Stronger Subsidiarity for a More Effective, Accountable and Resilient EU

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Summary

This paper argues that, as the EU is set to acquire new resources and possibly step up its action in several important fields, from industrial policy to defence, stronger protection of subsidiarity is necessary to ensure that it does so without encroaching upon the prerogatives of the lower levels and while remaining as close as possible to the citizens. The paper outlines some of the limits of the currently existing safeguards of subsidiarity, including the principle's failure to become justiciable, the consequences of the EU's 'over-constitutionalisation', and the difficulties with the 'yellow' and 'orange card' procedures. It then proposes a number of possible actions to strengthen subsidiarity on three fronts: its legal definition and justiciability, its institutional protection and its political protection. The conclusion underlines that the ultimate safeguards of subsidiarity are a culture and an ethos that value bottom-up solutions, decentralisation, polycentricity, competition and less regulation.

Keywords Subsidiarity – Simplification – Accountability

Introduction

Respect for subsidiarity is a key precondition for the long-term political sustainability of a heterogeneous federal union such as the EU. In such a polity, legitimacy always flows upwards from the member states, regions and peoples, who share sovereignty in and rule together through common institutions, but have no vocation to ever merge into a single *demos* and state. At a deeper level, subsidiarity defines a specific type of federal political order that strives to preserve the diversity, spontaneity and freedom of all human communities as intrinsically worthy, and in which the higher levels of government exist to assist the lower ones and enhance their ability for self-determination.

The more powers and competences that the EU acquires, therefore, the more important the strong protection of subsidiarity becomes to ensure that they are exercised without encroaching upon the prerogatives of the lower levels and that they remain as close as possible to the citizens. In other words, empowering the EU and strengthening subsidiarity are two sides of the same coin, and have historically progressed together. Thus, it is only appropriate to consider introducing more robust safeguards of subsidiarity in parallel with the ongoing discussions on a stronger role for the EU in several important fields, from industrial policy to defence.

Existing safeguards of subsidiarity and their limits

The key pillars of subsidiarity protection under the current treaties are Article 5 and Protocols 1 and 2 of the Treaty on European Union (TEU). Article 5 defines subsidiarity as meaning that EU action is justified only if and insofar as its objectives cannot be sufficiently achieved by the member states (that is, 'EU necessity'), but can rather, by 'reason of the scale or effects', be better achieved at Union level ('EU added value'). Protocol 1 requires national parliaments to be adequately informed about EU initiatives and legislative proposals and allows them to send reasoned opinions to EU institutions on the conformity of a particular legislative proposal with the principle of subsidiarity. Protocol 2 deals with the role of national parliaments in the enforcement and application of the principle of subsidiarity and proportionality. In particular, it lays out the 'yellow' and

'orange card' procedures, whereby national parliaments, by sending their reasoned opinions within a certain time frame and in sufficient number, can oblige the Commission to review a proposal deemed at odds with subsidiarity and impose conditions and obstacles to its development should the Commission still wish to progress with it. Moreover, since the entry into force of the Lisbon Treaty, the same protocol also grants the European Committee of the Regions (CoR) the right to bring an action before the European Court of Justice (ECJ) on the grounds of the infringement of subsidiarity.

Though helpful as broad legal–political principles, these provisions have largely failed to protect the functions of member states and regions or to mitigate the longstanding problem of 'competence creep', that is, the tendency to adopt EU legislation in areas in which the EU has not been conferred a specific legislative competence.[1] There are multiple and complex reasons for this, one being that although it has been in force since 1992, the subsidiarity principle has never acquired any justiciable content. Its vagueness means that the principle has never emerged as a standard for adjudicating concrete jurisdictional disputes. Another, much neglected, reason is the 'over-constitutionalisation' of the EU: that is, the fact that, the treaties having been turned into a de facto constitution by the case law of the ECJ, European constitutional law is full of provisions that, in any regular polity, would be governed by what is known as ordinary law. For example, the constitutionalised goal of establishing a common market provides a legal basis that could be used to generally undermine the competences of the member states, as every national norm could be construed as an impediment.[2]

The right of complaint granted to national parliaments under the Treaty of Lisbon cannot compensate for this, as it suffers from limitations of its own, ranging from the existing discrepancy of powers and resources among the national parliaments to the relatively short period (eight weeks) available to them to scrutinise subsidiarity under the yellow and orange card procedures. As a consequence, so far only three yellow card procedures have been undertaken and not a single orange card has been used. Relatedly, the EU has also often been accused of a tendency to over-regulate. Despite repeated attempts to tackle over-regulation during the last decade, no satisfactory solution to this problem has been found so far. Overall, the Article 5 definition of subsidiarity appears 'very minimalist', as 'reasons of scale and effects can always be found to justify EU action, and have been'.[3] Moreover, existing safeguards clearly lack effectiveness. Going forward, more robust ones need to be put in place, in parallel with the necessary strengthening of EU resources and executive capacity.

Proposals for the stronger protection of subsidiarity

To overcome some of the difficulties outlined above, the remainder of this paper suggests actions to reinforce the protection of subsidiarity on three fronts: the legal definition of subsidiarity and its justiciability, the institutional protection of subsidiarity and the political protection of subsidiarity. These three aspects appear to be the essential pillars of any comprehensive system of subsidiarity protection. The proposed measures range from relatively simple initiatives that would not require a treaty change to more transformative interventions that would. They are presented in more detail in the following sections.

Reinforcing the legal protection of subsidiarity

A key loophole in the system of subsidiarity protection currently in place in the EU is the failure of subsidiarity to become fully justiciable and acquire the status of a judicial review principle. In other words, despite the

[1] S. Garben, 'Competence Creep Revisited', *Journal of Common Market Studies* 57/2 (2019).
[2] D. Grimm, *The Constitution of European Democracy* (Oxford: Oxford University Press, 2017).
[3] F. O. Reho, 'Subsidiarity in the EU: Reflections on a Centre–Right Agenda, *European View* 18/1 (2019).

founding treaties making it clear, since the changes introduced by the Maastricht Treaty, that subsidiarity is a legally binding principle, the ECJ has consistently refused to strike down any legislation challenged before it on subsidiarity grounds. Not least because of the principle's vagueness, the Court has preferred to treat its substantive content as political and, as such, has left it to the discretionary appraisal of the EU institutions, particularly the Commission. In a sense, the Court's interpretative stunting of the legal protection of subsidiarity is yet another example of its well-known judicial activism in favour of further integration.[4]

Moving forward, this should be corrected by amending Protocol 2 of the TEU to establish clear guidelines on the application of the principles of subsidiarity and proportionality, and by including a detailed definition of subsidiarity in the Inter-Institutional Agreement on Better Law-Making. Inspiration for this could be drawn from Protocol 30 to the 1997 Amsterdam Treaty on the application of the principles of subsidiarity and proportionality, which ceased to be in force with the Lisbon Treaty. The Protocol contained substantive criteria for deciding when a legislative proposal was compatible with the subsidiarity principle, and several guidelines for assessing whether the conditions imposed by it had been fulfilled. No comparable legal basis exists in the current treaties.[5]

The goal of these legal clarifications would be to restate for the ECJ's benefit that the principle of subsidiarity is meant to be justiciable, while also offering the Court more substantive and detailed criteria and guidelines for applying the principle without fear of interfering with the political process. Moreover, we know from public choice theory that ECJ judges have a vested interest in transferring power from the member states to the EU level, and the Court's history and record largely confirm this. To correct this built-in bias and ensure that the Court acts as an impartial interpreter of the treaties as far as subsidiarity is concerned, a new constituent court of the ECJ should be established, specialised in disputes about the allocation of competences between the Union and its member states, as well as actions against alleged violations of the principles of subsidiarity and proportionality. It should be composed of former judges from the national constitutional courts and act as a chamber of the ECJ, so as not to undermine the Court's overall authority.[6]

More broadly, to solve the problem of 'over-constitutionalisation', which seems to be one of the root causes of 'competence creep', it would be wise to reclassify all provisions of a non-constitutional nature present in the EU treaties (essentially, most of the Treaty on the Functioning of the European Union (TFEU)) as ordinary law. As long as such provisions continue to enjoy constitutional rank, when the Commission and the ECJ apply them they are essentially implementing the constitution, which makes it impossible to redirect their actions through legislation to protect national and regional competences.[7] A more precise definition of shared competences under Article 4(2) of the TFEU would also help.

Reinforcing the institutional protection of subsidiarity

Beyond these legal changes, it is also important to reinforce the institutional mechanisms available to protect subsidiarity in the EU. A much neglected but essential aspect of this is arguably national parliaments' ability to hold their governments accountable for EU matters. EU member states display a variety of constitutional structures and provisions, and thus the ability of the national parliaments to accomplish this task is very uneven. Some of them enjoy a very high degree of oversight of their governments' EU involvement and negotiations, others lack the slightest ability to control and question them.

4 G. A. Moens and J. Trone, 'The Principle of Subsidiarity in EU Judicial and Legislative Practice: Panacea or Placebo?', *Journal of Legislation* 41/1 (2014).

5 R. Lopatka, 'Subsidiarity: Bridging the Gap Between the Ideal and Reality', *European View* 18/1 (2019).

6 European Constitutional Group, *A Proposal for a Revised Constitutional Treaty* (2006), 9; R. Vaubel, *The European Constitutional Group: The Constitutional Approach to Limiting the Power of Government at the European Level* (2019), 4.

7 Grimm, *The Constitution of European Democracy*, 1–20.

This unevenness in national parliaments' powers and resources is an inevitable consequence of Europe's historical and institutional diversity. As such, it cannot be fully remedied. However, it could be reduced by developing what we might call a 'gold standard' for the participation of national parliaments in EU legislative and political processes. This would be a list of minimum requirements that would enable national parliaments to scrutinise their governments on EU affairs and learn from the best practices of other parliaments (e.g. Finland's and Denmark's).

As mentioned above, however, national parliaments are also directly involved in scrutinising subsidiarity under the yellow and orange card procedures. For this scrutiny to be more effective, the deadline for submitting opinions should be extended from 8 to 12 weeks and the thresholds required should be reduced, for example, from a third to a quarter of the votes expressed by national parliaments for the yellow card procedure, and from a simple majority to a third for the 'orange card' procedure.[8] Moreover, a 'green card' and a 'late card' procedure could also be introduced. The former would allow national parliaments to voice their support for a proposal submitted by another national parliament. If the support garnered was high enough, the European Commission would have to consider incorporating the proposal into its legislative agenda. This is not a fictional scenario: individual national parliaments have taken such initiatives in the past, and one of them was actually adopted by the Commission.[9]

In contrast, the 'late card' procedure would 'grant the national parliaments the right to scrutinise draft legal acts a second time at the end of negotiations between the Commission, the European Parliament and the Council'.[10] It is also worth mentioning that, in several member states (e.g. Germany), subnational parliaments possess significant legislative powers, including on matters that are regularly the object of EU legislative proposals. At the moment, they play no role in the institutional mechanisms for protecting subsidiarity. They could at least be granted consultative rights when matters under their legislative purview are at stake.

Finally, there is an obvious subsidiarity angle to the Commission's Better Regulation Agenda, particularly in initiatives such as the Regulatory Fitness and Performance programme (which aims to ensure that EU laws deliver on their objectives at a minimum cost for citizens and businesses) and the Fit for Future platform, which is a high-level expert group that helps the Commission simplify EU laws and reduce unnecessary related costs. Institutionally, reinforcing the role of the CoR and even of the European Economic and Social Committee in scrutinising EU legislation when it comes up for revision in such and similar fora would make sense. This would deepen both vertical and horizontal subsidiarity by embedding subnational and socio-economic actors, respectively, more closely in better-regulation initiatives.

Reinforcing the political protection of subsidiarity

The history of the last 30 years, however, shows that the existing legal and institutional safeguards of subsidiarity can easily be voided of substance and effectiveness if the prevailing political ethos sees the principle as, at best, a frill to pay lip service to or, at worst, a hindrance to circumvent on the road to centralisation. This is why the ultimate safeguards of subsidiarity are always political and, in a sense, even cultural. The three main EU institutions could choose a variety of ways to signal their political commitment to subsidiarity.

As far the European Parliament goes, one way would be to establish a Subsidiarity Subcommittee of the Committee on Constitutional Affairs, which so far has all too hastily brushed aside subsidiarity concerns for fear that they might halt the forward march of European integration. However, as mentioned above, this is a misguided conception of subsidiarity, which, when correctly understood, is not meant to be a brake on

[8] R. Lopatka, *Die EU und die Mitgliedstaaten: Subsidiarität. Proportionalität. Weniger, aber effizienteres Handeln*, AIES Studies (Vienna, 2018), 22.
[9] Lopatka, 'Subsidiarity', 32.
[10] Ibid., 34.

integration but rather a specific modality of pursuing it. Another important initiative in the Parliament would be the formation of a Subsidiarity Intergroup grouping of Members with a specific interest in upholding subsidiarity as a fundamental EU constitutional principle in its broadest sense.

At the level of the Council, responsible working groups should be encouraged to systematically assess the compliance of the Commission's proposals with the principles of subsidiarity and proportionality. Moreover, the Commission itself should politically commit to reducing the burden and intrusiveness of EU legislation in various ways. These include

- committing to choosing the form of EU action which least interferes with national law (e.g. directives instead of regulations, the latter having now become the overwhelmingly dominant form of EU legislation, despite, or perhaps because of, their being the most intrusive);
- limiting the use of delegated and implementing legal acts, which have multiplied in recent years, but which elude subsidiarity control mechanisms, to the disadvantage of member states and regions; and
- committing to one or the other form of sunset clause, for example, by strictly implementing the 'one in, one out' principle, according to which an existing EU provision is cancelled in parallel with any new one being proposed.[11]

This would limit the proliferation of EU regulatory initiatives that risk burdening businesses and stifling innovation.

Finally, it is important to underline that, for the first time in the history of the directly elected European Parliament, in the current legislature forces to the left of the centre–right European People's Party do not now have a majority themselves. This means that, based on the current political composition of the Parliament, centre–right support is indispensable to approve any legislative proposals and resolutions that are put forward. This places on the European People's Party the special responsibility to act resolutely as the political guardian of subsidiarity by rejecting on strict constitutional grounds initiatives, whether binding or not, from any EU institutions that seem to exceed EU competences and violate the rigorous upholding of subsidiarity. These include (but are not limited to) initiatives on, or touching upon, controversial moral disagreements, such as those promoting expansive and divisive interpretations of Article 2 of the TEU.[12] The existence of a predominant political force that chooses to act as the guardian of subsidiarity would be the ultimate political safeguard of this important principle.

Conclusion

We need to stop seeing subsidiarity as a vague and largely empty principle to which some people only pay lip service—or even worse, as a potential brake on European integration or as a fig leaf behind which ill-intentioned forces hide in the hope of maintaining an air of respectability while they promote a Eurosceptic agenda. Broadly and rightly understood, subsidiarity actually offers a specific approach to advancing European integration and constructing European unity. It is an approach that values bottom-up solutions, decentralisation, polycentricity, competition and less regulation, as opposed to one that insists on centralisation, harmonisation and increased regulation. Stronger protection of subsidiarity will not hinder the cause of European integration, but rather will make the EU more effective, accountable and resilient at a time when the need for it to acquire additional powers and resources in a number of fields is widely and justly felt. The robust upholding of subsidiarity requires effective legal, institutional, political and ultimately cultural safeguards. The proposals contained in this paper could be important steps towards achieving this.

[11] Lopatka, 'Subsidiarity'.
[12] F. O. Reho, 'Protecting Fundamental EU Values: In Search of a Balanced Approach', *European View* 23/1 (2024).

	Programme 1	Programme 2	Programme 3
	Reinforcing the legal protection of subsidiarity	**Reinforcing the institutional protection of subsidiarity**	**Reinforcing the political protection of subsidiarity**
Project 1	Amend Protocol 2 TEU to establish clear guidelines on the application of the principles of subsidiarity and proportionality, and include a detailed definition of subsidiarity in the Interinstitutional Agreement on Better Law-Making.	Reinforce national parliaments' ability to hold their governments accountable for EU matters by issuing a gold standard for the participation of national parliaments in EU legislative and political processes.	Establish a Subsidiarity Subcommittee of the Committee on Constitutional Affairs as well as a Subsidiarity Intergroup in the European Parliament, and encourage the relevant Council working groups to systematically assess the compliance of Commission proposals with the principles of subsidiarity and proportionality.
Project 2	Establish a new constituent court of the ECJ that specialises in actions against alleged violations of the principles of subsidiarity and proportionality, composed of former judges from the national constitutional courts.	Grant longer deadlines for national parliaments to scrutinise subsidiarity under the yellow and orange card procedures, reduce the thresholds required for both, introduce a 'green card' and a 'late card' procedure, and grant a role to subnational parliaments possessing legislative powers.	Reduce the burden and intrusiveness of EU legislation by committing to choosing the form of EU action which least interferes with national law (e.g. directives instead of regulations); limiting the use of delegated and implementing legal acts; and strictly implementing the 'one in, one out'
Project 3	Reclassify all provisions of a non-constitutional nature present in the EU treaties as ordinary law (essentially, most of the TFEU) and formulate a more precise definition of shared competences under Article 4(2) TFEU.	Reinforce the role of the CoR (vertical subsidiarity) in scrutinising EU legislation when it comes up for revision (e.g. the Regulatory Fitness and Performance programme and Fit for Future platform), as well as the role of the European Economic and Social Committee (horizontal subsidiarity).	Reject on strict constitutional grounds initiatives, whether binding or not, from any EU institutions that seem to exceed EU competences and violate the rigorous upholding of subsidiarity, refusing to discuss their substantive merits (e.g. initiatives on, or touching upon, controversial moral disagreements).

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