcement of Subsidiarity by the CJEU*

The introduction of the subsidiarity principle in the Maastricht Treaty opened it to judicial enforcement by the CJEU. Initially it was expected that a flood of litigation might be triggered.⁷⁶ However, since the entry into force of the Maastricht Treaty subsidiarity challenges have played a role in fewer than twenty cases before the CJEU, with some of these repeating previous challenges.⁷⁷

The CJEU's jurisprudence on the subsidiarity principle⁷⁸ has been widely criticised, in particular, the Court's alleged unwillingness to 'deal with subsidiarity frontally' and its 'misleading interpretation' of the principle, because of a focus on procedural aspects, instead of a more substantive cost/benefit test for the necessity of EU action.⁷⁹ Moreover, the Court's case law has been described as a 'drafting guide', which means that, as long as EU institutions use the Court's vague vocabulary and draft EU legislation accordingly, the Court has no ground to annul such an act on the basis

⁷⁶ Toth, 'The Principle of Subsidiarity in the Maastricht Treaty' (above n. 5), 1101.

⁷⁷ P. Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) 50 *JCMS* 72, 80. Some argue that the CJEU conducted subsidiarity review under a different heading, see T. Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?' (2012) 50 *JCMS* 267, 270.

⁷⁸ See especially CJEU's cases: Case C-84/94, *United Kingdom v. Council* [1996] ECLI:EU:C:1996:431 (Working Time Directive); Case C-233/94, *Germany v. Parliament and Council* [1997] ECLI:EU:C:1997:231 (Deposit-Guarantee Schemes); and Case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECLI:EU:C:2002:741.

⁷⁹ G. Martinico, 'Dating Cinderella: On Subsidiarity as a Political Safeguard of Federalism in the European Union' (2011) 17 *European Public Law* 649, 655.

of a subsidiarity violation.⁸⁰ The Court was urged to develop a ‘doctrinal framework’ on subsidiarity to increase the transparency and justification of the legislative acts, instead of relying on the manifest-error doctrine.⁸¹

Partially the principle of subsidiarity itself is blamed for the low number of Court cases since it is seen as a ‘catch-all formula of good government and common sense, rather than a well-defined political or philosophical principle,’ and without ‘clear legal content.’⁸² Another given justification is the adherence of the Court to the separation of powers: the Court tried to avoid ‘substituting its own judgment for that of the institutions, in assessing a choice which was ultimately perceived as political.’⁸³ Another explanation offered sees the ‘idea of integration’ as an important driver of CJEU jurisprudence, which may be endangered by the ‘anti-integration’ character of the subsidiarity principle, which is directed specifically against the growth of EU competences.⁸⁴ Finally, the low number of cases is explicated by the fact that adoption of legislative acts requires a qualified majority, implying that a sufficient number of Member States saw EU action in compliance with subsidiarity.⁸⁵

The CJEU has been under greater scrutiny due to the broadening of EU competences and the extension of majoritarian decision-making by the Lisbon Treaty.⁸⁶ The Court is expected to enhance the control over the exercise of EU competences and advance a counter-majoritarian approach when reviewing EU legislation.⁸⁷ Lack of the Court’s case law declaring a subsidiarity breach should not be preventing bringing such EU legislative acts before the Court.⁸⁸ In this respect, the impact assessments attached

⁸⁰ S. Weatherill, ‘The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law Has Become a Drafting Guide’ (2011) 12 *GLJ* 827.

⁸¹ M. Kumm, ‘Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union’ (2006) 12 *ELJ* 503.

⁸² De Noriega, *The EU Principle of Subsidiarity and its Critique* (above n. 54), 96 and 139.

⁸³ A. Biondi, ‘Subsidiarity in the Courtroom’ in Andrea Biondi et al. (eds.), *EU Law after Lisbon* (Oxford University Press, 2012), 213, and earlier Toth, ‘The Principle of Subsidiarity in the Maastricht Treaty’ (above n. 5), 1102.

⁸⁴ De Noriega, *The EU Principle of Subsidiarity and its Critique* (above n. 54), 7. This approach of the members of the Court de Noriega drew from their doctrinal writings.

⁸⁵ Craig, ‘Subsidiarity: A Political and Legal Analysis’ (above n. 77), 81.

⁸⁶ M. P. Maduro and L. Azoulai, ‘Introduction’ in M. P. Maduro and L. Azoulai (eds.), *The Past and the Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome* (Hart, 2010), xix.

⁸⁷ *Ibid.*

⁸⁸ J. Ziller, ‘Le Principe de subsidiarité’ in J.-B. Auby and J. Dutheil de la Rochère (eds.), *Traité de droit administratif européen* (Bruylant, 2014), 533.

to draft legislative acts can possibly facilitate subsequent judicial review of subsidiarity.⁸⁹

B Enforcement of Subsidiarity by National Parliaments

In contrast to enforcement by the CJEU, which itself is an unelected EU body, the involvement of national parliaments in the subsidiarity scrutiny embodies an aspect of EU governance that may help address concerns over democratic legitimacy, the EU's so-called 'democracy issue'.⁹⁰ To analyse this issue it is useful to consider the notions of 'input' and 'output' legitimacy, two 'legitimising beliefs' for the exercise of governing authority.⁹¹ Input-oriented legitimacy means that 'political choices are legitimate if and because they reflect the "will of the people", that is, if they can be derived from the authentic preferences of the members of a community'.⁹² Under output-oriented legitimacy 'political choices are legitimate if and because they effectively promote the common welfare of the constituency in question'.⁹³ Viewed from this perspective, the transfer of competence from the national level to the EU brings with it concerns over legitimisation if the EU authorities and laws fall short in input and output legitimacy relative to their national counterparts.

Several attempts have been made to address these concerns. The first approach has been to increase the role of the directly elected EP in the legislative process. Indeed, the EP is the 'winner' in the Lisbon Treaty, due to the extension of the ordinary legislative procedure, whereby decisions are taken jointly by the EP and the Council, and the conferral of more control over the appointment of the President of the EU Commission.⁹⁴

The second attempt to strengthen the EU's democratic legitimacy has been to reinforce the role of national parliaments within the European legislative process. The Lisbon Treaty introduced the so-called Early Warning System (EWS) as a new way to safeguard subsidiarity that involves the national parliaments. This permits the national legislatures to be involved

⁸⁹ Craig, 'Subsidiarity: A Political and Legal Analysis' (above n. 77), 78.

⁹⁰ J. H. H. Weiler, 'The Transformation of Europe' (1991) 100 *YJL* 2403, 2472.

⁹¹ F. W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999), 6.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ P. Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press, 2010), 36.

in the enforcement of the main principle by which a limit is placed on the exercise of shared powers by EU institutions.

Under this new procedure, the Commission, the EP and the Council shall forward draft legislative acts to national parliaments, providing a justification regarding the principle of subsidiarity and proportionality for each proposal, including a detailed statement to enable the appraisal of compliance with these principles.⁹⁵ National parliaments are then granted eight weeks from the date of transmission of a draft legislative act to submit a reasoned opinion to the Presidents of the European Parliament, the Council and the Commission explaining why the draft is not in compliance with the principle of subsidiarity.⁹⁶ The institution from which the draft originates should 'take account' of the reasoned opinions received. Reasoned opinions count as votes: each national parliament has two votes; in a bicameral parliament, each of the two chambers has one vote. If the number of reasoned opinions exceeds certain thresholds, one of two procedures may be triggered.⁹⁷

First, under the 'yellow card', if the reasoned opinions issued by national parliaments are equal to at least one-third of all the votes allocated to national parliaments, the draft must be reviewed. For proposals in the area of freedom, security and justice, the respective threshold is one-quarter of the votes of national parliaments. Subsequently, the initiating institution may decide to maintain, amend or withdraw the draft, and is required to give reasons for its decision.⁹⁸

Second, in the procedure labelled as the 'orange card', if the reasoned opinions against a proposal within the ordinary legislative procedure represent at least the majority of votes assigned to national parliaments, the Commission must review the draft legislative act. The Commission may then decide to maintain, amend or withdraw the draft. If it decides to maintain the draft, the Commission should present its own reasoned opinion on the compliance of the draft with the subsidiarity principle.⁹⁹ This reasoned opinion of the Commission, together with the reasoned opinions of the national parliaments, is then forwarded to the EU legislator for consideration. If a majority of 55 per cent of the votes in the Council or a majority of the votes cast in the EP is of the opinion that the proposal is contrary to the principle of subsidiarity, the legislative procedure is halted.

⁹⁵ Protocol No. 2, Articles 4 and 5.

⁹⁶ *Ibid.*, Article 6.

⁹⁷ *Ibid.*, Article 7(1).

⁹⁸ *Ibid.*, Article 7(2).

⁹⁹ *Ibid.*, Article 7(3).

The experience thus far suggests that national parliaments have been actively participating in the EWS. By the end of 2016 they have issued 350 reasoned opinions.¹⁰⁰ So far the ‘orange card’ has never been invoked, but the ‘yellow card’ has been triggered three times: for the so-called Monti II proposal on the right to strike; for the proposal establishing the European Public Prosecutor’s Office; and for the proposal amending the Posted Workers Directive.¹⁰¹ In neither case did the reasoned opinions of the national parliaments convince the Commission of a subsidiarity breach. In the first case the Commission decided to withdraw the proposal following the ‘yellow card’ because of the possible future lack of support in the EP and in the Council.¹⁰² In the second case it elected to continue to work on the proposal without any amendments but taking ‘due account’ of the reasoned opinions.¹⁰³ This was not surprising especially since the Lisbon Treaty expressly provides that in a case of lack of unanimity on the proposal in the Council, nine Member States can proceed with enhanced cooperation to establish the Office.¹⁰⁴ In fact, in October 2017 the regulation establishing the EPPO was adopted by twenty Member States which were part of the EPPO enhanced cooperation at the time.¹⁰⁵ Finally, in the case concerning the amendment of the Posted Workers Directive the Commission decided to maintain the proposal.¹⁰⁶ However, as of March 2018, the proposed amendment has not yet been adopted by the EU legislator.

Overall, national parliaments see the EWS as in need of improvement. This concerns especially quality of the Commission replies to the reasoned

¹⁰⁰ Own calculation on the basis of Commission Annual Reports on Subsidiarity and Proportionality, COM (2011) 344; COM (2012) 373; COM (2013) 566; COM (2014) 506; COM (2015) 315; COM (2016) 469; and COM (2017) 600.

¹⁰¹ COM (2012) 130; COM (2013) 534; and COM (2016) 128 respectively. See F. Fabbrini and K. Granat, ‘“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’ (2013) 50 *CML Rev* 115; D. Fromage, ‘The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member State Parliaments’ (2016) 36 *YEL* 5–27.

¹⁰² See e.g. Commission reply to the Polish Sejm of 12 September 2012, Ares (2012)1058907.

¹⁰³ Communication from the Commission to the European Parliament, the Council and the National Parliaments, COM (2013) 851, 13.

¹⁰⁴ Article 86(1) TFEU.

¹⁰⁵ Council of the EU, Press Release 580/17, 12 October 2010.

¹⁰⁶ Communication from the Commission to the European Parliament, the Council and the National Parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No. 2, COM (2016) 505.

opinions, as well as adjustments in the eight-week deadline (e.g. by excluding the Christmas period and the parliamentary summer recess).¹⁰⁷

Besides the EWS, Member States notify on behalf of a national parliament or its chamber an action on grounds of subsidiarity violation before the Court.¹⁰⁸ Accordingly, the rules of action of annulment (Article 263 of the Treaty on the Functioning of the European Union (TFEU)) apply before the Court, while at the Member State level it is for national law to specify the rights of the parliament in this procedure.¹⁰⁹ So far no such subsidiarity action has ever been brought by national parliaments.

Viewed through the lens of input and output legitimacy, the EWS has arguably helped partially to address the EU's democratic deficit. The formal involvement of national parliaments, as well as their active use of the new tools, suggests that the preferences of the voters have received a greater voice in the EU legislative procedure, thereby improving input legitimacy. Furthermore, consistency with the subsidiarity principle ensures that government takes place at the level that is best placed to regulate specific functions, thereby achieving better outcomes for the community. However, these potential improvements in legitimacy are limited by the apparent lack of consequences of the reasoned opinions issued by national parliaments in the EWS. Many proposals for reform thus tend to focus on making the input of national parliaments more consequential for the legislative outcome as discussed in greater detail in section VIII below.

VII The Subsidiarity Principle in Practice

As indicated above, an assessment of the subsidiary principle needs to consider the concrete implications of any enforcement mechanism. The following section therefore discusses the application of the subsidiarity principle in practice, both by the Court and by national parliaments, and argues that this can be challenging. Subsidiarity as a principle of governance helps to decide when the EU is more apt to enforce a certain policy; that is, whether its objective cannot be sufficiently achieved at the national level and can be better attained at the EU level. The ease with which this test can be applied depends on the policy area and the objectives at hand. This section illustrates this aspect by considering two specific areas of interest,

¹⁰⁷ COSAC, 24th Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, 4 November 2015, 17 et seq.

¹⁰⁸ Protocol No. 2, Article 8.

¹⁰⁹ K. Granat, 'Institutional Design of the Member States for the Ex Post Subsidiarity Scrutiny' in M. Cartabia et al. (eds.), *Democracy and Subsidiarity in the EU* (Il Mulino, 2013), 427.

namely, internal market legislation and fundamental rights legislation. With regard to the achievement of the internal market, the problem is that it appears too easy to conclude that the subsidiarity principle points in the direction of undertaking certain action at the EU level, simply because of the inherent cross-border nature of the objective. With regard to the governance of fundamental rights, issues arise if subsidiarity is simply applied mechanically, without due respect for the wider-ranging objectives of fundamental rights policy.

A Internal Market

The review of EU legislation based on Article 114 TFEU, such as the Tobacco Products Directive, underlines the deficiencies of the subsidiarity test.¹¹⁰ The national parliaments challenged the Commission proposal for the Tobacco Products Directive under the EWS, issuing nine reasoned opinions.¹¹¹ The reasoned opinions argued that the Commission did not prove disparities between tobacco products in the Member States and therefore did not establish the presence of a threat to the functioning of the internal market.¹¹² It was also underlined that the Member States have already contributed to increasing health protection by measures such as banning smoking in public spaces or selling in vending machines.¹¹³ Moreover some parliaments underlined that the large number of foreseen delegated acts impeded subsidiarity assessment of the proposal.¹¹⁴

The threshold for the 'yellow card' was not reached and the EU legislator adopted the proposal with some changes in 2014. The Directive prohibits cigarettes with characterising flavours (e.g. menthol) and introduces health warnings on packages of tobacco and related products which consist of a picture and text health warnings covering 65 per cent of the front and back of the packages. Moreover, it provides safety and quality requirements for electronic cigarettes.

Subsequently, three cases concerning the new Directive were brought before the Court. Some of the challenges contested whether the prohibition

¹¹⁰ COM (2012) 788.

¹¹¹ Two of those reasoned opinions (Bulgarian parliament and Italian Chamber of Deputies) were issued after the eight-week deadline.

¹¹² Reasoned opinion of the Greek parliament, 20 February 2013, 4.

¹¹³ Reasoned opinion of the Bulgarian parliament, 28 February 2013, 2.

¹¹⁴ Reasoned opinions of the Danish parliament, 4 March 2013, 1; the Italian Senate, 30 March 2013, 1; and the Romanian Chamber of Deputies, 26 February 2013, 1.

of menthol cigarettes¹¹⁵ and the new rules on e-cigarettes complied with Article 5(3) TEU.¹¹⁶ The cases show the Court's reasoning and appear to provide the most structured discussion of subsidiarity to date in the case law. The Court's Advocate General (AG) provided the most extensive opinion in the *Poland v. Parliament and Council* case, referring to that opinion in the other proceedings.¹¹⁷ This is therefore the opinion that is reviewed in this chapter to show the challenges of subsidiarity analysis with regard to legislation based on Article 114 TFEU.

The AG included in the subsidiarity review an analysis of the substance of the EU measure and of the statement of reasons.¹¹⁸ Within the substantive test, the AG outlined two different limbs of the test, one negative and one positive, which de facto represent simply different labels for the national insufficiency test and comparative efficiency test discussed earlier.¹¹⁹ Under the negative limb the AG enumerated three components: (1) the technical and financial capabilities of the Member States to resolve the problem; (2) the national, regional and local features central to the issue at stake; and (3) the cross-border dimension of the problem that is impossible to address at national level.¹²⁰

Of these, the last one appears to be the most important and the AG's opinion focused on it. As was shown earlier, the Amsterdam Protocol referred to this test as a guideline to justify action at the EU level.¹²¹ The 'cross-border activity test' was also used in the earlier *Vodafone* case in the opinion of AG Maduro,¹²² who argued that the EU should act whenever it had 'a special interest in protecting and promoting economic activities of a cross-border character', and that 'the national democratic process is likely to fail to protect cross-border activities.'¹²³ Generally speaking, the EU should take action in cases where the transnational dimension of an

¹¹⁵ C-547/14, *Philip Morris Brands and Others* [2016] ECLI:EU:C:2016:325; and C-358/14, *Poland v. Parliament and Council* [2016] ECLI:EU:C:2016:323.

¹¹⁶ C-477/14, *Pillbox 38* [2016] ECLI:EU:C:2016:324.

¹¹⁷ Opinion of AG Kokott delivered on 23 December 2015, C-358/14, *Poland v. Parliament and Council* [2015] ECLI:EU:C:2015:848. According to the AG, the *Philip Morris Brands and Others* and *Pillbox 38* cases concern subsidiarity 'only briefly' (see [2015] ECLI:EU:C:2015:853, para. 273 and [2015] ECLI:EU:C:2015:854, para. 159 respectively).

¹¹⁸ Opinion of AG Kokott, C-358/14, para. 140.

¹¹⁹ *Ibid.*, para. 142.

¹²⁰ *Ibid.*, paras. 151–3.

¹²¹ Article 5 of Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty establishing the European Community.

¹²² Case C-58/08, *Opinion of Advocate General Poirares Maduro in Vodafone and Others* [2009] ECLI:EU:C:2009:596.

¹²³ *Ibid.*, para. 34.

issue means that national processes may fail, in turn increasing the added value of EU legislative intervention.¹²⁴

The AG indicated that ‘as a rule’ Member States cannot sufficiently achieve the aim of Article 114 TFEU which is elimination of obstacles to cross-border trade.¹²⁵ In this context, Poland argued that marketing of menthol-flavoured tobacco does not have a cross-border dimension. This was due to diverse consumption patterns and economic structures among the Member States, and the possibility to provide ‘health-related action’ by the Member States with the biggest markets (Poland, Slovakia and Finland).¹²⁶ However, the AG disagreed and underlined that the objective of the Directive – removal of obstacles for the trade of tobacco products and a simultaneous guarantee of a high level of health protection – can be achieved only when all characterising flavours are prohibited.¹²⁷ The AG pointed out that differences in the Member States are irrelevant: the key question is whether there is or will be cross-border trade in this area and whether the Member States can ‘efficiently’ remove these obstacles on their own.¹²⁸ The AG concluded that there exists a ‘lively’ cross-border trade in the tobacco market, with different national rules on characterising flavours, leading to a problem that the Member States cannot tackle themselves. Thus, the EU legislator did not commit a manifest error in its subsidiarity assessment.¹²⁹ Already this part of the AG’s reasoning shows that when cross-border trade is concerned, EU level regulation almost automatically wins.

With regard to the positive limb of the subsidiarity test, the AG framed this test as a question of ‘added value’ meaning that ‘the general interests of the European Union can be better served by action at that level than by action at the national level.’¹³⁰ Although, as the AG pointed out, this might be an ‘automatic’ case with regard to Article 114 TFEU legislation, it still

¹²⁴ Establishing that an activity has a cross-border character and thus demands an EU action is not always a straightforward task. For example, AG Maduro in the *Vodafone* case distinguished between the harmonisation of the wholesale and retail roaming prices. While it was hard to dispute that wholesale roaming prices had a cross-border character, the Member States could have regulated retail prices after the harmonisation of the wholesale prices. Yet, AG Maduro explained that EU-level regulation of the retail prices was indispensable, as they represented only a small part of domestic communications and thus there was a risk that the national regulator will not protect this cross-border activity.

¹²⁵ Opinion of AG Kokott, C-358/14, para. 154.

¹²⁶ *Ibid.*, para. 155.

¹²⁷ *Ibid.*, para. 157.

¹²⁸ *Ibid.*, para. 158.

¹²⁹ *Ibid.*, paras. 159–60.

¹³⁰ *Ibid.*, para. 162.

demands a quantitative and qualitative test.¹³¹ The AG established that the market at stake has a ‘substantial trade volume and affects the lives of millions of Union citizens every day’ (‘quantitative test’) and that the issue at stake is ‘beyond national boundaries’ confirming a common European interest (‘qualitative test’).¹³² Again, no manifest error of assessment was evident in the Commission’s reasoning and hence the Directive passed also the positive aspect of the subsidiarity test.¹³³

Finally, the AG assessed the procedural subsidiarity angle, since Poland argued that the Commission’s Directive is insufficiently justified, as only one recital of the Directive’s preamble concerns subsidiarity.¹³⁴ The AG agreed that the Directive only repeated the text of Article 5(3) TEU.¹³⁵ Despite this ‘empty formula’ used by the EU legislator, the AG found that other recitals in the preamble, even though they do not directly reference subsidiarity but rather justify the use of Article 114 TFEU, are nonetheless relevant to the issue at stake due to the overlap in the reasoning applicable to internal market and subsidiarity provisions.¹³⁶ Moreover, the AG underlined that the explanatory memorandum in the Commission proposal and the impact assessment discussed the insufficiency of national rules and the added value of EU action and were available to EU institutions and national parliaments in the legislative procedure.¹³⁷ Still, the AG advised the EU legislature to avoid ‘empty formulas’ and substantiate the preamble with regard to the subsidiarity principle in future legislative acts.¹³⁸ In sum, the AG found that the EU violated neither the substantial nor the procedural aspect of the subsidiarity principle.¹³⁹

The Court in its judgments confirmed that the Directive’s provisions prohibiting placing on the market mentholated tobacco products in the *Philip Morris Brands and Others* and in *Poland v. Parliament and Council* cases and the rules applicable to electronic cigarettes and to refill containers in the *Pillbox 38* case are compatible with the principle of subsidiarity.¹⁴⁰ The Court established that the initial, political review of subsidiarity is in the hands of national parliaments while the Court has to decide whether

¹³¹ *Ibid.*, paras. 164–5.

¹³² *Ibid.*, para. 167.

¹³³ *Ibid.*, para. 168.

¹³⁴ *Ibid.*, para. 175.

¹³⁵ *Ibid.*, para. 177.

¹³⁶ *Ibid.*, para. 180.

¹³⁷ *Ibid.*, paras. 182–5.

¹³⁸ *Ibid.*, para. 188.

¹³⁹ *Ibid.*, para. 189.

¹⁴⁰ See C-547/14, paras. 213–28; and C-477/14, paras. 142–51.

the EU legislature 'was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action cannot be better achieved at EU level'.¹⁴¹

The Court indicated that the objectives of the Directive were 'interdependent'.¹⁴² Even if the objective of the Directive to ensure a high level of protection of human health could be better achieved at the national level, its other objective, improvement of the functioning of the internal market for tobacco, would be shattered if the menthol-flavoured tobacco would be permitted in some Member States and prohibited in others.¹⁴³ In this light, the EU was better placed to achieve the objectives of the Directive. In addition, the subsidiarity principle does not aim at setting limits on EU action based on the situation in a specific Member State assessed individually but instead demands that action can be better achieved at EU level because of the Treaty objectives.¹⁴⁴ The Court disagreed that the objective of human health protection could be better achieved at the national level, since menthol cigarettes are consumed only in three Member States. In fact, at least an additional eight Member States had a market share greater than the EU-wide share.¹⁴⁵ With regard to the procedural aspect of the claim, the Court argued that the wording of the Directive, as well as its context and the circumstances of the case have to be taken into account. The CJEU concluded that both the proposal and the impact assessment offered 'sufficient information' showing 'clearly and unequivocally' the benefits of EU action.¹⁴⁶ Because Poland participated in the legislative procedure it could not claim to be unaware of the grounds behind the Directive.¹⁴⁷ In turn, in the assessment of the proportionality principle, the Court considered a procedural requirement that any burden upon the economic operators should be minimised and commensurate with the sought objective as per Article 5 of Protocol No. 2. The jobs and revenue lost due to the prohibition were mitigated by the transitional period until 2020 and by the expected decrease in the number of smokers.¹⁴⁸

¹⁴¹ C-358/14, paras. 112 and 114.

¹⁴² *Ibid.*, para. 118.

¹⁴³ *Ibid.*, para. 117.

¹⁴⁴ *Ibid.*, para. 119.

¹⁴⁵ *Ibid.*, para. 120.

¹⁴⁶ *Ibid.*, paras. 122–3.

¹⁴⁷ *Ibid.*, para. 125.

¹⁴⁸ *Ibid.*, paras. 100–1.

Clearly, the reasoning of the Court is much more succinct in comparison to the AG Opinions, not breaking down the subsidiarity assessment into positive and negative limbs. Moreover, with regard to the procedural aspect the CJEU is much more generous towards the EU legislature, and does not criticise the use of wording in the preamble. In addition, the Court draws a clear distinction between the political and judicial review of subsidiarity in the Directive. This is even more visible in the *Pillbox 38* case where the Court did not give any thought to the reasoned opinions issued during the legislative procedure, stating that the reasoned opinions are part of the political monitoring of subsidiarity principle under Protocol No. 2.¹⁴⁹

The case highlights the difficulties of enforcing subsidiarity in practice, in particular in instances concerning the internal market, where an almost automatic prejudice for EU action appears to apply. Nonetheless, one can argue that despite the evident cross-border implications of internal market issues, a meaningful subsidiarity review may still be applied, if a profound study of the issue at stake is offered by the impact assessment. Moreover, subsidiarity could be tied to the question of the harmonisation method chosen by the EU and whether the adopted approach minimises the disruption necessary to achieve the stated objectives.¹⁵⁰ Yet, this approach seems closer to the proportionality review since it concerns the applied means.

B Fundamental Rights

The second area that exposes the difficulties in the application of the subsidiarity principle concerns EU legislative proposals or acts with a fundamental rights objective. It has been argued that '[t]here is mismatch between the function of the principle of subsidiarity as defined in EU law and the function of fundamental rights standard-setting in the EU'.¹⁵¹ Legislative acts that express a fundamental right (or as is used in this chapter, those with a fundamental rights objective) often concern relations within Member States rather than among them.¹⁵² Moreover, the nature of fundamental rights, their focus on values, stands in contrast to a

¹⁴⁹ C-477/14, para. 147. The referring national court invoked the reasoned opinions of national parliaments arguing subsidiarity violation by the Tobacco Products Directive and no proof of divergent national regulation for electronic cigarettes.

¹⁵⁰ R. Schütze, 'Deciding when the EU Should Act', Durham Law School Research Briefing no. 26 (2015).

¹⁵¹ E. Muir, 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges' (2014) 51 *CML Rev* 219, 240.

¹⁵² *Ibid.*

subsidiarity test that concentrates on the effectiveness of the government level at stake.¹⁵³ The example of the ‘Women on Boards’ proposal and the reasoned opinions issued in this respect highlight the problems at stake.

In 2012 the Commission put forward a proposal for a Directive to promote gender equality in economic decision-making, specifically on boards of companies listed on stock exchanges.¹⁵⁴ The proposal followed up on an earlier, rather unsuccessful, pledge of the Commission encouraging self-regulation of publicly listed companies to increase the number of women on boards.¹⁵⁵ The proposed Directive set a target of 40 per cent for women in director positions on non-executive boards by 2020, or by 2018 in case of listed companies that are public undertakings.¹⁵⁶ Crucially, in the selection procedure, the female candidate is chosen when she has equal qualification to a male candidate in terms of suitability, competence and professional performance, unless an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the male candidate. The proposal put forward some examples of sanctions for infringements of national provisions implementing the Directive with regard to the selection process (e.g. administrative fines or annulment of the appointment).¹⁵⁷

The proposal was anchored in the EU competence to adopt measures ensuring the application of the principle of equal opportunities and equal treatment of men and women.¹⁵⁸ In support of the consistency of the proposal with the principle of subsidiarity, the Commission underlined the legal diversity in the Member States which resulted in a range from 3 per cent to 27 per cent of women within the boards.¹⁵⁹ Relying on its Impact Assessment, the Commission emphasised that female representation on boards will not reach 40 per cent by 2020 without further measures. The legal diversity across Member States was apt to produce problems in the functioning of the internal market, such as exclusion from public procurement, because of the lack of compliance with national binding quotas in

¹⁵³ *Ibid.*, 241.

¹⁵⁴ Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM (2012) 614.

¹⁵⁵ ‘Women on the Board Pledge for Europe’ MEMO/11/124, 1 March 2011, http://europa.eu/rapid/press-release_MEMO-11-124_en.htm. The pledge was signed only by twenty-four companies.

¹⁵⁶ Article 4 of the proposal.

¹⁵⁷ Article 7(2) of the proposal.

¹⁵⁸ Article 157(3) TFEU.

¹⁵⁹ Explanatory Memorandum, 9.

another Member State. In sum, as only an EU-level action could effectively achieve a 40 per cent quota allowing for equal opportunities and equal treatment of men and women in matters of employment and occupation and diminish the internal market related problems, the proposal was in conformity with the subsidiarity principle.

Eight parliamentary chambers issued reasoned opinions on this proposal, and the threshold for the 'yellow card' was not met. The Czech Chamber of Deputies and the Danish Folketing highlighted a subsidiarity violation, since affirmative measures should be taken by national initiatives.¹⁶⁰ The UK House of Commons stated that the Commission did not offer strong evidence on the cause of female underrepresentation and the problems encountered within the internal market that would justify the EU action.¹⁶¹ Another chamber established a subsidiarity violation by the draft Directive on the basis that it focused only on non-executive boards requiring less specialist knowledge and hence confirming gender stereotypes.¹⁶² Finally, some parliaments argued that reforms at the national level have recently begun.¹⁶³

This study of the reasoned opinions indicates that they were predominantly issued by national parliaments of Member States that had no existing legal quota and relatively high shares of women on boards. In those Member States corporate governance codes often regulate gender equality matters. In contrast, national parliaments of Member States with relatively low shares of women on boards tended not to submit a reasoned opinion.

Arguably despite the Commission's protestations to the contrary, the 'Women on Boards' proposal only marginally concerned situations of a truly transnational context, with substantive cross-border effects. Such a case would exist in only a limited set of cases; for instance, if a female member of a non-executive board applied for a similar position in another Member State in accordance with the free movement rules.¹⁶⁴ The proposed Directive – an example of a genuine fundamental rights legislation – however forced national parliaments to assess whether gender equality should be offered better protection, although an explicit cross-border dimension was not present. In fact, there have been cases

¹⁶⁰ Reasoned opinions of the Czech Chamber of Deputies, 6 December 2012, point 5; and the Danish parliament, 14 December 2012, 1.

¹⁶¹ Reasoned opinion of the UK House of Commons, 18 December 2012, point 22.

¹⁶² Reasoned opinion of the Polish Chamber of Deputies, 4 January 2013, 4.

¹⁶³ Reasoned opinion of the Dutch Tweede and Eerste Kamer, 18 December 2012, 1.

¹⁶⁴ Recital 13 of the proposal's preamble.

where fundamental rights legislation concerned transnational situations, for example the Commission proposal on the right to strike.

In the area of fundamental rights, a more open-ended approach to subsidiarity based on the issues of ‘process’, ‘outcome’ (capacity of the levels of authority to deal with certain issues) and ‘willingness’ rather than simply treating it as an efficiency measure may be called for.¹⁶⁵ For example, on the one hand, in terms of process and willingness, fundamental rights issues may best be dealt with at the national level, because this has ‘the information, the capacity and the political legitimacy to intervene.’¹⁶⁶ On the other hand, process and willingness also suggest that the EU or international level might be better placed to act as it is ‘less mired in the immediacy of a local political situation [and] is the more appropriate actor in certain human rights matters, since it is more likely to have the will, the independence, the wider experience and the normative authority to act.’¹⁶⁷ As regards outcome, the national level may be better placed to protect fundamental rights through constitutional values and political institutions, while monitoring of existing national protections might be better dealt with at the international level.¹⁶⁸ As these examples show, the result of this multifaceted assessment is an ‘inevitable interaction between those different levels and actors in adopting and carrying through a particular policy in a given sphere.’

In this light, the ‘Women on Boards’ proposal may improve the situation in those Member States lagging behind in gender equality. For instance, Malta, Hungary and Greece had very low shares of women on boards, ranging between 3 and 6 per cent. The EU Directive could assist these Member States in overcoming national problems, such as the entrenched positions of national parties on the issue of women in society. The ‘Women on Boards’ proposal thus presented a more suitable measure to move towards gender equality on companies’ boards as compared to a national level regulation.

This discussion of the ‘Women on Boards’ proposal highlights the issues arising in the application of the subsidiarity principle to fundamental rights legislation. A purely efficiency-based assessment may fail to do justice to the more wide-ranging ambitions of fundamental rights and their importance for the EU. Like proposals concerning the internal market,

¹⁶⁵ De Búrca, ‘Re-appraising Subsidiarity’s Significance after Amsterdam’ (above n. 1), 2–3.

¹⁶⁶ *Ibid.*, 4.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

proposals that have as their objective the protection of fundamental rights put a spotlight on certain limits and basic problems with the application of the subsidiarity principle in practice, thereby motivating the search for proposals to reform the current practice.

VIII Reform Proposals

Over time, the EWS as introduced by the Lisbon Treaty has been perceived as insufficient for safeguarding against the EU's 'competence creep'. For example, both the Netherlands and the UK have conducted systematic and wide-ranging reviews of EU legislation to assess whether and how the EU should act.

The Dutch report has shown that EU proposals raise concerns with regard to their proportionality and substance.¹⁶⁹ With regard to the subsidiarity principle itself, some 'points of action' in the report clearly highlighted that the issue at stake 'can best take place at national level' or that they do not have a 'transnational character'. However, in this assessment the Dutch tested only the national insufficiency prong of the subsidiarity principle, without looking into the EU's comparative efficiency.¹⁷⁰

The British 'Balance of Competences Review' produced a series of reports on the effects of EU law on the UK legal system. In a report dedicated to the subsidiarity and proportionality principles it stated that the evidence on how subsidiarity is applied in practice is 'mixed': on the one hand respect for subsidiarity is growing; on the other hand subsidiarity has not proven to be an effective brake on EU legislation.¹⁷¹ Since the outcome of the 'Balance of Competences Review' generally did not confirm the UK government's position, especially with regard to free movement, the British delegations did not use it in the negotiations with in the EU.¹⁷²

¹⁶⁹ Ministerie van Buitenlandse Zaken, Testing European legislation for subsidiarity and proportionality – Dutch list of points for action. See also Michael Emerson, 'The Dutch Wish-List for a Lighter Regulatory Touch from the EU', CEPS Commentary, 1 July 2013, <http://ceps.eu/book/dutch-wish-list-lighter-regulatory-touch-eu>.

¹⁷⁰ See A. Duff, 'Why the Dutch Version of the Balance of Competence Review Will Not Please the Brits' (2013), <http://blogs.lse.ac.uk/europpblog/2013/08/27/why-the-dutch-version-of-the-balance-of-competence-review-will-not-please-the-brits/>.

¹⁷¹ Review of the Balance of Competences between the United Kingdom and the European Union, Subsidiarity and Proportionality, para. 2.32.

¹⁷² C. O'Brien, 'Cameron's Renegotiation and the Burying of the Balance of Competencies Review', <http://ukandeu.ac.uk/camerons-renegotiation-and-the-burying-of-the-balance-of-competencies-review/>. Also, the House of Lords criticised lack of publicity of the review and lack of any overall summary of the findings of the reports. See House of Lords,

The Dutch and the British reports suggest that countering the competence creep of the EU cannot be the main reason why national parliaments should be involved in the EU legislative process. Instead, the main reason for enhancing of the role of national parliaments in the EU lies in the democratic legitimacy that their involvement brings to EU legislation. In line with this view, the UK in the renegotiation process of its EU membership called for 'a bigger and more significant role for national parliaments' to bring about democratic accountability.¹⁷³ The negotiations of UK membership in the EU have led to what is termed 'Tusk's proposal' putting forward a number of issues such as competitiveness, Eurozone relations and sovereignty, which included a section on proposed amendments to the EWS.¹⁷⁴

In Tusk's proposal national parliaments may submit reasoned opinions stating that an EU draft legislative act violates the principle of subsidiarity submitted within twelve weeks from the transmission of that draft. If these reasoned opinions represent more than 55 per cent of votes allocated to national parliaments (i.e. at least thirty-one of the fifty-six available votes), the opinions will be 'comprehensively discussed' in the Council. If the EU draft legislative proposal is not changed in a way reflecting the concerns of national parliaments in their reasoned opinions, the Council will discontinue the consideration of that draft.

This proposal differs from the current 'yellow' and 'orange' card schemes of the Lisbon Treaty in a number of ways concerning in particular the timeframe, applicable thresholds and the effects of these procedures. First, Tusk's proposal gives national parliaments more time for the analysis of proposals and drafting reasoned opinions as compared to the current eight-week deadline. Second, although the mechanism of assignment of votes to national parliaments remains unchanged, Tusk's proposal offers a different threshold of votes to be met by national parliaments: whilst at least nineteen are necessary for a 'yellow card' and at least twenty-nine for an 'orange card', thirty-one are required to meet the threshold in Tusk's proposal. The new procedure thus requires only slightly more votes than the existing 'yellow' and 'orange card'. Third, the most substantial change

European Union Committee, 12th Report of Session 2014–15, 'The Review of the Balance of Competences between the UK and the EU', 18.

¹⁷³ David Cameron, EU speech at Bloomberg, delivered 23 January 2013, www.gov.uk/government/speeches/eu-speech-at-bloomberg.

¹⁷⁴ Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union, EUCO 4/16, 2 February 2016.

concerns the consequences of activating the new procedure. Tusk's proposal insists on stopping the legislative procedure if the requests of national parliaments are not met, while the 'orange card' provided for discontinuation only if the Council finds a subsidiarity breach.

On the one hand Tusk's proposal seems to demand a more active response from EU institutions than the 'orange card'. On the other hand, and crucially in light of the perception of the initiative, Tusk's proposal does not grant national parliaments a veto power on any aspect of a Commission proposal. Tusk's proposal makes discontinuation of the legislative procedure conditional on the non-accommodation of the 'concerns' expressed in the reasoned opinions, with the ultimate decision taken by the Council, and thereby away from the national parliaments. In contrast, the rejected 'red card' initiative proposed in the Convention on the Future of Europe asked for a requirement of the Commission to withdraw its proposal in light of opposition from a two-thirds majority of national parliaments. Compared to this initiative, Tusk's proposal can hardly be seen as a 'red card'.¹⁷⁵ However, avoiding the introduction of a veto for national parliaments without further checks may be regarded as one of the benefits of the Tusk's proposal, as it prevents adding another veto player to the already often lengthy horse-trading over EU policy.

Finally, discussion in the Council could also mean that depending on the relationship between parliaments and their governments represented in the Council, ministers might show more or less flexibility with the 'concerns' of their own national parliaments and thus affect whether a consensus on stopping or continuing with the legislative procedure can be achieved.

As this final limit of Tusk's proposal suggests, a substantive strengthening of the role of national parliaments could take place by granting them more control over their governments in the Council. One of the ways that has been suggested to achieve this greater role for national parliaments would be to adopt a procedure similar to some existing national procedures with regard to the so-called flexibility clause expressed in Article 352 TFEU.¹⁷⁶ This clause allows the EU to act by unanimous decision of the Council where this is necessary to achieve one of the stated objectives of the Treaties even in cases where the EU does not yet have the requisite

¹⁷⁵ CONV 540/03, 6 February 2003, 3.

¹⁷⁶ See R. Schütze, 'Reply to Call for Evidence Questions on Subsidiarity, Proportionality, and Article 352 TFEU', www.gov.uk/government/consultations/subsidiarity-and-proportionality-review-of-the-balance-of-competences.

powers. In Germany and the UK a parliamentary approval in the form of an act of the national parliament is necessary before the representative of the government in the Council can support a draft legislative act based on Article 352 TFEU in the Council.¹⁷⁷ Of course, demanding an act of parliament for every EU legislative act might have a negative impact on the speed and efficiency of the decision-making. Even worse, the applicability of this mechanism to every EU legislative draft may diminish the value of such a procedure, making the parliament act *ex officio* or simply rubber-stamping approvals. This is why a requirement of prior agreement by parliament should be limited to the most important cases, specifically those where a national parliament has issued a reasoned opinion at an earlier stage of the EU legislative procedure. Such an approach would likely also make the approval process more deliberate. The number of reasoned opinions issued would then provide the EU institutions with a more accurate indication of possible opposition in the Council. For example, in the case of the Tobacco Products Directive, only the Polish representative voted against the proposal in the Council, even though its own parliament did not adopt a reasoned opinion.¹⁷⁸ A final advantage of strengthening national parliaments through the national Rules of Procedures of the parliamentary constitutions is that it would not demand an EU Treaty amendment and may thus be easier to achieve.

The proposals discussed here share a common focus on the outcome of parliamentary involvement. They seek to ensure that substantial disapproval by national parliaments has consequences for the EU legislative procedure, without giving the parliaments an outright veto on legislation. They can thus be usefully considered as targeting the output legitimacy of the EU.

IX Conclusion

This chapter has studied the role of the subsidiarity principle in the governance of the EU. It has shown the development of subsidiarity from its conceptual roots in the papal Encyclical *Quadragesimo Anno* through its incubation period in the German Basic Law to its formal introduction to the EU in the Maastricht Treaty. With the Lisbon Treaty, the subsidiarity

¹⁷⁷ European Union Act 2011, s. 8; §8 Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union (IntVG).

¹⁷⁸ See Council of the EU, 7763/14, 14 March 2014.

principle gained a new enforcement mechanism, beyond the CJEU, in the form of the EWS.

The analysis of two areas of competence, the internal market and fundamental rights, and the enforcement of subsidiarity either by the CJEU or national parliaments, identified conceptual and practical limitations inherent in the current use of subsidiarity as a principle of governance. These problems suggest that in its current practice subsidiarity may be unable to deliver fully on its promised benefits for limiting the EU competence creep and addressing the democratic deficit of the EU institutions.

Reforms currently under discussion focus predominantly on improving the output legitimacy through procedural tweaks, such as the red card 'light' of Tusk's proposal, although with the result of the UK referendum on 23 June 2016 on so-called Brexit indicating a preference to leave the EU the future of these proposals remains highly uncertain. As the analysis of the application of subsidiarity in the areas of the internal market and fundamental rights policy has shown, more substantial rethinking of the conceptual core of subsidiarity, beyond the established national inefficiency and EU comparative efficiency tests, may be necessary to perfect the subsidiarity principle as a governance tool that achieves a desirable balance between the EU and its constituent components.