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# Pope Leo XIII's Legacy in European Union Law – The Origin and Practice of the Subsidiarity Principle in European Union Decision-Making

*The principle of subsidiarity, which also appeared in antiquity, was refined and perfected by the Catholic Church. The essence of the principle of subsidiarity is to ensure that decision-making takes place as close as possible to the individuals, thus avoiding unnecessary centralisation and encouraging effective decentralisation. The rationale behind this principle is the recognition that higher levels of government do not always have an adequate level of insight or understanding of local realities, and that decision-making should therefore be taken at the lowest possible level of authority to achieve the best quality of governance.*

*The principle of subsidiarity is a fundamental principle of the European Union's decision-making system. A return to subsidiarity can play an important role in the constitutional disputes that have been revived in recent years between national constitutional courts and the Court of Justice of the European Union. This paper analyses the evolution of the subsidiarity principle in EU decision-making and the institutions and procedures that are supposed to guarantee its application. By examining the political and legal enforceability of the principle of subsidiarity, the paper draws conclusions on the present state of the enforcement of the principle and makes some proposals for the future.*

**Keywords:** subsidiarity, European law, European Union, common European values, decision-making

## Introduction

The term subsidiarity derives from the Latin *subsidium*, which means help or assistance; accordingly, the word *subsidiarius* means to help out.<sup>2</sup> According to the Hungarian Catholic

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<sup>2</sup> TÓTFALUSI 2008.

Lexikon, the principle of subsidiarity is “one of the basic principles of Christian democracy, according to which what a given organisational level can solve, a higher level is not entitled to decide”.<sup>3</sup> The text adds that “higher levels of organisation are responsible for helping and supporting self-organisation and deciding on issues that clearly cannot be dealt with at local level”. The principle of subsidiarity in the social organisation and political sense can therefore be defined as “the principle that all decisions and implementation shall be taken at the lowest possible level, where the greatest expertise is available”.<sup>4</sup>

The principle of subsidiarity, although often not in a denominated form, has been present in the organisation of human society for thousands of years as a model for the division of labour in government. We need only recall Aristotle’s insight that the right of ancient Greek polis extended as long as they *assisted* their citizens in the performance of their duties. Saint Thomas Aquinas attributed the effectiveness of decision-making in medieval Italian city-states, among other things, to the fact that it was carried out at a level close to the citizens.<sup>5</sup>

Despite the evolution and changes in civilisations, some elements of social organisation stand the test of time. The subsidiarity principle therefore plays a fundamental role in EU decision-making. This paper attempts to present the evolution of the subsidiarity principle in the European Union’s decision-making process, focusing on the institutions and procedures that are intended to guarantee the application of the principle.

## The ecclesiastical implications of the subsidiarity principle

Three pillars are traditionally identified as the foundations of a common European culture: Greek philosophy, Roman law and Christian ethics.<sup>6</sup> A pillar-based illustration also appears in the Maastricht Treaty, which entered into force in 1993, and also organised the structure of the European Union into three pillars. Strangely enough, the principle of subsidiarity is embedded in both pillar structures, figuratively speaking at the intersection of these two pillar systems. From the analysis below, it is clear that both the Roman Catholic Church and the European Union have discovered that subsidiarity is a natural and effective principle that may serve as a rule of thumb in the operation of extensive and complex decision-making structures.

Pope Leo XIII’s 1891 encyclical *Rerum novarum* (RN) addressed the social problems of the working class in the wake of the industrial revolutions. One of the starting points of the encyclical is that “men precedes the State”, therefore mankind’s care for themselves cannot be entirely transferred to the State. In this light, paragraphs 10 and 11 of the encyclical present the relations between the family as a natural community and the state as an artificial structure, emphasising that state intervention and assistance

<sup>3</sup> See: <http://lexikon.katolikus.hu/S/szubszidiaritás.html>

<sup>4</sup> See: <https://idegen-szavak.hu/szubszidiarit%C3%A1s>

<sup>5</sup> VARGA 2016.

<sup>6</sup> ZLINSZKY 2009: 127–132.



can only play a secondary role in the functioning of the family community based on paternal authority. According to Leo XIII, excessive state interference in family life is against the natural law, as it necessarily destroys the unity of the family. Although the encyclical does not explicitly use the principle of subsidiarity as a term, it expresses it in its meaning by qualifying the intervention of State power as complementary to the autonomy of natural communities.

However, in the encyclical of Pope Pius XI, *Quadragesimo anno* (QA), the principle of subsidiarity is already explicitly mentioned. The encyclical, published in 1931, also dealt with social issues, and was also relevant to the specific historical events of the time: the Great Depression of 1929 and the beginning of the rise of totalitarian ideas. The encyclical is based on an appreciation and further development of *Rerum novarum* and states the principle of subsidiarity in accordance with the social order set out therein. The thought expressed in paragraph 79 of the encyclical reads:

“As history abundantly proves, it is true that, on account of changed conditions, many things that were done by small associations in former times cannot be done now save by large associations. Still, that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organisations can do. For every social activity ought, of its very nature, to furnish help to the members of the body social, and never destroy and absorb them.”

From the quoted sentence, one can clearly see the parallel with the ideas of the encyclical forty years earlier, which analysed the relationship between the family and the State. Pius XI, however, abstracts Leo XIII's ideas and posits the principle of subsidiarity in two sets of relations: one between individuals and other communities, and the other between lower and higher communities. Subsidiarity therefore underpins the right and duty of self-support in these relations; and the principle of assistance in situations where self-support would not be sufficient.<sup>7</sup>

The principle of subsidiarity is then further elaborated in paragraph 80 of the encyclical, in terms of the effectiveness of state operation. “The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully and effectively do all those things that belong to it alone, because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands.”

Pope John XXIII also reflects on the principle of subsidiarity in chapter III of his 1961 encyclical *Mater et magistra*. Even so, the encyclical of John Paul II, *Centesimus annus*, written to commemorate the centenary of the publication of the *Rerum novarum*, also recalls the importance of the principle of subsidiarity, juxtaposing it with the principle of solidarity.

<sup>7</sup> OCKENFELS 1994: 66.



The principle of subsidiarity in the Roman Catholic Church can thus be traced back to Leo XIII and Pius XI. However, as the introduction to this paper suggests, this does not mean that the Church has developed the principle of subsidiarity without any precedent. Its role is indisputable, however, in not only rediscovering the principle, but also in consistently refining and abstracting its content.

In the light of the above, the principle of subsidiarity is therefore an organisational principle in which the role of the higher social level is to assist the lower social level, which is capable of organising itself. The principle serves the common good, but it takes a different approach than the classical theory of the welfare society. The latter seeks the most active role possible for the state, which necessarily runs counter to the idea of the primacy of self-care.<sup>8</sup> This does not mean, of course, that the concept of the welfare state is unviable, but the principle of subsidiarity claims that an effective state will play a role only in areas where it is absolutely necessary.

## The emergence of the subsidiarity principle in European integration

### *Soft-law*

The European integration process has taken the principle of subsidiarity from the domain of ecclesiology.<sup>9</sup> The political, power-technical meaning of the principle, however, is not based on the social concept of self-support, but is a kind of vertical division of power between the decision-making levels of the Community and the Member States.<sup>10</sup> In 1971, former European Commissioner Ralf Dahrendorf, criticising the over-bureaucratic nature of the Community, argued that Europe should move away from the dogma of harmonisation and towards the principle of subsidiarity.<sup>11</sup> Subsequently, the Tindemans Report, named after former Belgian prime minister, published in 1975, also expressed the need for a more people-oriented Europe, although it did not root from the classical subsidiarity principle, rather saw the key to a more effective functioning in the expansion of the powers of the EU institutions.<sup>12</sup>

### *The Single European Act*

After the soft-law precedents, the principle of subsidiarity first appeared in Article 130r(4) of the Single European Act, which entered into force in 1987.<sup>13</sup> This provision only appeared in relation to a narrower field: environmental policy. It stated that the

<sup>8</sup> NOVITZKY s. a.

<sup>9</sup> SZÖKE-KIS 2020: 27.

<sup>10</sup> SCHILLING 1995.

<sup>11</sup> CAROZZA 1997: 38, 50.

<sup>12</sup> TINDEMANS 1976.

<sup>13</sup> Single European Act. OJ L 169, 29/06/1987: 1–28.



Community would take action in this field only to the extent to which the objectives can be attained better at Community level than at the level of the individual Member States. This provision is clearly based on the essence of the principle of subsidiarity, setting up a rule of thumb for the way in which powers are shared between the Community and the Member States.

### *The Maastricht Treaty and the conclusions of the Edinburgh meeting of the European Council*

The Single European Act has not yet codified the subsidiarity clause as a general principle of law, but merely as a rule for environmental policy. The first general declaration of the principle of subsidiarity covering EU decision-making as a whole was made in the Maastricht Treaty, signed in 1992.<sup>14</sup> Article A(2) of Title I of the Treaty establishing the European Union states that it “marks a new stage in the process of creating an ever-closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen”. According to Article B(2) of the Treaty, the objectives of the Union are to be achieved while respecting the principle of subsidiarity”. This provision is reflected in Article 3b of the Treaty, which was inserted into the Treaty establishing the European Community through Article G(5). It states that “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 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”. Linked to this is the restrictive provision in the next paragraph, which states that: “Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.”

In the conclusions made in relation to the European Council meeting held in Edinburgh in 1992, the Heads of States and Governments stressed the importance of the principle of subsidiarity and called for the conclusion of an interinstitutional agreement between the Council, the European Parliament and the Commission to ensure its effective application.<sup>15</sup> According to Annex I to Part ‘A’ of the conclusions of the Presidency on the practical application of the subsidiarity principle, in areas which do not fall within the exclusive competence of the Community, the Community has to answer two questions when planning a decision: “should the Community act?” and, if so, “what should be the intensity or nature of the Community’s action?”. Paragraph 4 of said Annex also suggests a number of practical considerations for the institutions in order to apply the subsidiarity principle more effectively.

Among other things, the European Council points out in principle that it is the responsibility of each institution to enforce the principle of subsidiarity without upsetting the balance between the institutions. It also states that the principle of subsidiarity

<sup>14</sup> Maastricht Treaty. OJ C 191, 29/07/1992: 1-112.

<sup>15</sup> Conclusions of the Presidency 1992.



may not call into question the powers conferred on the Community by the Treaties or the case law of the Court of Justice of the European Union (CJEU), but should serve as a guide to their proper exercise at Community level. Finally, it also states that the application of the subsidiarity principle cannot undermine the primacy of EU law. However, the European Council also stated that the principle of subsidiarity is a “dynamic concept” that not only allows for the reduction and cessation of Community action, but also for its extension when circumstances require.

The conclusions of the European Council also point out that, where the subsidiarity principle precludes Community legislation, Member States are obliged to take the necessary measures to fulfil their obligations under the Treaties. According to the conclusions, although Article 3b, which refers to the subsidiarity principle, does not have direct effect, the Court of Justice of the European Union is empowered to review the application of the principle within the framework of the Treaty. Finally, the conclusions also state that the more specific the nature of a Treaty requirement, the less scope exists for applying subsidiarity, which functions as a general rule.

It is worth pointing out, however, that under the wording of the Maastricht Treaty, the exclusive and shared competences of the Union were not as clearly delimited as they are in the Lisbon Treaty. Indeed, Article 3 of the Maastricht Treaty lists the “activities of the Community” without classifying them into types of competence. A good example of the difficulty of delimitation is the internal market, where, according to the Commission’s assessment, a dynamic approach is also needed in the application of the subsidiarity principle, given the difficulties in distinguishing between basic operation and complementary rules and the constant evolution of the internal market.<sup>16</sup> The Commission also pointed out that the application of the subsidiarity principle should not result in stagnation in the development of the Community, and therefore also stressed the need for an interinstitutional agreement.<sup>17</sup>

### *Protocol annexed to the Treaty of Amsterdam*

The next step in the application of the subsidiarity principle was the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty of Amsterdam, signed in 1997. In its preamble, the Protocol refers back to the conclusions of the European Council meeting in Edinburgh, and summarises the relevant provisions in 13 points in order to confirm them. The provisions of the Protocol partly cover the findings of the Council conclusions, but also introduce a number of new elements.

Thus, according to point 4 of the Protocol, “For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators”. This finding remains true in the EU legislation process, and somewhat counterbalances the European Council’s

<sup>16</sup> Conclusions of the Presidency 1992: 121.

<sup>17</sup> Commission of the European Communities 1992: 117–119.



conclusions that the applicability of the subsidiarity principle is limited when specific legal bases are applied. This is a welcome development, as the principle of subsidiarity was already a general principle in the previous Article 3b, and not a provision that could be ignored or narrowed down. The Protocol therefore makes it clear that the subsidiarity principle is not just an ancillary principle in EU law-making.

Point 5 of the Protocol sets out a practical yardstick for the EU legislator: a Community action is justified if it satisfies two criteria: “the objectives of the proposed action cannot be sufficiently achieved by Member States’ action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.” To determine these, it is necessary to consider, firstly, whether the issue under consideration concerns several Member States; secondly, whether the possible actions by Member States alone or lack of Community action would conflict with the requirements of the Treaties; and thirdly, whether the action at Community level would produce clear benefits.

The Protocol also draws attention to the need to respect the principles of simplicity, necessity and proportionality in Community legislation, which also implies that Community legislation must leave as much scope as possible for national legislation. The Protocol requires the Commission to consult before proposing legislation and to report annually on the application of Article 3b.

## *The Constitutional Treaty*

The Treaty establishing a Constitution for Europe was signed in Rome in October 2004, but could not enter into force because of the outcome of referendums in France and the Netherlands.<sup>18</sup> The Constitutional Treaty would have included several provisions on the principle of subsidiarity, in addition to a number of reform measures. Article I-11(1) of the Treaty referred to the principle of subsidiarity directly alongside the principle of conferral, considering these two principles to be of equal weight, also symbolically. This is also appropriate from a systemic point of view, as it confirms the principle of subsidiarity as a general principle governing the whole functioning of the Union. After defining the principle of subsidiarity in the same terms as in the Maastricht Treaty, the Constitutional Treaty also stipulated that 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”. This Protocol would thus have established a system of guarantees for the application of the subsidiarity principle, in accordance with Article I-18(2) of the Constitutional Treaty, with the broad involvement of national parliaments. However, due to the failure of the Constitutional Treaty, the provisions of this Protocol will be discussed in the next chapter of the paper, in the context of the changes brought about by the Lisbon Treaty, given that the text of the Protocol annexed to it is almost identical in content to that of the Protocol annexed to the Constitutional Treaty.

<sup>18</sup> Treaty Establishing the Constitution of Europe 2004. OJ C 310, 16/12/2004: 1–474.





## *The Lisbon Treaty*

Member States have implemented the reforms foreseen in the Constitutional Treaty by the Lisbon Treaty,<sup>19</sup> signed in 2007, which retained around eighty percent of the provisions of the Constitutional Treaty.<sup>20</sup> Article 5 of the Treaty on European Union<sup>21</sup> (TEU), as amended by the Lisbon Treaty, deals with the principle of subsidiarity, building on the provisions of Article 3b introduced by the Maastricht Treaty. The Lisbon Treaty has not changed the definition of subsidiarity as described above, so the current Treaty reads it as follows: “in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.” The principle of subsidiarity is logically complemented by the principle of proportionality enshrined in Article 5(4) TEU, which states that “the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties”.

The second sentence of Article 5(3) TEU provides the legal basis for the subsidiarity control procedure. It says that 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 procedure set out in that Protocol.” In addition, Article 12(b) TEU underlines that national parliaments contribute to the good functioning of the Union by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol.

The fact that the contracting Member States have chosen the protocol form for the establishment of the subsidiarity control mechanism does not make the provisions of the Protocol subordinate to those of the TEU, as the Protocols annexed to the Treaties share the status of the Treaties pursuant to Article 51 TEU, meaning that they are binding primary sources of EU law.<sup>22</sup> The next chapter of this paper describes the procedures described in the Protocol that enable the application of subsidiarity to be monitored.

## *Provisions of Protocol (No 2)*

### *The yellow card and orange card procedures*

As mentioned above, the Protocol on the application of the principles of subsidiarity and proportionality was originally intended to be annexed to the Constitutional Treaty, but was added to the Lisbon Treaty with virtually unchanged substantive content. The provisions of the Protocol not only confirm those of the Protocol of the same name annexed to the Treaty of Amsterdam, but also give national parliaments quite extensive powers,

<sup>19</sup> OJ C 306, 17.12.2007: 13–390. Treaty of Lisbon 2007.

<sup>20</sup> DIENES-OEHM et al. 2014: 123.

<sup>21</sup> OJ C 326, 26/10/2012: 13–390.

<sup>22</sup> KENDE et al. 2018: 459.





in line with the provisions of the TEU quoted above. Under Article 2 of the Protocol, the Commission is required to consult before proposing legislative acts, and may only depart from this obligation in cases of exceptional urgency and including a justification. The Commission must then not only send the legislative proposal to the EU legislature but also to national parliaments at the same time. Article 4 adds that the “Council shall forward draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank and amended drafts to national Parliaments”.

Under Article 5 of the Protocol, “draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality”. By this provision, the principle of subsidiarity has indeed evolved into a horizontal rule of general application. Justification must be accompanied by impact assessments and qualitative and, where possible, quantitative indicators to demonstrate that the objective of the proposed action can be better achieved at Community level than at lower legislative levels.

Under Article 6 of the Protocol, any national parliament or any chamber of a national parliament may, within eight weeks from the date of transmission of a draft legislative act, send a reasoned opinion to the Presidents of the European Parliament, the Council and the Commission. In these, the Parliament (chamber) explains why it considers that the respective draft act does not comply with the principle of subsidiarity. The President of the Council shall ensure that, where the draft act was not initiated by the Commission, the reasoned opinion is forwarded to the initiating institution or a group of Member States. Reasoned opinions sent by Parliaments (chambers) must be taken into account by the co-legislators and the Commission (or the institution that submitted the draft), in accordance with Article 7 of the Protocol. A voting system is used to analyse the opinions. Each national parliament has two votes, in the case of a bicameral parliamentary system, each of the two chambers has one vote. The Protocol establishes two types of procedure, known as the yellow card and orange card procedures.<sup>23</sup>

The yellow card procedure is carried out in the following manner. Where reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national parliaments (chambers), the draft must be reviewed. This threshold is one quarter in the case of a draft legislative act submitted on the basis of Article 76 of the Treaty on the Functioning of the European Union<sup>24</sup> in the area of freedom, security and justice. After such a review, the Commission (or the initiator of the act concerned) can make one of three decisions, either to maintain, amend or withdraw the draft, with the obligation to give reasons for the decision.

The orange card procedure applies to drafts to be adopted under the ordinary legislative procedure. Where reasoned opinions on a draft for a legislative act represent at least a simple majority of the votes allocated to the national parliaments (chambers), the proposal must be reviewed. After the review, the Commission has the option to withdraw, amend or maintain the draft, as in the yellow card procedure. However, if it decides to maintain the draft, the justification (together with the reasoned opinions of

<sup>23</sup> BÓKA et al. 2019: 244.

<sup>24</sup> OJ C 202, 07.06.2016: 47–360.



the national parliaments) must be submitted to the EU legislature (the European Parliament and the Council). The legislator is obliged to examine the draft before concluding the first reading of the legislative procedure, taking the opinions of the Commission and the national parliaments (chambers) into account. If the majority position in the legislative institutions (a majority of the votes cast in the European Parliament or a majority of 55% of the members of the Council) is that the proposal is not compatible with the principle of subsidiarity, the proposal cannot be given further consideration. According to the Hungarian Parliament's Rules of Procedure, the European Affairs Committee is responsible for the role of the subsidiarity control to be carried out by national parliaments.<sup>25</sup>

By June 2021, there had been only three yellow card procedures. The Commission's 2012 Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (the so-called "Monti II Regulation") received 19 votes against.<sup>26</sup> Although the Commission did not raise any concerns following the review, it later withdrew the draft,<sup>27</sup> claiming that the proposal lacked the necessary political support to be adopted.<sup>28</sup> Then, in 2013, 18 national parliaments (chambers) considered that the Commission's proposal for a regulation establishing a European Public Prosecutor's Office violated the principle of subsidiarity.<sup>29</sup> In this case, the Commission also did not recognise a breach of the principle and, therefore, maintained the proposal.<sup>30</sup> The third yellow card was issued in 2016 by 14 parliaments (chambers) on the draft amendment to the Posted Workers Directive.<sup>31</sup> However, the Commission did not find the proposal to be in breach of the subsidiarity principle either, and it was left unchanged after the review.<sup>32</sup> Moreover, there has not been a single orange card procedure so far.

As can be seen from the above, national parliaments (and chambers) cannot directly secure the mandatory withdrawal of a proposal they consider to be in breach of the subsidiarity principle, neither in the yellow card nor in the orange card procedure. As a result, the Treaty change package preceding the referendum on the UK's exit from the EU included a draft red card procedure, whereby the EU legislature would have been obliged to reject the draft or remedy its shortcomings if the number of votes in national parliaments (chambers) was equal to at least 55%.<sup>33</sup> However, the Brexit referendum in 2016 has led to a break in negotiations on elements of the Treaty change package.

Two other aspects of the evaluation of the provisions of the Protocol are worth highlighting. On the one hand, the subsidiarity control established under the Protocol does not mean that all measures envisaged in the field of secondary EU law must be subject to subsidiarity control. The provisions of the Protocol consistently limit this obligation to

<sup>25</sup> Parliamentary Decision No 10/2014 (24.II.), Sections 142–143.

<sup>26</sup> COM(2012) 130 final.

<sup>27</sup> OJ C 109, 16/04/2013: 7.

<sup>28</sup> Letter from President Barroso to Martin Schulz, President of the European Parliament, Brussels, 12 September 2012.

<sup>29</sup> COM(2013) 534 final.

<sup>30</sup> COM(2013) 851 final.

<sup>31</sup> COM(2016) 128 final.

<sup>32</sup> COM(2016) 505 final.

<sup>33</sup> BÓKA et al. 2019: 244.



legislative acts, therefore, implementing and delegated acts are not affected. The Commission has nevertheless indicated that it is open to stricter scrutiny of non-legislative acts regarding the enforcement of subsidiarity and proportionality.<sup>34</sup>

On the other hand, despite its name, the Protocol only allows subsidiarity to be examined, but not proportionality. However, these two principles are considered closely intertwined in both EU primary law and the Protocol, it is therefore difficult to understand why the explicit possibility of scrutinising proportionality is missing from the national parliaments' toolbox, as some authors point out.<sup>35</sup>

## The possibility of judicial review

Following the above introduction to the political control of subsidiarity, the question may arise as to whether a Member State can request the annulment of an EU act on the grounds that it violates the principle of subsidiarity. In order to answer this question, it is necessary to examine whether the infringement of the principle of subsidiarity can be classified under one of the grounds for annulment listed in Article 263 TFEU (lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any provision of law relating to their application or misuse of powers).

On this point, Article 8 of the Protocol states that 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". The Court of Justice also has jurisdiction to rule on actions "notified by Member States in accordance with their legal order on behalf of their national Parliament or a chamber thereof". Finally, it should be noted that Article 8 of the Protocol also confers on the Committee of the Regions the right to bring an action "against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted".

According to the Act on the National Assembly of Hungary, "the National Assembly may initiate, within one month of the publication of the legislative act of the European Union in the Official Journal of the European Union, that the Government brings, in accordance with Article 263 TFEU, an action before the Court of Justice of the European Union on grounds of infringement of the principle of subsidiarity by the legislative act of the European Union".<sup>36</sup> On the basis of this initiative, the Government shall bring the action, which shall be notified to the National Assembly.

As a preliminary point, it can be noted that, just as in the case of political control of EU legislation, there is the same phenomenon in terms of legal control: the wording of Article 8 of the Protocol only provides for a possibility of action for compliance with the principle of subsidiarity, but not for breach of proportionality. However, this does not limit the possibility of bringing an action for breach of the proportionality principle:

<sup>34</sup> COM(2019) 333 final.

<sup>35</sup> WEATHERILL 2005: 23–41.

<sup>36</sup> Act XXXVI of 2012, Section 71, paragraph 3.



there have been a number of cases before the CJEU in which the parties have challenged the proportionality of an EU act.<sup>37</sup>

However, the CJEU's relevant jurisprudence provides the institutions with a fairly wide margin of discretion in assessing compliance with the subsidiarity (and proportionality) principle.<sup>38</sup> In *Case C-84/94*, for example, the applicants unsuccessfully argued that the EU legislator had breached the principle of proportionality (and thus subsidiarity) in adopting a directive requiring minimum harmonisation.<sup>39</sup> The compliance of a directive with the principle of subsidiarity was also at issue in *Case C-233/94*, in which the CJEU held that where the recitals of a directive show that the EU legislature has taken account of the principle of subsidiarity in its action, this is sufficient to justify the application of the principle.<sup>40</sup>

In a more recent case *C-547/14*, the applicants again unsuccessfully invoked a breach of the principle of subsidiarity on the issue that the protection of human health can be better achieved at national level. The CJEU confirmed its previous position, stating that in applying the principle of subsidiarity: "*Court must determine whether the EU legislature was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at EU level.*"<sup>41</sup> In this judgment, the CJEU also clarified that, of the subsidiarity scrutiny procedures mentioned in the Protocol, scrutiny by national parliaments is of a primary, political nature; whereas scrutiny by the CJEU is of a secondary, legal nature.<sup>42</sup>

In its judgment in *Case C-128/17*, the CJEU confirmed the wide margin of appreciation of the EU legislature in the assessment of subsidiarity and proportionality, adding that the only factor to be examined in assessing whether there has been a breach of the proportionality principle is whether the EU legislature has made any manifest error.<sup>43</sup> Further widening the scope of the institutions' discretion, the CJEU ruled in *Case C-482/17* that "not carrying out an impact assessment cannot be regarded as a breach of the principle of proportionality where the EU legislature is in a particular situation requiring it to be dispensed with and has sufficient information enabling it to assess the proportionality of an adopted measure".<sup>44</sup> These judgments show that the CJEU's case law consistently prioritises the protection of the institutions' freedom of discretion in the matter of subsidiarity control, and limits its own procedure to formal rather than substantive review.

At this point, two further comments are to be made. On the one hand, under the provisions of the Protocol, private individuals cannot bring actions before the CJEU for

<sup>37</sup> See: *Case C-128/17, Poland v. Parliament and Council*, EU:C:2019:194, paragraph 94 and the case law cited therein.

<sup>38</sup> BÓKA et al. 2019: 245.

<sup>39</sup> *Case C-84/94, United Kingdom of Great Britain and Northern Ireland v. Council of the European Union*, ECLI:EU:C:1996:431.

<sup>40</sup> *Case C-233/94, Federal Republic of Germany v. The European Parliament and the Council of the European Union*, ECLI:EU:C:1997:231, paragraphs 22–29.

<sup>41</sup> *Case C-547/14, Philip Morris Brands SARL and Others v. Secretary of State for Health*, ECLI:EU:C:2016:325, paragraph 218.

<sup>42</sup> ECLI:EU:C:2016:325, paragraphs 216–217.

<sup>43</sup> *Case C-128/17, Commission v. European Parliament and Council*, EU:C:2019:194, paragraph 96.

<sup>44</sup> *Case C-482/17, Czech Republic v. European Parliament and Council*, EU:C:2019:1035, paragraph 85.



breach of the principle of subsidiarity, although under Article 263 TFEU private individuals could also bring actions before the Court of Justice under certain circumstances. In this respect, the CJEU ruled in *Case T-429/05* that the rules on the competences of the Union (and any infringement thereof) do not create rights for private individuals,<sup>45</sup> thus excluding their possibility to bring actions in these matters.

In addition, some authors argue that the proportionality test could offer a more promising solution than the subsidiarity test in deciding questions of competence, given that it is common practice in EU disputes.<sup>46</sup> However, as with the examination of the application of the subsidiarity principle, the CJEU also limits its powers in these cases to examining manifest procedural errors, misuse of powers and abuse of discretion.<sup>47</sup> The wide discretion of the EU legislature is consistently confirmed by these judgments, particularly in relation to issues arising from political value choices.<sup>48</sup> It can therefore be concluded that the CJEU's definition of its own powers is similarly narrow in the scrutiny of both subsidiarity and proportionality, and while respecting the wide discretion of the EU legislature, it focuses on procedural issues instead.

## Subsidiarity in practice: measures taken by EU institutions and their analysis

The previous chapters described the subsidiarity principle and its enforceability in EU legislation. Below, the measures and mechanisms used by the institutions are examined, in particular the Commission, to implement the subsidiarity principle.

### *The 'Doing Less, More Efficiently' Task Force*

It has already been mentioned above that the Council conclusions accompanying the adoption of the Maastricht Treaty foresaw that the EU institutions would lay down quality legislative criteria to give effect to the principle of subsidiarity in an interinstitutional agreement. This was the basis for the 1993 interinstitutional agreement,<sup>49</sup> the 2003 agreement<sup>50</sup> and the current interinstitutional agreement issued in 2016, still in force.<sup>51</sup>

In 2017, marking the 60<sup>th</sup> anniversary of signing the Treaties of Rome, the Commission published a White Paper outlining five possible scenarios for the future of Europe. The fourth scenario, titled '*Doing Less, More Efficiently*,' envisages a Europe in which "what

<sup>45</sup> Case T-429/05, *Artogodan v. Commission*, EU:T:2010:60, paragraph 75.

<sup>46</sup> DAVIES 2006: 66.

<sup>47</sup> Case T-429/05, *Artogodan v. Commission*, EU:T:2010:60, paragraph 95.

<sup>48</sup> *Joined Cases C-643/15 and C-647/15, Slovakia and Hungary v. Council*, EU:C:2017:631, paragraph 206.

<sup>49</sup> OJ C 329, 06/12/1993: 135.

<sup>50</sup> OJ C 321, 31/12/2003: 1–5.

<sup>51</sup> OJ L 123, 12/05/2016: 1–14.



is handled at EU27, national and regional level” is better separated to focus limited resources more effectively.<sup>52</sup>

It was in this spirit that Commission President Jean-Claude Juncker set up the ‘Doing Less, More Efficiently’ Task Force in November 2017. The aim of the Task Force was “making recommendations on how to better apply the principles of subsidiarity and proportionality, identifying policy areas where work could be re-delegated or definitely returned to Member States, as well as ways to better involve regional and local authorities in EU policy making and delivery”.<sup>53</sup> It was chaired by the First Vice-President of the Commission in charge of Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights, and composed of members from national parliaments and the Committee of the Regions. The European Parliament could originally have delegated three members to the Task Force, but the European Parliament did not join the initiative, so the Task Force was composed of six members, including the President.<sup>54</sup>

The Task Force met regularly between January and July 2018, culminating in the final report published in July.<sup>55</sup> The report shows that the Task Force focused on three main issues:

- improving the application of the principles of subsidiarity and proportionality in the work of EU institutions
- identifying policy areas where some or all of the decision-making and implementation can be returned to Member States over time
- identifying policies that could be partly or fully transferred back to the competence of the Member States

The report made nine recommendations to make the subsidiarity principle more effective. The Task Force pointed to a problem already outlined in the case law of the CJEU: the institutions had a separate working method for monitoring compliance with subsidiarity. To this end, the final report recommended a uniform model assessment grid for all institutions, to allow for a detailed audit. The report also raised the issue of extending the eight-week period for national parliaments to examine subsidiarity to twelve weeks, which could lead to a more informed scrutiny and wider consultation. It also drew attention to the importance of closer cooperation between regional and national parliaments and local authorities, which it called “active subsidiarity”.

### *The practical implications of the Task Force report*

The final report of the Task Force was reflected in the Commission’s October 2018 Communication on strengthening the role of subsidiarity and proportionality.<sup>56</sup> It stressed the importance of the principles of subsidiarity and proportionality in the creation of

<sup>52</sup> White Paper on the Future of Europe. COM(2017) 2025 final.

<sup>53</sup> European Commission 2017.

<sup>54</sup> European Commission 2018a.

<sup>55</sup> European Commission 2018b.

<sup>56</sup> COM(2018) 703 final.





better EU regulations. In the Communication, the Commission foresees using the model assessment grid developed by the Task Force and amending its guidelines on better regulation accordingly.<sup>57</sup>

The Commission's subsidiarity toolbox also included the REFIT system, which was operated from 2015 to 2019 under its better regulation agenda.<sup>58</sup> REFIT was set up by the Commission as a platform to make EU legislation more effective and fit for purpose.<sup>59</sup> In the framework of REFIT, the Commission identified areas where the EU has used regulatory systems that are unduly complex and overly burdensome for legal entities. To ensure transparency, the Commission also publishes an annual scoreboard of the results achieved through REFIT, broken down by the different regulatory areas. In its 2019 Report,<sup>60</sup> the Commission explained that, after developing the successor to the REFIT platform, greater emphasis would be placed on the verifiability of subsidiarity and proportionality.

The Commission also updated the *Better Regulation Toolbox*,<sup>61</sup> a 540-page system linked to the *Better regulation Guidelines*,<sup>62</sup> introduced in 2017, following the recommendations of the Task Force on the verifiability of the subsidiarity principle. The former system was replaced in November 2021 by the Commission's new Better Regulation Guidelines<sup>63</sup> and the related Better Regulation Toolbox,<sup>64</sup> the latter amended in 2023.

Under Article 9 of the Protocol (No. 2) to the Lisbon Treaty, which was described in detail above, the Commission is required to submit an annual report on the application of the subsidiarity clause in Article 5 TEU, which is also sent to the European Council, the European Parliament and the Council and national Parliaments, as well as to the Economic and Social Committee and the Committee of the Regions.

In the introduction to the 2021 report, the Commission highlighted that it had used the subsidiarity assessment model grid developed by the 'Doing Less, More Efficiently' Task Force effectively.<sup>65</sup> The REFIT platform has been replaced by the Fit for Future Platform service,<sup>66</sup> which also includes the *Have your say* consultation portal.<sup>67</sup> This allows interested legal and natural persons, and even national parliaments, to comment on Commission proposals through a single platform. The Fit for Future Platform establishes a more interactive relationship between EU citizens and institutions than REFIT.

The report also highlights that, as the number of proposals presented by the Commission increased, national parliaments also submitted more opinions (360), of which 16

<sup>57</sup> This is also confirmed in Commission Communication COM(2019) 333 final.

<sup>58</sup> COM(2015) 215 final.

<sup>59</sup> COM(2012) 746 final.

<sup>60</sup> COM(2020) 272 final.

<sup>61</sup> European Commission: Better Regulation Toolbox: [https://commission.europa.eu/document/download/e8e78294-589e-484a-8c87-86e5b3f6c617\\_en?filename=better-regulation-toolbox.pdf&prefLang=hu](https://commission.europa.eu/document/download/e8e78294-589e-484a-8c87-86e5b3f6c617_en?filename=better-regulation-toolbox.pdf&prefLang=hu)

<sup>62</sup> COM(2017) 350 final.

<sup>63</sup> COM(2021) 305 final.

<sup>64</sup> Better Regulation Toolbox: [https://commission.europa.eu/document/download/9c8d2189-8abd-4f29-84e9-abc843cc68e0\\_en?filename=BR%20toolbox%20-%20Jul%202023%20-%20FINAL.pdf](https://commission.europa.eu/document/download/9c8d2189-8abd-4f29-84e9-abc843cc68e0_en?filename=BR%20toolbox%20-%20Jul%202023%20-%20FINAL.pdf)

<sup>65</sup> COM(2022) 366 final.

<sup>66</sup> See: [https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-less-costly-and-future-proof/fit-future-platform-f4f\\_hu](https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-less-costly-and-future-proof/fit-future-platform-f4f_hu)

<sup>67</sup> See: [https://ec.europa.eu/info/law/better-regulation/have-your-say\\_hu](https://ec.europa.eu/info/law/better-regulation/have-your-say_hu)





reasoned opinions pointed out the infringement of the subsidiarity principle. Although this figure is more than double the 2019 figure, it is well below the previous record set in 2012, when 663 opinions were received from national parliaments. A significant part of these were linked to the 'Fit for 55' climate policy package. Interestingly, in 2021, the Hungarian National Assembly did not submit a reasoned opinion, neither on the new pact on migration and asylum, nor on the draft EU Minimum Wage Directive.

### *The Committee of the Regions*

In addition to the Commission, it is worth mentioning the Committee of the Regions, which, by virtue of its role, has the potential to promote the subsidiarity principle. Since its strategy was adopted in 2012, the Committee of the Regions has been actively involved in subsidiarity control to the best of its ability through the Subsidiarity Monitoring Network (SMN).<sup>68</sup> Prior to the legislative phase, the Committee of the Regions can identify possible subsidiarity related problems by studying the Commission's work programme, and react to them in the form of opinions during the legislative phase. One important tool for this within the SMN, is the REGPEX system through which national regional parliaments and municipalities can comment on draft legislation based on their own criteria.<sup>69</sup>

The Committee of the Regions also organises Subsidiarity Conferences and summarises the result of its work in annual reports. The Committee of the Regions also runs a network of regional hubs (RegHub) to review the implementation of EU policies and feed the opinions of participating local authorities into EU policy decisions. For the period up to 2025, one of the objectives of the Committee of the Regions is to ensure that new EU legislative initiatives have a regional dimension and are more in line with the recommendations of the 'Doing Less, More Efficiently' Task Force.<sup>70</sup>

### *Conference on the Future of Europe*

The Conference on the Future of Europe was planned by the Commission, the Council and the European Parliament to be launched on 9 May 2020, on the 70<sup>th</sup> anniversary of the Schuman Declaration. However, the outbreak of the coronavirus pandemic delayed the launch of the initiative by a year, which was designed to open up a new space for EU citizens to express their views on the challenges facing the Union. On the basis of the joint declaration on the conference, the three co-organiser institutions undertook to take action following the conference on the basis of the results, in accordance with

<sup>68</sup> See: [https://portal.cor.europa.eu/subsidiarity/Documents/A8782\\_summary\\_subsi\\_strategy\\_EN\\_modif1\\_final.pdf](https://portal.cor.europa.eu/subsidiarity/Documents/A8782_summary_subsi_strategy_EN_modif1_final.pdf)

<sup>69</sup> See: <https://portal.cor.europa.eu/subsidiarity/regpex/Pages/default.aspx>

<sup>70</sup> Committee of the Regions 2021.



the principles of subsidiarity and proportionality, within their respective competences.<sup>71</sup> Based on the final report on the outcome of the conference, 49 proposals were put forward to the EU institutions, with the largest number of proposals received via the multilingual digital platform in relation to the topic of “European Democracy”.<sup>72</sup> The 40<sup>th</sup> package of proposals was titled *Subsidiarity*, in which EU citizens proposed, among other things, a review of the subsidiarity control mechanisms and their extension to regional parliaments.

## Summary

The paper sought to provide as comprehensive a picture as possible of how and when the subsidiarity principle has come into EU decision-making, what procedures are in place to monitor it, and what practical measures the EU uses to enforce it. Overall, since the entry into force of the Lisbon Treaty, the EU institutions have made significant efforts to implement the subsidiarity principle. However, until recently, the institutional frameworks and procedures designed to implement the principle have operated in a fragmented way across institutions, which has hampered effectiveness. On the positive side, the findings and recommendations of the ‘Doing Less, More Efficiently’ Task Force under the Juncker Commission have gradually started to be implemented in the actual practice of the institutions. This has unified the assessment of compliance with the principles of subsidiarity and proportionality, which is an encouraging step towards better law-making.

The yellow card and orange card procedures initiated by national parliaments have not yet resulted in the Commission withdrawing any draft act complained of by the Member States, acknowledging the lack of subsidiarity. It should also be noted that the number of reasoned opinions is rarely sufficient to initiate proceedings. In this regard, the effectiveness of the yellow and orange card systems may need to be reconsidered. Nor does the case law of the Court of Justice of the European Union encourage the institutions to carry out more detailed impact assessments, but emphasises instead their discretion in the legislative procedures, giving them a wide margin of manoeuvre.

Despite the steps taken by the institutions, both political and legal control of subsidiarity could be further developed. On the one hand, national parliaments could be given explicit powers to monitor not only subsidiarity but also proportionality of given draft acts. On the other hand, the Court of Justice of the European Union could also decide to extend its powers for review, in particular when examining proportionality. This would truly be a step forward, mostly because it would allow the inevitably politically-charged disputes between Member States and the EU institutions over the division of competences to be resolved by more neutral legal means.

<sup>71</sup> Joint Declaration on the Conference on the Future of Europe: [https://futureu.europa.eu/uploads/decidim/attachment/file/6/EN\\_-\\_JOINT\\_DECLARATION\\_ON\\_THE\\_CONFERENCE\\_ON\\_THE\\_FUTURE\\_OF\\_EUROPE.pdf](https://futureu.europa.eu/uploads/decidim/attachment/file/6/EN_-_JOINT_DECLARATION_ON_THE_CONFERENCE_ON_THE_FUTURE_OF_EUROPE.pdf)

<sup>72</sup> Conference on the Future of Europe – Report on the outcome 2022: 10.



In the heat of managing the situations created by the coronavirus and the Russian–Ukrainian war, it may seem less relevant to address the principle of subsidiarity. This however is misleading, because applying the subsidiarity principle to EU decision-making can lead to more effective and efficient action in times of difficulty. The principle of subsidiarity is a fundamental principle in discussions on competences between the institutions and the Member States, thus its sufficient implementation could serve the interests of both the Union and the Member States.

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