

# Reviving the Principle of Subsidiarity

Five requirements for achieving the EU-Commission's aim of „Better Regulation“

RA Klaus-Dieter Sohn & Sebastian Czuratis



- ▶ When preparing legislative proposals, the Commission must be obliged to consult with the national parliaments in advance on whether its plans comply with the principle of subsidiarity.
- ▶ National parliaments must have the right to monitor compliance with subsidiarity and file subsidiarity complaints throughout the entire legislative process.
- ▶ A specialised court must be set up to deal with matters of competency and subsidiarity and should contain at least some judges from national constitutional courts.
- ▶ Actionable subsidiarity criteria such as cross-border implications must be amended.
- ▶ National parliaments must voluntarily undertake to carry out strict monitoring of compliance with subsidiarity. Subsidiarity complaints and actions should be made into minority rights.

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## 1 Introduction

In December 1991, the Heads of State or Government of the then twelve Member States of the European Community agreed to found, in addition to the existing European Community, a European Union (EU). This took place by way of the Treaty on the European Union (TEU)<sup>1</sup>. The founding of the EU also involved a comprehensive reform of Community law codified in the Treaty establishing the European Community (TEC)<sup>2</sup>. Both treaties – the new TEU and the amended TEC – were agreed in what is known as the Maastricht Treaty<sup>3</sup> which came into force on 1 November 1993. At the heart of the Treaty was the desire to intensify economic and political relations between the Member States. At the same time, qualified majority decisions in the Council of Ministers became possible in 96 areas (previously: 51). In addition, the European Parliament was substantially strengthened as a colegislative body. In conjunction with the Council, it could now adopt new laws in 15 policy areas (known as co-decision legislative procedure) and, as a result of the consultation procedure, was involved in decisions in 52 (previously: 30) subject areas. Finally, under the Maastricht Treaty, six new policy areas<sup>4</sup> were incorporated into the EC's list of competences.<sup>5</sup> This substantial expansion of the Community's legislative powers would – due in large part to pressure from Germany – be limited by the introduction of the principle of subsidiarity.<sup>6</sup> According to the principle of subsidiarity, the EU may only take action in those areas which do not fall under its exclusive jurisdiction if the objectives in those areas can be achieved more effectively by measures at EU level than in the Member States.

Despite the obligation to comply with subsidiarity, the EU has come under repeated criticism for excessive interference in the everyday concerns of citizens.<sup>7</sup> The principle of subsidiarity recently received special attention in the 2014 European Elections when there was even a demand, in some Member States, for powers to be returned to national level. Jean-Claude Juncker reacted to the criticism and, after taking up his appointment as President of the European Commission, created the position of First Vice-President - acting, in the words of the Commission, as a "watch-dog" over the other members of the Commission – to ensure "Better Regulation". Frans Timmermans, who was entrusted with this post, received a "Mission Letter" from Juncker in November 2014 in which Juncker called on him to observe the principle of subsidiarity and demanded that all new legislative proposals be examined as to their compatibility with the principle of subsidiarity in order to strengthen the European project.<sup>8</sup>

This ceplnput traces the development of the principle of subsidiarity and demonstrates that to date - five years after entry into force of the Lisbon Treaty – the principle of subsidiarity has failed to limit the exercise of power. It then offers suggestions on how to improve the monitoring of compliance with the principle of subsidiarity.

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<sup>1</sup> Treaty on the European Union of 7 February 1992 (ABl. 1992 C 340/1).

<sup>2</sup> The Treaty establishing the European Community (TEC) is based on the earlier EEC Treaty of 25 March 1957 (BGBl. 1957 II p. 766), amended by the Single European Act (SEA) of 28 February 1986 (BGBl. 1986 II p. 1104).

<sup>3</sup> Named after Maastricht in the Netherlands in which the Treaty was signed on 7 February 1992.

<sup>4</sup> These policy areas were trans-European networks, industrial policy, consumer protection, general and vocational education and youth and culture.

<sup>5</sup> Figures taken from *Große Hüttmann/Wehling*, in: *Das Europalexikon*, 2nd Edition, 2013,

<sup>6</sup> *Nettesheim*, in: *Oppermann/Classen/Nettesheim, Europarecht*, 4th Edition, 2009, § 7 para. 20.

<sup>7</sup> Typical of interference in an individual's private sphere is the so-called light-bulb ban.

<sup>8</sup> The Mission Letter to the First Vice-President, Frans Timmermans, can be downloaded from the Commission's website at [http://ec.europa.eu/commission/sites/cwt/files/commissioner\\_mission\\_letters/timmermans\\_en.pdf](http://ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/timmermans_en.pdf)

## 2 Subsidiarity as a necessity

The principle of subsidiarity (from lat. *subsidium* meaning help) was developed in 1571 by the Synod of Emden. Subsidiarity referred to an organisational system for the church, state and society which placed individual responsibility before government action. Only where the individual or the smallest organisational unit is unable to solve a problem, or lay down an appropriate regulation, are measures by central government justified. Today, the principle of subsidiarity has particular importance at communal level, for example in relation to child, youth and social welfare. Thus, the right to a place at nursery school for children under three<sup>9</sup>, issued by the German central government, is generally realised by independent or church-based organisations which receive appropriate support for this from the local authority.

In the EU, the socio-political principle of subsidiarity developed into an instrument to protect the Member States from the excessive use of European power. In the EU, legislative measures should still originate at local level wherever this will achieve a result at least equivalent to that which can be achieved by EU measures. In simple terms: "The EU should only concern itself with matters that it can regulate better than the Member States."<sup>10</sup>

### 2.1 Arguments in favour of the principle of subsidiarity

Economists have long concerned themselves with the question of how to distribute competences between the upper and lower levels of governmental organisation. They have developed theories for various areas of policy - regarding both democratically legitimised institutions and bureaucratic ones – which all indicate that the principle of subsidiarity gives rise to gains in efficiency.<sup>11</sup>

Thus Buchanan and Brennan were able to show, by way of their Leviathan model, that centralised fiscal policy is not based on public preferences but on achieving a tax policy which maximises revenues.<sup>12</sup> One possibility for limiting the power of (central) government, "the taming of the Leviathan", is to shift government fiscal policy to a less centralised level. Compliance with the principle of subsidiarity can weaken the (central) government's monopoly and, alongside possible constitutional restrictions – such as maximum rates of tax –, make fiscal policy more efficient, by e.g. granting lower levels of government – such as municipalities, cantons and regions – the power to make decisions on fiscal policy.

In addition to the merits of the principle of subsidiarity, economists have also examined the incentive systems in bureaucratic institutions using what is known as the "Economic Theory of Bureaucracy" and shown that government administrations continually grow and expand.<sup>13</sup> Thus Niskanen demonstrated, with his model, that bureaucrats carry out their duties in such a way as to maximise their own income, prestige, office facilities, staff and power.<sup>14</sup> Dollery and Hamburger

<sup>9</sup> The law on additional support for children under three in nursery schools and daycare (*Kinderförderungsgesetz, KiföG*, BGBl. I, page 250).

<sup>10</sup> Europa-Lexikon der Bundesregierung, last retrieved on 7 November 2014, available on the internet at <http://www.bundesregierung.de/Content/DE/Lexikon/EUGlossar/S/2005-11-16-subsidiaritaet.html>.

<sup>11</sup> For democratic institutions see e.g. *Buchanan/Brennan*, (1980) in: *The Power to Tax: Analytical Foundations of a Fiscal Constitution*. 1st Edition, Cambridge Univ. Press, Cambridge and for bureaucracies e.g. *Niskanen*, in: *Bureaucracy and representative governments*, in *American Political Science Review*, 1974, Vol. 68 No. 4.

<sup>12</sup> *Buchanan/Brennan*, (1980) in: *The Power to Tax: Analytical Foundations of a Fiscal Constitution*. 1st Edition, Cambridge Univ. Press, Cambridge.

<sup>13</sup> The economic theory is a part of new institutional economics. On this point see e.g. *Erlei, Leschke and Sauerland*, in: *Neue Institutionenökonomik*, 2007.

<sup>14</sup> *Niskanen*, in: *Bureaucracy and representative governments*, in *American Political Science Review*, 1974, Vol. 68 No. 4.

provided empirical support for Niskanen's model with data from Australia for 1982 to 1992.<sup>15</sup> Brandt and Svendsen apply the Economic Theory of Bureaucracy specifically to the European Union.<sup>16</sup> They show, in particular, that the strong institutional position of the Commission results in a steady growth in administration but, in order to correct this, they only recommend strengthening the European Parliament. No consideration is given to the fact that there is a distinction to be made between the two regulatory levels: on the one hand, central government consisting of the European Commission, European Parliament and the Council, whose legislation applies EU-wide<sup>17</sup>, and, on the other hand, the decentralised level of the individual Member States.

Once there is initial confirmation of the basic need for legislation, the question which then has to be answered is what are the arguments supporting either a centralised or a decentralised legislative approach.<sup>18</sup> Only then does the full potential of the principle of subsidiarity, and the need for effective subsidiarity monitoring, become apparent.

### 2.1.1 Arguments for centralised regulation

The literature generally refers to two main arguments in favour of centralised regulation or the centralised supply of public sector goods. These are, firstly, increased economies of scale and, secondly, the external trans-national impact.<sup>19</sup>

Increased economies of scale exist where goods are cheaper and can be supplied more efficiently at a centralised level than at a decentralised level. This is true, for example, of the Eurofighter.<sup>20</sup> As a result of the high development costs, Germany, the United Kingdom, Italy and Spain joined forces to develop and build the Eurofighter. This meant that the fixed costs could be divided up between more participants thus giving rise to lower average costs – i.e. more efficient supply. Although this example relates to the public sector supply of goods, increased economies of scale can also be used to justify centralised regulation because having EU-wide regulatory conditions, such as EU standards or EU-wide authorisation procedures, is also an important requirement for the use of increased economies of scale by companies.<sup>21</sup>

External impact arises, in the case of the EU, where the decisions of a Member State have positive or negative consequences for another uninvolved Member State where there is no market relationship. If for example a Member State decides to relax the rules on the emission of harmful gases, this has negative consequences for neighbouring states. Thus, such a negative external impact may justify centralised regulation.

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<sup>15</sup> *Dollery/Hamburger*, in: *Modelling Bureaucracy: The case of the Australian Federal Budget Sector 1982-1992*, Public Administration, 1996, Vol. 74, Issue 3, p. 477-507.

<sup>16</sup> Cf. *Brandt/Svendsen*, in: *Bureaucratic Rent-seeking in the European Union*, Working Paper University of South Denmark, 2003.

<sup>17</sup> Where legislation is passed as a Regulation, it applies directly in all Member States. Where, on the other hand, it is adopted as a Directive, it must first be transposed into national law.

<sup>18</sup> For a discussion on market versus government failure see e.g. *Fritsch*, in: *Marktversagen und Wirtschaftspolitik*, 2014.

<sup>19</sup> *Koch/Kullas*, in: *cepAnalysis Subsidiarität nach Lissabon – Scharfes Schwert oder stumpfe Klinge?*, 2010.

<sup>20</sup> *Koch/Kullas*, in: *cepAnalysis Subsidiarität nach Lissabon – Scharfes Schwert oder stumpfe Klinge?*, 2010, p. 19.

<sup>21</sup> Cf. e.g. *Nader/Reichert*, *cepPolicyBrief No.32/2013 on EU-wide dimensions for commercial vehicles or cepStandpunkt "Überarbeitung des Rechtsrahmens für Medizinprodukte"* in favour of uniform authorisation procedures for pharmaceutical products.

In addition to these two justifications, other reasons why centralised regulation may be preferable to decentralised regulation have been cited such as the danger of a regulatory "race to the bottom" which results in a worse solution than that which centralised regulation would have achieved.<sup>22</sup>

It is also argued that centralised regulatory authorities have greater expertise – in the form of manpower or experience for example – and, by comparison with decentralised regulatory authorities, are therefore able to deliver more targeted regulatory provisions.<sup>23</sup> Another argument is that centralised regulatory authorities are less susceptible to lobbyism and regulation at central level is therefore better able to achieve the regulatory objectives.<sup>24</sup>

It is not possible to determine conclusively, in this context, whether and to what extent the last three arguments are relevant to the institutional situation of the EU. There may be some areas in which they are relevant and others in which this is not the case. In addition, similar arguments are also put forward in favour of decentralised regulation.<sup>25</sup> However, increased economies of scale and the external impact constitute two powerful arguments in favour of – at least partially – centralised regulation.

### 2.1.2 Arguments for decentralised regulation

There are also two main arguments in favour of decentralised regulation or supply.<sup>26</sup> Firstly, the diverse values, cultures and traditions which exist at the decentralised level. Secondly, decentralised regulation may constitute a possibility for experimentation and thus form a component of competition.

A decentralised regulatory level such as that of the Member States is better able to take account of the local preferences of citizens and companies than a centralised regulatory level. In the case of heavy differences of opinion between the Member States on the form of regulatory conditions, in particular, the centralised regulatory level would have to undertake time-consuming measures to find a compromise. This would give rise either to results based on the lowest common denominator or, as a result of vote trading to achieve a majority during the political process, to additional regulatory conditions.<sup>27</sup>

Thus, disregarding the external impact and increased economies of scale, decentralised regulation produces more "citizen-centred" regulation. Particularly in areas in which the attitudes of Member States differ – such as legislation affecting the distribution or redeployment of income – decisions are better where they are made at the decentralised level due to the proximity to public preferences.<sup>28,29</sup>

The second argument considers decentral regulation to be a basis for competition between the different regulatory levels. The regulatory levels compete with each other for citizens and companies. Tailor-made regulations allow them to attract and keep companies and individuals. By contrast with the "race to the bottom" argument (see Section 2.1.1), here, regulatory competition is

<sup>22</sup> Cf. *Hahn/Layne-Farrar/Passel*, in: *Federalism and Regulation*, 2003.

<sup>23</sup> The same arguments in reverse are also used to support decentralised regulation. See Section 4.1.2.

<sup>24</sup> Cf. *Hahn/Layne-Farrar/Passel*, in: *Federalism and Regulation*, 2003.

<sup>25</sup> Cf. Chapter 2.1.2.

<sup>26</sup> Cf. *Hahn/Layne-Farrar/Passel*, in: *Federalism and Regulation*, 2003.

<sup>27</sup> For an explanation of vote trading see e.g. *J. S. Vosswinkel*, in: *Konstitutionelle Ökonomik und Wandel des fiskalischen Föderalismus in Deutschland*, 2011.

<sup>28</sup> Cf. *Czuratis/Sohn*, in: *cepPolicyBrief No. 20/2013* and *Hahn/Layne-Farrar/Passel*, in: *Federalism and Regulation*, 2003.

<sup>29</sup> This argument is well-known to academics as Oates' Decentralisation Theorem. *Oates*, in: *Fiscal federalism*, 1972.

not seen as automatically leading to lower quality regulatory conditions. Furthermore, regulatory competition is regarded as a process of discovery allowing successful regulations to be adapted by other decentralised regulatory levels.<sup>30</sup>

## 2.2 Subsidiarity in the European Treaties

Subsidiarity was as foreign a concept to the EEC Treaty of 1957 as it was to the Single European Act (SEA) of 1986. The principle of subsidiarity only gained entry into primary European law with the Maastricht Treaty of 1992. The provisions were revised in the Amsterdam (1997) and Lisbon (2009) Treaties.

### 2.2.1 Subsidiarity in the Maastricht Treaty (1992)

The principle of subsidiarity as set out in the Maastricht Treaty stated:

"In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far 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."<sup>31</sup>

Apart from this, the Treaty only contains the references to the fact that the Union intends to achieve its objectives in accordance with the principle of subsidiarity<sup>32</sup> and that "decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity".<sup>33</sup> Maastricht contains no further provisions on the principle of subsidiarity.

In 1993, aware that the provisions were very imprecise, the European Parliament, the Council and the Commission concluded an Interinstitutional Agreement containing the following rules.<sup>34</sup>

- Any proposal by the Commission must include a justification based on the principle of subsidiarity.
- Any amendment to the Commission's proposal must be accompanied by a justification based on the principle of subsidiarity.
- The three institutions regularly check that action envisaged complies with the provisions concerning subsidiarity as regards both content and the choice of legal instruments.

### 2.2.2 Subsidiarity under the Amsterdam Treaty (1997)

The Treaty of Amsterdam took on the wording of the Maastricht Treaty, albeit with new Article numbers<sup>35</sup>, and supplemented it with a Protocol on the Application of the Principles of Subsidiarity

<sup>30</sup> Cf. *Hayek*, in: *Der Wettbewerb als Entdeckungsverfahren*, 1968.

<sup>31</sup> Art. 3b TEC (Maastricht).

<sup>32</sup> Title I, Art. B (2) TEU (Maastricht).

<sup>33</sup> Preamble TEU (Maastricht).

<sup>34</sup> Interinstitutional Agreement between the European Parliament, the Council and the Commission on the procedures for implementing the principle of subsidiarity of 25 October 1993 (OJ C 329 of 6/12/1993, p. 135).

<sup>35</sup> Art. B TEU (Maastricht) became Art. 2 (2) TEU (Amsterdam) and Art. 3b TEC (Maastricht) became Art. 5 (2) TEC (Amsterdam).

and Proportionality.<sup>36</sup> The Protocol replaced the Interinstitutional Agreement. The Protocol took on the main provisions of the Interinstitutional Agreement and supplemented them, in particular, with the following provisions:

- The principle of subsidiarity provides a guideline on how to exercise powers at Community level. Subsidiarity is a dynamic concept.
- Community measures are only justified if both of the conditions of the principle of subsidiarity (see Section 2.2.1) have been met.

The Protocol also contained guidelines to be followed when examining whether the aforesaid requirements had been met:

- "The issue under consideration has trans-national aspects which cannot be satisfactorily regulated by action by Member States."
- Measures by Member States would conflict with the requirements of the Treaty or would otherwise significantly damage Member States' interests.
- Action at Community level will produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.
- Where the application of the principle of subsidiarity leads to no action being taken by the Community, Member States are required to take all appropriate measures to ensure fulfilment of their obligations under the Treaty and by abstaining from any measure which could jeopardise the attainment of the objectives of the Treaty.

Before submitting legislative proposals, the Commission was obliged, except in cases of particular urgency or confidentiality, to consult widely before proposing legislation and, wherever appropriate, publish consultation documents.

The European Parliament and the Council were each required to examine whether the Commission proposals, as well as any amendments made by the European Parliament and the Council, complied with the principle of subsidiarity.

### **2.2.3 Subsidiarity under the Lisbon Treaty (2009)**

Under the Lisbon Treaty, the provision concerning the principle of subsidiarity was not incorporated into the TFEU<sup>37</sup> as the successor to the TEC but moved to the TEU. In addition to this formal modification, a further change was made: The Protocol on the Application of the Principles of Subsidiarity and Proportionality was retained with the same title but the content underwent substantial changes. The elements determining whether legislation complies with the principle of subsidiarity were left out. This affected, in particular, the requirement that the issue concerned had to have a transnational aspect which could not be satisfactorily regulated by action by Member States.

On the other hand, the principle of subsidiarity was reinforced by the introduction of two monitoring methods.

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<sup>36</sup> Protocol (No. 30) on the Application of the Principles of Subsidiarity and Proportionality.

<sup>37</sup> The Treaty on the European Community was renamed as the Treaty on the Functioning of the European Union (TFEU).



### 2.2.3.1 Ex-ante monitoring by the national parliaments

Firstly, the national parliaments were granted a monitoring right. This states that the national parliaments are entitled to file a complaint on the basis of a possible breach of the principle of subsidiarity within eight weeks of transmission of a Commission draft. In this respect, bicameral parliaments have one vote for each chamber; parliaments with a single chamber have two votes.

Where complaints are filed by at least one third of the allocated votes (so-called "yellow card")<sup>38</sup> the Commission is obliged to review the draft legislation as to its compliance with the principle of subsidiarity. However, it is not obliged to withdraw or amend it. Where at least a simple majority of the allocated votes files a complaint against the proposal (so-called "orange card")<sup>39</sup> but the Commission chooses to maintain it, the European Parliament and the Council must review the proposal and vote on it. If at least 55 % of the members of the Council or a simple majority of the European Parliament agree with the complaints filed by the national parliaments, the proposal will not be given any further consideration (so-called "red card").

During the period from 2010 to 2014<sup>40</sup> national parliaments filed complaints for failure to comply with subsidiarity against 472 legislative proposals. In only two out of these 472 cases, however, did they achieve enough votes for a yellow card.<sup>41</sup> At no time did they achieve enough votes for an orange card.

### 2.2.3.2 Ex-post monitoring by way of an action in the ECJ

Secondly, national parliaments were granted the right to carry out ex-post monitoring by bringing an action in the European Court of Justice (ECJ). Any national parliament or, in the case of multi-cameral systems, any parliamentary chamber, has the right to bring an action in the ECJ for breach of the principle of subsidiarity.<sup>42</sup> An action for breach of the principle of subsidiarity is independent of a subsidiarity complaint. This is due to the distinction to be drawn between political and judicial monitoring.<sup>43</sup>

## 3 Reasons for the failure of current subsidiarity monitoring

The call from the President of the Commission, Jean-Claude Juncker, that Europe should be big on big things and small on small things ultimately amounts to no more than the desire for stricter compliance with the principle of subsidiarity. National issues should be handled by the Member States themselves, issues with a European element should be a matter for the EU. It may reasonably be assumed that the Commission will adhere to this and examine future legislative proposals for their compatibility with the principle of subsidiarity. However, the Member States should also continue to monitor compliance with the principle of subsidiarity and, in this regard, it is vital to improve the monitoring capabilities of the Member States.

<sup>38</sup> Where the number of Member States is 28, 56 votes are allocated. A third of the votes therefore means 19 votes are required.

<sup>39</sup> Where the number of Member States is 28, 56 votes are allocated. Half of the votes therefore means 28 votes are required.

<sup>40</sup> Source: Ipex Dynamic Database – EP Database (Protocol 2). Available at <http://www.ipex.eu/IPEXL-WEB/epdoc.do>. Status as of: 11/04/2014

<sup>41</sup> Stiftung Familienunternehmen in: Reform der Europäischen Union: Bereitschaft in den zehn größten Mitgliedstaaten.

<sup>42</sup> Art. 263 TFEU

<sup>43</sup> Koch/Kullas, in: cepAnalysis Subsidiarität nach Lissabon – Scharfes Schwert oder stumpfe Klinge?, March 2010, p. 8.

Because the small number of subsidiarity complaints filed in the last five years, and in particular the fact that there were only two yellow cards, casts doubt on the effectiveness of subsidiarity monitoring. This is especially true in view of the sometimes highly eurosceptic view of individual Member States who, during the election campaign in 2014, never tired of demanding the return of powers to national level, or at the very least, stricter compliance with the principle of subsidiarity.<sup>44</sup> The fact that there has certainly been cause for subsidiarity complaints has often been remarked upon. Thus – quite apart from the lack of competence, which cannot be the subject of an ex-ante complaint by national parliaments – a complaint should have been made to the proposal for a Directive on the introduction of quotas for female directors<sup>45</sup> due to a lack of a cross-border element.<sup>46</sup> Nevertheless, the required number of votes for a yellow card was never achieved.

The insufficient level of subsidiarity monitoring by national parliaments can be explained if one thinks of the institutional structure of the EU as a Principal and Agent relationship. The Principal-Agent Theory<sup>47</sup> examines relationships between Clients (Principals) and Contractors (Agents) where information is distributed asymmetrically such that the Agent has an informational advantage. In order not to have to carry out tasks itself, the Principal assigns tasks and decision-making powers to the Agent. Since the Agent generally also pursues its own objectives and the Principal does not exercise sufficient supervision over the implementation of tasks, there is a risk that the Agent will not complete the tasks assigned to it solely with the Principal's interests in mind.

In academic literature, the Principal-Agent theory is not only applied to economic but also to political relationships. In this case, the model is applied to the relationship between the Commission, national parliaments and citizens in order to explain why subsidiarity monitoring by national parliaments is so limited.<sup>48</sup>

Considering the theory in terms of the two-way relationship between the national parliaments and the Commission, the national parliaments represent the Principal because, by passing the European Treaties, they have empowered the Commission to act as their Agent in taking EU-wide legislative initiatives – subject to the proviso of subsidiarity.

This view falls short, however, when it comes to subsidiarity monitoring because it is, after all, the European citizens and voters who constitute the primary Principal. It is they who, by way of their votes, have mandated the national parliaments or their members to implement policy and it must be recognised that subsidiarity monitoring is carried out on their behalf.

This three-sided relationship between Commission, national parliaments and citizens – or the Principal-Agent-Agent model – clearly indicates the dilemma of effective subsidiarity monitoring at the level of the national parliaments. Since the national parliaments are not the primary Principal but Agents also pursuing their own interests which may well contradict the interests of the citizens, the national parliaments cannot necessarily be relied upon to provide effective subsidiarity monitoring. This is especially true where a subsidiarity complaint requires a majority of the MPs in

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<sup>44</sup> Stiftung Familienunternehmen in: Reform der Europäischen Union: Bereitschaft in den zehn größten Mitgliedstaaten.

<sup>45</sup> Commission Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures [COM(2012) 614].

<sup>46</sup> Cf. *Czuratis/Sohn*, in: cepPolicyBrief No. 51/2012.

<sup>47</sup> The Principal-Agent Theory goes back to the Economists Michael Jensen and William H. Meckling and their 1976 essay entitled "Theory of the firm: Managerial behaviour agency costs and ownership structure".

<sup>48</sup> Cf. Section 2.2.3 for a description of subsidiarity monitoring by national parliaments.

parliament or, depending on the national rule, in the respective committee<sup>49</sup>, because this majority is generally loyal to the government and therefore in a close relationship with the respective government. So, in matters of subsidiarity, it will only challenge the Commission's proposals in rare cases where this is appreciated by its government. Such incentives are weaker in bicameral systems, provided the second chamber does not have a similarly dependent relationship, but in principle they still exist. Since, for national parliaments, the will of the primary Principal is not the focus of the decision on whether or not to file a subsidiarity complaint, monitoring will be correspondingly rare.

This problem comes to the fore in particular where a national government wants to implement a specific regulation but expects to meet significant domestic political opposition. In such cases it is better for them to bring about regulation at EU level and push it through unobtrusively ("by the back door"). It can then channel public opposition towards the EU without bearing responsibility itself. National MPs in the majority parties will not challenge this *modus operandi* because, as already stated, they are in a close relationship with the government. Where the respective regulatory proposal gives rise to a breach of the principle of subsidiarity, the government majorities in the national parliaments also have no incentive to file a complaint against the breach.

The problem of negative incentives could be eliminated by leaving national governments out of the legislative process at EU level. There is, however, no political will for such a treaty change. Nevertheless, changes should be brought in at European and national level in order to enhance subsidiarity monitoring.

## 4 Requirements for effective subsidiarity monitoring

### 4.1 Requirements at EU level

#### 4.1.1 Early inclusion of national parliaments

The national parliaments should be included in the preparatory work on European legislative proposals. Before the Commission submits a legislative proposal, there are regular public consultations, Green Papers and White Papers which set out its aims in more or less clear terms. Although the outcome of consultations is not generally predetermined and there is usually an option to refrain from legislative action, the Commission does not carry out consultations in order to check whether planned proposals comply with the principle of subsidiarity. What it actually wants to know is whether the existing legal framework is still effective in dealing with the problem under consideration and/or whether those affected – usually representative organisations, companies and civil society – see a need for action. National parliaments are hardly involved, if at all, in this process. The Commission should therefore explicitly consult the national parliaments on subsidiarity at the consultation stage or prior to the submission of Green or White Papers and, if appropriate, desist from continuing with its proposal.

Although there is no formal legal draft statute at this early stage which could form the subject of a legal assessment, subsidiarity monitoring by national parliaments constitutes political rather than legal monitoring so that the national parliaments should already be involved at an early stage on the question of whether EU action is required at all or whether the stated aim could also be achieved with the means available to the Member States. This dialogue could take place regularly,

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<sup>49</sup> A summary of the various national rules is contained in: European Parliament, Directorate-General for the Presidency, Directorate for Relations with National Parliaments, Legislative Dialogue Unit "National Parliaments' internal procedures for subsidiarity checks" of 8 April 2013.

at least three months before submitting a consultation or a Green or White Paper, and in such a way that reduces the information deficit in the national parliaments. A possible alternative would be to expressly include the national parliaments in consultations and attach particular weight to their input. This would, in any case, help national parliaments to raise their awareness of subjects which they consider to be important. Following submission of a concrete proposal, they will then be able to decide on their position within the eight-week period for filing complaints.

**Requirement 1:** When preparing legislative proposals, the Commission must be obliged to consult with the national parliaments on whether its plans comply with the principle of subsidiarity.

#### 4.1.2 Continual inclusion of national parliaments

Early inclusion of national parliaments is not enough however. The best ex-ante monitoring is of little help if after the eight-week complaint period has expired, the European legislative organs – European Parliament and Council – can modify the Commission Proposal so that only then is it in breach the principle of subsidiarity. Although the European legislator must be given broad scope for discretion in deciding which concrete regulation it considers necessary, this must not be used as a way of circumventing subsidiarity monitoring.

To conclude that the eight-week time limit granted to the national parliaments is simply too short and therefore to call for an extension<sup>50</sup> is pointless because the national parliaments themselves state that the time limit is no problem. This was the result of a survey by the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC)<sup>51</sup>: 20 of the 32 surveyed parliaments/chambers said that they considered the eight-week time-limit to be sufficient.<sup>52</sup>

The circumvention of subsidiarity monitoring in the course of the legislative process can only be prevented by ensuring that national parliaments are able to file subsidiarity complaints throughout the entire European legislative process. National parliaments should create organisational structures to allow for continuous subsidiarity monitoring.

**Requirement 2:** National parliaments must have the right to monitor compliance with subsidiarity and file subsidiarity complaints throughout the entire legislative process.

#### 4.1.3 Improving judicial ex-post monitoring

Any national parliament can currently file an action with the ECJ for breach of the principle of subsidiarity after conclusion of the legislative process. In the past, concerns have been expressed about this possibility. The basis of the criticism was the ECJ's integration mandate enshrined under primary law. It ensures that the ECJ "tends towards centralisation and, as an organ of the European Union, bears responsibility for achieving ever closer union among the peoples of Europe".<sup>53</sup> Although this criticism comes from the time of the Nice Treaty which, under Article 5 TEU, obliges

<sup>50</sup> DBResearch, in: Zuschauer oder Schiedsrichter? Nationale Parlamente und das Subsidiaritätsprinzip im VIII. Europaparlament, p. 7.

<sup>51</sup> Reminder: During the period from 2010 to 2014 national parliaments filed subsidiarity complaints against 472 proposals. In only two of these did they achieve enough votes for a yellow card.

<sup>52</sup> Nineteenth Bi-annual Report: Developments in European Union and Practices Relevant to Parliamentary Scrutiny, 17.05.2013, p. 28 et seq.

<sup>53</sup> Gerken/Schick, in: Wege zur europäischen Verfassung I – Wer garantiert die Subsidiarität? Argumente zu Marktwirtschaft und Politik, No. 75, August 2003, p. 11.

the Court to exercise its "competences [...] in accordance with the Treaties", the idea of the Treaties was and still is the creation of ever closer Union among the peoples of Europe (Preamble of the TEU). Although the form of Article 5 TEU (Nice) was not adopted by the Lisbon Treaty, nevertheless the European Treaties today contain the assertion that the Union shall have an institutional framework which aims to promote its objectives (Art. 13 (1) TEU). The criticism is therefore still relevant.

It can be answered by setting up a specialised court whose remit is limited to examining compliance with the list of competences and the principle of subsidiarity. Thus interpretation of secondary law will remain with the ECJ. Only the sensitive area of restrictions on the exercise of powers is withdrawn from the ECJ. In order to achieve the greatest possible level of objectivity, this specialised court should contain at least some judges from national constitutional courts - where available.

**Requirement 3:** A specialised court must be set up to deal with matters of competency and subsidiarity and should contain at least some judges from national constitutional courts.

#### 4.1.4 Reintroduction of actionable assessment criteria

Although the monitoring rights of the national parliaments have been strengthened by adding the subsidiarity complaint and the action for breach of the principle of subsidiarity to the Protocol on the Application of the Principles of Subsidiarity and Proportionality, as amended by the Lisbon Treaty, this addition has been offset by the simultaneous removal of the criteria to determine when a legislative act complies with the principal of subsidiarity.<sup>54</sup> In particular, the removal of the criterion requiring the existence of a cross-border issue for EU legislation allows the Commission to claim that there has been compliance with the principle of subsidiarity in almost every case, even where the issue is purely domestic.

Furthermore, the abolition of the material requirements means that it is virtually impossible for the ECJ to effect judicial scrutiny in the context of an action for breach of the principle of subsidiarity. The ECJ will have to develop the requirements to be applied to the principle of subsidiarity by way of case law. Thus monitoring instruments risk becoming ineffective.

**Requirement 4:** The Protocol on the Application of Principles of Subsidiarity and Proportionality must be extended to include actionable subsidiarity criteria. These include, in particular, the condition that a cross-border issue exists.

## 4.2 Requirements at the level of the Member States

The four measures required at EU level will nevertheless be of no use if the Member States do not make a firm commitment to deal with subsidiarity issues. A voluntary undertaking by the national parliaments would be helpful in this respect. This also includes the necessity for national parliaments to get involved in subsidiarity monitoring<sup>55</sup> in advance of measures and express their views, in line with their national practices.

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<sup>54</sup> Section 2.2.1.

<sup>55</sup> See Requirement 1.

To ensure that the concerns of opposition parties about compliance with the principle of subsidiarity are not overruled by the parliamentary majority loyal to the government,<sup>56</sup> Member States should make subsidiarity complaints and actions based on subsidiarity into minority rights so that MPs in the opposition party are also able to take action. A vote of 25% or 33% of the MPs in parliament or the respective chamber would seem feasible.<sup>57</sup>

**Requirement 5:** The national parliaments must voluntarily undertake to carry out strict subsidiarity monitoring. Subsidiarity complaints and actions must be designed to be minority rights.

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<sup>56</sup> Regarding the problem of the majority loyal to the government see Section 3, p. 10 et seq.

<sup>57</sup> In Germany, the institution of subsidiarity actions can be demanded by a quarter of the MPs in the German Bundestag (Art. 23 (1a) Basic Law (GG), Section 93d Bundestag Rules of Internal Procedure (GO-BT). A simple majority is required for filing a subsidiarity complaint (Section 11 of the Act on the Exercise by the Bundestag and by the Bundesrat of their Responsibility for Integration in Matters concerning the European Union (IntVG) in conjunction with Sections 48 and 93c GO-BT).

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**Authors:**

RA Klaus-Dieter Sohn heads the Department for "EU Treaties and Institutions" at the Centrum für Europäische Politik.

Sebastian Czuratis is Policy Analyst in the Department for "EU Treaties and Institutions" at the Centrum für Europäische Politik.

**cep | Centrum für Europäische Politik**

Kaiser-Joseph-Strasse 266 | D-79098 Freiburg

Telephone +49 761 38693-0 | [www.cep.eu](http://www.cep.eu)

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