INSTITUTIONAL INNOVATIONS

Does Subsidiarity Ask the Right Question?

Jörgen Hettne Senior Researcher, SIEPS
Fredrik Langdal Researcher, SIEPS

Subsidiarity was formally introduced in the European Union (EU) with the Maastricht Treaty, which entered into force on 1 November 1993. By introducing this principle, Member States wanted to impose a check on how EU institutions used their powers. The principle of subsidiarity implies a preference for decisions to be taken as close as possible to the people affected, but if more efficient outcomes can be reached at the central level, then decisions should be taken there.

Article 5.3 in the Treaty of the European Union (TEU) provides that:

> *Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*
>
> *The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.*

Hence, the principle of subsidiarity concerns all cooperation in the Union "which do not fall within its exclusive competence". The areas in which EU has exclusive competence are enumerated in Article 3 in the Treaty of the Functioning of the European Union (TFEU) which reads as follows:

> *1. The Union shall have exclusive competence in the following areas:*
> *(a) customs union;*
> *(b) the establishing of the competition rules necessary for the functioning of the internal market;*
> *(c) monetary policy for the Member States whose currency is the euro;*
> *(d) the conservation of marine biological resources under the common fisheries policy;*
> *(e) common commercial policy.*
>
> *2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.*

But subsidiarity is not the only principle in the EU Treaty that relates to the distribution of powers between the EU and Member States. Article 5 TEU contains in fact three fundamental principles, which each impose limitations on the institutions of the Union: the principles of conferral, subsidiarity and proportionality.

The meaning of these principles can be summarised as follows. The principle of conferral controls when the EU is able to act, the principle of subsidiarity when the EU should act and the principle of proportionality how the EU should act. In contrast to the principle of conferral, the principles of subsidiarity and proportionality are therefore not concerned with the issue if the EU has the power to do something or not, but rather impose certain conditions on how these powers should be used. While the principle of subsidiarity regulates whether and to what extent the powers are to be exercised, the principle of proportionality shall ensure that they do not give rise to actions that are more extensive than is necessary to achieve the objectives of the Union.

The role of the national parliaments

The assessment of subsidiarity has, until the entry into force of the Lisbon Treaty, been handled exclusively by EU institutions. A political *ex ante* control has been made by the Commission, the European Parliament and the Council and a legal *ex post* review has been possible before the European Court of Justice (ECJ). The Lisbon Treaty alters this situation and national parliaments have now been assigned the task of monitoring draft EU legislation to see if it complies with the principle of subsidiarity. This means that for the first time national parliaments have a (although limited) Treaty-based opportunity to exercise influence over the legislative process in the Union.[1] Subsidiarity has thus shifted from being primarily a judicial *ex post* control to essentially be a political *ex ante* control. It is of utmost importance that it is no longer the EU's own institutions, but rather the national parliaments who are now primarily responsible for this control. National parliaments have a particular interest to verify that the transferred powers are not abused, because it is they who initially gave away these powers to be shared within the EU. However, the legal ex-post control before the ECJ remains as a complement to the political ex ante control.

The new procedure is constructed as follows. National parliaments receive a draft legislative act. Thereafter, they have the possibility, within eight weeks, to lodge a reasoned opinion

1. See Jörgen Hettne, "Subsidiaritetsprincipen: Politisk granskning eller juridisk kontroll?", *Sieps*, 2003:4, p. 39 Available at: http://www.sieps.se/sites/default/files/6-20034.pdf

stating why they consider that the draft in question does not comply with the principle of subsidiarity. If such opinions represent at least one third of all the votes allocated to the national parliaments,[2] the draft must be reviewed. This threshold shall be a quarter in the case of a draft legislative act submitted on the basis of Art. 76 TFEU on the area of freedom, security and justice. After such review, the Commission – or another institution depending on the case – may decide to maintain, amend or withdraw the proposal. If it chooses to maintain the proposal, the Commission or the other institution will have to justify, in a reasoned opinion, why it considers that the proposal complies with the principle of subsidiarity. As regards legislative acts under the ordinary legislative procedure, an alternative procedure is available.[3]

The limited scope of the subsidiarity check

It is noticeable that the scrutiny of national parliaments under the Protocol on the application of the principles of subsidiarity and proportionality is limited in several respects. Firstly, it is only a draft legislative act they are able to scrutinize not non-legislative acts, i.e. acts under TFEU that are not derived from a legislative process, such as delegated acts and implementing acts adopted by the Commission. It is thus important to verify which pieces of legislation constitute "legislative acts". It follows, for example, of the TFEU that a request to amend the Statute of the court is a "draft legislative act".[4]

Second, a national parliament can only comment on why it considers that a draft is inconsistent with the principle of subsidiarity. National parliaments are not invited to comment on whether a proposal appears to be incompatible with the principle of conferral or the principle of proportionality. Still, these two principles are obviously part of the same context (the distribution of powers between the EU and the Member States) as illustrated by Art. 5 of the EU Treaty, where these three principles are grouped together. Furthermore, there is no explicit provision for national parliaments to object if they believe that national identity has been violated within the meaning of Art. 4.2 of the EU Treaty.

From a practical perspective, it is understandable that national parliaments are not given more extensive powers than at present under the Protocol. The task of monitoring the subsidiarity principle is new and certainly already demanding in itself. However, there is a risk

2. Each national Parliament shall have two votes, distributed on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote (see Article 7 in the Protocol on the application of the principles of subsidiarity and proportionality
3. When reasoned opinions (on the non- compliance with the principle of subsidiarity of a proposal for a legislative act) represent at least a simple majority of the votes allocated to the national parliaments and the Commission chooses to maintain the proposal, the issue of subsidiarity will also be considered by the Union legislator (Council/European Parliament). If, by a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration
4. According to Article 3 of the Protocol: "For the purposes of this Protocol, 'draft legislative acts' shall mean proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank, for the adoption of a legislative act"

tgae Think Global - Act European

that subsidiarity is proving to be a very blunt instrument of control if the principle is isolated from other related principles.

Consider the following example. If the Commission proposes that English should be the language of the EU, some national parliaments would probably object and claim that this is not in accordance with the principle of subsidiarity. However, in such a case subsidiarity misses completely the point. The judgment to be made under the principle of subsidiarity is not about the objective pursued but whether the pursuit of that objective requires Community action.[5] Thus, that principle does not (on its own) provide a method to balance between the interest of the Member States and the Union. It rather asks who should implement the already agreed objectives. Looking at the issue of English as the language of the EU, it is obvious that one of the biggest obstacles to mobility within the EU is lack of language skills. It is therefore possible to argue that the TFEU provides a basis for harmonization of this. Moreover, it is completely impossible for Member States to solve this problem on their own. Accordingly, subsidiarity provides no reason not to legislate.[6]

As can be seen from this reasoning, the problem is that added value to the Union is not balanced against the damage done to national interests. To add this national aspect it is necessary to consider the proposal in the light of the principle of proportionality. It would probably be a convincing argument that one single language for the EU is disproportionate to the aims, if the costs to Member States' interests are considered.

It could be argued that an element of proportionality is part of the principle of subsidiarity. Renaud Dehousse has for instance claimed that "the proportionality test […] is a logical component of any subsidiarity assessment".[7] Some support for this can also be found in Article 5 TFEU, which provides that "the Union shall act only if **and in so far as the objectives of the proposed action cannot be sufficiently achieved**". In the case at hand it would therefore be possible to argue that language teaching could reduce linguistic obstacles to movement. However, the crucial question is if this permits the conclusion that free movement is sufficiently achieved by such teaching?[8]

The case is obviously extreme, but similar questions have also appeared in cases before the ECJ. In fact, it has proved virtually impossible to challenge a harmonization measure in the light of the subsidiarity principle. In these cases, the Court has pointed out that when the objective pursued by the measure is that of harmonization, which is necessary in order to prevent differences between national laws causing obstacles to movement or distortions of

5. See opinion of Advocate General Maduro in Case C-58/08, Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform, not yet reported, paragraphe 30
6. See Gareth Davies, "Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time", *CMLrev 43,* 2006, pp. 63, 69
7. See Renaud Dehousse, "Centralization and Decentralization in the European Community: Are we Asking the Right Questions?", in *The Future of Europe – Centralized and Decentralized Approaches,* ERA 1994, p. 36. See also "betänkande 2010/11:KU18 Uppföljning av riksdagens tillämpning av subsidiaritetsprincipen"
8. See Davies, *op. cit.,* p. 72

competition, it is manifestly the case that Member States alone cannot act.[9] Accordingly, subsidiarity in itself has no relevance to those measures whose aim is to create the uniformity necessary for the Single Market. Still, this is the area where the principle has been claimed to have its biggest impact (shared competences). Where uniformity is necessary, only the Union will be able to act.[10]

To make the subsidiarity check the instrument that it originally was intended to be – a counterweight to the increased competences of the EU – it must be complemented with a full-fledged application of the principle of proportionality. Then, the correct question to ask is whether the importance of a Union measure is sufficient to justify its net effect on Member States.

It may be noted that so far the ECJ has avoided making such a full-scale review of proportionality, given that in assessing the proportionality of decisions made by the legislature, the Court is required to accord a margin of discretion to the legislature. Accordingly, in principle and in these domains, "judicial review of the exercise of [the legislature's] powers must be limited to examining whether it has been vitiated by a manifest error of assessment or a misuse of powers or whether the legislature has manifestly exceeded the limits of its discretion."[11] However, having regard to the different nature of national parliamentary control, there is obviously no reason for national parliaments to observe the same level of precaution towards Commission proposals. In their case, it is about an *ex ante* political control and not an *ex post* legal control.

Finally, it should be stressed that even though subsidiarity and proportionality control of national parliaments is not – and should not – be legal in nature, it nevertheless concerns the application of constitutional principles. Therefore, to avoid asymmetry, incoherence and fragmentation, it would be desirable if Member States' national parliaments could agree on what these principles do entail and on common procedures for how the control should be undertaken in practice.

Conclusions

One reason why national parliaments were allocated responsibility for monitoring the subsidiarity principle was that legal control exercised by the ECJ hitherto had been perceived as a disappointment. It has been showed in this article that one explanation to this is that subsidiarity does not ask the right question in all cases. The principle of subsidiarity does not, on its own, provide a method to balance between the most important interests at stake, i.e. to balance the added value to the Union with the possible harm to national interests. To make this possible, it is necessary to consider new EU legislation in the light of not only the principle of subsidiarity, but also the principle of proportionality. This would avoid the truncated control currently formalised in the Treaty and it would make dialogue between national parliaments and the Commission much more accurate. The Protocol on the application of the principles of subsidiarity and proportionality does not provide an explicit basis for national parliaments to object on reasons of violations of proportionality. However, this should not prevent national parliaments from discussing a proposal in the light of these principles and from making their views known to the Commission in the form of a reasoned opinion. This is also obviously true for the principle of conferral or control of the legal base. It is an important task for the forthcoming Trio Presidency to ensure, in collaboration with the national parliaments (in the COSAC – Conference of Parliamentary Committees for Union Affairs), that the subsidiarity check becomes the tool it has the potential to be, i.e. an efficient check on how the EU institutions use their powers, and not a pointless ritual. Cynicism regarding subsidiarity control is the easy option – taking it seriously is the correct one. In the longer term, the protocol should be revised to explicitly accord, when it comes to national parliamentary control, the principle of proportionality the same standing as the principle of subsidiarity.

9. See for example Case C-491/01, The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd, ECR 2002 I-11453, paragraph 182
10. The review of the Court of Justice has further been influenced by the fact that "the Court is not substituting its judgment for that of the Community legislator but simply compelling it to take subsidiarity seriously". See opinion of Advocate General Maduro in Case C-58/08, Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform, not yet reported, paragraph 30
11. See for example Case C-127/95 Norbrook Laboratories [1998] ECR 1531, paragraphs 89-90