

## **Subsidiarity and proportionality acc. Article 5 TEU**

### **Deficits of the application - solutions**

#### **“Returning” competences to Member States and regions**

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#### **Different approaches/views of subsidiarity:**

The biggest problem in dealing with "subsidiarity" in the Union is its different interpretation and ideas about what subsidiarity means (see also presentation by Prof. Dougan in Task Force Subsidiarity):

- There is the fundamental **sociological meaning of assigning responsibility** according to the principle, only when the individual, the family, the small group, the community, etc. cannot handle a matter with the means available to him/her, the next higher level is called to act (and only then!) - based on the Christian value of individual responsibility.
- In modern democracy and **interlocking multilevel governance**, the political concept of subsidiarity is increasingly strained and, more unconsciously than consciously, anchored above all in the minds of politicians: a specific subject matter (or specific detail topic) is solved by the respective one level (municipality, country, national or EU level) which represents the 'most tangible' one. Thus considerations of direct contact with the citizens, the traditional exercise of competence, the implementation of successful measures, etc. play an essential role. Conversely, if a new problem often overwhelms one's own (financial) resources or there are concerns about the positive reception of unpopular measures, it is argued politically that the 'higher' level, the regional government, the federal government or even the EU must take action.
- Compared with this, **the "principle of subsidiarity" enshrined in Article 5 (3) TEU is a mere rule for the use of EU competences** which have been delegated to the Union by the Member States under the shared competences (including ancillary competences) of the EU Treaties, Likewise, Article 5 (4) states the 'principle of proportionality' as a supplementary interpretation rule, under which other (restrictive) conditions the EU can and may become active as a 'European legislator' and is allowed to set of measures.

All three essential approaches towards "subsidiarity" have in common that, despite the quite extensive scientific work, they cannot be based on clear criteria of demarcation. In any case, especially in everyday political and social life, different approximation parameters are used for all three meanings of subsidiarity, and some are also used intermingled. Even for the interpretation of the "subsidiarity principle" enshrined in the TEU, there are again different approaches (political, procedural, economic - see, for example, Prof. Dougan), all of which seek different starting points for an "externalisation".

#### **The subsidiarity principle of Article 5 (3) TEU as a rule for using the EU competence(s):**

The complex formulation of the principle of subsidiarity in Article 5 (3) is a 'constitutional principle' of the EU Treaty, which allows the EU institutions to become involved in shared competences only

under certain conditions. The "becoming active" and thus the right to use and exercise the shared competence defined in the contract is thus limited.

In any case, "becoming active" presupposes that there must first be a concrete "conferral" (Article 5 (2) TEU) for the EU to act. It is therefore a fundamental preliminary question to examine the principle of subsidiarity as to whether and to what extent a "legal basis" exists for the relevant subject area. This legal basis, usually the concrete article (or even several) of the TFEU concerning the matter, may already contain further restrictions. The EU may e.g. only adopt minimum requirements or, more specifically, the exception, only take action at EU level by means of a "directive" (as in the case of workers' protection legislation in accordance with Article 151 et seq. TFEU). That means that every individual legal basis already limits the EU legislator, which must be analysed in advance and taken into account before the assessment of the correct application of the subsidiarity principle. This applies particularly to the "accessory" responsibilities, where the EU/EC can only act as a supportive body, or can or should co-ordinate or promote the measures of the member states (example: Civil Protection pursuant to Art. 196 TFEU, Education, Social Affairs, etc.).

The principle of subsidiarity acc. Article 5 (3) TEU is thus a 'constitutional principle' which allows the EU to exercise 'shared competence' (in the case of exclusive competences this would also be logically incomprehensible) and thus to take action if it can be argued that the EU can deliver "better" results on a perceived (policy) need for action ("Better Clause"). If this demonstration/proof is unsuccessful, the responsibility for 'becoming active' automatically remains with the Member States or with the local and regional authorities (since Lisbon explicitly mentioned in Article 5).

### **What is in favour for this kind of (narrow) interpretation of the subsidiarity principle?**

- The "principle of subsidiarity" has been explicitly included in the EC/EU Treaties with the Maastricht Treaty, after the discussion on the ongoing integration and thus the shift of (implementation) "competences" from the Member States to the EC/EU level reached its peak for the first time. The "principle of subsidiarity" was deliberately conceived **as the "EU constitutional principle" restricting the exercise of EU competences** and subsequently (slightly) as an expression of the desire for greater proximity to citizenship ("political subsidiarity") in the Constitutional Treaty and finally further developed in the Lisbon Treaty (mentioning of the local and regional level). Additional protocols ("Early Warning Mechanism" and the Protocol on the Application of the Principle of Subsidiarity and the Principle of Proportionality) contain almost without exception procedural or formal provisions on these two 'constitutional principles' of the EU Treaty.
- The principle of "subsidiarity" was designed therefore also "softly", that means its content is **designed without any further criteria in order to examine on a case-by-case basis whether it makes sense to 'become active' at EU level** and thus not to hinder the dynamics of the European integration process (i.e. also with regard to the temporal dimension). Note: However, the political dissatisfaction at national and regional level with "too much EU" remained undiminished. On the other hand, individual Member States or even groups of Member States repeatedly enjoy the 'vagueness' of the principle of subsidiarity because it gives them the opportunity to demand or agree with the EU on measures that are not insignificant in their (financial or political) interests.
- In interpreting a 'constituent principle' in the EU treaties, **applying 'political parameters' such as 'proximity to citizens', 'tradition' or simply 'more subsidiarity' in the sense of renationalising measures would not be very productive**. Experience shows that there are very different (basic) views within the EU on what has to be regulated at a specific moment regionally or nationally and what can be regulated at EU level. The opinions of national (and

even more blatantly from some regional) parliaments prove how contrary the views and also the arguments on the same subject matter (Commission proposal) in Europe are.

- Although the ECJ has not fundamentally (yet) ruled on the "principle of subsidiarity" and "proportionality" in its case-law, in the absence of a reasoned and preliminary ruling, judges of the ECJ (Lars Bay Larsen, Berlin Subsidiarity Conference, 18. Dec. 2013,) made it clear that the subsidiarity principle is "... *not a rule for the allocation of competences, but for the use of competences*".

### **Successful ex ante impact of the "subsidiarity principle":**

The "subsidiarity principle" enshrined in Article 5 (3) TEU is the "antipode" to the "Jean Monnet method", which is the essential feature of the ever-increasing integration process of the EU; the dynamics of the ever-small steps, which consequently require further (integration) steps. This is the "unintended consequence" (Prof. Pelinka), e.g. in the case of Schengen, which as a consequence required a closer cooperation of the police authorities and consequently requires a secure external border. This applies to all crises of the EC/EU, which made deficits in the EU regulations visible and these were consequently "eliminated" by further measures at EU level regularly – but not without exception - within the existing treaties.

Generally it can be said that **the principle of subsidiarity** - and this does not apply to the proportionality principle - **is applied satisfactorily**. There are only a few exceptions (a maximum of 5 per cent of the Commission proposals), where, in spite of even internal Commission findings and opinions (impact assessment), Commission proposals have infringed the subsidiarity principle. Examples from the recent past are the proposals for the Blue Card Directive (Com (2016) 378 of 10 June 2016), for the extension of the "European Civil Protection Mechanism" (Com (2017) 772 v. 23 Nov. 2017) or for amending the "Drinking Water Directive" (Com (2017) 753 v. 1 Feb. 2018).

Furthermore, it can be said by experience that the two EU legislators (mainly the Council), for functional reasons and hardly due to breaches of the principle of subsidiarity – reasons of subsidiarity serve merely as supportive arguments – are weakening proposed sub-measures of a regulation or directive, which are critical particularly in view of subsidiarity concerns, or "negotiate them out". Thus the responsibility for autonomous "activism" and action remains at the Member States as far as possible. Example: Circular Economy Package, Proposal "Waste Directive" (Com (2015) 595); the original proposal of the strict separate collection of "municipal waste" (via a very narrow definition) was weakened during the negotiations at Council level, so that the municipal waste - as economically sensible in Austria - can be collected and recycled together with similar and harmless commercial waste.

### **The proportionality principle (Article 5 (4) TEU) supplements the rule for the use of EU-competences**

The "proportionality principle" is **laid down very vague** in the TEU. Many complain like the "excess of bureaucracy" by the EU, the "love in details" of EU regulations, the designing of "directives" with no remaining room for manoeuvre for the Member States responsible for the implementation, the detailed rules for regional policy programs and the common agricultural policy to be implemented by "decentralised EU administration", the excessive grasp on "delegated acts" (indirectly), etc., are based on the concrete outflow of breaches of the principle of proportionality.

**Neither the text of the EU Treaty nor the previous case law of the ECJ** on the principle of proportionality - *"everything is proportionate, which is obviously not inappropriate to achieve the objective of the measure"* - **give any objective evidence to limit the EU's " becoming active proportionately"** (in particular the Commission).

If a legal act titled as a 'directive' is detailed in such a way that it obliges the national authorities to use specific means and a specific form for their transposition, and not just the objective, which they have to achieve, than it is a clear breach of the principle of proportionality. The EU legislator will be obliged to use the "least appropriate means to achieve the defined objectives"; in a case where the simple definition of the objective alone will not be sufficient and further detailed rules governing the form and the means are necessary, the EU legislators are recommended to use the legal instrument of a 'regulation' (directly applicable). If, in addition, yet provisions beyond the objective formulation are necessary but – as explicitly limited by the workers' protection rules (minimum requirements) – only the instrument of the 'directive' is commanded by the Treaties, then you will find a good opportunity to bring a clear (formal) breach of the principle of proportionality before the ECJ.

### **What are the criteria for demonstrating "better results" at EU level?**

It is absolutely true that the "rule for the use of EU-competence" of Article 5 (3) ("subsidiarity principle") **is geared towards "economic efficiency of legislation"**, which is broadly argued and used by the Commission in this sense. There are hardly any other aspects of the proposals and the accompanying documents (impact assessments). The argument, which has recently been increasingly used, namely that the proposal and the option chosen make it possible to create a certain number of jobs in the EU caused by their implementation, also underlines this alignment. The reason for this is provided by the anchored "added value", which has vaguely to be assessed in **terms of the "scope and effects"** of the planned (legal) measure with regard to the desired objectives (to satisfy the obvious need for action).

The "Protocol on the Application of the Principle of Subsidiarity and the Principle of Proportionality" as well as that on the "Early Warning Mechanism" provides no further substantive indications for limiting or even determining when a measure is "better" to be exercised at EU level (basic openness to the dynamics of the European integration).

Internally, the European Commission has developed comprehensive guidelines and various tools for the preparation and justification of the compliance of proposals with the two principles since the discussion on "closer proximity to citizens" for its administrative bodies. With the discussion on "Better Regulation" and the negotiation of the relevant "Interinstitutional Agreement", the guidelines and tools have been revised. All of these focus primarily on formal and procedural aspects and, above all, represent "economic" aspects, in particular for the assessment and selection of (action) options.

### **How to address the obvious deficit of clearly manageable criteria (within the Treaties, by a Treaty amendment):**

The following **new "criteria" for assessing the "EU added value"** could be anchored in the form of **self-discipline and self-commitment** in the sense of the motto already postulated by Commission's President Barroso: "The EU should be big on big things and small on small things".

- **Introduction/application of new substantive criteria:** The Commission proposal must have a direct impact on at least 5 million citizens (1% of the EU population) or indirectly on at least 25 million citizens (5% of the EU population) – except proposals concerning EU fundamental rights and freedoms, e.g. non-discrimination or fundamental improvements of EU freedoms.
- Relativizing the 'economic' single edged approach through a (quantifiable) **'better clause' in favour of Member States and their regions and municipalities;** e.g. if a certain number (1/3) of Member States (with their sub-national authorities) can demonstrate that they have already satisfactorily - albeit differently - resolved a clearly identified need for action, it is not necessary anymore to take action at European level.
- Clear **definition of parameters/indicators, which generates an "EU added value" at EU level:** "Improvement" is expected for almost all EU states (not a minority, because there e.g. EU rules have not been implemented); the Commission has exhausted all the existing resources (infringement procedure, legal action at ECJ) and yet Member States remain in default; clear cross-border interdependencies (and not just the unwillingness or ability of individual states to act); the expected 'generated EU added value' must directly relate to the defined objective and measure (not accompanying effects, such as the expectation that additional jobs could be created that are not immediately the aim of the measure - that is one currently quite common and political 'reasoning' of the Commission, but deceives the fact that these jobs must be created by someone, which is associated with costs - usually in the public sector at the national enforcement authorities).

Under a **Treaty amendment, the "Better Clause" could be newly designed** by a limiting definition of its objective and/or supplementary text on the "principle of subsidiarity" in Article 5 (3) ("Less EU is more EU"). The 'new Better Clause' would also benefit the Member States (and their local and regional authorities); it should set specific parameters/indicators for the "EU added value" to be generated (beyond the vague "scope and effects"); finally, altogether has to be complemented by a **mind of self-restraint** (abstaining from an EU action even in the event of and the awareness that there is a need for regulation).

### **Who can procedurally ensure – and how – that the current (or even new more restrictive and manageable) criteria for the subsidiarity principle are respected?**

It is reiterated that in the overwhelming majority of cases, the "principle of subsidiarity" is correctly applied. For the **remaining cases of infringement, the following measures could help to remedy the situation:**

Commission: **exercises itself in "self-discipline"** and deliberately refrains from 'becoming active' in open initiatives that are not clearly based on EU added value (within the "specific conferral" in accordance with Article 5 (2) TEU); renunciation of the "exercise" of a shared competence in the sense of the motto announced for still 8 years: the EU may be big on big things and small on small things. **The "voluntariness" could support:**

- If **the College of the Commission** as a whole will be much **smaller** and therefore the Commissioners had to take care of the "really" big EU issues (and not side-lines).
- The Commission would more often and honestly **refer to the primary responsibility for action of the Member States** (especially in the public communication).
- If the Commission **would not participate in "public relations measures" simple for their own image** in cases, where the EU do not have competences conferred; in the expiring Juncker presidency, this has been intensified in the social sphere (political proclamation of the

"European Pillar of Social Rights"), although the EU hardly has de facto any conferred competences in the social field according to the Treaties.

- If the Commission, as a whole (including the civil service), **will better bear up against various external and political and economic interests**, including in particular many political resolutions of the Parliament, individual action and financing concerns of individual Member States, and demands of "European Citizens' Initiatives": the obligations for the Member States to ensure "access to drinking water" for all, now included in the revising proposal of the "Drinking Water Directive", is a good example of an 'accommodating' by the Commission: after the finalising of the citizens' initiative in 2014 the Commission originally referred to the fact, that the EU was not responsible and that it is a task of the MS. But the Commission was criticised a lot, particularly also by the European Parliament. After 4 years and after further "consultations", the Commission has now picked up the "political demands" contrary to the provisions of the EU Treaties. (Note: the Commission could have solved the issue of "Access to Drinking Water for All" much more elegantly and earlier with the proposal of a "recommendation" (a legally non-binding instrument) that would automatically bring the central responsibility of the Member States to the fore).

Consultation processes: are important, but in part already exaggerated and overly formalized and written; especially for the local and regional level, there are few opportunities to provide good examples, to make clear the immediate concern and to demonstrate the potential impact of proposed EU legislation.

A positive example was the discussion on "Urban Mobility" (with issues of urban driving restrictions, promotion of public transport, etc.) 2013: to this end, the Commission services together with the Committee of the Regions organized a workshop linked to a "Subsidiarity Forum" where affected cities and regions could present their actions and discuss them with the Commission services. The result of the workshop led the Commission to abstain from the already planned legislative initiatives at EU level.

- **targeted workshops** (about 10 per year) with space for dialogue for local and regional authorities on selected Commission initiatives already in the pipeline (key elements of planned action of the Commission should be known)

Regulatory Scrutiny Board: The "Board" has been strengthened by the Better Regulation Initiative and the proposals for an "Interinstitutional Agreement". Contrary to the original plan to make it completely independent, this 'authority' is subordinated to the President of the Commission and the seven members are also appointed by the Commission's President. The current members are mostly approved economists (5) and two lawyers (one member specialised in labour law) with an EU background, half of whom come from the Commission staff.

The main task of the Regulatory Scrutiny Board is to review and assess initiatives in preparation for compliance with the Better Law-making criteria and to deliver a "positive" or "negative" opinion. The audit also includes checks on the compliance with the principle of subsidiarity and the principle of proportionality (especially cost implications) and the assessment of a reasoned argumentation, for which reason, finally, a certain option out of several is proposed for adoption to the EU legislators. A random check of "opinions of the Regulatory Scrutiny Board" revealed that, in particular, the Commission's 'critical' proposals on compliance with the principle of subsidiarity and proportionality were mostly negative, with proposals/recommendations to improve and supplement the Commission proposal. The process of acceptance by the College was thereby delayed. There are examples ("Drinking Water Directive new") in which, shortly before adoption by the College of the Commission, a second "*positive opinion with reservations*" was made. The 'reservations' relate in substance to the facts/concerns already discussed and demanded in the 'negative' opinion.

The **Regulatory Scrutiny Board** will attach a key and essential importance to the observance of the 'EU constitutional principles' laid down in Article 5 (2) to (4) TEU (principle of conferral, subsidiarity principle, proportionality principle) if the following improvements are made:

- The Regulatory Scrutiny Board is **provided free of any instructions** (independency);
- Its **composition** should be designed so that at least **three members are lawyers** with relevant experience in relation to the 'EU constitutional principles'; where possible, these should come from non-Commission services;
- The Regulatory Scrutiny Board has **the right of a technical "veto"**: the Commission's College is prohibited from adopting a legislative proposal (**effective ex ante control**) in the case of clearly argued and justified infringements of the 'EU constitutional principles';
- The assessment of conformity with the three 'EU constitutional principles' of Article 5 TEU in **the Opinion ('Subsidiarity Opinion')** of the Regulatory Scrutiny Board should, where possible, be **carried out according to a schematic grid** that provides and lists the basic and extended (also quantitative) criteria - and new ones when developed by the case law of the ECJ;
- In any case, all **"Opinions" of the Regulatory Scrutiny Board must be made public at the time of their completion** (that is, before the approval of the legislative initiatives by the College) and, in particular, **incorporated into the REGPEX system**; this could ensure timely information (**"warnings"**) to national and regional authorities (including parliaments) on a legally sound basis (this also mitigates the 8-week deadline in the Early Warning Mechanism, because the authorities and parliaments are aware of any concerns);
- Each "Opinion" has to **be transmitted automatically together with an "updated Roadmap" of the planned proposal to the national parliaments** and, if possible, also **to the regional parliaments**; they serve as an independent technical basis for the assessment of the 'EU constitutional principles' according to Article 5 TEU.

Early Warning Mechanism (i.e. national parliaments' monitoring of the principle of subsidiarity): The 'involvement' of national parliaments in the EU legislative process by the Treaty of Lisbon in 2009 pursued the purpose of a complementary 'democratic legitimisation' of EU decisions (EU laws). In reality, **the involvement of national parliaments, which is limited** in scope to an examination of compliance with the principles of subsidiarity and proportionality, **is too late**. The 'seriousness' of the approach is very different in the Member States; **rightly, the political bodies that determine the nature of democracy and are directly elected break from their tight corset** of the "Early Warning Mechanism", seek broad political dialogue and act and argue predominantly politically. This is in **sharp contrast** to the requirement **to treat the 'constitutional criteria' of Article 5 enshrined in the TEU professionally and legally**. For a credible argumentation/reasoning towards the Commission, it is indispensable to address the Commission's arguments at the same level, namely the technical-legal one. With regard to a 'discussion' and treatment of the arguments before the ECJ in the context of a subsidiarity legal action, only the technical-legal interpretation of the 'constitutional principles' is decisive. Political arguments will not count (anymore).

The **few "yellow cards"** also underline the tendentious/**superficial political argumentation of the national parliaments**:

With the proposal (2013) for an "European Public Prosecutor's Office" to improve combating fraud against EU funds, the national parliaments (and governments in the background) became aware of the fact that they had created an excessive conferral of power in 2009 by creating Article 86 (1) TFEU and its wording (*'Establishment of a European Public Prosecutor's Office'*); it concerned a very traditional sovereignty of states, namely general prosecution! The "subsidiarity objections" therefore represented the (political) emergency brakes, which, however, could not be substantiated in legal and technical terms.

In the case of the proposal for a recast of the "Posting of Workers Directive" with the aim of "equal pay for equal work at the same place" in view of increasing labour migration within the EU with almost unchanged wage (and social) disparities between EU countries it is not surprising, therefore, that mainly national parliaments from 'sending countries' raised a 'subsidiarity objection'. Politically, it was about safeguarding the economic and social benefits of labour migration. A substantive-juridical examination of the subsidiarity objections on the validity of the subsidiarity concerns could not (credibly) withstand them, because who better should handle and solve this problem of unequal treatment and distortion of competition, which is interlinked in many ways between the Member States and deeply integrated into the freedoms of the internal market?

The argumentation of the national parliaments, motivated mainly by legitimate political interests, is also reflected in many other "subsidiarity objections" and 'communications/opinions'. This also applies to some "Subsidiarity Opinions" by regional parliaments. Genuine subsidiarity arguments and concerns also go down when they are mixed with political arguments and justifications.

The **credibility and the power of impact of the Early Warning Mechanism could be improved** as follows:

- **Timely provision of - independent - technical and legal assessments on the compliance with the three 'EU constitutional principles' of Article 5 TEU;** as stated above, this could be the 'Subsidiarity opinion' of the Regulatory Scrutiny Board, drawn up independently and without instructions, which will be made available to all national and regional authorities before the adoption of the (legislative) initiative by the Commission;
- **improving/intensifying the coordination processes of the national parliaments (COSAC);** Exchange of positions and arguments among themselves, if possible before the 8-week deadline of the Early Warning Mechanism on the basis of the "roadmaps" (the Commission now regularly publishes 1 year up to ½ year before the adoption of the proposals) or at the latest with the presentation of the "opinion" of the Regulatory Scrutiny Board;
- **Clear separation of the "subsidiarity objection" or subsidiarity concerns from political interests and arguments** in written comments to the Commission (thus the Commission will be enabled/forced to provide a more precise answer/reply to the 'subsidiarity arguments');
- **Intensifying the political dialogue in general between national/regional parliaments and the Commission** (and, if appropriate, other EU institutions) in order to address the legitimate need for 'ex-ante political participation and development' of main live and economic framework conditions at EU level; Currently, national and regional parliaments and their actors ("members are directly elected by citizens") are not only undergoing that the EU increasingly adopts the "exercise" of competences and tasks (Jean Monnet dynamics), but they are acting as well as copy-legislators without any real scope for design where EU legislators have made decisions; Just to understand these processes, immediate information and dialogue are very important (identification with and not isolation from the process of European integration).

EU Legislators - Council and European Parliament: The **Council, as a rule and by its very nature, acts as the "brake" on excessive "use" of EU competences.** On the one hand, because the "exercise" of partial aspects of a conferred "shared competence" (principle of conferral) generally, like communicating vessels, means the loss of one's own (political) 'capacity of shaping' at the national level. The 'brake' can only curb specific self-interests and populist purposes, which would give greater benefits in the perception and 'exercise' of the competence at EU level to some member states. The latter applies in particular to "financial measures" and EU activities. Therefore, it is easy to explain that the recent proposal to amend the "Union Civil Protection Mechanism" (Com (2017) 772 v. 23 Nov. 2017) does not cause much resistance in the Council, especially by the southern member states,



which will benefit significantly by large fire-fighting equipment or by mobile surgical hospitals funded directly by EU means within the new "reserve rescEU". The technical and legal concerns are being pushed aside which states that the Art. 196 TFEU created by the Lisbon Treaty is at best to be the (legal) basis for EU "accessory measures" for disaster risk reduction (specific limited conferral), but could be never implemented completely independent of the activities of Member States. Even the Council's Legal Service joins the political majority and, by a very narrow interpretation of the text and disregarding the general principles of art. 5 TEU, supports the emerging political opinion-forming in the Council.

**However, the Council mitigates** - and continues to do so as a decisive EU legislator - in most cases infringements of the 'EU constitutional principles' of Article 5 TEU by the Commission in the Council's in-process negotiations on the subject. In doing so, **it is less the subsidiarity arguments** - which are usually raised only in the case of massive and apparent breaches - but **rather the content-related shaping that play a role**: the Member States "conquer" territories of the "use" of competence step by step back by: reducing the Commission's activity radius, renegotiate certain flexibility margins particularly within proposals of directives, or even push back unnecessary bureaucracy and administrative burdens in the sense of the principle of proportionality. There are certainly high discussions and negotiations with the Commission when a "legal basis" used by the Commission is called into question. Thus the "Council", from technical working groups to the Coreper right up to the Council of Ministers, is characterized by processes in which subsidiarity and proportionality concerns are mitigated, **rather unconsciously**, by the technical design and modification of the Commission's proposal.

The second, officially equal EU legislator, the European Parliament, is behaving in the opposite direction. Obviously, the **European Parliament is anxious to fill out** as far as **possible and creatively the "specific conferrals"** delegated in the area of shared competences - at least for more than 500 million citizens. Considerations on subsidiarity or proportionality play a minor role.

For the trilogue, it is mostly the more 'realistic and feasible' results of the Council's negotiations which, as a rule, the Commission has already given its assent (mediator for a compromise), **are prevailing** and **the 'mitigation' of the original infringement of the 'EU constitutional principles' of Art. 5 TEU** will be achieved but not the **unquestioning/unconsidered conformity** with these.

Compliance with the 'EU constitutional principles' of Article 5 TEU can **be improved in the EU legislative procedure by the two EU legislators as follows**:

- **Compulsory discussion and handling and examination** of the 'EU constitutional principles' of Article 5 TEU **by the largely independent "Legal Services"** of the two EU legislators (independent review/confirmation/addition/refutation of the "Subsidiarity Opinion of the Regulatory Scrutiny Board"); thus more conscious handling of the fundamental principles of the EU Treaty;

Committee of the Regions (right of legal action): **early tackled the issue of "subsidiarity" and introduced its own compliance monitoring and assessment tools**: the CoR has a specific expert group on subsidiarity, which select "dossiers" from the annually Commission's work program and recommend them for further consideration; the "dossiers" demonstrates reference to regional and local competences. As a result, the experts also contribute specific expertise. A political 'Subsidiarity Steering Group' composed of CoR members oversees the CoR's activities in this field. This includes a "Subsidiarity Monitoring Network" of approx. 160 regional and local authorities or associations of these, including individual national organizations. The CoR is also the engine and key organizer of

"Subsidiarity Conferences", which are usually held on a biennial basis with a national parliament (most recently the 8th Conference on 4 December 2017 with the Austrian Bundesrat in Vienna).

The CoR developed at an early stage a **generally understandable "assessment grid and questionnaire"** (technically led by Christian Gsodam) for the evaluation of individual Commission proposals for their compliance with the 'EU constitutional principles' of Article 5 TEU. It has been applied for more than 10 years. This grid also offers scope for proposing alternative forms and means for the use of (shared) EU competences.

The CoR opinions themselves contain only a few comments on the 'EU constitutional principles' of Article 5 TEU. There are still concerns about proportionality in the context of excessive bureaucracy or burdensome costs for local and regional authorities. The opinion and decision-making in the CoR is characterized by the very heterogeneous composition and thus the very different interests of its members. The general statements are therefore often the "lowest common denominator" of positioning vis-à-vis the other EU institutions on a concrete proposal from the Commission. In the absence of (co-) decision-making authority, the subsidiarity and proportionality concerns are not ignored, but have only a modest influence on the further decision-making process.

Ex post - ECJ: Since the late 1990s the ECJ has ruled on aspects of the principles of subsidiarity and proportionality **in approx. 160 judgments**, however, many times in an accompanied manner (in particular the "Tobacco Directives"). Likewise, there are statements on the application of the "principle of conferral" because the question of the correct legal basis was also put forward concretely in legal actions. With regard to the principles of subsidiarity and proportionality, there is no overarching and substantive case-law, but rather partial aspects dealt with and 'approaches to the margins of these two principles'. (Note: an overview/summary of the most important quotes can be provided separately).

The open criticism towards the European Court of Justice (debate question at the 8th Subsidiarity Conference to Judge Jean-Claude Bonichot), according to which the ECJ has not yet made a comprehensive decision - or even a abrogation of an EU legal norm – for the breach of the subsidiarity principle, must be **countered that no direct legal action or claim has been made yet**. Aspects of the above principles have been brought forward only additionally by complainants or applicants. But the ECJ will not be afraid, according to Bonichot, to treat a clearly stated claim and at the most, after a very banal examination procedure, to repeal once a legal act.

### **Concrete examples of areas of "renationalisation" on the basis of current experience:**

- Structural and regional (cohesion) policies: Scientific research shows that EU cohesion policy has failed to achieve the aim of reducing economic disparities between states and regions and thus the Treaty objective of promoting economic, social and territorial cohesion. The many billions spent by the "Structural and Cohesion Funds" were not meaningless because they at least made sure that economic weakest and peripheral regions have not lost even more economic - and therefore also social - terrain. Indirectly they have benefited more from the involvement of the economies of wealthier countries and benefited more from the increased competition capacity and the economic recovery and sometimes from the structural investments of the EU. EU policy can indeed limit the objective of promoting the "economic and social cohesion" to the exclusive promotion of economically weak regions. Indeed, the 'rich' regions themselves are competitive and financially capable of carrying out structural reforms independently. The EU money (to a greater extent) could be concentrated on the actual cohesion goal (in the sense of a close application of the principle of subsidiarity in

accordance with Article 5 (3); the richer EU states will not gain an "added value" in the sense of the Treaty objective, which is obviously only a 'political added value', when the richer regions get back money from the EU). A genuine 'renationalisation' could only take place with an amendment in the form of a limiting text in the EU Treaty (definition of weaker economic regions, introduction of a GDP limit in the current "Cohesion Fund", weakening of the comprehensive definition of the cohesion objective, etc.). A positive accompanying effect would be that the 'richer' MS and regions would get rid of the currently unmanageable ridge of EU funding bureaucracy (about 5,000 pages of EU regulations plus 'gold-plating' of the MS). (Note: both options are politically unrealistic!)

- Territorial cooperation as a specific area of cohesion policy: The EU may limit itself by stating the simple the EU-wide obligation that "neighbouring states" or states and regions of "macro-regional strategies" (transnational component of Interreg) have to establish their own "cross-border" or "transnational" development programs for territorial cohesion. These have to be financed from national funds alone in the future - with reference to historical shares in programs. Beside basic monitoring of the implementation of the EU obligation (based on results), the EU/Commission provides only "accessory" services, such as the provision of program development and management tools. The affected regions and Member States at their borders, however, are completely free from EU requirements in terms of priorities and organization - they know best where there is potential of (economic) development at borders or transnationally (again they will benefit from the removal of the EU bureaucracy influx for EU subsidies). This would require a TFEU amendment to limit the EU's specific conferral regarding these tasks.
- The same applies mutatis mutandis to the "development of rural areas" or the handling of new challenges for "urban spaces" (emissions, immigration, traffic problems, etc.) as described above for "territorial cooperation"; the towns/municipalities and those (politically) responsible for rural areas know best themselves where potentially development and/or approaches for solutions can take place. With the exception of "economically weak regions and MS" ("cohesion regions and countries"), EU 'interventions' should be traced back to purely supportive (accessory) competences (exchange of experience, management tools, etc.).
- Enforcement of consumer protection rights - no sanctioning authority of the EU in case of injuries: In general, the EU legislator (and thus the Commission as "guardian of the treaties") could be limited in its capacity to enforce directly EU consumer law (as part of contract and civil law) by punishing infringements with concrete fines. This would require a specific ban on imposing fines in the TFEU regarding consumer protection (Art. 169) and in addition in Art. 114 TFEU (general conferral for EU legislation for harmonizing rules for the proper functioning of the Single Market). The implementation of EU consumer protection provisions is in any case the responsibility of the Member States. With a ban on sanctions at EU level, civil enforcement of EU consumer protection rules would again be the responsibility of the Member States.

### **General approaches for "returning" EU competences to Member States**

- As stated above, 'genuine breaches of the principle of subsidiarity' are the exception and can be prevented by the introduction and rigorous management/control of parameters/indicators or by practising of 'self-restraint/self-discipline'.
- The infringements of the principle of proportionality seems only moderately reducible, because there are no objective indications and criteria for the very expansive term of 'proportionality'. In this regard, only "self-discipline" of the EU institutions, including governments and parliaments (no requests for or support to regulation at EU level) in the sense of a rather "political understanding of subsidiarity" can remedy this – despite the still existing diverging views.

**Generally in the context of an amendment of the Treaties (and only by this way) effective measures for "definitely returning of EU competences to Member States" could be:**

- (Even) narrower definition of the 'specific conferrals', in particular with the proviso that only one specific form of the act (recommendation, directive) may be provided for the 'becoming active' of the EU (the form of the 'use' of the competence will be specified in the Treaty). This makes it easier to link up and assert a formal infringement by all "monitoring bodies" particularly by the ECJ;
- The inclusion of a general provision which do not allow EU institutions to enforce EU secondary legislation in the field of "shared competences" by imposing penal sanctions; sanctioning is generally reserved to the authorities of the Member States.