

Principle of Subsidiarity and the European Union Institutions*

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Abstract

The tasks and responsibilities of the institutions, which are specified by the EU treaties, have been subject to scholarly debate. With the changes that are occurring in the EU political system, an emphasis is placed on the question of how much the principle of subsidiarity can advance the practice of integration in terms of the decision-making capacity of the institutions. A particular attention is paid to the question of whether principle can have major positive effects by helping to shape the institutions within which democracy can operate. This paper explores the possible impact of the principle on the EU institutions.

Keywords

European Union, institutions, subsidiarity

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Introduction

Article 5 of the Treaty on the European Union (TEU) provides a workable division of powers between the EU and the member states. Article laid down the responsibilities for the EU institutions to exercise powers over the national parliaments. The competences between the EU and the member states were merely distinguished. The EU is now required to take action only if national action is insufficient in accomplishing the objectives of the proposed action. So, the EU measures are not expected to go beyond what is necessary to comply with the Treaty objectives.

Under this legal framework, the policy responsibilities between the EU and national governments have led to a fierce debate in a sense that resistance to the principle is considerable. This is particularly relevant for the question of which competences should be given to the EU institutions and which retained for the member states. It is generally recognized that the EU institutions are politically significant as to they make considerable contribution to integration process. This in turn raises a question mark for the efficacy of principle within the EU's institutional context.

The concept of subsidiary

The concept of subsidiarity is an organizing principle to the extent of which the political decisions should always be made by the smallest, lowest or least centralized competent authority. It is a level of government, which opposes the centralizing tendencies and is thus assertion the rights of the parts over the whole.

The original philosophical meaning of subsidiarity was first pronounced by Pope Pius XI:

'It is an unjust, a grave evil and disturbance of right order for a large and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies'.¹

¹ Pius XI, Encyclical Letter, AAS 23 (Quadragesimo Anno, 1931).

The principle of subsidiarity fits easily with the Christian democratic parties in Europe.² From the beginning, the European Community (EC) Treaty created the common community rules, not in the areas marked out for common organization, such as social policy, but in all the areas of activity outlined in the Treaty, or falling within the broader objectives of the Community.³ Roughly speaking, the idea of subsidiarity was invoked in 1980s, when the Community embarked on a programme by extending its competence under the Single European Act (SEA) of 1986. The second paragraph of Article 5 of TEU (ex 3b) simply stated: 'In areas which do not fall within its exclusive competence, the Community shall take action, accordance with the principle of subsidiarity, only if and insofar as the objective 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'.

The principle desires to create local democracy by highlighting its respective contribution to a broad political idea. In that sense, Article 1 of the TEU makes the principle more concrete and applicable as it marks 'a new stage in the process of creating an ever closer union among the European peoples, in which decisions are taken as closely as possible to the citizen'. From this perspective, it is assumed that the EU should be governed as close as possible to its citizens and involved in policy management, only where necessary to safeguard the completion of internal market, together with other fundamental aims of the subsequent treaties.

As a further step, Article 5 of the Treaty of Amsterdam, which was signed in October 2 1997, incorporated the 'protocol on application of the principles of subsidiarity and proportionality' into the EU treaties without altering the wording of the subsidiarity criterion. The Treaty clearly stated that 'action by the European Community in accordance with the principle of subsidiarity not only concerns the member states, but also their entities, to the extent that they have their own law-making powers conferred on them under national constitutional law'.¹ The aim

² Tansey, S. D. *The Basic Politics*, (Routledge, 2004), pp. 157.

³ Steiner, J. and Woods, L. *Textbook on EC Law*, (Oxford University Press, 2003), pp. 259.

was to enhance the proper implementation of principle by the EU institutions. It was hoped that the common interests would eventually bring the concrete benefits regarding the policy areas in which the EU forms. The priority given to the economic integration was made clear from the outset as the primary goal of the Treaty of Rome.⁴ At the same time, invoking subsidiarity had a chilling effect on the inclination of the EU institutions to go for ever more EC draft legislation in the early 1990s. In the years of the Convention and the constitutional treaty debates, the subsidiarity question was fiercely debated in the political terms of “more or less Europe”.⁵

In the early 2000s, the issue was discussed by the Convention on the Future of Europe. This wide conception of subsidiarity was challenged, but its precise meaning was identified. In order to determine whether subsidiarity can be applicable, the principle became an integral feature of the Constitutional framework of the EU.²

In an abortive effort for a better control and respect for the principle, the Treaty of Nice that was signed in 26 February 2001 established innovative goals to distinguish competences of the EU institutions. The Treaty introduced a mechanism to check compliance of draft legislative acts with the principle. The violation of principle implied removal of a draft act from the legislative agenda of the EU. This emerging perspective was given a new role to the national parliaments of the member states. Through the changes brought by the Treaty, the EU decision-making process was set to take on a new dimension, with the introduction of an *ex ante* procedure.⁶ Surely, this was a crucial step forward that would stimulate the application of the principle in terms of the EU’s institutional development.

⁴ McCormick, J. Understanding the European Union, the European Union Series, (Palgrave- Macmillan, 2008), pp. 142.

⁵ Pelkmans, J. ‘An EU Subsidiarity Test is Indispensable’, Forum, Intereconomics, September/October, 2006, pp. 249–254.

⁶ Gutman, K. ‘The Commission’s 2010 Green Paper on European Contract Law: Reflections on Union Competence in Light of the Proposed Options’, ERCL 2/2011, pp.251-272 (269).

Principle of subsidiarity: policy relevance

How far do the particular features of the EU's system produce the subsidiarity model? Is the tendency towards centralised authority in the EU resistible? These questions are difficult to answer. They are so at least for four reasons.

Competences of the EU

While emphasizing transferring more competences to the EU level, the modern realities dictate that the objectives of action are less fanciful to achieve by the national governments alone. The member states lack capacity to manage their own affairs in accordance with the sufficiency criterion. Simply, transferring more powers to the EU are fundamental and perhaps the most significant aspect of the EU system. The crucial point is that building Europe may no longer be a progressive step forward if the EU's involvement is marginal. Gradually, the member states have arrogated to themselves exclusive responsibility for establishing uniform laws that have motivated the citizens to move more easily from one part of the country to another. In principle, minimum harmonisation does underlie a great deal of geographical mobility in the absence of different tax regimes, and legal, educational and social security systems throughout the EU. The goal of harmonisation can be attained via the supranational Union.

Bravely, commentators have tried to work out what subsidiarity means for the policy-making and regulations in the EU. They agree that some of the EU's biggest programmes conflict with it. For instance, much of the work of Schäfer (2006) emphasized on the increasing tendency towards centralisation, which clearly runs counter to the principle – even though it is the fundamental principle for action in the EU. As Schäfer has pointed out, the decisive reasons for the increasing departure from the principle by means of further centralisation in the EU are more likely to be derived from the domain of politico-economic explanation approaches. In this sense, the United Nations' bodies are striving to

strengthen their power by extending their areas of activity. This is equally true for the European Commission, the European Parliament (EP) and the European Court of Justice (ECJ).⁷ Here, the focus is the action of the EU.

To this end, there is an apparent danger in expanding the boundaries of central authority. If so, does the decision-making power corrupt? How would responsibilities vested in central and local institutions be distinguished? In a very real sense, is the concept of control from the centre less appropriate? Heywood's response to these questions relates to the pressure to shift the political resources from central to local level, reflecting on the "economies of scale". There are no limits to the amount of centralisation that is possible or desirable. Indeed, the notion of a modern state compromising ten or even hundreds of millions of citizens being entirely governed from the centre is simply absurd. For example, if all the services and functions of modern government were to be administered from the centre, the result would be hopeless inefficiency and bureaucratic chaos, reflecting what economists call the 'diseconomies of scale'.⁸

A different perspective is provided by Mander (2009), who strongly advocated the concepts of subsidiarity against the "danger of globalisation". In political sense, local bodies prevent central authorities from turning into a tyranny against individuals. For Mander, subsidiarity is the term of which many employ to describe an essential aspect of the current anti-globalization movement: the effort to bring real economic and political power as close to the local as is practical and feasible. Where the currently dominant globalization system tries to diminish the power of the local, the regional, even the national, and move all power to centralized global mega-institutions far away from affected communities, "subsidiarity" tries to stimulate the opposite. It seeks to build a bias in all

⁷ Schäfer, W. 'Harmonisation and Centralisation Versus Subsidiarity: Which Should Apply Where?', *Forum, Intereconomics*, September/October, 2006, pp. 246–249 (248).

⁸ Heywood, A. *Politics*, (Palgrave Foundations, 2007) pp.164.

governing systems, operating systems and rules to favor the local – or as close to the local as possible.⁹

It is just as important not to take this line of argument too far; the subsidiarity model has also been criticised:

- The model is less influential for the risk of “social dumping” – a challenge for the EU decision makers. This is often regarded as incrementalism, when the national governments seek to cut taxes on capital, and thus provide fewer public services, in order to attract investment, whilst allowing a decline in health and safety standards that firms have to meet.
- Under such a model, it is difficult to create a modern, adequate and sustainable social protection system, when the national governments remain free. The implication of this increasing reliance upon the member states for the policy process is a variable pace of integration.
- It is difficult to see how characteristics of low social protection can be reconciled regarding labour mobility across the EU countries. In fact, the costs of social protection are already borne by workers as one of the reasons for stay “put”. The idea of effective or active labour market policies, coupled with comprehensive lifelong learning strategies in the EU-wide are likely to give workers more protection.
- It is unclear how the model can sustain the European sense of values. Whilst the policy content of the division of power can vary, the EU policy competence should be extended and strengthened, especially in the areas of foreign affairs, security and defence, management of the single currency, and specification and protection of citizens. There has been a growing tendency for some policy areas that fall under prima-

⁹ Mander, J. A Bias to the Local, *The Subsidiarity Principle*, Multinational Monitor, 2009 March-April, pp. 37–41 (37).

rily responsibility of the central level because they are keys to coherence, identity and protection of the system as a whole.

A key element of these approaches is the role of subsidiarity in public policy of the EU, despite its precise meaning has never been totally clarified. This role is a more focus one regarding the welfare advantages. Such advantages are gained by the optimum satisfaction of citizens' preferences by the decentralised administrative bodies. In this sense, a strict application of the principle endorses a trade-off in terms of the production of public services.

One may assume that there remains considerable scope for variation between the national governments within the general trend of creeping subsidiarity. Usually in situations where subsidiarity is not taken seriously, burden on the centralisers is far greater. Typically, leaving the degree of freedom to the member states to adopt measures, which differ from harmonized rule, may be damaging for the integration process. In the name of globalisation, the European Commission is entrusted with important responsibilities with regard to externalities. This is, for instance, especially true for the effect of lax environmental rules (i.e., pollution), which can easily spread to other countries. This is not only because of the self-interests of a particular member state, but a common approach as regards to the objectives of the treaties. The individual action may not always assist towards a deeper understanding of these effects.

Benefits for the Union

The integration sceptics have often shamped into disagreements about the question of how much and what kind of integration the member states want. A question of what type of political organisation the EU is the key to this debate. There is no doubt that the successive reforms of the EU have led to the integrationist advances. Such reforms are related to institutional systems, as well as a range of common policies. Actions of the member states are evaluated on the basis of their efforts to promote integration. Arguably, integration is usually achieved through cooperation, while one eye on the national interests. The aim is to secure

the desired end, most notably the economic growth and the promotion of harmonious relations between the member states.

There have always been those who argued that the action must convey added value over and above what could be achieved by the individual countries alone. As specified in the treaties, the EU may act only where unanimity voting is needed for an existing policy framework or a new policy area. There is now a marked shift away from unanimity towards qualified majority voting in the Council of Ministers. The EU's social policy can exemplify this. Much of the focus is on job training and re-training, labour mobility, working conditions, and the general promotion of employment. These issues are always presented much more in terms of costs and benefits for the European societies, with greater stress on the national sovereignty.

On the other hand, there are those who suggest that achieving integration process is much to do with the belief that benefits for all. The award of special benefits envisaged in the treaties has usually taken the form of providing a base for some sort of policy development that is especially helpful for a particular state or a group of states. For example, the SEA provided a policy base when, largely at the behest of the poorer member states, it included provisions for the development of redistributive policies. The TEU did much the same thing, with the creation of a Cohesion Fund which would be directed at the poorest member states (Greece, Ireland, Portugal and Spain).¹⁰ Some degree of prosperity has already been achieved to ensure sustainable growth with regards to the management of a single currency, tax and spending policies.

At a more specific level, the core of policy management has been challenged. This points to the legitimate differences of each member state. In this sense, Article 6(1) of TEU produced the most crucial outcome for the liberal democratic identity. Accordingly, the Community actors cannot just bargain, that is, exchange threats and promises, but need to argue, that is legitimize their preferences on the basis of the commu-

¹⁰ Nugent, N. *The Government and Politics of the European Union*, The European Union Series, (Palgrave Macmillan, 2004), pp.107.

nity ethos, and to be concerned about their image and credibility as the Community members. For those actors that pursue ethos-conforming preferences, the ethos adds legitimacy to their goals and thus strengthens their bargaining power.¹¹ It is not sensible to criticise subsidiarity for not being generating benefits for all. The fundamental objective is to argue and act successfully whatever difficulties that actors encounter, as they pursue the self-serving goals. Surely, if actors do not comply with such ethos, they will run into image and credibility problems.

People's democracy

The attraction of subsidiarity principle is that it widens the scope of political participation and strengthens democratic accountability by bringing government “closer” to people. The governments are not obligated to accept decisions on major issues imposed on them by the EU, given the attempts to reinforce the power of the EU member states. The principle features of the concept certainly make a new stage in the process of European integration. This role reveals a dynamic understanding of the way in which the principle can make political decisions more intelligible and legitimate by creating a network of checks and balances within a government.

Quite apart from this, the principle of subsidiarity primarily relates to responsiveness. In this sense, effective engagement can involve in making discriminating decisions about how to participate as well as action *per se*. These decisions can be made individually and collectively within local communities, but evidently connote a commitment to the public interest.¹² Of course, leaving important decisions – in the spirit of subsidiarity, as European lawyers might put it – to the local level is all very well if local democracy is in rude health. But if a given measure – as in this instance – has the potential (in concert with other measures) to

¹¹ Schimmelfennig, F. Liberal Intergovernmentalism (eds) in European Integration, Theory Oxford University Press, 2004, pp. 75115 (91).

¹² Andrews, R. and Turner, ‘Modelling the Impact of Community Engagement on Local Democracy’, Local Economy, Routledge Taylor & Francis Group, August, November, Vol. 21, No. 4, 2004, pp. 378–390 (379).

reinvigorate a system of local democracy afflicted by malaise, it is somewhat paradoxical to devolve to the local level the decision whether to adopt the measure.¹³ A concern with effective service delivery is present, but is not clearly defined. There are vague references to the need for responsiveness to the community, but exactly how this is achieved is not elucidated. Therefore, the main concerns are with the nature of the decision-making process and the lack of effective checks in the system,¹⁴ given the spectrum of the EU's minimum policy involvement.

Perhaps more helpful starting point from which to consider the principle of subsidiarity is the localised opportunity for participation offered by elections and referendums. As democracy links government with people, the EP elections can be a vehicle to the extent of which European citizens are offered regular and direct opportunities to participate in the political process. As much, elections help to foster legitimacy by justifying the EU system. Elections are sufficient conditions for mobilizing active consent, but they may not always be successful in “bottom up” fuctions. The voter turnout in the EP elections is, in most cases, low by the national standards. A study by the Triware Network Systems in 2008, found that 18% of the EU citizens were not at all interested in the elections, while 35% indicated that they were rather not interested.³ Declining turnout levels in every set of the EP elections – since they were first held in 1979 – casts doubt on the democratic legitimacy of the EU institutions.

What matters most is that constructing public opinion across the EU that gives clues about the application of principle as a whole. Some evidence of limited enthusiasm about the EU is quite widespread. In broad terms, this may be the features of three main set of findings:

- Figures concerning how people feel about the EU are generally low. Around one-third of citizens strongly support the

¹³ Bailey, S and Elliot, M. 'Taking Local Government Seriously: Democracy', *Autonomy and The Constitution*, Cambridge Law Journal, Great Britain, 68(2), July 2009, pp. 436–472 (463).

¹⁴ Jones, T., Newburn, T., and Smith, D. J 'Policing and the Idea of Democracy', *Brit. J. Criminol*, Vol. 36 No.2 Spring 1996, pp.182–198 (189).

European integration, while over one-tenth strongly oppose. Over one-half of attitudes of Europeans are ranged between fickleness and cautious public opinion.

- The highest supporters among the member states are Ireland, Luxembourg and Spain, while the UK, Denmark and Sweden being amongst the lowest.
- Europeans have rather negative views about further harmonisation of the EU policies including budget, taxation or social provision where support usually diminishes.

From this perspective, the implications seem to be threatening for the principle of subsidiarity. Conversely, the problem of democratic deficit could have been seen to require a grander reform along the lines of a “third legislative chamber” for the EU.¹⁵ The propensity is that the national governments have overall directions of European integration and pace of decision-making in accordance with the interpretation and application of the principle.

Additionally, the extent to which the EU’s institutional systems, as well as policies that offer choices to its citizens are closely and extensively monitored by both the EU and national levels. The EU has already launched a programme so-called “dialogue”, which makes use of online citizens’ panels and focus groups, with the aim of creating better-informed and more politically sophisticated citizenry. Besides, the media and Eurobarometer polls have always played a significant role in the expression of citizens’ views. Presumably, polls may be used by the national leaders by bypassing the institutions to create a mechanism. By doing so, European citizens are made more informed about what is going on behind the close doors. To some extent, these initiatives gives some clues about the success and the nature of the principle.

¹⁵ Cooper, I. ‘The Subsidiarity Early Warning Mechanism: Making It Work’, Forum, Intereconomics, September/October 2006, pp. 254–257 (257).

Individual freedoms

The principle of subsidiarity has been called upon the protection of individual freedoms within the constitutional framework, since its inclusion in the TEU. At the heart of the principle lies in liberty that is incorporated in Articles 1-1 and 1-2 of the EU's new Constitution as one of the common values. This degree of autonomy for the national governments is upheld by the fact that power corrupts. Therefore, the member states are expected to declare that freedom prevails in their societies. The idea is to create a safeguard to protect individuals from a tyranny within the system. It can be assumed that moving power towards local level can achieve a good deal of human rights regime.

The central question is then to what extent the principle of subsidiarity is consistent with the human rights abuses and whether the principle solves such a problem or exacerbates it. The symbols of failure are more often called upon performing the functions by the EU. Although undoubtedly difficult, it is possible to identify cases for human rights violations in the EU member states ranging from gender related to religious freedom issues. By all means, the problems as such on a local level are persistent. Since the first ombudsman was appointed in 1995, the European Commission has been the target of most of the complaints. This is probably a sign that things are getting worse and more people are becoming aware of the work of ombudsman.¹⁶ This gives the impression that the functions of governments are almost exclusively performed by the member states.

Equally important, the appeal of further integration points to the articulation of interests of whole rather than various parts; sectional, ethnic or regional groups. The EU authority directly relates to the strong centre and ensures addressing the common interests of the entire community. In this context, a copy of very powerful and radical Charter of Fundamental Rights of the EU, which was incorporated in the TCE, is already agreed by all member states. Consequently, the EU institutions

¹⁶ McCormick, J. *Understanding the European Union*, the European Union Series, (Palgrave- Macmillan, 2008), pp.131.

themselves are obligated to conform to the standards of fundamental rights. In short, individual rights and freedoms can be applied at local levels wherever possible. The EU authority provides the means whereby the rights are guaranteed by the international institutions.

Not surprisingly, local problems for the human rights violations as versions of direct participatory democracy cannot accurately be portrayed. Simply, there is no limits to local problems. It is also doubtful that the EU decision-makers are responsive to such problems. It is important to recognize that the principle of subsidiarity reflects, as well as shape local communities that seek to sustain their cultural and economic rights, and resources. Although the principle is most effective means of meeting human rights needs, the EU system does not fully allow for a genuine equality of opportunity. The principle needs to be sustained.

EU institutions and principle of subsidiarity

The EP as a dominant actor

The EU has a directly elected representative legislature in the form of EP, which has growing powers over the process by which European laws are made.¹⁷ In recent years, the principle of subsidiarity has been defended by the EP. In fact, more decisive steps were taken by the Edinburgh Council meetings between in November 18 1992 and October 25 1993, implying that the EP, as well as the Council of Ministers and the European Commission respected for the principle. As a result, the following provisions are included.

- The European Commission will take into account the principle, when it exercises the right to initiative. The same applies to the EP and the Council of Ministers, in accordance with powers conferred on them by Articles 192 (138b) and 208 (152), respectively, of the ECT.

¹⁷ Ibid.

- The explanatory memorandum for any Commission proposal will include a justification of the proposal under the principle.
- Any amendment to the Commission's text by the Council or the EP must be accompanied by a justification if it entails a change in the sphere of the Community intervention.
- During the examination of a legislative proposal, the EP shall respect for the fundamental rights under Rule 58 of EP's Rules of Procedure.¹⁸

It is important to note that the successful amendments to the treaties have increased the powers of the EP in an attempt to close the “democratic deficit” of the EU.¹⁹ This is because the increased competences of the EP have been accompanied by changes in the EU treaties. As the EP is empowered in legislative sense, it may exercise greater influence on the decision-making process, in comparison to other EU institutions. Article 5(3) and Article 12 (b) of the TEU laid down the provisions concerning the compliance of draft legislative acts by the EP. Moreover, the Lisbon Treaty provided relatively clear tasks of the EP in terms of the application of the subsidiarity principle. According to Article 7(3) (b), a legislative proposal may be removed from the legislative agenda. This can only occur in the case of a majority of the votes cast in the EP – considers such a proposal is in contrast with the principle.

Interestingly, as the powers of the EP grow, the powers of national legislature are declining²⁰, although the EU treaties assign the most important powers to the national parliaments in particular area. The EP has a right to send the proposing institution a reasoned opinion explaining the reason of violation, when the principle of subsidiarity is violated. As an initial step, the draft proposal may be referred back to the Council by

¹⁸ European Parliament Fact Sheets, ‘Subsidiarity’, http://www.europarl.europa.eu/factsheets/1_2_2_en.htm, (16 October 2010).

¹⁹ Bache, I. and George, S. *Politics in the European Union*, (Oxford University Press, 2006), pp.264.

²⁰ McCormick, J. *Understanding the European Union*, the European Union Series, (Palgrave- Macmillan, 2008), pp.16.

the EP for re-examination. Such a proposal may eventually even be ruled out and removed from the legislative agenda. However, the EPs do not have totally free hand in the legislative procedure. A draft proposal has to be reviewed by the national governments within 8 weeks before it is put on the Council agenda. Under enhanced cooperation, assent and co-decision procedure, a great number of decisions are made in joint forms between the Commission, the Council and the EP.

In practical terms, a mechanism introduced by Article 7, par. 3 (b) of the Lisbon Treaty does not seem to have any relevant impact on the policy process. Article 7 makes it difficult to reach the requested numbers by the EP (as well as the Council) and block a legislative proposal on the ground of the violation of subsidiarity principle. It is important to avoid making it too easy to use the principle to stop legislation and creating the risk to halt the European legislative process.²¹ This has already served to highlight the EP's role, which does not appear to innovate. Given this outlook, it is reasonable to suggest that the national parliaments are important innovations for their task to comply with the principle. The power rests ultimately on the national parliaments rather than the EP.

Additionally, the problem is that time for examining a draft proposal by the national parliaments are limited. The lack of coordination among the national parliaments seems another obstacle, which will likely to impact on a legislative proposal. The obstacle of kind is an inconsistent with the efficiency of the EP's tasks and, more importantly, the provisions of the Lisbon Treaty. As a perspective, which emphasizes the powers of the EP, it is a difficult approach that has seemingly a limited effect and relevance in practice.

Erosion of the European Commission autonomy

A question has recently arisen about the possible erosion of the autonomy of the Commission. This may be a result of changes made to

²¹ Tronchetti, F. 'National Parliaments As Guardians of Subsidiarity: A Feasible Task Or An Utopist Chimera?', Volume 7, No.9 (Serial No.59) *Journal of US-China Public Administration, USA, September (2010), pp.15-26 (20).*

the powers of the EP.²² For more political and institutional processes, the EU institutions ensure compliance with the subsidiarity principle as part of its decision-making process. The obligations are placed on the European Commission to consult widely with the stakeholders and the duty of the Union legislator to frame the legislative proposals so as to ensure compliance with the principle.²³ Indeed, the powers and the responsibilities of the Commission are becoming very crucial for the principle, since the EU treaties have increased the functions of the institutions.

Since the SEA, the EU decision-making procedure has become more complex than ever before, making the application of subsidiarity principle difficult to handle. In order to overcome this complexity, the Lisbon Treaty created two mechanisms:

- Yellow Card Mechanism: the nature of the principle calls for the Commission to give reasons for keeping, changing or withdrawing the proposal (art. 7(2) of Protocol no.2).
- Red Card Mechanism: under the co-decision procedure, the EP's opinion is sought to specific policy area (i.e., common foreign or security policy) before decision is taken by the Council of Ministers. The Commission's proposal has to be compatible with the principle (art. 7(3) of Protocol no.2).

In a parallel initiative, the Treaty of Amsterdam in 1997 called for the European Commission to carry out a systematic analysis of how proposals for legislation related to the principle of subsidiarity and impose an obligation, wherever possible, to use the least far-reaching the EU measures. On the yearly basis, the Commission compiles a report for the EP, the Council and the European Council concerning the application of the principle.²⁴ Similarly, the Treaty of Nice highlighted the need to focus

²² Bache, I. and George, S. *Politics in the European Union*, (Oxford University Pres, 2006), pp.264.

²³ Gutman, K. 'The Commission's 2010 Green Paper on European Contract Law: Reflections on Union Competence in Light of the Proposed Options', *ERCL* 2/2011, pp.251-272 (269).

²⁴ The EU information Centre, *What is the Subsidiarity Principle?* http://www.euo.dk/euo_en/spsv/all/61/, (30 July 2008)

on the core objectives and allocated responsibilities of the Commission precisely. To this end, the second subparagraph of Article 7(3) requires the Commission to submit the reasoned opinion justifying the compliance of a proposed act to the EU legislator (i.e., the Council and the EP). The only novelty introduced by the Treaty of Lisbon in this respect is that the Commission may, by means of the reasoned opinion, restate or better explain its case for having respected the principle.²⁵

A debate centres on whether the European Commission can actually determine the direction in which the EU moves, given its legislative role. From a procedural point of view, before presenting a proposal for a new legislation, the Commission is given the right to examine the proposal, which should conform to the principle of subsidiarity. Under Article 12 of the TEU, the Commission is obligated to review the draft act. The national interest is obviously of considerable importance in determining level of influence that the Commission may exercise. The non-compliance of a proposal is possible by the simple majority of national parliaments under ordinary legislative procedure. However, it is difficult to violate the principle due to the powers of the Council or the EP. It is at their discretions either to accept or block the Commission's draft proposal concerning any policy area.

While the Commission's power is extended to the decision-making process, it is important to consider the subsidiarity check in the EU as an reinvigorating practice. The Commission has already implemented the subsidiarity check at the national level. To illustrate this point, the Commission received a high amount of reactions totalling at 450, when it sent proposals for new laws for subsidiarity check in the period of 2006-2008. However, until now the Commission has not changed one single proposal after the reactions from the national parliaments.²⁶ In a way, this is a reflection of the Commission's significant political contribution to the practices of the principle.

²⁵ Tronchetti, F. 'National Parliaments As Guardians of Subsidiarity: A Feasible Task Or An Utopist Chimera?', Volume 7, No.9 (Serial No.59) Journal of US-China Public Administration, USA, September (2010), pp.15-26 (19).

²⁶ EUABC.Com, 'Subsidiarity, <http://en.euabc.com/word/879>

The ECJ in the Context of European law

The extent to which the EU seeks to find possible ways of enhancing the EU institutions' compliance with the principle of subsidiarity is an issue that has remained a valuable exercise. It is in the context of the ECJ as an actor, with an independent influence over the process of European integration. In simple terms, the main task of the ECJ is to ensure that the member states fulfill their obligations under the Community Law. This gives an additional role to the ECJ in safeguarding the principle beyond the reviewing EU's legislative measures.

Often required to determine limitations of actions of a national or Community actor within the TEU, the ECJ has begun developing an inferred definition of the principle of subsidiarity through its rulings and reasonings. Article 164 of the TEU states that 'The Court of Justice shall ensure that in the interpretation of the Treaty the law is observed'. The EU legal system both upholds and threatens the authority of the member states' legal systems. The ECJ acknowledges the necessity of the various national and domestic legal systems, through the principle.²⁷ Thus, the applicability of the principle is a reflection of sustained fashion upon the effectiveness of the ECJ rulings.

While ostensibly a commitment to the EU legal system, the institutional reforms are to be lasting significance for the principle of subsidiarity. This is particularly true for the introduction of action for annulment by the ECJ which was created by the Treaty of Nice. Clearly, this role is precisely about the reviewing the legality of the EU legislation acts to see if any infringement of the principle occurs. The new protocol on the application of the principle strengthens the ECJ's judicial supervision by extending the right to institute proceedings before the court of national parliaments of member states.²⁸ Thus, the decision-making procedure is complemented by the possibility of bringing annulment actions by the

²⁷ From the Selected Works of Linda Margaret Broughton, *Subsidiarity and Proportionality in European Law*, http://works.bepress.com/linda_broughton/1, (5 November 2007).

²⁸ Subsidiarity Monitoring Network, *Subsidiarity in the EU Legislative Process*, <http://extranet.cor.europa.eu/subsidiarity/whatis/Pages/SubsidiarityintheEUlegislativeprocess.asp>

national governments against already adopted legislation on subsidiarity grounds before the ECJ, either by themselves or on behalf of their national parliaments.²⁹

From the supranationalist point of view, the EU has a complex system of treaties and laws that are uniformly applicable throughout the EU, to which all the member states and their citizens are subject, and that are interpreted and protected by the ECJ.³⁰ For that reason, the procedural requirements within the legislative process have been developed, while an eye on enforcing the principle of subsidiarity. By the ratification of the 'protocol on the application of the principles of subsidiarity and proportionality' as an annex to the Treaty of Amsterdam, the guidelines, which are used to examine whether the principle has been fulfilled, are codified as primary Community Law. The protocol specifies the requirements for the legislative process, primarily relating to the European Commission. Such a process include mandatory hearings, duty to give qualified reasons and present annual reports. In spite of this, the quantity of European legislation has not been reduced, so far.³¹ This may imply an inefficient legislative control by the EJC.

The role of the ECJ seems most sharply when one considers how the national interest can override the common goals. . The ECJ has generally held that the member states are charged with enforcing Community Law and may determine their own rules, so long as they do not defeat or discriminate against Community rights.³² The principle is only relevant where the ECJ is required to make a judgement on whether or not there is a need to exercise competence at the EU level where this is

²⁹ Tronchetti, F. 'National Parliaments As Guardians of Subsidiarity: A Feasible Task Or An Utopist Chimera?', Volume 7, No.9 (Serial No.59) Journal of US-China Public Administration, USA, September (2010), pp.15-26 (19).

³⁰ McCormick, J. Understanding the European Union, the European Union Series, (Palgrave- Macmillan, 2008), pp.16.

³¹ Ritzer, C., Ruttlof, M. and Linhart, K. 'How to Sharpen a Dull Sword – The Principle of Subsidiarity and its Control', German Law Journal Vol. 07 No. 09, 2009, pp.740.

³² Swaine, Edward T. 'Subsidiarity and Self-Interest: Federalism at the European Court of Justice', Harvard International Law Journal, Volume 41, Number 1, Winter 2000, pp.3.

held currently with the member states.³³ It is also hardly conceivable that the ECJ might find adherence to subsidiarity acceptable, even if there is no underlying the EU competence. This is despite the fact that the formulation of Article 5 expressly gives rise to the existence of a non-exclusive competence. The principle systematically always includes the preliminary examination of the relevant competence. Consequently, this excludes the principle of individual authorization by the ECJ, which is a part of standard scrutiny.³⁴

Overall, the principle of subsidiarity has created high expectations regarding the rulings of the ECJ. In essence, greater responsibilities are fallen on the shoulders of the ECJ in terms of the interpretation of the EU treaties. These tasks are due to the fact that the principle is subject to judicial testing in accordance with Article 5 of the Amsterdam Treaty. In general terms, the ECJ's jurisdiction is seen as an inverse proportion in a sense that the member states are effectively involved in a decision on the substance and scale of measures under consideration. For instance, in its judgments of 12 November 1996 in Case C-84/94, ECR I-5755 and 13 May 1997 in Case C-233/94, ECR I-2405, the Court found that the compliance with the principle was one of the conditions covered under Article 253 (190) ECT.³⁵ In retrospect at least, these judgements serve as a magic cure against the democratic deficit.

The Council of Ministers as an reluctant partner

It is widely accepted that, although the EU institutions may have exercised some influence on the course of events, the decision-making power rests on the representative of the governments of the member states' meeting in the Council. Oddly enough, some member states are sometimes in favour of greater centralisation of power, despite the

³³ Horsley, T. Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw? *Journal of Common Market Studies*, 2011, pp.15.s

³⁴ Ritzer, C., Ruttlof, M. and Linhart, K. 'How to Sharpen a Dull Sword – The Principle of Subsidiarity and its Control', *German Law Journal* Vol. 07 No. 09, 2009, pp.755.

³⁵ European Parliament Fact Sheets, Subsidiarity 16.10.2010, http://www.europarl.europa.eu/factsheets/1_2_2_en.htm

decision-making powers of the European Commission and the EP have been extended in relation to the central level of governance at the EU level.³⁶ In technical terms, the principle of subsidiarity is difficult to apply, and can fairly be regarded as “political” rather than “technical”.³⁷ In this sense, the Council has always been reluctant to make connections to the principle.³⁸ Therefore, the Council has been recognised as politically significant because its contribution to the decision-making process is considerable. The priority issue is, of course, to ensure the proper application and compliance with the principle, since it must be applied and its compliance scrutinized.

At the symbolic level, the principle of the subsidiarity has often been used to link with the national sovereignty. In the praxis of multilateral relations, the principle appears to reinforce inter-governmentalism.³⁹ This largely derives from the legal framework. Article 7(3) of the Treaty of Lisbon empowered the national governments to adopt a proposed legislation. Having said that, the national parliaments have a stronger role to initiate a procedure, which may prevent a certain act from being adopted. However, the new powers of the national parliaments seems more relevant in theory than in practice. The final decision, which determines whether or not a Commission proposal violates the principle, is taken by the Council and the EP and not by the national parliaments. These two institutions are the ultimate arbiters.⁴⁰ This is, at least, a crucial shift, but

³⁶ Lankowski, C. ‘Germany: Transforming Its Role (eds) The European Union and the Member State’, Lynne Rienner, London, 2006, pp. 35–59 (57).

³⁷ Syrpus, P. ‘In Defence of Subsidiarity, Oxford Journal of Legal Studies’, Vol. 24, No. 2 (2004), pp. 323–334 (334).

³⁸ Van Hecke, S. *The Principle of Subsidiarity: Ten Years of Application in the European Union, Regional & Federal Studies*, Frank Cass, London Vol.13, No.1, Spring 2003, pp.55– 80 (67).

³⁹ Giorgi, L and Pohoryles, Ronald J. ‘Challenges to EU Political Integration and the Role of Democratization, Routledge’, Taylor and Francis Group, Vol. 18, No. 4. 2005, pp.407-418 (409).

⁴⁰ Tronchetti, F. ‘National Parliaments As Guardians of Subsidiarity: A Feasible Task Or An Utopist Chimera?’, Volume 7, No.9 (Serial No.59) *Journal of US-China Public Administration*, USA, September (2010), pp.15-26 (22).

does not mean that the member states have a real device to influence the outcome of such action.

The priority issue is, of course, to ensure the proper application and compliance with the principle of subsidiarity. In achieving gains for the principle, the Council, the Commission and the EP are required to forward their draft legislative acts and the amended drafts to the national parliaments. Each draft legislative acts are justified in line with the principle. In this respect, any draft legislative acts include a statement which may make an appraisal of compliance with subsidiarity possible. So, the Commission is required to give a reasoned opinion to the Council and the EP. Either of these institutions, notably the Council by a majority of 55% of its members or the EP by a majority of the votes cast, may rule out the draft proposal if they consider that the principle has been breached.⁴¹ What comes into this is the ambiguity of the Council's role for the principle. This is to say, the Council appears to hesitate a firm action, rather than trying to exert pressure on the whole process. Nonetheless, the Council has been recognised as politically significant because its contribution to the decision-making process is considerable.

Conclusion

The principle of subsidiarity is important because it serves to set the character of the EU institutions. In a legal sense, the principle has a significant effect on the existing democratic institutions in the EU. A better control of compliance with the principle of was guaranteed by the TEU. From the institutional perspectives, the subsequent treaties, most notably Treaty of Lisbon reinforced the functions of the principle. So, the EU institutions are assigned new roles to implement the principle effectively in the member states. Although the necessity of the provisions of the EU treaties has given new roles to the institutions, the national parliaments seems to influence the legislative process. The role of national parliaments is enhanced. Obviously, this is an obstacle for the application of the principle

⁴¹ Ibid.

Perhaps daunted by the complicated political assessments of the principle entails, adherence to subsidiarity clearly varies from institution to institution, as well as from one time-frame to the next. This is in parallel to the amendment of the EU treaties. It is only recently that the EP and the European Commission have a renewed interest in principle that limits the centralisation of power, while the Council of Ministers remains the most reluctant institution. A key element represented by the willingness of the ECJ has made use of the principle in good faith. In spite of this, there is a noticeable limitation on the exercise of ECJ's power that does not appear to be achieved. Nevertheless, there are no obvious obstacles for applying the principle, in order to guide the ECJ in its interpretation of the Community Law.

Allinall, these considerations are born out of the realisation of the political significant of the subsidiarity principle. The EU institutions have taken steps towards acknowledging that the principle is, at a minimum level, a practical significance for the European political project to be succeeded. Indeed, the principle can be employed by the EU institutions (including the Council), on the conditions that if further institutional innovations occur. Surely, this necessitates to reinforce the recent efforts to bolster the effectiveness of subsidiarity as a guiding principle of European integration. As the practice of integration advances in the EU, much emphasis is implicitly placed on the institutions that involve in decision-making process. In fact the EU institutions have been recognized as politically significant. It is rather more straightforward that they make considerable contribution to integration process.