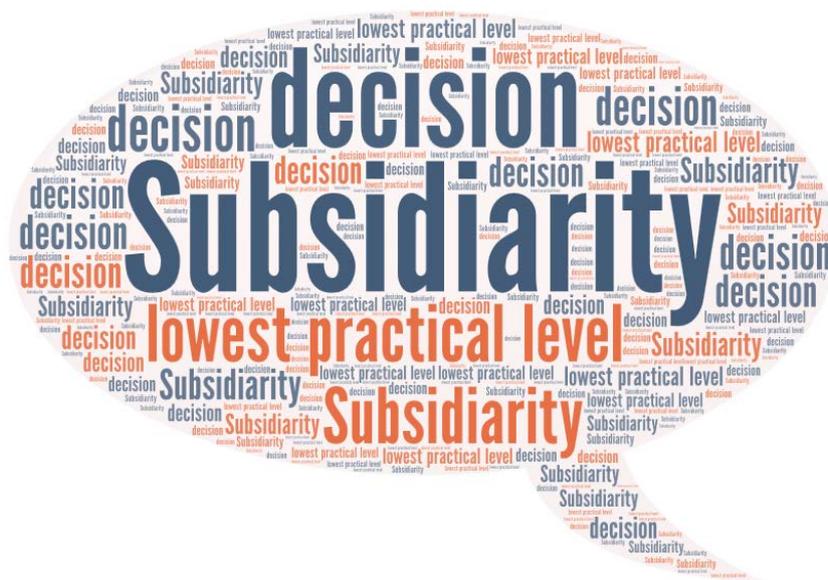

Subsidiarity: Mechanisms for monitoring compliance



IN-DEPTH ANALYSIS

There is a broadly held concern that implementation of the principle of subsidiarity by the EU institutions leaves room for improvement. This publication looks at the nature of the subsidiarity principle and the controversies surrounding its application. It addresses the mechanisms for scrutinising compliance with the principle, including the national parliaments' 'early warning mechanism'.

PE 625.124

ISBN 978-92-846-3535-1

doi:10.2861/888391

QA-04-18-657-EN-N

Original manuscript, in English, completed in June 2018.

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EXECUTIVE SUMMARY

The principle of subsidiarity requires decisions to be taken at the lowest practical level of government without, however, jeopardising mutually beneficial cooperation at the supranational level. Recent decades have seen efforts to strengthen the subsidiarity principle in EU law, including the incorporation of the sub-national dimension into the principle, granting new powers to the Committee of the Regions, and the introduction of the well-known early warning mechanism (EWM) for national (and, to a lesser extent, regional) parliaments.

At the same time, the principle of subsidiarity remains a contested notion. Some view it as a purely political principle, noting that nothing is more political than a decision regarding the appropriate level of action. Others challenge this purely political understanding of the principle and maintain that it is high time to make it a truly operational *legal* principle of EU governance. Still others consider subsidiarity to be a procedural device, and/or view subsidiarity as an essentially economic principle.

The contested nature of the principle of subsidiarity has important implications for the regulatory, political and judicial bodies monitoring compliance with the principle. The vast research assessing, for example, the functioning of the EWM reveals diverging understandings among different actors of what the principle of subsidiarity actually entails. Such research suggests that while some national parliaments aim to stick to the literal wording the principle, others adopt a far more political approach, sometimes simply viewing subsidiarity as more of a 'pretext' to object to proposals whenever they do not like their content. It is in this context that commentators have called for a better (and shared) understanding of the principle. Calls have also been mounting for the Court of Justice of the EU to reassess its 'light-touch' review of subsidiarity and to adopt a more searching approach. At the same time, attention is increasingly shifting away from judicial review of subsidiarity to the preparatory processes of the legislating EU institutions themselves, including the role the Commission's internal quality bodies could play in monitoring subsidiarity more effectively.

Recent years have also seen the reopening of the question regarding the 're-delegation' of certain tasks back to the Member States, not least following the in-depth assessments of EU competences and EU action in several Member States. Many have called upon the EU to exercise 'more restraint' in some areas, while doing more in others. It is in this context that Commission President Jean-Claude Juncker established a 'task force on subsidiarity, proportionality and doing less more efficiently', which is to make recommendations on, *inter alia*, how to apply the principle of subsidiarity more effectively and address the issue of such re-delegation.

It can be expected that as the debate on the future of Europe gathers pace discussions regarding subsidiarity and proportionality in the EU's multilevel governance system will intensify too. At the same time, both academic observers and political actors emphasise the importance of a balanced debate that does not reduce the principle of subsidiarity to the overly simplistic, counterproductive and by now outdated dichotomy of 'more' or 'less' EU. For subsidiarity to become a meaningful principle in EU law, it may be more helpful not to view subsidiarity as means to protect Member States' prerogatives *against* EU interference. It is broadly argued that subsidiarity expresses an aspiration to take decisions as closely as possible to the public without, however, foregoing mutually beneficial cooperation at EU level.

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1. Introduction: taking subsidiarity seriously?

1.1. The development of EU competences

The division of tasks between the EU and its Member States has long been a source of tension – and contention. Since its inception, the scope of EU action has grown significantly, and successive treaty revisions have brought new policies within the remit of the EU. The initial European Economic Community (EEC) Treaty primarily had an economic focus – the establishment of a common market. Later, the focus gradually moved away from an exclusively economic to a more political one – a shift also illustrated by renaming the European Economic Community the European Community and the introduction of EU citizenship in 1992. Over the years, the EU and EC Treaties have gradually incorporated new areas of action, such as a common foreign and security policy (CFSP), justice and home affairs, consumer and environmental protection, energy, social policy, and others.

The **expanded range of EU action** has resulted from a *mix* of different factors, including new competence attributions in treaty revisions by Member States, extensive use of broad legal bases by EU institutions and, not least, the case law of the Court of Justice of the EU (CJEU). Scholars have, therefore, cautioned against construing this as some unwarranted, unilateral 'arrogation of power by the EU to the detriment of states' rights' but, rather, as a product of the *interplay* of all these variables.¹ Nonetheless, the above developments have led to the well-known arguments of 'creeping competence' and 'Brussels' centralist tendencies', which many want to see 'contained'.

One of the earlier attempts at such containment was the introduction of subsidiarity as a general principle of EU law with the Maastricht Treaty (1992).² The principle was incorporated at the request of, mainly, federal states and required the Community to act 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can [...] be better achieved' by the Community. Later years saw the strengthening of mechanisms to monitor compliance with the principle.

Establishing a **clearer division of competence** was one of the primary concerns underlying the last comprehensive EU treaty reform, which ended with the 2007 Lisbon Treaty. The latter introduced a number of limits to EU powers and submitted them to stricter control. For example, the Lisbon Treaty for the first time listed the areas subject to different categories of Union competence. It incorporated a sub-national dimension into the principle of subsidiarity, by explicitly acknowledging for the first time that certain objectives can best be achieved at **regional or local level**. It established the early warning mechanism (EWM), offering national and, to a lesser extent, regional parliaments a platform to raise subsidiarity concerns regarding planned legislative action. The Lisbon Treaty further incorporated legal limits on the use of the so-called 'flexibility clause' (now Article 352 of the Treaty on the Functioning of the European Union (TFEU)), and repeatedly referred to the principle of 'conferral', according to which the Union may only act if it has been empowered to do so by the Member States. Finally, Article 48(2) of the Treaty on European Union (TEU), governing treaty revision procedures, for the first time made explicit that treaty revision may aim at, *inter alia*, 'reduction' of the competences conferred upon the EU. According to some, after five decades of 'pooling of sovereignty', the appetite for more centralisation had 'greatly diminished'.³

1.2. Recent developments

Increased scepticism towards continued growth of EU competences is well illustrated by recent attempts in several Member States to embark upon in-depth assessments of the workings of

¹ P. Craig and G. De Búrca, *EU Law. Text, Cases and Materials*, Oxford University Press, 2015, p. 74.

² P. Craig, 'Subsidiarity: A Political and Legal Analysis', in *Journal of Common Market Studies*, 2012, 50(S1), p. 72.

³ R. Baldwin and C. Wyplosz, *The Economics of European Integration*, McGraw-Hill Education, 2015, p. 72.

the EU and taking stock of EU competences. The most comprehensive so far was the **Balance of Competences Review** (2012-2014) in the United Kingdom (UK), aimed at an 'objective analysis of where the EU helps and where it hampers'.⁴ Although the option of 'repatriation' of tasks was raised explicitly against the background of this review, commentators agreed that the resulting reports largely accepted the current balance of competences as 'about right', and presented no convincing case in favour of transferring back competences to the UK in any of the areas.⁵ Nonetheless, the reports did raise the issue of enhancing respect for the principles of subsidiarity and proportionality (see Section 4).

A similar subsidiarity review was conducted by the Dutch government, which in 2013 resulted in a **Dutch list of points for action**. The review was explicit in *not* challenging the existing distribution of competences as established in current Treaties. However, it formulated recommendations and identified concrete pending proposals regarding which the EU should either 'exercise more restraint' and/or leave the Member States more scope for action⁶ (see Section 4).

The issue of 're-delegation' of powers to Member States was recently reopened by Commission President Jean-Claude Juncker, who signalled early his intention to work toward an EU that is 'big and more ambitious on big things and smaller and more modest on small things'.⁷ In a mission letter of 1 November 2014 to Frans Timmermans, the First Vice-President of the Commission, President Juncker stated that 'respect for the principles of subsidiarity, proportionality and better regulation will be at the core of the work of the new Commission'. The Commission's Better Regulation package (May 2015) signalled reinforced commitment to, *inter alia*, subsidiarity, compliance with which was 'not to be taken for granted'.⁸ In the White Paper on the Future of Europe, the Commission has raised the option of '**doing less more efficiently**' as one of the possible scenarios for the future development of the EU, which would entail stepping up work in certain priority fields such as security, migration, border management and defence, while stopping acting or doing less in areas where EU action is perceived as having less added value (e.g. public health, regional development or parts of employment policy). On 14 November 2017, President Juncker created a task force on subsidiarity, proportionality and 'doing less more efficiently', which is to: (a) make recommendations on how to apply the principles of subsidiarity and proportionality more effectively, (b) identify areas where work could be 're-delegated' to Member States, and (c) look for ways to involve regional and local authorities in EU policy making and delivery in a better way.

Some see the issue of re-delegation (or 'repatriation') as opening a Pandora's box for national demands. However, both decision-makers and scholars were quick to emphasise that reopening the question of the allocation of responsibilities is not synonymous with weakening the EU. Instead, according to some, the issue of allocation of tasks has always been in flux and needs to be part of a debate in all systems where power is shared between different levels.⁹ It is in this context that the Commission white paper on the future of Europe (2017) cautioned against reducing the debate on the future of the EU to a 'misleading and simplistic' choice between more or less Europe,¹⁰ and Commission President Juncker called for an end to the

⁴ HM Government, [EU Speech at Bloomberg](#), published on 23 January 2013.

⁵ Senior European Experts, [Britain & the EU: What the Balance of Competences Review Found](#), March 2015, p. 2; M. Emerson (ed.), [Britain's future in Europe. Reform, renegotiation, repatriation or secession?](#) CEPS 2015, pp. 153-155.

⁶ [Testing European legislation for subsidiarity and proportionality – Dutch list of points for action](#), Dutch Ministry of Foreign Affairs, 21 June 2013.

⁷ European Commission, [President Juncker's Political Guidelines](#), published on 15 July 2014.

⁸ [Better Regulation Guidelines](#), p. 20.

⁹ R. Zbiral, 'Restoring Tasks from the European Union to Member States: a Bumpy Road to an Unclear Destination?', in *Common Market Law Review*, 2015, Vol. 52, p. 52.

¹⁰ European Commission, [White paper on the future of Europe](#), 1 March 2017, p. 15.

'eternal and artificial opposition between the Union and its Member States', as the former can only be built with them, but 'never against them'.¹¹

In a similar vein, academic observers insisted on the need for a **balanced debate** that avoids polarisation and over-simplifications such as 'the EU does too much' or 'too little', and accept that the EU might have gone too far in some cases while not going far enough in others.¹² Regarding the subsidiarity principle, scholars have cautioned that thinking of subsidiarity in terms of protecting Member States' prerogatives versus EU interference is out-of-date, artificial and counterproductive.¹³ Instead, it might be more helpful to think of subsidiarity as a principle that not only expresses preference for decision-making at the lowest possible level but also embraces the 'simultaneous necessity'¹⁴ of local, regional, national *and* supranational regulation.

It can be expected that as the **future of Europe** debate gathers momentum discussions regarding competence, subsidiarity and proportionality in the EU's multilevel governance system will intensify too. The pages below aim to take a closer look at the principle of subsidiarity and the mechanisms for monitoring it. The analysis addresses the remaining challenges to monitoring and maps the suggestions for reform formulated in a myriad of academic inquiries, assessments and reports. The issue of re-delegating certain tasks to the Member States is briefly addressed too, but is not the main focus. While not aiming to provide definitive answers to the many normative questions regarding the allocation of tasks among the different levels of EU governance, this study should be seen as a mapping exercise, giving an overview of the various perspectives and suggestions. The section below begins by taking a closer look at the meaning of the subsidiarity principle, while also addressing the other main principles governing EU action, as, in practice, subsidiarity-related debates often raise issues relating to legal basis and proportionality that can at times be hard to disentangle.

2. Principles governing the allocation of tasks between the EU and the Member States

Article 5 TEU

1. The *limits* of Union competences are governed by the principle of conferral. The *use* of Union competences is governed by the principles of subsidiarity and proportionality.
2. 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.
3. Under the principle of **subsidiarity**, 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.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National parliaments ensure compliance with the principle of subsidiarity in accordance with the

¹¹ Speech at the plenary session of the European Parliament, 17 January 2018.

¹² Among others, Van den Bergh, 'Farewell Utopia? Why the European Union should take the economics of federalism seriously', in *Maastricht Journal of European and Comparative Law*, 2016, 23(6), p. 938.

¹³ A. Meuwese and S. Gomtsian, 'Regulatory scrutiny of subsidiarity and proportionality', in *Maastricht Journal of European and Comparative Law*, 2015, 22(4), p. 495.

¹⁴ The term taken from A. Biondi, 'Subsidiarity in the courtroom', in P. Eeckhout, A. Biondi and S. Ripley (eds.), *EU law after Lisbon*, 2012, Ch. 10.

procedure set out in that Protocol.

4. 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.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

2.1. The principle of conferral and categories of competence

The principle of conferral requires the EU to act within the limits of the competences that the Member States have conferred upon it. This principle is well known in international law: international organisations work to achieve the aims for which they have been created and possess the powers that have been attributed to them in their constitutive acts (charters, treaties, conventions). According to some, the fact that this principle has been reiterated many times in the Lisbon Treaty¹⁵ reflects Member States' wariness regarding the continued growth of EU competences.¹⁶ The treaty explicitly (and repeatedly) states that all powers *not* conferred upon the EU remain with the Member States. In this respect, particular mention is made of national security which remains the 'sole responsibility of each Member State'.¹⁷

EU competence is 'evidenced' in a **legal basis**, which not only grants the Union the power to act but also provides for the respective procedure to be followed as well as, at times, the *type* of instrument to be adopted (e.g. directives, regulations or simply 'measures'). Given that the legal basis determines the procedure (and thus the involvement of the Parliament or voting arrangements in the Council), the choice of legal basis has been a source of inter-institutional disputes, resulting in an important body of case law. A detailed analysis of the criteria determining the choice of legal basis is beyond the scope of this study. However, as the court has famously stated, the choice of legal basis must be based on **objective criteria** amenable to judicial review, including, in particular, the aim and content of the measure.¹⁸ The former part of this dictum is now reiterated in the 2016 Interinstitutional Agreement on Better Law-Making, which once again reminds the institutions that the choice of legal basis is a 'legal determination' (para. 25).

In the past, controversies also arose regarding the use of **'broad' legal bases** such as Article 114 TFEU (internal market) or the so-called flexibility clause (now Article 352 TFEU). While, as has been suggested, the Court has generally been 'disinclined' to put limits on broadly formulated Treaty articles, such limits do exist and have been defined by the Court.¹⁹ For example, the Court has clearly stated that measures based on (now) Article 114 TFEU must genuinely be aimed at improving the functioning of the internal market, and that a 'mere finding of disparities between the national rules' is not enough. The Court further stated that recourse to Article 114 TFEU is possible if the aim is to 'prevent the emergence of future obstacles to trade resulting from multifarious development of national laws', however, 'the emergence of such obstacles must be *likely* and the measure in question must be designed to prevent them'.²⁰ The above dictum of the court is now reiterated in the Commission Better Regulation toolbox, which reacts to the common reproach that the Commission has too readily considered divergences as an impediment to the internal market, sometimes without an all-too-serious inquiry as to whether or to what extent this is the case.

¹⁵ For example, Articles 3(6), 4(1), 5(1) and (2) TEU, Article 7 TFEU, Declaration No 18.

¹⁶ Among many others, L.S. Rossi, 'Does the Lisbon Treaty provide a clearer separation of competences between EU and Member States?', in P. Eeckhout, A. Biondi and S. Ripley (eds), *EU Law after Lisbon*, Oxford University Press, 2012.

¹⁷ Article 4(2) TFEU.

¹⁸ For example, judgment in case [C-376/98](#), *Federal Republic of Germany v Parliament and Council*, para. 59, CJEU, 5 October 2000.

¹⁹ P. Craig and G. De Búrca, *EU Law. Text, Cases and Materials*, Oxford University Press, 2011, p. 76.

²⁰ Judgment in case [C-376/98](#), *Federal Republic of Germany v Parliament and Council*, paras 83-86, CJEU, 5 October 2000.

While the principle of subsidiarity for areas of non-exclusive EU competence was introduced with the Maastricht Treaty (1992), it was not until the Lisbon Treaty (2007) that that areas falling under exclusive competence were listed. The Treaty of Lisbon for the first time distinguished between the different **categories of competence**:

- *Exclusive*: The EU alone is able to legislate and adopt binding acts in these fields. The Member States' role is limited to implementing these acts, unless the EU empowers them to adopt certain acts themselves (Article 2(1) TFEU).
- *Shared*: The EU and Member States may legislate and adopt binding acts. However, Member States may exercise their competence only to the extent that the EU has not done so (pre-emption). Protocol No 25 specifies that once the EU has taken action, it covers only those elements governed by the Union act, and not the entire area. Member States may again exercise their competence to the extent that the EU has decided to *cease* doing so (Article 2(2) TFEU).
- *Supporting*: The EU can only intervene to 'support, coordinate or supplement' the actions of Member States, which retain the main responsibility in the respective areas. Harmonisation is explicitly excluded in these areas (Article 2(5) TFEU).

Despite the list of areas falling under the respective category of competence, in practice, **delineation problems** are likely to arise. For example, it may not be instantly clear whether a matter falls within 'common safety concerns in public health matters' (shared competence) or protection of human health (supporting competence). Scholars also note that demarcating borderlines between competition rules (exclusive competence) and the internal market (shared) may also give rise to disputes, as, for example, the case with regard to the EU unitary patent has shown;²¹ the same applies with regard to customs union and/or internal market.

The wording of the Treaty seems to indicate that the article lists the areas of exclusive competence *exhaustively*. However, the Commission maintains that some other areas are exclusive 'by nature' as, regarding certain institutional or budgetary matters, it is clear that only the EU can or has to act. Examples listed by the Commission include the draft budget, the MFF Regulation, the Comitology Regulation or the European Citizens' Initiative.²² This may equally give rise to controversies and be challenged by actors as the category of competence has important legal and political implications insofar as it determines, inter alia, the (in)applicability of subsidiarity and pre-emption.

²¹ Judgment in joined cases [C-274/11 and C-295/11](#), *Spain and Italy v Council*, paras 16-26, CJEU, 16 April 2013.

²² Commission's [Better Regulation Toolbox](#), tool #5. Legal basis, subsidiarity and proportionality.

Categories of EU competence

Exclusive (Article 3 TFEU):

- Customs union
- The establishing of competition rules necessary for the functioning of the internal market
- Monetary policy for euro area countries
- Conservation of marine biological resources under the common fisheries policy
- Common commercial policy
- Conclusion of international agreements under certain conditions

Shared (Articles 4 TFEU):

- Internal market
- Social policy, but for aspects defined in the Treaty
- Economic, social and territorial cohesion (regional policy)
- Agriculture and fisheries (except conservation of marine biological resources)
- Environment
- Consumer protection
- Transport
- Trans-European networks
- Energy
- Area of freedom, security and justice
- Common safety concerns in public health matters (only aspects defined in the TFEU)
- Research, technological development, space
- Development cooperation and humanitarian aid

Supporting (Article 6 TFEU):

- Protection and improvement of human health
- Industry
- Culture
- Tourism
- Education, vocational training, youth and sport
- Civil protection
- Administrative cooperation

Two areas are considered to fall within a separate category of '**special**' competences. Regarding economic and employment policies, the Treaties provide that 'the Member States shall coordinate their economic and employment policies within the arrangements as determined by this Treaty, which the Union *shall have competence to provide*' (Article 2(3) TFEU). In the area of foreign policy, the Union has the competence to 'define and implement a common foreign and security policy, including the progressive framing of a common defence policy.'

2.2. Subsidiarity and proportionality

2.2.1. Subsidiarity: contents, context and development

While the principle of subsidiarity has been defined in many ways, in essence, it reflects the aspiration that decisions should be taken at the lowest practical level. It made its first entrance into the EU Treaties with the 1986 Single European Act, but only with regard to environmental policy.²³ The Maastricht Treaty 'lifted' the principle to a general principle of EU law – mainly owing to pressure from decentralised states (Germany, Belgium and also the UK).²⁴ The 2007 Lisbon Treaty strengthened the principle in several ways by, for example, listing areas of

²³ Article 25 of the Single European Act.

²⁴ P. Van Nuffel, 'The protection of Member States' regions through the subsidiarity principle', in C. Panara and A. de Becker (eds.), *The role of the regions in EU governance*, Springer, 2011, pp. 55-80.

exclusive competence, establishing the 'early warning mechanism' (EWM) for national parliaments and by empowering the Committee of the Regions to bring action for annulment on subsidiarity grounds (see Section 3). The Lisbon Treaty also incorporated a **sub-national dimension** into the principle, by explicitly acknowledging that certain objectives may best be achieved at regional or local level. This is significant and may be taken to suggest that subsidiarity is no longer conceptualised as a binary principle to protect national prerogatives *against* EU interference. Rather, it is an aspiration to take decisions as closely as possible to the citizen without, however, 'jeopardising win-win cooperation at the EU level'.²⁵ Such reading is not only consistent with the Treaties, calling for decisions to be taken 'as closely as possible to the citizen', but potentially also helpful if subsidiarity is to become a meaningful and helpful guide in thinking about the allocation of tasks instead of a polarising device. In fact, the principle's goals are twofold: a) expressing preference for decision making at the lower level, while at the same time (b) allowing the EU to act where there is merit in doing so.

It should be noted that, unlike the principle of conferral, which concerns the *existence* of Union competence, the subsidiarity principle concerns the question as to whether this competence should be *exercised*. This reflects the implicit acknowledgment in the Treaties that EU competence, if given, need not automatically be acted upon. Logically, subsidiarity applies only to areas of **non-exclusive** Union competence (shared and supporting), where both the EU and Member States may, in principle, take action. As only a few areas of Union action fall within the category of exclusive competence, most proposals will have to satisfy the subsidiarity test. However, as explained above, certain 'boundary disputes' regarding the delineation of competence are likely to arise, and actors may contest the categorisation of competence as, for example, exclusive or shared.

2.2.2. Proportionality

Unlike subsidiarity, the principle of **proportionality** requires the content and form of Union action – if taken – not to go beyond what is necessary to achieve the Treaty objectives (Article 5(4) TEU). It concerns the question of how a competence – once acted upon – should be exercised. A proportionality test as applied by the Court of Justice will generally imply asking two questions: first, whether the measure in question is suitable/appropriate to achieve the envisaged legitimate objective and, second, whether it does not go beyond what is necessary to achieve such an objective. Therefore, proportionality is a distinct principle which, moreover, applies to all EU action and is not limited to non-exclusive competence. However, despite these distinct characteristics, the principles of subsidiarity and proportionality are closely interlinked. This is due to several reasons, including the wording of Article 5(3) TEU itself, which allows EU action *if* and *insofar* as such action is better performed at EU level. This has important implications for monitoring compliance with the principle of subsidiarity, in particular within the early warning mechanism (Section 3.1).

Regulation or directive?

At times, it is the legal basis itself that specifies the type of act to be adopted. However, if that is not the case, the legislator has the choice between, mainly, directives and regulations. On the one hand, there is a tendency to depict proportionality and subsidiarity as expressing a preference for lighter touch, less prescriptive rules, leaving sufficient scope for national autonomy. The use of **directives** may be part of such an approach, as they are binding as to the results to be achieved yet leave national authorities discretion regarding the choice of form and methods (Article 288 TFEU). That is why the Protocol on subsidiarity and proportionality attached to the Amsterdam Treaty (1998) explicitly expressed a general preference – 'other things being equal' – for the use of directives compared with regulations. Many have followed this approach and suggested greater use of directives, in the name of subsidiarity and proportionality.

²⁵ R. Baldwin and C. Wyplosz (2015), p. 75.

On the other hand, EU legislation that is flexible and leaves scope for discretion to adapt it to national circumstances runs the risk of being criticised for being overly complex, inconsistent, badly designed or simply 'a patchwork of regulatory good intentions'.²⁶ It is to be noted that, in certain cases, it may be difficult to reconcile subsidiarity and proportionality considerations with those of effectiveness and coherence,²⁷ which are equally among the imperatives of 'better quality legislation'. Following this line of reasoning, **regulations** are often seen as leading to a simpler and more consistent legal framework, as well as to greater legal certainty or better redress for individuals (horizontal direct effect). This illustrates the many trade-offs that may be inevitable in the quest to reconcile calls for, on the one hand, flexibility, national autonomy, subsidiarity and proportionality and, on the other, simplicity, clarity, legal certainty and coherence. At the same time, practice indicates that in terms of content, the differences between regulations and directives may have become minimal.

The 2016 Interinstitutional Agreement (IIA) on Better Law-Making implicitly acknowledges that the right approach will depend on the particularities of an individual case and provides that the Commission, when proposing legislation, 'should take account of the difference in nature and effects between regulations and directives' (para. 25). The Parliament, in its resolution of 14 September 2011 on better legislation, subsidiarity and proportionality, called for greater use of regulations as part of a better legislation strategy. The same approach was confirmed in Parliament's resolution of 30 May 2018 on the interpretation and implementation of the IIA.

2.3. The meaning of subsidiarity: legal, political, economic, or what?

For EU action to pass the subsidiarity test, two conditions need to be fulfilled: the objectives of the proposed action (a) 'cannot be achieved **sufficiently**' by Member States themselves – either at central, regional or local level and (b) can be '**better**' achieved at Union level, 'by reason of the scale or effects of the proposed action'. Contrary to the earlier wording of the principle, these conditions are cumulative:²⁸ the fact that Member States are not in the position to achieve certain stated objectives sufficiently does not inevitably lead to the conclusion that the EU can do so better.

However, the very nature of subsidiarity remains **highly contested**. Some view it as a purely **political** principle, suggesting that the terms 'insufficiently' or 'better' invite political judgment and do not lend themselves to legal interpretation. As suggested by a former judge of the German Federal Constitutional Court, nothing is more political than the decision as to the most appropriate level for action – European or national.²⁹ Proponents of this view famously claim that:

'[I]n divided power systems, the most effective defences against centralising pressures are to be found in the political process rather than the judiciary. If this is true for federal systems, should it not be so *a fortiori* for the Community system, where Member States enjoy more powers? Defining at what level a task is better accomplished is primarily political problem: it should be therefore left to the political process'.³⁰

Others challenge the purely political conceptions of the principle and maintain that there is no reason why the principle, albeit admittedly vague, should not be considered as (also) a **legal** one. They contend that 'it might be high time for judges to be involved' – after all, Article 5 TEU

²⁶ The term comes from Kelemen and Menon, in: Weatherill, S. (ed.), *Better Regulation*, Hart Publishing 2007, Ch. 10.

²⁷ P. Craig (2012), p. 75 et seq.

²⁸ The initial wording in the Maastricht Treaty provided that: 'the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can *therefore*, by reason of the scale or effects of the proposed action, be better achieved by the Community' (emphasis added).

²⁹ D. Grimm, 'Subsidiarität allein reicht nicht', *Frankfurter Allgemeine*, 1 November 2016.

³⁰ R. Dehousse, Does subsidiarity really matter? EUI Working Paper No 92/32, p. 21.

establishes subsidiarity as one of the general principles of EU law, and Protocol No 2 leaves no doubt that the Court of Justice has jurisdiction in actions on grounds of subsidiarity.³¹

Scholars distinguish yet another, **procedural**, interpretation of subsidiarity, which views the principle as imposing a 'certain onus of justification'³² on EU institutions when taking action. Instead of answering the question as to the appropriate level of action, it rather asks whether the relevant institutions engaged 'in a particular inquiry' before concluding who should act and why.³³

Law and economics scholars view subsidiarity as essentially an **economic** criterion that, if applied correctly, can lead to 'allocative efficiency' and help to maximise social welfare. Drawing on the economics of (fiscal) federalism, economists start from the basic presumption that decisions should be taken at the lowest practical level of government, as reflected by the subsidiarity principle. This is due to several reasons including, first of all, *local diversity*: citizens hold different preferences regarding what type of policy should be adopted, and one size does not and should not fit all. The local level is not only expected to have better information about such preferences but also better information regarding the implications of a particular policy. Such information may come in handy when, for example, implementing and enforcing policies (e.g. inspecting local businesses). Secondly, scholars emphasise the *learning processes* that can take place if different systems adopt different approaches, leaving scope for mutual learning in the quest for the most effective or efficient solutions. Finally, there is emphasis on the idea that localised decision making is a matter not only of efficiency but, ultimately, also one of democracy, as proximity to voters heightens accountability and forces decision makers to stay close to citizens' wishes.

While expressing a general preference for making decisions at the most local level for the above reasons, economists are quick to emphasise that certain factors speak very well in favour of centralised decision making. In certain situations, the advantages of local decision making may be amply outweighed by the benefits that supranational decision making brings. One of the classic arguments in favour of 'lifting' decision making to a higher, possibly supranational, level is the well-known concept of **externalities** (spill-over effects), which can occur when a local, regional or central body takes a decision that generates (negative) side effects for an uninvolved third party. A textbook example of this is environmental pollution. However, it is also stressed that not *all* aspects of environmental activity have cross-border effects as, for example, localised pollution may well be confined within national, regional or even local boundaries. Another, related argument is the well-known concept of the '**race to the bottom**', which is said to occur when states start loosen their standards (e.g. tax rules) to attract businesses, and which may eventually lead to destructive competition. Here, however, it is emphasised that the extent to which such a race to the bottom actually occurs may often be exaggerated, and requires careful analysis. The additional well-known concept of '**economies of scale**' also favours supranational decision making. This argument is commonly advanced in the context of an EU defence policy or army, which, as it has been suggested, could enable significant cost savings. However, it should also be noted that there may be trade-offs between the various arguments advanced above as, for example, areas with the greatest economies of scale and/or cross-border effects may at the same time be areas subject to crucially differing preferences or (national) traditions, requiring careful analysis and consideration.³⁴

The above paragraphs do not offer an exhaustive list of the arguments that speak in favour of or against supranational decision making, nor identify which of the different perspectives on subsidiarity are 'correct' and should prevail. However, it is clear that these concepts can be

³¹ For example, A. Biondi (2012).

³² G. de Búrca, [Reappraising subsidiarity's significance after Amsterdam](#), Harvard Jean Monnet Working Paper 7/99.

³³ G.A. Bermann, 'Taking subsidiarity seriously: Federalism in the European Community and the United States', in *Columbia Law Review*, 94(2), 1994, p. 336.

³⁴ For an overview of economic arguments put forward in federalism literature and their application to the EU see for example R. Baldwin and Wyplosz (2015), Ch. 3; Van den Bergh (2016).

useful in guiding discussions as to the appropriate level of action. For example, in line with the wording of Article 5(3) TEU, they may help to explain why action at national level might be 'insufficient' (e.g. the existence of cross-border externalities) and/or why action at EU level may be 'better' by reason of its scale or effects (e.g. economies of scale). They, therefore, can and have been employed in subsidiarity checks performed by various players, including national parliaments, and have figured in guidance documents aimed at assisting subsidiarity assessment (Commission, Committee of the Regions). However, it should also be noted that the above criteria do not give rise to generalised answers as to centralisation, as it is clear that the respective answers will depend on the analysis of each particular case. Finally, practice shows that those who interpret and apply the principle of subsidiarity employ different interpretations of the principle, discussed above, including the political, legal, economic and procedural. This has important implications for the enforcement of the principle, to which the following section now turns.

3. How compliance with subsidiarity is monitored and by whom

Professor Weatherill noted in 2003 that, given the rather abstract meaning of subsidiarity, much depends on how the test is applied within the institutional setting monitoring its application.³⁵ In practice, compliance of EU action – planned and adopted – with the principles of subsidiarity and proportionality is considered at different phases by different actors – regulatory, political and judicial. This includes subsidiarity scrutiny during the legislative preparatory phase (by the Commission and the Regulatory Scrutiny Board), after adoption by the Commission of a legislative proposal (by national and regional parliaments and the Committee of the Regions), during the legislative process (by the co-legislators), after adoption of the act (by the Court of Justice) and, ideally, during its subsequent review and evaluation (by the Commission and the Regulatory Scrutiny Board). Probably the most prominent mechanism for this subsidiarity control, and one that has attracted impressive (scholarly) attention post-Lisbon, is the national parliaments' early warning mechanism. While this mechanism constitutes *ex ante* control by political bodies, an adopted act may also be challenged *ex post* before the Court of Justice – a means of subsidiarity control which pre-dates the EWM. At the same time, scholars note a shift of attention *away* from judicial scrutiny of subsidiarity to the pre-legislative phase, and emphasise the role of Commission's preparatory processes in this regard.³⁶ The below pages look at how these mechanisms have been functioning in practice, and with what results. They briefly address the numerous proposals for reform put forward by political actors and academic observers without, however, seeking to provide an exhaustive list.

3.1. Ex ante political control: 'early warning' by national parliaments

3.1.1. Legal framework and limits

The introduction of the early warning mechanism (EWM) by the Lisbon Treaty (Protocol No 2 on the application of the principles of subsidiarity and proportionality) was significant insofar as it gave national parliaments a central role in watching over compliance of proposed legislation with the principle of subsidiarity. In the EWM, each national parliament may – within eight weeks of transmission of the proposal – issue a **reasoned opinion**, setting out why the national parliament (or chamber thereof) considers a proposal as violating subsidiarity. If the reasoned opinions represent at least a third³⁷ of the total number of votes allocated to

³⁵ S. Weatherill, 'Competence', in B. de Witte (ed.), [Ten reflections on the Constitutional Treaty for Europe](#), EUI, 2003, p. 62.

³⁶ A. Meuwese and S. Gomtsian, 2015.

³⁷ The threshold is one quarter for acts in the area of freedom, security and justice.

parliaments (currently 56),³⁸ the proposal must be reviewed ('**yellow card**'). The Commission, however, remains free to *maintain, amend or withdraw* the proposal, but needs to give reasons for its decision. Where, in the context of the ordinary legislative procedure, reasoned opinions represent a simple majority of the votes allocated to national parliaments, an '**orange card**' is issued. This has not yet happened to date. If, in such a case, the Commission decides to maintain the proposal, the matter is referred to the Union legislator (Parliament and Council), which may override the Commission's decision. Therefore, while national parliaments lack the power effectively to veto a proposal ('red card'), such power rests with the EU legislator.³⁹

It is important to note that while the principle of subsidiarity applies generally to EU action in areas of non-exclusive competence, the EWM itself covers draft *legislative* acts only.⁴⁰ Non-legislative acts, including delegated and implementing acts (DIAs), are excluded from its application. However, there is nothing to prevent national parliaments from raising subsidiarity concerns regarding a legislative proposal that envisages delegation of powers to the Commission to adopt DIAs, and they have done so in the past.⁴¹

There is another important limitation of Protocol No 2 establishing the EWM which, despite naming subsidiarity *and* proportionality in the title, limits reasoned opinions to **subsidiarity only**. Professor Weatherill noted that this is 'regrettable' and risks triggering 'unhelpful demarcation disputes'. It has broadly been suggested that there is little reason why, given the obvious difficulties in disaggregating subsidiarity and proportionality, national parliaments should not also be able to raise proportionality concerns.⁴² Political research has shown that national parliaments have in fact done so, and proportionality-related concerns have figured prominently in reasoned opinions. Such research further suggests that national parliaments do not in fact stick to the literal wording of the subsidiarity principle but adopt a far more **political approach**, sometimes treating subsidiarity as a pretext to object to a proposal on other grounds whenever they dislike its content.⁴³

³⁸ Each national parliament has two votes, in bicameral systems each of the two chambers has one vote.

³⁹ The issue of a red card was sought by David Cameron in the context of the 'new settlement' for the UK in the EU before the UK referendum: [letter](#) of David Cameron to Donald Tusk, 10 November 2015.

⁴⁰ Article 3, Protocol No 2.

⁴¹ [Reasoned opinion](#) of the Swedish Parliament, COM(2016)0551.

⁴² S. Weatherill, 'The limits of legislative harmonisation ten years after tobacco advertising: How the Court's case law has become a 'drafting guide'', *German Law Journal*, 2011, 12(3), pp. 857-858.

⁴³ I. Cooper, 'Is the early warning mechanism a legal or a political procedure? Three questions and a typology', in A. Corneel and M. Goldoni (eds), *National and regional parliaments in the EU legislative procedure post-Lisbon: The impact of the early warning mechanism*, Bloomsbury Publishing PLC, 2017, pp. 21 et seq.

Regional parliaments

The EWM was designed first and foremost to foster parliamentary involvement and primarily concerns national parliaments. However, it has also opened the doors for (more) regional participation. When issuing reasoned opinions, 'it will be for each national parliament' or chamber of it to 'consult, where appropriate, *regional parliaments with legislative powers*'. Eight out of 28 Member States (Austria, Belgium, Finland, Germany, Italy, Portugal, Spain and the UK) have been reported to have regions with legislative powers.⁴⁴ Protocol No 2 does not allocate votes directly to the regional parliaments – votes are allocated to national parliaments only. It is the latter that decide whether or not to consult regional parliaments. If they choose to do so, the function of regional parliaments is merely **advisory** – their positions regarding subsidiarity will not count as votes for triggering the yellow/orange card procedure.⁴⁵ As a result, the role of regional parliaments under this mechanism has been somewhat neglected in political and academic debates.

3.1.2. Practice, statistics

According to the European Commission, between 2010 and the end of 2017, there were **409** reasoned opinions from national parliaments which amounted to 582 votes.⁴⁶ Generally, the number of reasoned opinions grew between 2010 and 2013 but declined sharply in 2014 and 2015, before increasing again in 2016. To date, there have been three yellow card procedures; no orange card has been triggered so far. It should be noted that the number of reasoned opinions may also fluctuate depending on the legislative activity and the overall numbers of proposals, which declined markedly in 2015 before rising again in 2016. The Commission reports that, in 2016, it received **65** reasoned opinions from national parliaments, compared with only **8** in 2015. The number in 2016 was the third highest since the EWM's introduction; the proposal that gave rise to most reasoned opinions concerned the review of the Posting of Workers Directive.⁴⁷

It has been noted that parliaments' participation has been much higher under **political dialogue**, which is a less formal 'complement' to the EWM that is *not* limited to subsidiarity.⁴⁸ For example, in 2015, Commission received a total of 342 contributions from national parliaments, of which only 8 (2.3 %) were reasoned opinions.⁴⁹

⁴⁴ [CoR report](#) on the subsidiarity early warning system of the Lisbon Treaty – the role of regional parliaments with legislative powers and other subnational authorities, Leuven Centre for Global Governance Studies, November 2013, p. 9.

⁴⁵ This is different in Belgium, whose approach assimilates regional parliaments to national parliaments for the purposes of the protocol, provided a proposal falls within their competences (Declaration No 51).

⁴⁶ Commission [Discussion paper No 3](#): Application of subsidiarity and proportionality in the work of the institutions, p. 2.

⁴⁷ Commission Annual report (2016) on subsidiarity and proportionality, COM (2017) 600 final, p. 7.

⁴⁸ The 'political dialogue' initiative, aimed at increasing national parliaments' involvement, dates back to 2006 and has both a written (contributions of national parliaments) and an unwritten dimension (e.g. contacts and visits by Commissioners).

⁴⁹ [Subsidiarity as means to enhance cooperation between EU institutions and national parliaments](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, March 2017, p. 5.

Yellow cards

To date, there have been three yellow cards. The first card was triggered in 2012 regarding the **'Monti II'** proposal, aiming to find a balance between the right to strike and the freedom to provide services. In total, 12 reasoned opinions were issued, amounting to a total of 19 votes. The Commission *withdrew* its proposal, albeit maintaining the view that the proposal complied with the subsidiarity principle. Rather, the Commission claimed that it had decided to withdraw the proposal because the proposal was unlikely to gather the necessary support in the Council and Parliament. In that case, the legal basis was Article 352 TFEU, requiring unanimity in the Council.⁵⁰

The second yellow card was triggered in 2013 and concerned the creation of the **European Public Prosecutor's Office** (EPPO). In this case, the Commission decided to *maintain* the proposal unchanged. The proposal was based on Article 86(1) TFEU, requiring unanimity in the Council. The failure to achieve such unanimity in the Council opened the doors for recourse to 'enhanced cooperation' as explicitly foreseen in Article 86 TFEU. This led to the adoption of the [EPPO Regulation](#) in October 2017, in which 20 Member States participate.

The third yellow card was issued in 2016 and concerned the proposal to amend the **Posting of Workers Directive**, seeking to prevent distortions of the freedom to provide services, and to ensure a level playing field by providing, inter alia, that workers carrying out work at the same location should be subject to the same rules, including rules on remuneration. On subsidiarity, the Commission proposal's explanatory memorandum merely stated that 'an amendment to an existing directive can only be achieved by adopting a new directive', but did not contain further subsidiarity reasoning. 14 reasoned opinions were issued by parliaments in 11 Member States, primarily from central and eastern Member States. The main issues raised in the reasoned opinions included the lack of adequate justification regarding the proposal's compliance with subsidiarity, the competitiveness concerns of lower-wage Member States, the adequacy of the existing rules, over-regulation, proportionality, and failure to recognise Member States' competences in the area. It was suggested that national parliaments first and foremost disagreed with the very contents of the proposal instead of contesting its compliance with subsidiarity.⁵¹ In a later communication the Commission replied to subsidiarity-related arguments raised in the reasoned opinions, concluded that the proposal complied with the subsidiarity principle, and *maintained* the proposal unchanged.

3.1.3. Assessment and obstacles to participation

Overall, the vast research assessing the functioning of the EWM reports **mixed results**. Before interpreting them, however, it is important to keep in mind that the sheer number of yellow cards says little about EWM's effectiveness in ensuring subsidiarity scrutiny. It is important not to infer false causalities here as, for example, the low number of yellow cards by no means shows that the EWM is ineffective but, as some have suggested, may be understood as a proof of the contrary, i.e. that subsidiarity control is working.⁵²

The drafters of the EU Constitutional Treaty, which paved the way for the Lisbon Treaty, reaffirmed the political nature of subsidiarity by choosing to entrust subsidiarity monitoring to political institutions, i.e. national (and, to a lesser extent, regional) parliaments. Already early commentators on the principle of subsidiarity have predicted that, owing to the abstract meaning of the principle (owing to references to, in particular, 'insufficiently' and 'better'), it is likely that subsidiarity concerns will be raised on account of disapproval of the (political) contents of legislative proposals as such, regardless of whether or not they violate subsidiarity.

⁵⁰ On this case, see I. Cooper, 'A yellow card for the striker: national parliaments and the defeat of EU legislation on the right to strike', *Journal of European Public Policy*, 2015, 22(10), p. 1406-1425.

⁵¹ Fromage, D., 2015, p. 6.

⁵² G. Barrett, 'Monti II: The subsidiarity review process comes of age. Or then again maybe it doesn't', *Maastricht Journal of European and Comparative Law*, 2012, 19(4), p. 600.

In other words, it may be difficult for actors not to issue a reasoned opinion regarding a legislative proposal whose contents they clearly disapprove of.⁵³ Political research now confirms these early views and shows that national parliaments interpret subsidiarity and employ the EWM in **many different ways**, which echo the perspectives (legal, political, economic and procedural) discussed above. They utilise, inter alia, legal *and* political criteria, including arguments relating to proportionality, the scope for national discretion, externalities, the added value of EU action, the form of action in terms of the choice of regulation versus directive, or sovereignty and legitimacy-related arguments.⁵⁴ The research shows that while some national parliaments aim to stick to the wording of Article 5(3) TEU, others use subsidiarity as an 'endlessly flexible' tool for political bargaining, allowing them to reject any course of action if it is in their political interest to do so.⁵⁵ Academic commentators further maintain that national parliaments not only disagree among themselves but also with the Commission as to how to define subsidiarity. It is noted that while the Commission has been responsive to national parliaments in terms of procedure by replying to their opinions, it has 'rarely or never' conceded 'any substantive point regarding subsidiarity' (including in the three cases triggering yellow cards).⁵⁶ Concerns have also been raised by regional parliaments, suggesting that a non-superficial subsidiarity assessment requires knowledge and cooperation, and is not necessarily helped by the **diverging understandings** of what the principle actually entails. It is in this context that different actors have called for action to foster a better (and shared) understanding of subsidiarity and called for a more transparent formula of how to decide whether action needs to be taken at EU level. The Committee of the Regions has been providing guidance, for example, in the form of a 'subsidiarity assessment grid',⁵⁷ that reflects guidance formulated in the earlier Amsterdam Protocol on subsidiarity and proportionality. The current work of the above-mentioned task force on subsidiarity, proportionality and 'doing less more efficiently' could provide further guidance in this regard.

Besides diverging views as to the nature and content of subsidiarity, national as well as regional parliaments face numerous **other obstacles** to a genuine subsidiarity check. Such obstacles include the limited time available for scrutiny, insufficient staff, the low (perceived) impact of reasoned opinions, difficulties in achieving the necessary thresholds, the limits of collective action necessitating networking and coordination activities, or the narrow scope of EWM (subsidiarity only).⁵⁸ Commentators have also pointed to the comparative attractiveness of the less formalised 'political dialogue', which is not dependent on strict deadlines nor limited to subsidiarity concerns.⁵⁹ Some have noted a sheer lack of interest from parliaments in utilising a tool primarily perceived as being designed to block proposals rather than *shape* them.⁶⁰ More critical observers have concluded that the EMW, which is focused on subsidiarity, does not do justice to national parliaments as political institutions and is, therefore, 'ill-suited to full-blown policy deliberation' which provokes polarisation, politicisation and, ultimately, democratisation.⁶¹

⁵³ For example, G.A. Bermann, 'Taking subsidiarity seriously: Federalism in the European Community and the United States', *Columbia Law Review*, 1994, 94(2), pp. 331-456.

⁵⁴ For example, W. Vandenbruwaene and P. Popelier, *Belgian parliaments and the early warning system*, A. Corneel and M. Goldoni (eds), 2017, Ch. 9.

⁵⁵ I. Cooper, (2017), p. 18.

⁵⁶ Cooper, I., (2017), p. 47 and 39.

⁵⁷ Committee of the Regions, [subsidiarity assessment grid](#).

⁵⁸ For example, [CoR report](#) on the subsidiarity early warning system of the Lisbon Treaty, November 2013.

⁵⁹ D. Fromage, 2017.

⁶⁰ C. Sprungk, (2013), '[A New Type of Representative Democracy? Reconsidering the Role of National Parliaments in the European Union](#)', *Journal of European integration*, 35(5), pp. 547-563.

⁶¹ D. Jančić, *National parliaments after the Lisbon Treaty and the euro crisis*, Oxford Studies in European Law, 2017, p. 308.

3.1.4. Mapping proposals for EWM reform

Against this background, it is no surprise that suggestions for reform put forward by political actors and scholars are numerous. They relate to the above shortcomings of the EWM, and include proposals for a better (common) understanding of the subsidiarity principle, extending the time period available for scrutiny, lowering the thresholds for triggering yellow or orange cards, enabling parliaments to effectively veto proposals ('red card') and granting them the right to take legislative initiative ('green card'). Some of these proposals may be better placed than others to contribute to better subsidiarity monitoring. For example, extension of deadlines for subsidiarity scrutiny can be reasonably expected to lead to a better quality of subsidiarity check. However, it is doubtful whether this is also true when it comes, for example, to lowering the thresholds for triggering cards or the introduction of a 'red card'. While lower thresholds or a 'red card' may be expected to encourage parliaments to participate in the system by increasing the potential impact of their reasoned opinions, this does not automatically lead to better subsidiarity scrutiny. Moreover, it may be considered problematic in the absence of a common understanding regarding what subsidiarity actually entails, as discussed above. It may, however, foster other, equally important aims of the EWM such as increasing parliamentary involvement in general.

In a note on subsidiarity, the Commission's figures for votes under the EWM demonstrate that in the overwhelming majority of cases, the number of votes issued by parliaments has remained *way below* 10 (out of total 56) and thus one fifth of the total number of votes, while the respective thresholds for yellow and orange card are one third and a half respectively. From this, the Commission concludes that reducing the relevant thresholds to one fourth or one-fifth of the total number of votes would have 'little or no effect'. At the same time, it should be noted that, under the current rules, parliaments have acted upon an assumption that one third of the total number of votes is needed, and research analysing the dynamics of parliaments' mobilisation suggests that parliaments may become more active once a yellow card is within reach.⁶²

Perhaps more importantly, the proposals to reduce the thresholds or introducing a 'red card', while empowering parliaments, do not seem to counter the objection that national parliaments would prefer to be shaping EU policy as opposed to blocking it. The former aim would be furthered rather by the introduction of a '**green card**', granting national parliaments an (indirect) right of initiative.⁶³ This, again, would have little to do with subsidiarity monitoring, but could foster parliamentary involvement in general. It would also put national parliaments on an equal footing with those already in possession of an 'indirect' right of initiative – the European Parliament, Council and one million EU citizens (European Citizens' Initiative).

⁶² I. Cooper, (2017), p. 45.

⁶³ In fact, national parliaments have [already been inviting](#) the Commission to submit proposals.

European Parliament resolutions regarding national parliaments and subsidiarity

Several recent Parliament resolutions⁶⁴ have addressed the role of national parliaments in general, and their role in subsidiarity scrutiny in particular. Parliament's resolution of 16 February 2017 on improving the functioning of the European Union by building on the potential of the Lisbon Treaty encouraged political dialogue with national parliaments on the content of legislative proposals but emphasised that national parliaments are 'best placed' to exercise influence and scrutiny in particular via the control of their national governments at the national level (pt 20). The resolution sought explicitly to formulate suggestions compatible with the current EU Treaties. Another resolution adopted on the same day on possible evolutions of and adjustments to the current institutional set-up of the European Union, and which was *not* confined to what is feasible under the current treaty framework, suggested, *inter alia*, 'complementing and enhancing the powers of national parliaments by introducing a **'green card'** procedure whereby national parliaments could submit legislative proposals to the Council for its consideration'. The most recent Parliament resolution of 19 April 2018 on the implementation of the Treaty provisions concerning national parliaments also raised the option of 'constructive proposals' that national parliaments could submit to the Commission while respecting the Commission's right of initiative. Regarding the EWM and, in particular, its **time limits**, the resolution notes that while a formal extension would be beyond the scope of the treaties, the Commission 'should implement a technical notification period within the EWM in order to grant additional time between the date on which draft legislative acts are technically received by national parliamentary chambers and the date on which the eight-week period begins' (pt 16).

3.2. Ex post judicial enforcement: what role for the Court of Justice?

3.2.1. A controversial question

The above-discussed early warning mechanism concerns, as the title suggests, an early subsidiarity check of a proposed legislative act by political institutions, i.e. national and regional parliaments. The legality of an act, once adopted, may also be challenged on subsidiarity grounds *ex post* before the Court of Justice. Article 8 of Protocol No 2 explicitly provides for this possibility:

The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.

This leaves no doubt that subsidiarity is justiciable. However, judicial review of subsidiarity has been subject to **intense controversy** as it cuts to the very core of the debate regarding the nature of subsidiarity. As discussed above, renowned commentators have emphasised the primarily political nature of the principle and argued that nothing is more political than the decision as to the most appropriate level for action, which should be left to the political process. Following this line of reasoning, it has been suggested that the Court's involvement would entail substituting the judgment of political institutions with the Court's own judgment and would be nothing less but political action in a 'judge's robe', leading to perceptions of a political court.⁶⁵

⁶⁴ Resolution of [16 February 2017](#) on improving the functioning of the European Union by building on the potential of the Lisbon Treaty; Resolution of [16 February 2017](#) on possible evolutions of and adjustments to the current institutional set-up of the European Union; Resolution of [19 April 2018](#) on the implementation of the Treaty provisions concerning national parliaments.

⁶⁵ D. Grimm, 'Subsidiarität allein reicht nicht', *Frankfurter Allgemeine*, 1 November 2016.

Others have explicitly challenged these propositions and advocated a more active role for the Court in subsidiarity scrutiny. Advocate General Póitares Maduro, in his *Vodafone* opinion, suggested that subsidiarity requires that:

*'[...] there be a reasonable justification for the proposition that there is a need for Community action. This must be supported by more than simply highlighting the possible benefits accruing from Community action. It also involves a determination of the possible problems or costs involved in leaving the matter to be addressed by the Member States. In requiring this, the Court is **not substituting** its judgment for that of the Community legislator but simply compelling it to **take subsidiarity seriously.**'*

In a similar vein, Professor Biondi has invited the Court to take subsidiarity seriously and to 'engage in both a rigorous procedural and substantive review of the consideration attributed to subsidiarity as a legal principle'. According to him, 'judicial application is the only way of making this doctrine a true operational principle of governance in the EU' and:

*'[In accordance with Protocol (No 2) [...]] the Court 'should ensure that the reasons for concluding that a Union objective can be better achieved at Union level are substantiated by qualitative or, wherever possible, quantitative indicators.'*⁶⁶

According to Biondi, it is 'not impossible' for the Court to assess whether evidence relied upon has been reliable and well funded, as it has done before. Moreover, scholars have highlighted that 'the Court has already shown its abilities of skilful navigation in applying equally vague concepts' such as proportionality or effectiveness.⁶⁷ At the same time, it remains clear that judicial review of subsidiarity may draw the Court into areas of intense political controversy.⁶⁸ Professors Craig and De Burca suggest that:

*'If ECJ continues with very light touch review, it will be open to the criticism that it is effectively denuding the obligation in Article 5(3)-(4) of all content. If, by way of contrast, the ECJ takes a detailed look at the evidence underlying the Commission's claim it will have to adjudicate on what may be a complex socio-economic calculus concerning the most effective level of government for different regulatory tasks.'*⁶⁹

They, therefore, conclude that the application of the principle remains controversial, and it is likely to remain so in the foreseeable future.⁷⁰

3.2.2. Frequency and intensity of judicial review

In practice, the number of challenges on subsidiarity grounds is **low**. If such claims are brought, subsidiarity is normally not the main, let alone the only, plea.⁷¹ Craig and De Búrca estimated in 2015 that in over 20 years since the introduction of the principle in the Maastricht Treaty, there have been approximately thirty challenges on grounds of subsidiarity.⁷² According to Craig, the reason for the low number of subsidiarity claims lies in politics. The successful adoption of an act already demonstrates that there is a broad support for the course of action taken, including qualified majority in the Council. A Member State challenging that act on subsidiarity grounds will know that its argument will certainly be opposed by the remaining Member States.⁷³

Action for annulment and the role of the Committee of the Regions

⁶⁶ A. Biondi, Subsidiarity in the Courtroom, in P. Eeckhout, A. Biondi, and S. Ripley (eds), *EU Law after Lisbon*, Oxford University Press, 2012.

⁶⁷ Ibid; S. Weatherill, (2005), pp. 138-139.

⁶⁸ S. Weatherill, (2005), p. 139.

⁶⁹ P. Craig and G. De Búrca, (2015), p. 100.

⁷⁰ P. Craig, 2012, p. 84.

⁷¹ C. Panara, (2015), *The sub-national dimension of the EU. A legal study of multilevel governance*, Springer, p. 82.

⁷² P. Craig and G. De Búrca, (2015), p. 101.

⁷³ P. Craig, 2012, *ibid.*, p. 81.

The Lisbon Treaty incorporated a sub-national dimension into the principle of subsidiarity by acknowledging that certain aims may best be achieved at regional or local level. This has been given 'legal teeth' by granting the Committee of the Regions the right to start an action for annulment (Article 263 TFEU) for the purpose of protecting its prerogatives, i.e. as a **semi-privileged applicant**. Article 8 of the subsidiarity protocol provides that the Committee may bring actions on grounds of subsidiarity 'against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted'. So far, the Committee of the Regions has not launched any action on subsidiarity grounds. In a 2005 opinion, the Committee welcomed its enhanced rights concerning its standing before the Court, yet also indicated that it was 'determined to use the right to bring actions before the Court of Justice as a **last resort** and only when all other means of exerting influence have been exhausted'.⁷⁴

With regard to the intensity of subsidiarity review, it is often suggested that the Court has adopted a 'light touch', minimalist approach to subsidiarity,⁷⁵ and it has never struck down a measure for breaching the principle. It is in this context that commentators have invited a more 'searching' approach by the Court, albeit noting that this would not necessarily have changed the outcome in terms of invalidation of measures.

Given the above controversies, scholars have been exploring the options for a workable model for the judicial review of subsidiarity, shifting attention to the Commission's preparatory documents. For example, Professor Craig suggests that the Court could 'require more from the Commission in procedural terms', and 'should be willing to consider the adequacy of the reasoning for EU legislative action' by looking behind the 'formal legislative preamble' to the arguments that underpin it.⁷⁶

The Vodafone case

The Vodafone case⁷⁷ involved a challenge to the Roaming Regulation, which established the maximum charges (wholesale and retail) that mobile operators could charge for the provision of roaming services. In his opinion, Advocate General Maduro, invited the Court to 'take subsidiarity seriously', and emphasised that the decision of the EU legislature to cap *retail* charges rather than limiting itself to wholesale charges required a particular justification (paras 27-28). He emphasised that a subsidiarity assessment needed not only to simply highlight the possible benefits of EU action, but also to determine 'the possible problems or costs involved in leaving the matter to be addressed by Member States' (para. 30). In its succinct treatment of subsidiarity, the Court referred to the preamble of the contested regulation, highlighting the interdependence of retail and wholesale charges for roaming services. The Court accepted that the Community legislature 'could legitimately take the view', given such interdependence, a joint approach at the level of both wholesale and retail prices by the EU legislature was needed (para. 78).

3.3. Preparatory phase: regulatory scrutiny of subsidiarity

The perceived inadequacies of the EWM and judicial review to ensure subsidiarity control have led actors to search for complementary ways to monitor subsidiarity, and shifted attention to the decision-making processes of the legislating institutions themselves. Experts have noted a 'growing realisation' that judicial control is not the only way to control the boundaries of EU

⁷⁴ [Opinion](#) of the Committee of the Regions on guidelines for the application and monitoring of the subsidiarity and proportionality principles, 2006/C 115/08, para. 3.22.

⁷⁵ P. Craig and G. De Búrca, 2015, p. 100; S. Weatherill, (2005), p. 138.

⁷⁶ P. Craig and G. De Búrca, (2015), p. 100; P. Craig (2012), p. 78.

⁷⁷ Judgment in case [C-58/08](#), *Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform*.

action, and have highlighted the role, in particular, of the internal quality control bodies of the Commission in this regard.⁷⁸

Article 5 of Protocol No 2 clearly requires draft legislative acts to be justified with regard to the principles of subsidiarity and proportionality. It states that:

*Any draft legislative act should contain a **detailed statement** making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be **substantiated by qualitative** and, wherever possible, **quantitative indicators** [...].*

Such analysis is normally conducted within the framework of an impact assessment (IA). The Commission's Better Regulation guidelines signalled that subsidiarity considerations are not to be taken lightly.

*The IA should verify whether EU action in areas outside its exclusive competence is compatible with the principle of subsidiarity. This is **not to be taken for granted** and it is important to remember that, pursuant to the Treaty of Lisbon, the respect of the principle of subsidiarity is closely scrutinised by the other EU institutions and by national parliaments and that Union acts can be annulled by the Court for non-respect of the principle.⁷⁹*

It is added that:

'national Parliaments and the Committee of the Regions have rights and powers to monitor the application of the principle of subsidiarity and they will critically examine any related analysis provided by the Commission'.⁸⁰

In addition, all Commission proposals are to be accompanied by an **explanatory memorandum**, explaining the context of and the reasons for a proposal. The Commission's Better Regulation communication expresses the Commission's desire to *explain* the action it takes better by means of improved explanatory memorandums, which are to incorporate subsidiarity considerations.⁸¹ Further guidance explicitly states that 'standard phrases' merely stating that a proposal complies with the subsidiarity principle are insufficient, and formulates explicit questions to be answered in order to demonstrate the proposal's compliance with the principle, stating that 'circular arguments should be avoided'.⁸² Subsidiarity issues may later resurface during the review and evaluation of existing legislation. This responds – at least in procedural terms – to the frequent criticism of the Commission's minimalist reasoning regarding subsidiarity, which was often considered scant. However, this guidance did not prevent the Commission from including only one sentence in its explanatory memorandum for the proposal to revise the Posting of Workers Directive, in which it stated that 'an amendment to an existing directive can only be achieved by adopting a new directive'.⁸³

The quality of impact assessment reports, which systematically address subsidiarity, is controlled by the Regulatory Scrutiny Board, which in 2015 succeeded the Impact Assessment Board. The latter's approach to subsidiarity and proportionality has been subject to an elaborate inquiry by Meuwese and Gomtsian. In their analysis, the authors point to the lack of 'interpretative clarity' regarding the principles of subsidiarity and proportionality, and

⁷⁸ Opinion of AG Poiares Maduro in case [C-58/08](#), *Vodafone*, para. 1; A. Meuwese and S. Gomtsian, 'Regulatory scrutiny of subsidiarity and proportionality', *Maastricht Journal of European and Comparative Law*, 2015, 22(4), p. 492.

⁷⁹ [Better Regulation Guidelines](#), p. 21. (Emphasis added.)

⁸⁰ [Better Regulation Toolbox](#), # 5 (Emphasis added.)

⁸¹ COM(2015) 215 final, p. 5.

⁸² [Better Regulation Toolbox](#), # 5 and # 38.

⁸³ COM (2016) 128 final, p. 4.

emphasise the important role that the Regulatory Scrutiny Board could play in contributing to such clarity. The authors take a careful look how the subsidiarity and proportionality test was put together by the Regulatory Scrutiny Board's predecessor, the Impact Assessment Board, from 2010 to 2011. They conclude that, in the overwhelming majority of cases, the Board interpreted both principles in **procedural** terms (e.g. by asking for the analysis to be strengthened): more than 75 % of the Board's comments on subsidiarity and 97 % of its comments on proportionality were based on a procedural interpretation. Only in few cases did the Board point, for example, to the (limited) cross-border scale of problems or insignificant impacts on or distortions of the internal market. The authors suggest that, 'in the interest of a powerful subsidiarity principle', the Board 'would do well to go deeper into the substance of impacts and the details of methodology more often' – while at the same time accepting the caveat that it is too early to draw conclusions regarding the Board's successor, the Regulatory Scrutiny Board.⁸⁴

Table 1 – Overview of subsidiarity monitoring

Preparation	Legislative process			Review and evaluation
	Proposal	Adoption of act		
Commission Regulatory Scrutiny Board (RSB)	EWM: national parliaments (regional parliaments, CoR)	Legislators: Parliament Council	Judicial review: Court of Justice	Commission (RSB)

Source: author's own illustration.

4. Taking subsidiarity seriously: repatriation, re-delegation, reform?

While debates on subsidiarity have generally focused on improving mechanisms for its monitoring, as discussed above, more recently, attention has shifted to the issue of what some refer to as the 'repatriation' or 're-delegation' of certain powers back to the Member States. Some have embarked upon in-depth reviews taking stock of EU competences, (re)opening questions regarding the optimal allocation of tasks. The sections that follow address some of the most prominent of these without attempting to provide an exhaustive list or systematic analysis.

4.1. Taking stock of EU action: an amalgam of views

The issue of the 'repatriation' of powers back to Member States gained prominence against the backdrop of the UK's 'new settlement' in the EU, after the 2010 Conservative Party manifesto set out to 'bring back' certain powers to the UK. However, it should be noted that the possibility of 'restoring' certain tasks to the national level was raised earlier than that. In 1992, after the Danish 'no' vote regarding the Maastricht Treaty, the then Commission President Jacques Delors presented a secret memorandum on ways in which the Community might focus its activities on a more limited range of important areas, while repatriating competence in others where EU legislation was perceived to be intrusive.⁸⁵ In 2001, the Laeken Declaration, which paved the way for the Lisbon Treaty, explicitly raised the option of 'restoring' tasks to the Member States:

'Citizens often hold expectations of the European Union that are not always fulfilled. And vice versa – they sometimes have the impression that the Union takes on too much in areas

⁸⁴ A. Meuwese and S. Gomtsian, 'Regulatory scrutiny of subsidiarity and proportionality', *Maastricht Journal of European and Comparative Law*, 2015, 22(4), pp. 483-505.

⁸⁵ A. L. Teasdale, 'Subsidiarity in post-Maastricht Europe', *The Political Quarterly*, 1993, 64(2), p. 193.

where its involvement is not always essential. Thus the important thing is to **clarify, simplify and adjust** the division of competence between the Union and the Member States in the light of the new challenges facing the Union. This can lead both to **restoring tasks to the Member States** and to **assigning new missions to the Union**, or to the extension of existing powers, while constantly bearing in mind the equality of the Member States and their mutual solidarity.¹⁸⁶

While the 'Laeken process' did not result in repatriation of powers, the Lisbon Treaty did incorporate important new provisions relevant to the division of tasks between the different levels, as mentioned above (e.g. listing the categories of competences, rewording the 'flexibility clause', incorporating a sub-national dimension into the principle of subsidiarity, etc.). Most importantly in this respect, it made explicit that the Treaty revision procedure could aim not only to increase but also to **reduce** EU competences (Article 48(2) TEU). While legal scholars considered this clarification as having a rather *symbolic* meaning, such clarification was nonetheless significant.

Recent years have seen an increased recognition that the EU might have gone further than necessary in some areas while not going far enough in others. Readiness to discuss the issue of EU competences was also signalled by several political figures, including those with a traditionally steadfast positive stance towards European integration. For example, in a speech before the German Bundestag in 2013, German Chancellor Merkel acknowledged the difficulty of Treaty change yet also stated that 'those who want more Europe' should be ready to talk about a 'readjustment of competences'.¹⁸⁷ The issue of the 're-delegation' of powers to Member States was recently reopened by Commission President Jean-Claude Juncker, whose task force on subsidiarity, proportionality and 'doing less more efficiently' is, inter alia, to identify policy areas 'where work could be re-delegated or definitely returned to Member States'. In the words of the white paper on the future of Europe (2017), such debates should, however, not be reduced to a 'binary choice between more or less Europe'.

Other examples of taking stock of how the EU exercises its competences are numerous. The Dutch Ministry of Foreign Affairs led by Frans Timmermans conducted a 'subsidiarity review', which in 2013 resulted in a '**Dutch list of points for action**'. The review was explicit in *not* challenging the existing distribution of competences as established in the current Treaties but sought to initiate an 'agenda for a more modest, more sober but more effective EU' based on the principle 'European where necessary, national where possible'. The Dutch government emphasised that there will be a continued strong need for European cooperation in many areas, including financial and economic affairs, energy, climate change, asylum and migration, the completion of the internal market, tackling tax evasion and cooperation in the field of defence. At the same time, it expressed the view that many other issues should be better left to the Member States: there should be no 'further harmonisation of social security systems', working conditions 'should only be regulated in broad outline', and flood risk management 'should only be harmonised at European level for truly transboundary water courses'. The report formulated general recommendations, including, for example, refraining from unnecessarily prescriptive and detailed EU legislation but instead focusing on 'the main lines of policy and the goals to be attained'. The report further identified 54 EU legal acts or proposals in different policy areas regarding which the EU should either 'exercise more restraint' and/or leave the Member States more scope for action in the light of the principles of subsidiarity and proportionality. These included, inter alia, proposals to harmonise substantive criminal law, EU programmes for school milk and fruit, the Environmental Noise Directive, the Soil Framework Directive, safety, health and welfare legislation, and many others. By way of example, the report identified soil management as one of the policies that should primarily be

¹⁸⁶ [European Council meeting in Laeken 14 and 15 December 2001, Presidency conclusions](#), Annex I on the Future of the European Union (Laeken Declaration).

¹⁸⁷ [Regierungserklärung von Bundeskanzlerin Merkel zum Europäischen Rat, 19-20 December 2013](#).

dealt with at the national, regional or local level. While not denying that some common soil policy is desirable, the report emphasised that its 'international aspects are limited'.⁸⁸

Some of the Dutch points for action were echoed in another comprehensive review of EU competences and their exercise, the UK's **Balance of Competences Review** (2012-2014). According to former Prime Minister James Cameron, this review sought to provide an 'objective analysis of where the EU helps and where it hampers'.⁸⁹ It resulted in a total of 32 reports addressing different policy areas without, however, an overall summary or analysis. Albeit conducted against the background of the mounting calls in the UK to 'return powers' back to the UK, the reports largely accepted the current balance of competences as 'about right', and presented no convincing case in favour of transferring back competences to the UK in any of the areas.⁹⁰ Nonetheless, the reports did repeatedly raise the issue of doing more to uphold the principles of **subsidiarity and proportionality**, which were subject to a separate, cross-cutting report. The latter did express general support for the principles yet noted rather mixed evidence regarding their implementation in practice, leaving room for improvement.⁹¹ The report noted some examples of areas that should be dealt with at the national level, which included aspects of environmental policy such as land use planning, noise, soil protection or flooding, aspects of transport policy concerned with local and domestic transport, or aspects of agricultural policy without a cross-border dimension. In most other areas, the 'balance of competences' was generally felt to be broadly appropriate.

The Scottish government contributed to the Balance of Competences Review and in August published **Scotland's Agenda for EU Reform**. It concluded that the 'EU Treaties strike the right balance on the competences which have been conferred on the EU but that the exercise of these competences can be vastly improved and that the vast array of EU regulation is now in need of substantial reform'. According to the Scottish government, strengthening of the cornerstone principles of **subsidiarity and proportionality** 'should lie at the heart of EU reform'.⁹²

There is no shortage of further reports and academic contributions regarding the optimal allocation of tasks among different levels, often employing economic criteria for centralisation, as discussed above. For example, a comprehensive study by the Bertelsmann Foundation (2017) investigated eight selected areas of policy on the basis of five criteria (spill over effects, economies of scale, preference heterogeneity, internal market consistency and competition), and rated them depending on whether the area was best dealt with at the EU or national level (Table 1). By way of example, the report finds support for an integrated EU army on account, inter alia, of large economies of scale, but criticises the current arrangements of the common agricultural policy (income support for farmers) which, according to the report, leads to 'massively excessive costs' and should be left to the national level. Further academic literature inspired by the economics of (fiscal) federalism suggests that the EU should focus on areas where economies of scale are large and where there is a need to internalise externalities, but should be much more modest where such externalities are negligible (or non-existent), where heterogeneity of preferences is so significant as to outweigh the benefits of action at the supranational level, or where different approaches taken at the lower level could enhance mutual learning in search for optimal solutions. Following this line of reasoning, it was suggested that, while environmental law is an obvious and 'classic' example for centralisation due to the need to internalise externalities, the absence of such externalities in the case, for example, of localised pollution does not justify supranational action. On the other hand, from

⁸⁸ Dutch Ministry of Foreign Affairs, [Testing European legislation for subsidiarity and proportionality - Dutch list of points for action](#), 21 June 2013. See also Government of the Netherlands, [European where necessary, national where possible](#).

⁸⁹ HM Government, [EU speech at Bloomberg](#), published on 23 January 2013.

⁹⁰ Senior European Experts, March 2015 (fn 7), p. 2; Emerson, M. (ed.), 2015 (fn 7), p. 153-155.

⁹¹ HM Government, Balance of Competences Review, [Subsidiarity and proportionality](#).

⁹² The Scottish Government, [Scotland's Agenda for EU Reform](#).

an economic perspective, there is strong support for a common European defence policy and/or common efforts to secure external borders.⁹³

Table 2 – Summary of findings (Bertelsmann Foundation)

Policies	Optimal allocation
Asylum and refugee policy	Clearly EU
Defence (European army)	Clearly EU
Corporate taxation (harmonised tax base)	Weakly EU
Development aid	Weakly EU
Unemployment insurance	Weakly EU
Railway freight transport	indifferent
Agricultural policy (income protection)	Weakly national
Post-secondary and tertiary education	Weakly national

Source: Bertelsmann Foundation 2017.

4.2. (Legal) feasibility of 'repatriation'

As discussed above, the Laeken Declaration (2001) explicitly raised the question, inter alia, of the possible restoration of tasks to the Member States. However, it explicitly added that this question needs to be addressed while 'respecting the existing *acquis communautaire*'.⁹⁴ It is clear that this may be a difficult balance to achieve and invites controversy, as any attempt to readjust the allocation of tasks is likely to raise concerns that this calls into question what has been achieved at EU level.⁹⁵ Others, on the other hand, emphasise that the division of tasks in systems of shared powers has always been in flux, and readjustments of the allocation of responsibilities needs to be part of the debate in all such systems, including the EU.⁹⁶

Regarding the legal feasibility of such readjustments, in 1971, the Court of Justice has uncompromisingly rejected attempts at a *unilateral* repatriation of powers by individual Member States.⁹⁷ However, it is clear that such repatriation can take the form of treaty amendment, as made explicit with the Lisbon Treaty (Article 48(2) TEU). **Treaty amendment** is overwhelmingly considered to be a lengthy and laborious process, which – in its ordinary version – requires a 'convention', a unanimous agreement in an intergovernmental conference, and a national ratification process. This implies different veto players at different stages, and necessitates a broad consensus. Various commentators have expressed diminished 'appetite' for fully-fledged Treaty reform in the close future. The *simplified* revision procedure does provide for a somewhat simpler means of Treaty amendment, in so far as it allows amendment by a European Council decision and does not require a convention. It does not, however, avoid the need for unanimity in the European Council and a national approval process.⁹⁸

It should be noted that a broad, 'wholesale' approach to returning competences to the Member States by means of Treaty change is not the only way in which the EU could 'exercise more

⁹³ For an overview of such literature see, for example, B. Geys and K. Konrad, 'Federalism and optimal allocation across levels of governance', in Zürn, Wälti and Enderlein (eds.), *Handbook on Multi-level Governance*, Edward Elgar Publishing, 2012, Ch. 2; Van den Bergh (2016); A. Alesina et al, 'What does the European Union do?', in *Public Choice* (2005), 123, pp. 275-319.

⁹⁴ The European Council meeting in Laeken 14 and 15 December 2001. Presidency conclusions, [Annex I on the future of the European Union](#) (Laeken Declaration).

⁹⁵ See the discussion in V. Miller, [Repatriating EU powers to Member States](#), House of Commons Library, Briefing paper of 7 December 2011, pp. 7 et seq.

⁹⁶ R. Zbiral (2015), pp. 52-53.

⁹⁷ In its judgment in case [7/71](#), *Commission v France*, para. 20, the Court states that: 'powers thus conferred could not, therefore, be withdrawn from the Community, nor could the objectives with which such powers are concerned be restored to the field of authority of the Member States alone, *except* by virtue of an express provision of the treaty' (emphasis added).

⁹⁸ The simplified procedure may only be used to amend Part III of the TFEU (Union policies and internal actions), and doubts may arise as to whether and to what extent, the simplified procedure may be used to return competences.

restraint', as demanded by some (as per the discussion above). The Treaties do provide for a more 'modest', piecemeal approach to readjusting the allocation of tasks, by explicitly providing that the EU can **cease** exercising competence and thereby allow Member States to resume action in a particular field. This option is explicitly envisaged in Article 2(2) TFEU regarding shared competence, and elaborated upon in Declaration No 18. The latter provides that EU may cease to exercise competence by **repealing** a legislative act, in order to ensure 'constant respect for the principles of subsidiarity and proportionality'. The declaration emphasises the possibility for the **Council** to use its right of (indirect) legislative initiative under Article 241 TFEU, and to ask the Commission to propose repeal of legislative acts. This can be done at the initiative of one or several Member States, and requires a simple majority of Council members. The Commission, which enjoys a near-monopoly of initiative, is not obliged to follow up on such a request. However, the declaration expresses the Commission's intention to 'devote particular attention to these requests' (text box below).

As rightly pointed out by some, it is a matter of opinion (and semantics) whether such a repeal of existing EU legislation would amount to 'repatriation', 'deactivation' or simply 'reform' ('repatriation' being eschewed by many, and 'reform' acceptable to most).⁹⁹ However, whatever the label, Declaration No 18, albeit not well known, is an important piece of the puzzle in debates on how to ensure that the principle of subsidiarity is upheld.

Declaration in relation to the delimitation of competences (No 18)

'[...] When the Treaties confer on the Union a competence **shared** with the Member States in a specific area, the Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to **cease** exercising, its competence. The latter situation arises when the relevant EU institutions decide to **repeal** a legislative act, in particular better to ensure constant respect for the principles of subsidiarity and proportionality. The Council may, at the initiative of one or several of its members (representatives of Member States) and in accordance with Article 241 of the Treaty on the Functioning of the European Union, request the Commission to submit proposals for repealing a legislative act. The Conference welcomes the Commission's declaration that it will devote particular attention to these requests.'

'Equally, the representatives of the governments of the Member States, meeting in an Intergovernmental Conference, in accordance with the ordinary revision procedure provided for in Article 48(2) to (5) of the Treaty on European Union, may decide to amend the Treaties upon which the Union is founded, including either to increase or to reduce the competences conferred on the Union in the said Treaties.'

5. Summary and outlook

There is a widespread perception that subsidiarity is not being taken sufficiently seriously. Scholars and political actors alike have repeatedly called upon the EU to exercise 'more restraint' in some areas (while doing more in others), and to conduct a more rigorous analysis before concluding that action at the EU level is warranted. At the same time, subsidiarity remains a contested notion. Some view it as a purely political principle, noting that nothing is more political than the decision as to the appropriate level of action. Others contend that it is time to recognise that subsidiarity is (also) a legal principle, whose contents cannot (and should not) be endlessly stretched. The diverging views on the real nature of subsidiarity has important implications for subsidiarity scrutiny, including the national parliaments' early warning mechanism. It is in this context that calls for a workable formula and shared understanding of the principle have been mounting, if subsidiarity is to become a sufficiently flexible but meaningful tool in guiding decisions regarding the appropriate level of action.

⁹⁹ M. Emerson (ed.), [Britain's Future in Europe. Reform, renegotiation, repatriation or secession?](#) CEPS 2015, p. 154.

Against the background of the 'future of the EU' debates, discussions regarding competence, subsidiarity and proportionality are likely to continue. Yet, given the diminished appetite for full-blown treaty reform, 'piecemeal' readjustments within the current legal framework seem more likely. At the same time, one should probably not expect a definite and a fully satisfying solution regarding competence, subsidiarity and proportionality to be found in the close future. As Professor Weatherill noted in 2003, an all-too rigid formula regarding what is to be done at which level may be neither workable nor desirable because, according to him:

*'the relationship between different levels of governance typically fluctuates over time in all divided-power systems that currently exist or have existed. This is because of changing functional need but also because of varying political fashion. There is no reason to suppose the EU is, or should be, any different in this respect.'*¹⁰⁰

It seems that the current 'political fashion' calls for taking a fresh look and, possibly, making readjustments. At the same time, (academic) observers are overwhelmingly calling for a balanced debate that does not reduce the subsidiarity debate to the overly simplistic, counterproductive and outdated dichotomy of 'more' or 'less' EU. For subsidiarity to become a meaningful principle, it may be helpful not to view it as means to protect Member States' prerogatives *against* EU interference but, instead, as the aspiration to take decisions as closely as possible to the citizen without foregoing mutually beneficial cooperation at supranational level. After all, subsidiarity not only expresses preference for decision-making at the lowest possible level, but also explicitly recognises the simultaneous need for local, regional, national *and* supranational legislation.

¹⁰⁰ S. Weatherill, 'Competence', in B. De Witte (ed.), [Ten reflections on the Constitutional Treaty for Europe](#), EUI, 2003, p. 66.

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The principle of subsidiarity requires decisions to be taken at the lowest practical level of government without, however, jeopardising mutually beneficial cooperation at the supranational level. Recent decades have seen efforts to strengthen the subsidiarity principle in EU law, including the introduction of the well-known early warning mechanism (EWM) for national parliaments. At the same time, the principle of subsidiarity remains a contested notion. This has important implications for the regulatory, political and judicial bodies monitoring compliance with the principle. In this context, commentators have called for a better (and shared) understanding of the principle and have formulated a number of suggestions as to how to monitor compliance with the principle more effectively.

This is a publication of the
Members' Research Service

Directorate-General for Parliamentary Research Services, European Parliament



PE 625.124
ISBN 978-92-846-3535-1
doi:10.2861/888391

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