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THE PRINCIPLE OF SUBSIDIARITY IN EU JUDICIAL AND LEGISLATIVE PRACTICE: PANACEA OR PLACEBO?

*Gabriël A. Moens * and John Trone***

I. INTRODUCTION

This paper considers the failure of subsidiarity as a judicial review principle and its somewhat more successful record as a legislative review principle in the European Union. Although the founding Treaties make clear that subsidiarity is a legally binding principle, the European Court of Justice has adopted an excessively deferential approach to its judicial enforcement. The Treaty provisions have been rendered essentially meaningless platitudes so far as judicial enforcement is concerned. The European Court's under-enforcement of subsidiarity should be contrasted with the Court's history of judicial activism. While the Court has often fashioned novel legal doctrines without express support in the founding Treaties, in the case of subsidiarity an express guarantee in the Treaties has been emptied of content by judicial interpretation.

On the other hand, subsidiarity has shown more promise as a legislative principle. The parliaments of the Member States have procedural rights in the EU legislative process, though they do not have a right to veto EU legislative proposals. Under the early warning system, the Member State parliaments are able to force the Commission to reconsider proposals that they consider to be an infringement of subsidiarity. These parliaments have successfully used the early warning system to force reconsideration of a legislative proposal, resulting ultimately in the withdrawal of the proposal by the Commission.

II. SUBSIDIARITY AS A JUDICIAL REVIEW PRINCIPLE

A. The Applicable Treaty Provisions

A brief history of the subsidiarity principle in the founding Treaties provides useful background to the discussion that follows, as the various Treaty

revisions are significant. The principle of subsidiarity first appeared in the Community founding treaty through the amendments introduced by the Single European Act, though only in relation to environmental matters and with very little detail.¹ Subsidiarity was given more prominence in the Maastricht Treaty when it became a general principle of EU lawmaking.² A Protocol elaborating upon the application of the principle of subsidiarity was added by the Treaty of Amsterdam³ and amended by the Treaty of Lisbon.⁴

In their current versions the founding Treaties contain numerous provisions that make reference to the principle of subsidiarity. Only the more significant of these provisions need be referred to here. The preamble to the Treaty on European Union states that in the process of European integration “decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity”.⁵

The Treaty on European Union substantively provides that the exercise of power by the EU must respect the principle of subsidiarity.⁶ Subsidiarity is defined as follows: “in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.⁷

The three key principles of conferral, subsidiarity and proportionality are all contained within the same Article of the Treaty on European Union.⁸ The principle of conferral is defined as follows: “the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.”⁹ Proportionality is defined as follows: “the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”¹⁰

Put briefly, the conferral principle asks “can” the EU take a proposed measure. The subsidiarity principle asks “if” the EU must defer to the Member States

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1. Single European Act art. 25, Feb. 17, 1986, 1987 O.J. (L 169) 1 (inserting Treaty Establishing the European Economic Community art. 130 R(4)).

2. Treaty on European Union art. 3b, Feb. 7, 1992, 1992 O.J. (C 191) 1; *see also* *Id.* Tit. I art. B. ¶ 2.

3. Treaty of Amsterdam, Protocol on the Application of the Principles of Subsidiarity and Proportionality, Oct. 2, 1997, 1997 O.J. (C 340) 105.

4. Treaty of Lisbon, Protocol on the Application of the Principles of Subsidiarity and Proportionality, Dec. 13, 2007, 2007 O.J. (C 306) 1.

5. Treaty on European Union Preamble, para 13, as revised Dec. 13, 2007, 2012 O.J. (C 326) 13 [hereinafter Treaty on European Union] (current version).

6. *Id.* art. 5(1).

7. *Id.* art. 5(3).

8. *Id.* art. 5.

9. *Id.* art. 5(2).

10. *Id.* art. 5(4).

in relation to the proposed measure. The proportionality principle asks “how” the proposed measure may be taken.¹¹

Conferral has also been summarised as being concerned with the “existence” of a competence, subsidiarity with the “exercise” of a concurrent competence, and proportionality with the “intensity” of EU action.¹² The United Kingdom House of Commons contrasted subsidiarity and proportionality as follows: “if proportionality is looking at whether a sledgehammer can be used to crack a nut, subsidiarity is looking at whether the sledgehammer should be picked up in the first place.”¹³

By the express language of the Treaty, the principle of subsidiarity has no application to the exercise of the exclusive powers of the Union.¹⁴ The Court of Justice has confirmed that subsidiarity does not restrict the use of the exclusive powers of the Union.¹⁵ In the context of exclusive powers subsidiarity is thus “wholly irrelevant.”¹⁶ Subsidiarity restricts only the exercise of the non-exclusive powers of the Union.¹⁷

Until the Lisbon Treaty the founding Treaties did not contain a list of the exclusive competences of the Union, so the range of such competences was open to dispute.¹⁸ Under the current version of the Treaties the EU has exclusive competence over few subject matters. These are the customs union, competition rules for the internal market, monetary policy for the Eurozone, marine biological resource conservation, and the common commercial policy.¹⁹ The Commission also considers that a few other matters are inherently exclusive, such as EU budgetary and institutional matters.²⁰ The Czech Chamber of Dep-

11. Christopher Ritzer, Marc Rutloff & Karin Linhart, *How to Sharpen a Dull Sword – The Principle of Subsidiarity and its Control*, 7 GERMAN L.J. 733, 737 (2006).

12. Thomas Horsley, *Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?*, 50 J. COMMON MARKET STUD. 267, 268-69 (2012).

13. Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union, Nicosia, Cyprus, Oct. 14-16, 2012, *Eighteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny*, 5 (Sept. 27, 2012), available at <http://www.cosac.eu/documents/bi-annual-reports-of-cosac/d5-18-Bi-annual-Report-EN.pdf>.

14. Gabriël A Moens, *The Subsidiarity Principle in European Union Law and the Irish Abortion Issue*, in LAW, LEGAL CULTURE AND POLITICS IN THE TWENTY FIRST CENTURY 424, 426 (Guenther Doeker-Mach and Klaus A Ziegert eds., 2004).

15. Case T-420/05, *Vischim Srl. v. Comm’n*, 2009 E.C.R. II-3841, ¶ 223 (decision not appealed); Case C-288/11 P, *Mitteldeutsche Flughafen AG v. European Comm’n*, EU:C:2012:821, ¶ 79; Case T-31/07, *Du Pont de Nemours (France) SAS v. European Comm’n*, EU:T:2013:167, ¶¶ 204-205.

16. Horsley, *supra* note 12, at 275. See also Statement from the Committee on the Constitution, Report from the Commission on Subsidiarity and Proportionality, 2010/11:KU26, at 17-18 (Swed.), available at http://ec.europa.eu/dgs/secretariat_general/rerelations/rerelations_other/npo/docs/sweden/2010/com20100547/com20100547_riksdag_opinion_en.pdf (discussing how a draft regulation relating solely to an exclusive competence of the Union was erroneously submitted for subsidiarity scrutiny by the Commission).

17. Gerard Conway, *Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ*, 11 GERMAN L.J. 966, 988 (2010).

18. Paul Craig, *Subsidiarity: A Political and Legal Analysis*, 50 J. COMMON MARKET STUD. 72, 74 (2012); see now Treaty on European Union, *supra* note 5, at art. 3(1).

19. Treaty on European Union, *supra* note 5, at art. 3(1).

20. *Letter from the Commission to the Swedish Riksdag*, C(2012)6193 final (Sept. 18, 2012), available at

uties has disputed whether EU institutional matters are within the exclusive jurisdiction of the Union, arguing that the Treaty listing of exclusive competences is exhaustive.²¹

The EU and the Member States share jurisdiction over a larger group of subject matters. These include the internal market, social policy, agriculture and fisheries, environment, consumer protection, transport, energy, and the area of freedom, security and justice.²²

The Subsidiarity Protocol provides that legislative proposals must “take account of the need” for financial or administrative burdens upon the Member States “to be minimised and commensurate with the objective to be achieved.”²³ The Treaty of Amsterdam version of the Subsidiarity Protocol provided that subsidiarity allowed EU action to be “expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified.”²⁴ This passage no longer appears in the Lisbon version of the Protocol. In 2003 the Commission cited this provision in support for its argument that EU pre-packaging legislation was no longer required because other EU Directives fulfilled its objectives.²⁵

The Charter of Fundamental Rights also briefly mentions subsidiarity. The Charter provides that it is “addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity.”²⁶ The Charter is legally binding upon the EU and the Member States when they implement EU law²⁷ and possesses the “same legal value as the Treaties.”²⁸ The Court of Justice has confirmed that subsidiarity does not create individ-

http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/swe-den/2011/com20110345/com20110345_riksdag_reply_en.pdf.

21. Comm. for European Affairs, Chamber of Deputies, Parliament of the Czech Republic, Res. 304, 43rd Sess. (Feb. 28, 2013), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/czech_republic/2012/com20120777/com20120777_deputies_opinion_en.pdf.

22. Treaty on European Union, *supra* note 5, at art. 4(2).

23. Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality art. 5, as revised Dec. 13, 2007, 2012 O.J. (C 326) 206, 207 [hereinafter Protocol No. 2] (current version).

24. Protocol on the Application of the Principles of Subsidiarity and Proportionality art. 3, Oct. 2, 1997, 1997 O.J. (C 340) 105, 106.

25. ‘Better Lawmaking 2003’: Report from the Commission pursuant to Art. 9 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality (11th Report), at 20, COM (2003) 770 final (Dec. 12, 2003), available at http://aei.pitt.edu/38401/1/COM_%282003%29_770_final.pdf.

26. Charter of Fundamental Rights of the European Union art. 51(1), 2012 O.J. (C 326) 391, 406. The Charter is based upon the European Convention on Human Rights, which was adopted under the auspices of the Council of Europe rather than the European Union. Interestingly, following a recent amendment the preamble to the European Convention will expressly refer to the principle of subsidiarity. See Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, June 24, 2013, C.E.T.S. No. 213. As at February 16, 2015 this amendment had not yet entered into force.

27. Treaty on European Union, *supra* note 5, at art. 6(1); Charter of Fundamental Rights of the European Union, *supra* note 26, at art. 51(1).

28. Treaty on European Union, *supra* note 5, at art. 6(1).

ual rights under the Treaties as it solely relates to the division of powers between the Union and the Member States.²⁹

It should be noted that apart from the subsidiarity provisions, the founding Treaties themselves expressly accommodate particular national sensitivities. Some of the accompanying Protocols exempt particular Member States from various aspects of the integration programme or protect certain national particularities from challenge under EU law.³⁰

The Treaties also provide a framework for optional integration through enhanced cooperation between some, but not all, Member States.³¹ The legal acts that are created under this framework bind only the Member States that are participating in this cooperation.³² The enhanced cooperation procedure has been applied in relation to the law applicable to divorce,³³ unitary patent protection³⁴ and financial transaction tax.³⁵

B. Actions for the Infringement of Subsidiarity

The Treaties make clear that subsidiarity is a judicially enforceable legal principle. The Subsidiarity Protocol expressly confers jurisdiction upon the Court of Justice in actions alleging infringement of the principle of subsidiarity by an EU legal act.³⁶ Such actions may be brought by the Member States under the rules relating to the review of the legality of EU legal acts.³⁷

The national parliaments also have an indirect right to bring an infringement action under the present version of the Protocol.³⁸ The national parliaments do not have a direct right to bring judicial review proceedings for breach of subsidiarity, but do so through proceedings notified by the national government.³⁹

In some Member States there are national legal provisions regulating the

29. Case C-221/10 P, *Artogodan GmbH v. European Comm'n*, EU:C:2012:216, ¶ 75.

30. Protocol Nos. 15-18, 20-22, 31-32, 34-35. *See also* Protocol on the Concerns of the Irish People on the Treaty of Lisbon, May 16, 2012, 2013 O.J. (L 60) 131. This Protocol has now been ratified by all Member States. *See* <https://verdragenbank.overheid.nl/en/Treaty/Details/012628.html>

31. Treaty on European Union, *supra* note 5, at art. 20; Treaty on the Functioning of the European Union art. 326, 2012 O.J. (C 326) 47 [hereinafter TFEU].

32. Treaty on European Union, *supra* note 5, at art. 20(4).

33. Council Regulation No. 1259/2010, Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation, 2010 O.J. (L 343) 10.

34. European Parliament and Council Regulation No. 1257/2012, Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection, 2012 O.J. (L 361) 1. *See* Case C-274/11, *Spain v. Council*, EU:C:2013:240.

35. Council Decision No. 2013/52/EU, Authorising Enhanced Cooperation in the Area of Financial Transaction Tax, 2013 O.J. (L 22) 11.

36. Protocol No. 2, *supra* note 23, at art. 8.

37. *See* TFEU, *supra* note 31, at art. 263.

38. Protocol No. 2, *supra* note 23, at art. 8; Leonard F M Besselink & Brecht van Mourik, *The Parliamentary Legitimacy of the European Union: The Role of the States General within the European Union*, 8, 1 *UTRECHT L. REV.* 28, 47 (2012).

39. Adam Cygan, *Regional Governance, Subsidiarity and Accountability within the EU's Multi-level Polity*, 19 *EUR. PUB. L.* 161, 169 (2013).

process for bringing such indirect proceedings. In several states the relevant provisions appear in the national constitution. For example, the German Constitution provides that both the *Bundestag* (lower house) and the *Bundesrat* (upper house) have an indirect right to bring actions for infringement of the subsidiarity principle. The *Bundestag* is bound to support such an action if one quarter of its members pass a motion to that effect.⁴⁰ The German Constitutional Court has indicated that the purpose of this provision is to enable a minority of the lower house to assert the rights of the national parliament against the will of the majority of the house and the executive government it supports.⁴¹

The French Constitution provides that such proceedings may be instituted by either house of the legislature. Proceedings must be brought at the request of 60 members of the National Assembly (lower house) or 60 members of the Senate (upper house).⁴² At present there are 577 members of the lower house and 348 members of the upper house.⁴³ The Government refers the proceedings to the Court of Justice.

In Austria either house of the federal Parliament may bring an action for breach of the principle of subsidiarity. The Chancellor notifies the Court of Justice of the action.⁴⁴ In some nations the process is regulated by legislation. An Irish statute provides that either House of the legislature may notify the Minister of Foreign Affairs of its desire that an action be brought and the Minister shall make arrangements for bringing that action.⁴⁵

Not all Member States regulate the process by positive law. In the United Kingdom it is intended that such proceedings will be regulated in accordance with two non-legally binding memorandums of understanding (MOUs).⁴⁶ The first MOU would be entered into between the government and the chairs of the EU committees of both houses of parliament.⁴⁷ The government would only bring an action on behalf of a house of parliament if that house passes a motion

40. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Basic Law] art. 23(1a), inserted by Gesetz zur Änderung des Grundgesetzes [Law Amending Basic Law], Oct. 8, 2008, BGBl. I at 1926 (Ger.).

41. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jun. 30, 2009, 123 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 267, 431 (Ger.), translated in 3 C.M.L.R. 13, 371 (2010).

42. 1958 CONST. art. 88-6 (Fr.).

43. ASSEMBLEE NATIONALE. <http://www.assemblee-nationale.fr/qui/>; SÉNAT. <http://www.senat.fr/lng/en/senators.html>.

44. BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl. No. 1/1930, as last amended by BGBl. I No. 57/2010, art. 23h (Austria).

45. European Union Act 2009 (Act No. 33/2009), §§ 1, 7(4) (Ir.). On October 4, 2013 a referendum seeking to abolish the Irish upper house failed. See Thirty-second Amendment of the Constitution (Abolition of Seanad Éireann) Bill 2013 (Ir.).

46. Memorandum of Understanding on Implementing Article 8 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality, Sept. 11, 2013, ¶ 10 (U.K.) [hereinafter First MOU]; Supplementary Memorandum of Understanding, ¶ 4 (U.K.) [hereinafter Second MOU], available at <http://www.parliament.uk/documents/commons-committees/european-scrutiny/FinalMoU-text.pdf>.

47. HOUSE OF COMMONS EUROPEAN SCRUTINY COMMITTEE, SUBSIDIARITY – MONITORING BY NATIONAL PARLIAMENTS: CHALLENGING A MEASURE BEFORE THE EU COURT OF JUSTICE, 2013-14, H.C. 671, ¶ 4 (U.K.).

detailing the terms of the challenge to the EU legislation.⁴⁸

Any proceedings would be conducted by the United Kingdom government⁴⁹ and “avoid anything which could adversely affect the reputation” of the nation before the Court.⁵⁰ If the government’s legal representatives are of the view that the conduct of proceedings may “undermine . . . wider policy interests” concerning the EU, then the Minister and the chair of the EU committee of the house will meet to settle that issue.⁵¹

The second MOU would be entered into between the accounting officers of each house of parliament.⁵² Under this MOU the house that initiated a subsidiarity challenge to EU legislation would bear the costs of the resulting litigation.⁵³

The Committee of the Regions can also challenge an EU legislative act which it considers to have been adopted in breach of subsidiarity.⁵⁴ There are three pre-conditions for bringing such an annulment action: the act must have been subject to mandatory consultation with the Committee, the challenged act must be a legislative act, and the action must be brought within two months of the publication of the challenged legislation.⁵⁵ The Committee’s Plenary Assembly decides whether to bring an action for infringement of the subsidiarity principle.⁵⁶

The Committee has indicated its preparedness to use its power to challenge a measure on subsidiarity grounds. After the Commission withdrew a proposed regulation on collective action, the Committee issued an opinion which stated “that if the Commission had maintained its proposal . . . the [Committee] could have considered taking the necessary steps to lodge an ex-post appeal against it for breaching the principle of subsidiarity in terms of both the choice of legal basis and insufficient evidence of the added value of EU action in this area”.⁵⁷

48. *Id.* ¶¶ 5, 8.

49. First MOU, *supra* note 46, at ¶ 4.

50. *Id.* ¶ 7.

51. *Id.* ¶ 8.

52. House of Commons European Scrutiny Committee, *supra* note 47, ¶ 4.

53. *Id.* ¶ 6.

54. Protocol No. 2, *supra* note 23, art. 8. The following provisions provide for mandatory consultation with the Committee: TFEU, *supra* note 31, arts. 91, 100, 148-149, 153, 164-168, 172, 175, 177-178, 192, 194. *See also* Legal Service, Committee of the Regions, *Practical Guide on the Infringement of the Subsidiarity Principle* (nd), p 6, available at [https://portal.cor.europa.eu/subsidiarity/Publications/Documents/Guide on SubsidiarityFINAL.pdf](https://portal.cor.europa.eu/subsidiarity/Publications/Documents/Guide%20on%20SubsidiarityFINAL.pdf). The Committee is an advisory body representing the regional and local governments of the EU. *See* TFEU, *supra* note 31, art. 300(4).

55. Legal Service, *supra* note 54, at 5-6, 8. *See also* TFEU, *supra* note 31, art. 263 (setting out time limitation).

56. Committee of the Regions Rules of Procedure R. 53(2), 2010 O.J. (L 6) 14.

57. Committee of the Regions, *The Posting of Workers in the Framework of the Provision of Services*, 2013 O.J. (C 17) 67, 69.

C. Subsidiarity as Interpreted by the Court of Justice

The case law of the Court of Justice reveals that the enforcement of subsidiarity as a judicial principle has been strikingly ineffective. The Court's approach has been described as "very timid[]."58 One study summarized the decisions with the observation that subsidiarity had thus far been of "little value as a standard of scrutiny."59 Similarly, Professor Dashwood testified before a House of Commons Committee that subsidiarity was "largely inoperable at the stage of adjudication."60 The Council of the European Union has stated that it regards subsidiarity "essentially as a political and subjective principle."61 The Court's subsidiarity jurisprudence has even been described as, "to put it bluntly, an embarrassment."62

As a judicial principle subsidiarity has been a placebo rather than a panacea. The Court has never held that any EU legal act was invalid for breach of the principle of subsidiarity. The permissive standards of review applied by the Court suggest that it is likely to do so only in quite exceptional circumstances. The Court has applied a very weak standard of review for both substantive and procedural compliance with the principle.63 The Court's examination of subsidiarity questions is also generally quite cursory. That is ironic in view of the founding Treaty's requirement that the political institutions of the EU produce detailed subsidiarity justifications.64

There have been relatively few subsidiarity cases in the European courts. According to one count, there were only ten subsidiarity challenges over a period of almost two decades.65 However, if EU acts were subject to a rigorous scrutiny on subsidiarity grounds, it could reasonably be anticipated that the number of challenges would sharply rise.

There have only been a few major cases. In the *Working Time Directive* case66 the Directive regulated rest breaks, minimum periods of daily and weekly rest, the maximum average weekly working time and the minimum amount of annual paid leave throughout the Community.67 The Directive

58. Aurélian Portuese, *The Principle of Subsidiarity as a Principle of Economic Efficiency*, 17 COLUM. J. EUR. L. 231, 247 (2011).

59. Ritzer, *supra* note 11, at 760.

60. HOUSE OF COMMONS EUROPEAN SCRUTINY COMMITTEE, SUBSIDIARITY, NATIONAL PARLIAMENTS AND THE LISBON TREATY, 2007-8, H.C. 563, at Ev 3 (U.K.) (evidence of Prof Alan Dashwood).

61. Committee of the Regions, *Subsidiarity Annual Report 2011*, R/CdR 1188/2012, at 31, available at http://extranet.cor.europa.eu/subsidiarity/activities/Documents/SAR_2011_FINAL_A2224_EN.pdf.

62. Peter L Lindseth, *Equilibrium, Demoi-cracy, and Delegation in the Crisis of European Integration*, 15 GERMAN L.J. 529, 558 (2014).

63. Michael Marc Delehanty, *Subsidiarity and Seanad Éireann*, 13 TRINITY C.L. REV. 133, 136-37 (2010).

64. Protocol No. 2, *supra* note 23, art. 5.

65. Craig, *supra* note 18, at 80.

66. Case C-84/94, *United Kingdom v. Council (Re Working Time Directive)*, 1996 E.C.R. I-5755. See Gabriël A Moens, *The Subsidiarity Principle and EC Directive 93/104*, 34 AUSTRALIA & WORLD AFFAIRS 51 (1997).

67. See *Working Time Directive*, 1996 E.C.R. I-5755, ¶ 4.

had been adopted under a provision of the Treaty which stated that the “Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of conditions in this area, while maintaining the improvements made. . . . In order to help achieve [this] objective . . . the Council . . . shall adopt by means of directives minimum requirements for gradual implementation”.⁶⁸

The United Kingdom argued that this Treaty provision “should be interpreted in the light of the principle of subsidiarity, which does not allow adoption of a directive in such wide and prescriptive terms as the contested directive, given that the extent and the nature of legislative regulation of working time vary very widely between Member States.”⁶⁹ The Court rejected the argument that the EC legislator had not established that the aims of the Directive would be better served at the EC level rather than at the national level. Once the European legislators had found it appropriate to improve and harmonize the level of health and safety protection within the Community, achievement of that goal justified Community-wide action.⁷⁰ The Court’s decision treated subsidiarity as essentially irrelevant where the Community’s purpose was harmonization.⁷¹

In this case the British government also emphasized that the Treaty provided that the Council was only empowered to adopt “minimum requirements.” The government argued that subsidiarity was relevant in determining whether the directives adopted constituted such minimum requirements.⁷² The government argued that a measure would be proportionate only if it was consistent with subsidiarity. The government argued that it was therefore necessary for the Community to show that the aims of the directive would be better achieved by the EC than by the Member States.⁷³

The Court gave short shrift to this argument, saying that this argument was about the need for EC action, which the Court had already upheld.⁷⁴ The Court also construed the words “minimum requirements” as no limitation at all. Those words did not mean that EC requirements were limited “to the lowest common denominator, or even to the lowest level of protection established by the various Member States, but mea[n] that Member States are free to provide a level of protection more stringent than that resulting from Community law, high as it may be.”⁷⁵

68. Treaty Establishing the European Community art. 118a(1)-(2), as revised Feb. 7, 1992, 1992 O.J. (C 224) 6, 45.

69. *Working Time Directive*, 1996 E.C.R. I-5755, ¶ 46.

70. *Id.* ¶ 47.

71. Florian Sander, *Subsidiarity Infringements before the European Court of Justice: Futile Interference with Politics or a Substantial Step Towards EU Federalism?*, 12 COLUM. J. EUR. L. 517, 538 (2006).

72. *Working Time Directive*, 1996 E.C.R. I-5755, ¶ 50. See also *Id.* ¶¶ 51-53 (arguing that three other principles were also relevant in determining this question).

73. *Id.* ¶ 54.

74. *Id.* ¶ 55.

75. *Id.* ¶ 56.

In the *Deposit Guarantee* case⁷⁶ the German government did not argue that the challenged Directive was in breach of subsidiarity. The government's argument was that the Directive had failed to state sufficient reasons for its adoption.⁷⁷ This argument was based on a Treaty provision which required that the legislator state the reasons upon which a Directive was based.⁷⁸ The Court cited the very general reasons given in the recitals preceding the operative provisions of the Directive.⁷⁹ The recitals showed the legislator's view that its aims would be best achieved at the Community level.⁸⁰ Another recital showed that previous Member State action had been insufficient.⁸¹

The Court held that the brief reasons stated in the recitals were sufficient to satisfy the obligation to state reasons why the legislation was consistent with subsidiarity. The Court stated that it was not even necessary to expressly refer to the principle of subsidiarity.⁸² The Court did not require that the reasons given be established by qualitative or quantitative indicators, but contented itself with accepting assertions in the recitals.⁸³

In the *Biotechnology* case, the Court held that consideration of subsidiarity was "necessarily implicit" in the recitals of the challenged Directive, which was sufficient to satisfy the obligation to state reasons. The recitals asserted that without Community action, the varied laws of the Member States relating to the protection of biotechnology were an impediment to the operation of the internal market.⁸⁴

In the *British American Tobacco* case,⁸⁵ a Directive restricted the manufacturing, marketing and sale of cigarettes. The Court considered whether the objective of the Directive could be better achieved at the Community level.⁸⁶ One objective of the Directive was to eliminate barriers to the operation of the inter-

76. Case C-233/94, *Germany v. Parliament (Re Deposit Guarantee Directive)*, 1997 E.C.R. I-2405.

77. *Id.* ¶ 24.

78. Treaty Establishing the European Community art. 190, *supra* note 68, at 67. See now TFEU, *supra* note 31, art. 296. The purpose of the statement of reasons is to inform those affected by a legal act of the reasons for its adoption and to facilitate judicial review of the measure by the Court of Justice. See Case C-76/00 P, *Petro tub SA v. Council*, 2003 E.C.R. I-79, ¶ 81; Case C-342/03, *Spain v. Council (Re Tariff Preferences for Canned Tuna Imports)*, 2005 E.C.R. I-1975, ¶ 54; Case C-465/02, *Germany v. Commission*, 2005 E.C.R. I-9115, ¶ 106. The failure of a legal act to provide an adequate statement of reasons amounts to an infringement of an essential procedural requirement. See Case C-413/06 P, *Bertelsmann AG v. Independent Music Publishers and Labels Association*, 2008 E.C.R. I-4951, ¶ 174; Case C-89/08 P, *Commission v. Ireland*, 2009 E.C.R. I-11245, ¶ 34.

79. See generally Tadas Klimas & Jūratė Vaičiukaitė, *The Law of Recitals in European Community Legislation*, 15 ILSA J. INT'L & COMP. L. 61 (2008).

80. *Deposit Guarantee Directive*, 1997 E.C.R. I-2405, ¶ 26.

81. *Id.* ¶ 27.

82. *Id.* ¶ 28.

83. Delehanty, *supra* note 63, at 135-36.

84. Case C-377/98, *Netherlands v. European Parliament*, 2001 E.C.R. I-7079, ¶ 33.

85. Case C-491/01, *R v. Secretary of State for Health; ex parte British American Tobacco (Investments) Ltd*, 2002 E.C.R. I-11453.

86. *Id.* ¶ 180.

nal market caused by differences between national laws regarding the manufacture, presentation and sale of cigarettes.⁸⁷ This objective could not be adequately achieved at the national level, given the great diversity of the previously applicable national laws.⁸⁸ This aim could thus be better achieved at the Community level.⁸⁹ The specific provisions adopted did not go beyond what was necessary to achieve this objective.⁹⁰ This case was the first occasion where the Court examined a measure on substantive rather than procedural grounds relating to subsidiarity.

In the *Personal Protective Equipment* case,⁹¹ the Court applied its *British American Tobacco* holding. The Court held that since the relevant national laws had significant divergences, they could act as a trade barrier. Given the ‘scope and effects’ of the harmonisation of such divergent laws, only the EC legislature was able to achieve harmonisation.⁹²

In the *Food Supplements* case,⁹³ the Court upheld provisions of a Directive that prohibited the marketing of food supplements that did not comply with the Directive. The Court held that the aim of those provisions could be better achieved by the Community and could not be achieved by the Member States.⁹⁴ The provisions dismantled the trade barriers caused by the differing national laws relating to food supplements.⁹⁵ To rely on national laws would “perpetuate the uncoordinated development of national rules” and their consequential barriers to trade.⁹⁶

In the *Vodafone* case,⁹⁷ a Regulation concerning mobile phone roaming was challenged as violative of subsidiarity. The Regulation set a ceiling for both wholesale and retail charges and required that consumers be informed about those charges.⁹⁸ The Court observed that the EU legislature had introduced a “common approach” to facilitate the smooth operation of the internal market. Mobile phone providers would now operate within one “coherent” system of regulation.⁹⁹

Wholesale and retail charges were interdependent. Any attempt to reduce retail charges without also reducing wholesale charges would be likely to hinder the operation of the EU roaming market. The legislature considered that a “joint approach” to both wholesale and retail charges was necessary for the

87. *Id.* ¶ 181.

88. *Id.* ¶ 182.

89. *Id.* ¶ 183.

90. *Id.* ¶ 184; *see also Id.* ¶¶ 122-141.

91. Case C-103/01, *Comm’n v. Germany*, 2003 E.C.R. I-5369.

92. *Id.* ¶ 47.

93. Case C-154/04, *R (On the Application of Alliance for Natural Health) v. Sec’y of State for Health*, 2005 E.C.R. I-6451.

94. *Id.* ¶ 107.

95. *Id.* ¶ 105.

96. *Id.* ¶ 106.

97. Case C-58/08, *R v. Sec’y of State for Bus., Enter. and Regulatory Reform; ex parte Vodafone Ltd*, 2010 E.C.R. I-4999.

98. *Id.* ¶ 50.

99. *Id.* ¶ 76.

smooth operation of the internal market.¹⁰⁰ The interdependence between wholesale and retail charges meant that the EU legislature could legitimately consider that both charges needed to be regulated at the EU level.¹⁰¹ The Court held that the challenged provisions were consistent with subsidiarity.¹⁰²

In the *Airport Charges* case,¹⁰³ a Directive regulated charges at some airports with fewer than five million passenger movements a year. Some airports that served larger numbers of passengers than were served by Luxembourg's main airport had been exempted from complying with the Directive, but the Directive applied to Luxembourg's airport as the main airport of its Member State. Luxembourg argued that subsidiarity was breached because the Directive applied to situations that could be regulated at a national level.¹⁰⁴

The Court pointed out that an airport with less than five million passenger movements a year which was also the Member State's main airport was "assumed to be in a privileged position".¹⁰⁵ The fact that some airports with less than five million passenger movements were exempted from compliance did not establish a breach of subsidiarity because the EU legislature had correctly taken the view that it was unnecessary to regulate those airports since they were not the main airport of their Member State.¹⁰⁶ The Court also held that the Luxembourg government had not argued its challenge in sufficient detail to permit the Court to determine whether Member State laws would be adequate to achieve the aim of the Directive.¹⁰⁷

Several other points emerge from the cases. The principle of subsidiarity does not operate as a restriction upon the exercise of individual rights conferred by the founding Treaties.¹⁰⁸ The subsidiarity principle does not apply retroactively to Community legislation that was adopted prior to the entry into force of the Maastricht Treaty.¹⁰⁹ Before the Maastricht Treaty subsidiarity was also not a general principle of law against which the legality of Community acts must be tested.¹¹⁰

The Legal Service of the Committee on the Regions has identified, somewhat optimistically, six potential grounds of subsidiarity review under the Court's case law. Legislation was open to challenge if it did not meet various criteria for EU action:

100. *Id.* ¶ 77.

101. *Id.* ¶ 78.

102. *Id.* ¶ 79.

103. Case C-176/09, *Lux. v. European Parliament*, 2011 E.C.R. I-3727.

104. *Id.* ¶ 73.

105. *Id.* ¶ 81.

106. *Id.* ¶ 82.

107. *Id.* ¶ 80.

108. Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Bosman*, 1995 E.C.R. I-4921, ¶ 81.

109. Case T-29/92, *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid v. Comm'n*, 1995 E.C.R. II-289, ¶¶ 330-331, appeal dismissed on other grounds Case C-137/95 P, 1996 E.C.R. I-1611; Case C-36/97, *Kellinghusen v. Amt für Land- und Wasserwirtschaft Kiel*, 1998 E.C.R. I-6337, ¶ 35.

110. *Vereniging*, 1995 E.C.R. II-289, ¶¶ 330-331.

[1] The situation at issue presents transnational aspects that cannot be addressed satisfactorily by action at Member State level... [2] Action at national level or lack of action at Union level would be contrary to the requirements of the Treaty (such as, for example, the need to strengthen social, economic or territorial cohesion) or would otherwise harm the interests of the Member States... [3] For reasons related to its dimension or its effects, action at Union level would present obvious advantages over action at Member State level... [4] Action at Union level is justified by the lack of national legislation to address the situation at issue... [5] Action at Union level is justified taking into consideration the substantial disparity of national and/or regional legislation and the effects of that disparity on the internal market... [6] Action at Union level is justified taking into account the wording of an act of secondary law that grants the Union the exclusive right to intervene, even though the policy area at issue does not fall within an area of exclusive competence.¹¹¹

The approach of the Court of Justice to subsidiarity review has been one of excessive deference. It is a rather extreme form of judicial 'self-restraint' that has resulted in the under-enforcement of an important guarantee of Member State autonomy. It is possible that the lack of commitment to meaningful enforcement of subsidiarity as a judicial principle may be motivated by a perception on the part of the Court that compliance with subsidiarity is a political judgment that should be made by the political institutions of the Union.¹¹²

By contrast, most constitutional courts in federal states approach federalism issues as legal rather than political questions. For example, while the United States Supreme Court has held that it does not have authority to decide political questions,¹¹³ the Court does not treat federalism issues as political questions.¹¹⁴ The Australian High Court and Privy Council similarly emphasised that federalism issues were ultimately issues for judicial enforcement.¹¹⁵

In essentially leaving control of the observance of subsidiarity to the political branches, the Court of Justice's approach to this issue is reminiscent of Herbert Wechsler's famous paper that emphasised the political safeguards of

111. Legal Service, *supra* note 54, at 38, 41-43, 44, 51 (numbering of grounds inserted for clarity).

112. TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* 185 (2nd ed. 2006).

113. *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Nixon v. United States*, 506 U.S. 224, 228 (1993); *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012).

114. The guarantee to each State of a republican form of government is a *possible* exception. See U.S. Const. art. IV, § 4; *New York v. United States*, 505 U.S. 144, 184-85 (1992).

115. *R v. Kirby, ex parte Boilermakers' Society of Australia*, [1956] 94 C.L.R. 254, 267-68 (High Court) (Austl.); [1957] 95 C.L.R. 529, 540 (Privy Council) (Austl.).

federalism over judicially enforced limits.¹¹⁶ In 1985 the United States Supreme Court expressly applied the Wechsler approach in a commerce power case. In the *Garcia* decision by a 5-4 majority the Court held that “State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”¹¹⁷

However, the broader significance of the *Garcia* case was substantially eroded by the Court’s subsequent decision in *New York v. United States*, though the majority in that case disclaimed any necessity “to revisit the holding” in *Garcia*.¹¹⁸ The Wechsler approach has continued to exercise an influence upon a minority of the Justices.¹¹⁹ However, the majority of the Court has preferred to craft judicially enforced limitations upon federal power such as the principle that Congress may not commandeer State legislatures or officials.¹²⁰ The Wechsler approach has thus not proven to be an enduring doctrine in the United States or in any other federal system.

Another reason for the weakness of subsidiarity as a judicial principle may lie in the limited scope of the underlying principle. Subsidiarity assumes that the Union’s goals are valid and makes their achievement the paramount consideration. It asks only which level is better able to achieve those Union goals. At most the Member States will be permitted to carry out the EU’s goals. The principle does not protect the right of the Member States to carry out their own goals in areas of shared competence.¹²¹ In particular, subsidiarity “assumes the primacy of the central goal, and allows no mechanism for questioning whether or not it is desirable, in the light of other interests, to fully pursue this.”¹²² The goal is assumed, the only question is who is to achieve that goal.

It has been persuasively argued that to be effective subsidiarity must incorporate an element of federal proportionality since the questions of “whether” and “how” are “tied together”. The Court should thus ask “whether the European legislator has *unnecessarily* restricted national autonomy.”¹²³ To be an effective safeguard of subsidiarity the standard of review applied by the Court ought to prohibit disproportionate restrictions of national autonomy.¹²⁴

116. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954).

117. *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 552 (1985).

118. *New York*, 505 U.S. at 160.

119. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 184 (1996) (Souter, J., dissenting); *Printz v. United States*, 521 U.S. 898, 957 (1997) (Stevens, J., dissenting); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 93 (2000) (Stevens, J., dissenting in part and concurring in part).

120. *New York*, 505 U.S. at 161, 175; *Printz*, 521 U.S., at 933; *Reno v. Condon*, 528 U.S. 141, 149-50 (2000).

121. See Gareth Davies, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, 43 COMMON MKT. L. REV. 63, 67-68 (2006).

122. *Id.* at 78.

123. Robert Schütze, *Subsidiarity After Lisbon: Reinforcing the Safeguards of Federalism?*, 68 CAMBRIDGE L.J. 525, 533 (2009).

124. *Id.* at 534.

Indeed the Swedish parliament has argued that the definition of subsidiarity in the founding Treaties includes a requirement of federal proportionality.¹²⁵ That definition provides that the EU “shall act only if and in so far” as the objectives of a measure cannot be sufficiently achieved by the Member States and can be better achieved at the Union level.¹²⁶ The case law of the Court of Justice also hints at a standard of federal proportionality, though without elaboration. In the *British American Tobacco* case the Court held that the challenged provisions were consistent with subsidiarity as they did not go beyond what was necessary to achieve the objective of the measure.¹²⁷

The principle of subsidiarity is arguably applicable to the Court of Justice as an Institution of the Union when it exercises its function of interpreting the *scope* of EU competences,¹²⁸ so it is open to the Court to have regard to subsidiarity in resolving these questions. In this respect there are glimmers of hope for the protection of Member State autonomy by the Court of Justice. Notions of subsidiarity may have influenced the Court’s interpretation of a shared competence of the Union.

In interpreting the scope of EU competence in relation to the internal market,¹²⁹ the Court invoked the conferral principle in holding that this power was not to be interpreted as a “general power to regulate the internal market.”¹³⁰ This holding echoes the decision of the United States Supreme Court that the commerce power of Congress was not to be interpreted as conferring “a general police power of the sort retained by the States.”¹³¹ While the Court expressly referred to the conferral principle rather than subsidiarity, its underlying concern might be better seen as subsidiarity since the Court was interpreting the scope of a shared competence.

It should also be noted that in judicial proceedings the Member States do not speak with one voice in relation to subsidiarity. The national governments may disagree as to how the principle of subsidiarity applies to challenged legislation, so they may be on opposite sides regarding the question of its validity. The Member States have also argued against subsidiarity challenges brought by private parties.¹³²

Of course it is possible for an apparently moribund principle to receive a

125. *Reasoned opinion issued by the Swedish Riksdag on COM (2012) 0011, available at* [http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/4b_reasoned_opinionse_com\(2012\)11_4b_reasoned_opinionse_com\(2012\)11_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/4b_reasoned_opinionse_com(2012)11_4b_reasoned_opinionse_com(2012)11_en.pdf).

126. Treaty on European Union, *supra* note 5, art. 5(3).

127. Case C-491/01, *R v. Secretary of State for Health; ex parte British American Tobacco (Investments) Ltd*, 2002 E.C.R. I-11453, ¶ 184.

128. *Horsley*, *supra* note 12, at 272, 274.

129. Treaty Establishing the European Community arts. 14, 95 (as amended by the Treaty of Amsterdam, *supra* note 3). *See now* TFEU, *supra* note 31, arts. 26, 114.

130. Case C-376/98, *Germany v. Parliament (Re the Validity of Directive 98/43 on Tobacco Advertising and Sponsorship)*, 2000 E.C.R. I-8419, ¶ 83. *See also* *Horsley*, *supra* note 12, at 270-71.

131. *United States v. Lopez*, 514 U.S. 549, 567 (1995).

132. *See e.g.*, Case C-491/01, *R v. Sec’y of State for Health, ex parte British American Tobacco (Investments) Ltd* 2002 E.C.R. I-11453, ¶¶ 175-176. *See also* *Craig*, *supra* note 18, at 81.

new lease of life. In Australia, Kirby J once warned that a constitutional doctrine threatened to become “a constitutional guard-dog that would bark but once.”¹³³ Unlike subsidiarity, at least that dog had barked once.¹³⁴ In fact that dog continues to bark: the Australian High Court has since held that several State laws have infringed the doctrine.¹³⁵ By contrast, at present there seems little prospect that the Court of Justice will breathe new life into subsidiarity as a judicial principle.

III. THE COURT OF JUSTICE AS AN ACTIVIST COURT

Judicial activism has been most extensively considered in the United States. ‘Liberal’ and ‘conservative’ American judges often accuse each other of judicial activism, especially in dissenting opinions.¹³⁶ Generally accepted examples of judicial activism include the infamous *Dred Scott* decision and the discredited *Lochner* line of decisions. In the *Dred Scott* decision the Supreme Court invalidated an Act of Congress that prohibited slavery in certain federal territories.¹³⁷ The Court also indicated that ‘property’ rights in enslaved persons were protected by the due process clause of the Fifth Amendment to the United States Constitution.¹³⁸ In the *Lochner* line of cases the Supreme Court struck down numerous laws in furtherance of a *laissez-faire* economic philosophy through its “substantive due process” interpretation of the due process clauses of the Fifth and Fourteenth Amendments.¹³⁹

The phrase ‘judicial activism’ has often been regarded as a rhetorical device employed against judicial decisions that a speaker dislikes.¹⁴⁰ Indeed the term is often used in such a superficial manner, so it needs to be defined with more precision. While there is no generally accepted meaning of judicial activism, certain elements tend to reappear in definitions. Judicial activism may

133. *Baker v. R*, [2004] 223 C.L.R. 513, ¶ 54 (Austl.).

134. See generally *Kable v. Dir. of Pub. Prosecutions (NSW)*, [1996] 189 C.L.R. 51 (Austl.).

135. *Int’l Fin. Trust Co. Ltd v. New South Wales Crime Comm’n*, [2009] 240 C.L.R. 319 (Austl.); *South Australia v. Totani*, [2010] 242 C.L.R. 1 (Austl.); *Wainohu v. New South Wales*, [2011] 243 C.L.R. 181 (Austl.).

136. See e.g., *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 98-99 (2000) (Stevens J, dissenting in part and concurring in part); *Lopez* 514 U.S. at 611 (Souter, J., dissenting); *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 105, 107, 109 (1993) (Scalia, J., concurring); *Payne v. Tennessee*, 501 U.S. 808, 844-45 (1991) (Marshall, J., dissenting); *Florida v. Wells*, 495 U.S. 1, 13 (1990) (Stevens, J., concurring in judgment); *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting); *Furman v. Georgia*, 408 U.S. 238, 470 (1972) (Rehnquist, J., dissenting); *United States v. Wade*, 388 U.S. 218, 250 (1967) (Black, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 520, 522 (1965) (Black, J., dissenting).

137. *Dred Scott v. Sandford*, 60 U.S. 393, 452 (1857).

138. *Id.* at 450-52.

139. See e.g., *Lochner v. New York*, 198 U.S. 45 (1905); *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923). *But see West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (abandoning this approach).

140. See e.g. William P Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002); KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 3* (Yale University Press, 2006); Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 568, 574, 600, 610-11 (2007).

be characterised by elements such as legally unjustifiable invalidation of legislation or executive action,¹⁴¹ decisions based upon implausible legal grounds,¹⁴² excessive willingness to overturn precedent,¹⁴³ creation of very broad judicial remedies,¹⁴⁴ and “non-judicial decision-making”, especially if influenced by partisan considerations.¹⁴⁵

The European Court’s under-enforcement of subsidiarity should be contrasted with the Court’s history of judicial activism.¹⁴⁶ While the Court has often fashioned novel legal doctrines without express support in the founding Treaties, an express guarantee in the Treaties has been emptied of content by judicial interpretation in the subsidiarity cases.

The European Court’s under-enforcement of subsidiarity may represent a relatively uncommon form of judicial activism. Most of the scholarly literature regarding judicial activism concerns excessive judicial interference with the activities of the political branches of government. However, excessive deference to the political branches can also constitute a form of judicial activism since the effect may be to render constitutional provisions ineffective. Hence “a judge can be activist by deferring too much, thereby authorizing excessive governmental power.”¹⁴⁷ It is activist to ignore or downplay the constitutional text in order to uphold an unconstitutional law.¹⁴⁸

If an act of the political branches is clearly beyond power, in a system of checks and balances it is the role of the courts to declare that invalidity.¹⁴⁹ For example, it would be an obvious abdication of judicial responsibility if the Australian High Court upheld a federal statute which declared that Christi-

141. See Frank H Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1407 (2002); Aziz Z Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579, 581 (2002).

142. See Roberts, *supra* note 140, at 574-75; James Allan, *The Three ‘Rs’ of Recent Australian Judicial Activism: Roach, Rowe and (No)‘riginalism*, 36 MELB. U. L. REV. 743, 744 (2012).

143. Frank B Cross and Stefanie A Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1755 (2007).

144. Ernest A Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1144 (2002); See also Marshall, *supra* note 140, at 1220.

145. Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1224 (2009).

146. See generally Takis Tridimas, *The Court of Justice and Judicial Activism*, 21 EUR. L. REV. 199 (1996); Edward Elgar, *JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE* (Mark Dawson, Bruno de Witte & Elise Muir eds., 2013). It has been argued that the absence of dissenting judgments in the Court of Justice promotes judicial activism as it preserves the anonymity of the majority and dissenting judges behind the public façade of a collective judgment. See Hjalte Rasmussen & Louis Nan Rasmussen, *Activist EU Court ‘Feeds’ on the Existing Ban on Dissenting Opinions: Lifting the Ban is Likely to Improve the Quality of EU Judgments*, 14, 8 GER. L.J. 1374, 1382 (2013). The Court’s judgments state only the names of the participating judges. See Protocol (No. 3) on the Statute of the Court of Justice art. 36, 2012 O.J. (C 326) 210.

147. Green, *supra* note 145, at 1227-28.

148. Randy E Barnett, *Is the Rehnquist Court an ‘Activist’ Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1276-77 (2002).

149. Cross & Lindquist, *supra* note 143, at 1755. See also Stephen F Smith, *Taking Lessons from the Left? Judicial Activism on the Right*, 1 GEO. J. L. & PUB. POL’Y 57, 66-67 (2002); Roberts, *supra* note 140, at 577, 583-84, 601.

anity was the religion of the Commonwealth, in violation of the constitutional prohibition against establishing any religion by federal law.¹⁵⁰ The decision of the United States Supreme Court that ‘separate but equal’ racial segregation in public education was consistent with the equal protection of the laws was a similarly egregious case of excessive deference to the political branches.¹⁵¹

The over-deference of the Court of Justice in relation to subsidiarity is striking when compared with the Court’s activism in numerous other legal contexts. Many of the key doctrines of EU law were created by the Court rather than by an express provision of the founding Treaties. In 1963 the Court of Justice first enunciated the doctrine of the direct effect of EU law. Under that doctrine individuals can invoke some EU Treaty provisions and legislation in legal proceedings in the courts of the Member States.¹⁵² The Court also created the doctrine of the supremacy of EU law, which thus prevails over any conflicting law of a Member State, whether it be legislation or the national constitution.¹⁵³ The Court’s decisions on supremacy and direct effect “carry an indelible activist mark: these doctrines were not enshrined in the Treaties, but constitute pure products of judge-made law, created for the benefit of the *effet utile* [effectiveness] of European law.”¹⁵⁴

Similarly, the Court acknowledged that the EU Treaties contained no express provision concerning liability for breaches of EU law by the Member States. The Court considered that in those circumstances it was its responsibility to formulate principles of EU law regarding such liability.¹⁵⁵ The Court adopted the principle that a Member State was required to pay compensation for harm caused to individuals by breaches of EU law by that state.¹⁵⁶ The Court considered that state liability for breach of EU law was inherent within the Treaty itself.¹⁵⁷

The Court of Justice has also long identified and applied general principles

150. AUSTRALIAN CONSTITUTION S116.

151. *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896), *overruled by* *Brown v. Board of Education*, 347 U.S. 483, 494-95 (1954). *See also* GABRIEL MOËNS, *EQUALITY FOR FREEDOM* 20-34 (1976).

152. Case 26/62, *Algemene Transport- en Expeditie Onderneming van Gend en Loos (NV) v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 12-13 (Founding Treaties); Case 41/74, *van Duyn v. Home Office*, 1974 E.C.R. 1337, ¶ 12; Case C-268/06, *Impact v. Minister for Agriculture and Food*, 2008 E.C.R. I-2483, ¶ 57 (Directives). *See* GABRIËL A. MOENS & JOHN TRONE, *COMMERCIAL LAW OF THE EUROPEAN UNION* 367-76 (2010).

153. *Legislation*: Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 593-94; Case C-198/01, *Consorzio Industrie Fiammiferi v. Autorità Garante della Concorrenza e del Mercato*, 2003 E.C.R. I-8055, ¶ 48; Case C-295/04, *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, 2006 E.C.R. I-6619, ¶ 39; Case C-119/05, *Ministero dell’Industria, del Commercio e dell’Artigianato v. Lucchini SpA*, 2007 E.C.R. I-6199, ¶ 61; *Constitution*: Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, ¶ 3; Case C-285/98, *Kreil v. Germany*, 2000 E.C.R. I-69, ¶¶ 5, 32; Case C-399/11, *Criminal Proceedings Against Melloni*, EU:C:2013:107, ¶ 59.

154. *Henri de Waele & Anna van der Vleuten, Judicial Activism in the European Court of Justice – The Case of LGBT Rights*, 19 MICH. ST. J. INT’L L. 639, 644-65 (2011).

155. Case C-46/93, *Brasserie du Pecheur SA v. Germany*, 1996 E.C.R. I-1029, ¶ 27.

156. Case C-6/90, *Francovich v. Italy*, 1991 E.C.R. 5357, ¶ 37.

157. *Id.* ¶ 35.

of EU law. Such principles have a “general, comprehensive character” and “have constitutional status.”¹⁵⁸ As part of that process the Court identified and protected fundamental rights as such general principles.¹⁵⁹ For example, in one of its more controversial decisions the Court held that non-discrimination on the ground of age was a general principle of EU law.¹⁶⁰ The Court’s decisions recognised an extensive catalogue of fundamental rights under EU law.¹⁶¹ These fundamental rights were subsequently codified in the Charter of Fundamental Rights.¹⁶²

If the Court has displayed such robust enthusiasm in creating doctrines of EU law, it must be asked why it has not approached the interpretation of the Treaty’s express guarantees of Member State autonomy with similar enthusiasm. The answer may lie in the fact that the Court’s implied doctrines have had a centralising effect, while the express guarantees of Member State autonomy might reasonably be expected to have a decentralising effect. The Court’s activism in relation to subsidiarity lies in continuing to give effect to its preference for centralisation in the face of express Treaty provisions that have the contrary intention.

In the early days of the Community the Court’s centralising doctrines sought to safeguard the unity and effectiveness of EU law against the more powerful Member States. However, the balance has long since swung in the other direction. The unity and effectiveness of EU law now requires that the Court protect subsidiarity in a more stringent manner. That is because some European constitutional courts have begun to set up national constitutional boundaries against serious infringements of the division of powers between

158. Case C-101/08, *Audiolux SA v. Groupe Bruxelles Lambert SA*, 2009 E.C.R. I-9823, ¶¶ 50, 63.

159. Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419, 425; Case 4/73, *Nold Kohlen- und Baustoffgrosshandlung v. Comm’n*, 1974 E.C.R. 491, ¶ 13. *But see* Treaty on European Union, *supra* note 5, art. 6 (express provision that fundamental rights constitute general principles of EU law).

160. Case C-144/04, *Mangold v. Helm*, 2005 E.C.R. I-9981, ¶ 75. *See also* Case C-555/07, *Kücükdeveci v. Swedex GmbH & Co KG*, 2010 E.C.R. I-365, ¶¶ 21, 50; Case C-476/11, *HK Danmark v. Experian A/S*, EU:C:2013:590, ¶ 19.

161. *See generally* John L. Murray, *Fundamental Rights in the European Community Legal Order*, 32 FORDHAM INT’L L.J. 531 (2009); MANFRED A. DAUSES, *THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE LEGAL ORDER OF THE EUROPEAN UNION WITH EMPHASIS ON THE INSTITUTIONAL PROTECTION OF THOSE RIGHTS* (2010).

162. Charter of Fundamental Rights, *supra* note 26. The Charter is now legally binding upon the EU itself and the Member States when they implement EU law. *See also* *Id.* at art. 51(1); Treaty on European Union, *supra* note 5, art. 6(1). The situation is more complicated in relation to the United Kingdom and Poland. *See* Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom art. 1(1), 2012 O.J. (C 326) 313; Case C-411/10, *N S v. Sec’y of State for the Home Department*, 2011 E.C.R. I-13905, ¶ 120. The Czech Republic sought to be included in this Protocol. *See* Commission Opinion on a draft European Council decision in favour of examining the proposed amendment of the Treaties concerning the addition of a Protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic, COM (2012) 197 final. The European Parliament called upon the European Council “not to examine the proposed amendment of the Treaties.” *See* European Parliament Resolution of May 22, 2013 on the Draft Protocol on the Application of the Charter of Fundamental Rights of the European Union to the Czech Republic, *available at* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0209+0+DOC+PDF+V0//EN>. On February 20, 2014 the Czech Republic withdrew its request to be included in the Protocol.

the EU and the Member States.

For example, the German Federal Constitutional Court has held that an act of EU institutions may be *ultra vires* if it goes beyond the competences transferred by the national government. In its *Maastricht* decision the German court indicated that under national constitutional law it had the power to review whether EU institutions law kept within the boundaries of the powers transferred to the Union by the German state.¹⁶³ If an EU institution exceeded those limits, that action would be unenforceable in Germany.

In the *Mangold* case the German Court held that its *ultra vires* jurisdiction arises “if it is manifest that acts of the European bodies and institutions have taken place outside the transferred competences” and those acts are “manifestly in violation of competences and . . . highly significant in the structure of competences between the Member States and the Union.”¹⁶⁴ In its *Outright Monetary Transactions* decision the Court has foreshadowed an intention to hold that a decision of the European Central Bank was beyond the powers of the European Union under its founding Treaties. The German Court has sought a preliminary ruling from the Court of Justice, arguing that a limiting interpretation of the challenged decision would save it from invalidity.¹⁶⁵

Constitutional Courts in Poland, the Czech Republic and Denmark have also held that in exceptional cases they possess the power to hold that an EU legal act is *ultra vires* if it exceeds the powers transferred to EU institutions.¹⁶⁶ The Czech Constitutional Court has actually held that an EU act exceeded the limits of the powers transferred by the Czech state,¹⁶⁷ though the primary motivation for that judgment appears to lie in a contest of authority between Czech

163. Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Oct. 12, 1993, 89 B.Verf.G.E. 155, 188, translated in 1 C.M.L.R. 57, 89 (1994) (Maastricht Case). See also Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jun. 30, 2009, 123 B.Verf.G.E. 267, 353-54, translated in 3 C.M.L.R. 13, 337-8 (2010) (Treaty of Lisbon Case); Neue Juristische Wochenschrift [N.J.W.] 907, 2014, Jan. 14, 2014, 2 BvR 2728/13, ¶¶ 21-24, translated at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html (Outright Monetary Transaction Case).

164. Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] July 6, 2010, 126 B.Verf.G.E. 286, 304, translated in 1 C.M.L.R. 33, 1085-86 (2011) (Mangold Case). See also Malte Beyer-Katzenberger, *Judicial Activism and Judicial Restraint at the Bundesverfassungsgericht: Was the Mangold Judgment of the European Court of Justice an Ultra Vires Act?*, 11 ERA FORUM 517 (2011). This case was an *ultra vires* challenge to the Court of Justice’s decision in Case C-144/04, *Mangold v. Helm*, 2005 E.C.R. I-9981.

165. 2 BvR 2728/13, ¶ 55.

166. *Poland*: EU Accession Treaty Case, Const. Trib., K 18/04, May 11, 2005, available at http://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf; *Czech Republic*: Treaty of Lisbon Case, US (Const. Ct.) Nov. 26, 2008, Pl. US 19/08, ¶¶ 109, 120, 139, 216, available at http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=484&cHash=621d8068f5e20ecadd84e0bae0527552; *Denmark*: Carlsen v. Rasmussen, Sup. Ct., Apr. 6, 1998, 3 C.M.L.R. 854, ¶ 33 (1999); Henrik Palmer Olsen, *The Danish Supreme Court’s Decision on the Constitutionality of Denmark’s Ratification of the Lisbon Treaty*, 50 COMMON MKT. L. REV. 1489, 1502-03 (2013).

167. US (Const. Ct.) Jan. 31, 2012, Pl. US 5/12, § VII, available at http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=37&cHash=911a315c9c22ea1989d19a3a848724e2.

courts.¹⁶⁸ While directed at respect for the principle of conferral rather than subsidiarity,¹⁶⁹ the decisions of these national courts stand as a judicial warning to the Court of Justice that the national courts may police the boundaries of EU competences if the European Court fails in that task.

IV. SUBSIDIARITY AS A LEGISLATIVE REVIEW PRINCIPLE

A. *Consideration of Subsidiarity by the Commission and the Member State Parliaments*

By far the most significant application of the subsidiarity principle is its consideration as part of the EU legislative process. This process involves both EU institutions and the parliaments of the Member States. Practical examples of the operation of these principles appear in the reasoned opinions adopted by the national parliaments and the annual reports on subsidiarity issued by the Commission.¹⁷⁰

When the ill-fated European Constitution¹⁷¹ was being drafted, the working group on subsidiarity expressed the view that the monitoring of the observance of the principle should be primarily preventive as part of the legislative process. The working group stated: “as the principle of subsidiarity was a principle of an essentially political nature, implementation of which involved a considerable margin of discretion for the institutions (considering whether shared objectives could ‘better’ be achieved at European level or at another level), monitoring of compliance with that principle should be of an essentially political nature and take place before the entry into force of the act in question.”¹⁷² The case law of the Court of Justice is certainly consistent with this approach.

Legislative control of constitutionality has been described as “directing the mouse to safeguard the cheese”.¹⁷³ Fortunately, the observance of subsidiarity in practice is not safeguarded only by the questionable capacity of EU institutions to be sole judges in their own causes. The participation of the national parliaments in the EU legislative process means that both the Member State and Union institutions bring their perspectives to bear in the process.

Consideration of subsidiarity begins at the pre-legislative stage. Respect for

168. See Robert Zbiral, *A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed Ultra Vires*, 49 COMMON MKT. L. REV. 1475, 1487-88, 1490 (2012); Jan Komárek, *Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires*, 8 EUR. CONST. L. REV. 323 (2012); Georgios Anagnostaras, *Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court*, 14, 7 GERMAN L.J. 959, 960, 969 (2013).

169. 126 B.Verf.G.E. 286, 302; translated in 1 C.M.L.R. 33, 1084 (2011) (Mangold Case)

170. The Commission is required to issue an annual report on the application of the subsidiarity principle. See Protocol No. 2, *supra* note 23, art. 9.

171. Treaty Establishing a Constitution for Europe, Oct. 29, 2004, 2004 O.J. (C 310) 1.

172. *Conclusions of Working Group I on the Principle of Subsidiarity*, at 2, CONV 286/02 (Sept. 23, 2002), available at <http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00286.en02.pdf>.

173. Robert S Barker, *Taking Constitutionalism Seriously: Costa Rica's Sala Cuarta*, 6 FLA. J. INT'L L. 349, 353-54 (1991). See also Sander, *supra* note 71, at 546 (“foxes guarding henhouses”).

subsidiarity is a major responsibility of the Commission, which has the initiative in introducing legislative proposals.¹⁷⁴ The Commission has acknowledged that the principle “clearly establishes a presumption in favour of the Member States taking action” in areas of shared competence.¹⁷⁵ The Subsidiarity Protocol requires that the Commission “consult widely” before proposing legislation. In situations of “exceptional urgency” the Commission may dispense with consultation.¹⁷⁶

The Treaty of Amsterdam version of the Subsidiarity Protocol expressly stated that, “[o]ther things being equal”, Directives were to be preferred to Regulations.¹⁷⁷ The General Court restrictively interpreted this provision, holding that the words “[o]ther things being equal” gave the legislature a discretion about whether to use a Directive or a Regulation.¹⁷⁸ There is no corresponding provision in the present version of the Subsidiarity Protocol. However, there appears to have been a move towards greater reliance upon Directives rather than Regulations. Directives offer more scope for subsidiarity than do Regulations.¹⁷⁹ Directives leave the Member States with discretion as to the method to achieve a specified result, while Regulations are directly applicable in the Member States.¹⁸⁰

The Commission has indicated that it considers subsidiarity at three points: in preparing roadmaps for its Work Programme, during the impact assessment process, and in the preparation of the explanatory memorandums and recitals for legislative proposals.¹⁸¹ The Commission has published its guidelines regarding subsidiarity for use in preparing explanatory memorandums. These guidelines read in relevant part:

“When the subsidiarity principle applies, the proposal must meet at least one of the two conditions listed under A and B, as well as the condition listed under C. . . .

(a) Indicate why action by Member States would not be sufficient to achieve the objectives of the proposed action. Refer in particular to the transnational aspects that cannot be properly regulated by

174. Simona Constantin, *Rethinking Subsidiarity and the Balance of Powers in the EU in the Light of the Lisbon Treaty and Beyond*, 4 CROATIAN Y.B. EUR. L. & POL'Y 151, 160 (2008). See TFEU, *supra* note 31, art. 294(2).

175. *Report from the Commission on Subsidiarity and Proportionality (16th Report on Better Lawmaking covering the year 2008)*, at 2, COM (2009) 504 final (Sept. 25, 2009).

176. Protocol No. 2, *supra* note 23, art. 2.

177. Protocol on the Application of the Principles of Subsidiarity and Proportionality art. 6, as adopted by the Treaty of Amsterdam.

178. Case T-526/10, *Inuit Tapiriit Kanatami v. European Commission*, EU:T:2013:215, ¶ 100; appeal pending as at February 16, 2015, docketed as Case C-398/13.

179. Craig, *supra* note 18, at 75.

180. TFEU, *supra* note 31, art. 288; Case C-348/04, *Boehringer Ingelheim KG v. Swingward Ltd*, 2007 E.C.R. I-3391, ¶ [58].

181. *Report from the Comm'n on Subsidiarity and Proportionality (17th Report on Better Lawmaking covering the year 2009)*, at 4, COM (2010) 547 final (Oct. 8, 2010).

Member States' action.

(b) Indicate why action by Member States alone would damage significantly Member States' interests.

(c) Indicate why EU action will better achieve the objectives of the proposal, by referring to the scale and/or the effects of its action.

3. Indicate which qualitative indicators demonstrate that the objective can be better achieved by the Union.

4. Indicate which quantitative indicators demonstrate that the objective can be better achieved by the Union (Optional).

5. Demonstrate that the scope of the proposal is limited to what Member States cannot satisfactorily achieve and what the Union does better."¹⁸²

The Treaty of Amsterdam version of the Subsidiarity Protocol elaborated upon the scope of the principle by including tests that were dubbed the necessity and EU added value tests. The relevant provision of the Protocol read as follows:

"For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.

The following guidelines should be used in examining whether the abovementioned condition is fulfilled:

- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States; [the first 'necessity test']
- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests; [the second 'necessity test']
- action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the

182. *Comm'n Staff Working Paper*, Comm'n of the Eur. Cmty, at 36, SEC (2007) 737 (June 6, 2007).

Member States. [the 'EU added value' test]."¹⁸³

The Amsterdam version of the Protocol expressly required that both the necessity and value added tests had to be satisfied for EU action to be consistent with subsidiarity.¹⁸⁴ The Lisbon Protocol no longer incorporates the necessity and EU value added tests, but the Commission has stated that it will continue to apply those tests as part of its guidelines.¹⁸⁵ The national parliaments also continue to apply these tests. For example, the House of Commons argued that a proposal breached subsidiarity because the Commission had not demonstrated the necessity for EU action.¹⁸⁶

The Commission's impact assessment guidelines set out questions which must be answered in applying the necessity and EU value added tests.¹⁸⁷ The guidelines state:

"1. Does the issue being addressed have transnational aspects which cannot be dealt with satisfactorily by action by Member States? (eg reduction of CO2 emissions in the atmosphere)

2. Would actions by Member States alone, or the lack of Community action, conflict with the requirements of the Treaty? (eg discriminatory treatment of a stakeholder group)

3. Would actions by Member States alone, or the lack of Community action, significantly damage the interests of Member States? (eg action restricting the free circulation of goods)

4. Would action at Community level produce clear benefits compared with action at the level of Member States by reason of its scale?

183. Treaty of Amsterdam, Protocol on the Application of the Principles of Subsidiarity and Proportionality, *supra* note 3, art. 5.

184. Portuese, *supra* note 58, at 244.

185. *Report from the Commission on Subsidiarity and Proportionality (17th Report on Better Lawmaking covering the year 2009)*, at 3, COM (2010) 547 final (Oct. 8, 2010); *Report from the Commission on Subsidiarity and Proportionality (18th Report on Better Lawmaking covering the year 2010)*, at 2, COM (2011) 344 final (June 10, 2011).

186. Reasoned Opinion of the House of Commons concerning a Draft Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, ¶¶ 14-17, available at http://ec.europa.eu/dgs/secretariat_general/relations/reasons_other/npo/docs/united_kingdom/2012/com20120130/com20120130_commons_opinion_en.pdf. See also Italian Senate, *Resolution of the 8th Standing Committee on the Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework on Market Access to Port Services and Financial Transparency of Ports* (COM (2013) 296 final), at 3-5 (July 23, 2013), available at http://ec.europa.eu/dgs/secretariat_general/relations/reasons_other/npo/docs/italy/2013/com20130296/com20130296_senato_opinion_en.pdf.

187. Impact assessments are available on the Commission website at http://ec.europa.eu/governance/impact/index_en.htm.

5. Would action at Community level produce clear benefits compared with action at the level of Member States by reason of its effectiveness?"¹⁸⁸

The dialogue between the Commission and the legislatures of the Member States shows the competing interpretations of subsidiarity for which those parties contend.¹⁸⁹ The national parliaments generally apply a broader concept of subsidiarity which would confer a wider immunity from the exercise of EU concurrent jurisdiction. In its reasoned opinion on the proposed Common European Sales Law the House of Commons observed that it was "axiomatic" that a common sales law could be better achieved at the EU level. However, it would need to be demonstrated that the adoption of such a common regime was necessary and would produce greater benefits than if left to the Member States.¹⁹⁰

By contrast, the Commission applies a narrower concept of subsidiarity that would broaden the permissible exercise of the Union's concurrent jurisdiction. In relation to an anti-discrimination proposal the Commission argued that the objective of the proposal could not be achieved by the Member States alone as only an EU measure could provide a minimum level of protection against discrimination across the Union.¹⁹¹

In several reasoned opinions the House of Lords has argued that "[t]he failure of Member States to act is not in itself a reason for the Union to act."¹⁹² The impact assessment guidelines state that since it is possible that changes of circumstances may mean that Union action is no longer necessary, subsidiarity justifications should not be based exclusively on past assessments.¹⁹³

The Greek Parliament expressed its concerns about the full harmonisation attempted by a proposed Directive on consumer rights. The Commission responded that full harmonisation was limited to particular aspects of consumer

188. *Impact Assessment Guidelines*, at 22, SEC (2009) 92 (Jan. 15, 2009).

189. Apart from the dialogue taking place through the subsidiarity control mechanism, the Commission also engages in general political dialogue with the national parliaments. See e.g., Davor Jančić, *The Barroso Initiative: Window Dressing or Democracy Boost?*, 8 *UTRECHT L. REV.* 78 (2012).

190. *Reasoned Opinion of the House of Commons: Draft Regulation on a Common European Sales Law for the European Union*, ¶ 18, available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/united_kingdom/2011/com20110635/com20110635_commons_opinion_en.pdf. See also Patrick Ernst Sensburg, *The Position of the German Bundestag on the Commission's Proposal for a Regulation on a Common European Sales Law*, 8 *EUR. REV. CONTRACT L.* 188, 199-201 (2012) (discussing other reasoned opinions regarding this proposal); Michael Educate, *The Common European Sales Law's Compliance with the Subsidiarity Principle of the European Union*, 14 *CHI. J. INT'L L.* 317, 338-42 (2013).

191. Comments of the European Commission on an Opinion from the Two Chambers of the States-General of the Kingdom of the Netherlands, at 2 (Mar. 2009), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/netherlands/2008/com20080426/com20080426_both_reply_en.pdf.

192. HOUSE OF LORDS EUROPEAN UNION COMMITTEE, *SUBSIDIARITY ASSESSMENT: DISTRIBUTION OF FOOD PRODUCTS TO DEPRIVED PERSONS*, 2010-2, H.L. 217, at ¶ 10 (U.K.). The Committee advanced the same view in its report on an earlier version of the proposal. See also HOUSE OF LORDS EUROPEAN UNION COMMITTEE, *SUBSIDIARITY ASSESSMENT: DISTRIBUTION OF FOOD PRODUCTS TO DEPRIVED PERSONS*, 2010-11, H.L. 44, at ¶ 9.

193. *Impact Assessment Guidelines*, at 22, SEC (2009) 92 (Jan. 15, 2009).

protection and was not a comprehensive regulation of that subject matter. The problem of legal fragmentation caused by the varied national approaches regarding these aspects could not be sufficiently addressed by the Member States as the fragmentation was caused by the “uncoordinated use” of clauses in the existing Directive.¹⁹⁴

At the legislative stage the Commission is required to send legislative proposals to the national parliaments at the same time as it sends them to the European Parliament.¹⁹⁵ The subsidiarity monitoring system under the Protocol relates only to draft legislative acts, that is, acts which must be adopted under the ordinary or a special legislative procedure. If the Treaties do not specify that an act must be adopted under one of these procedures, the act is not a legislative act and is not subject to the subsidiarity monitoring system.¹⁹⁶ For example, a proposal on requirements for national budgetary frameworks was not subject to the monitoring system as it was a non-legislative measure.¹⁹⁷ Green and white papers issued by the Commission are also not subject to the system.¹⁹⁸ The Polish parliament argued for closer scrutiny of a proposed authorisation of delegated acts as such acts would fall outside the control mechanism.¹⁹⁹

194. Comments of the European Commission on an Opinion from the Hellenic Parliament. COM (2008) 614. Proposal for a Directive of the European Parliament and the Council on Consumer Rights, at 3 (Sept. 2009), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/greece/2008/com20080614/com20080614_deputies_reply_en.pdf.

195. Protocol No. 2, *supra* note 23, art. 4.

196. Letter from the Commission to the Italian Senate (COM (2010) 291), C/2010/9010 (Dec. 21, 2010), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/italy/2010/com20100291/com20100291_senato_reply_en.pdf; Letter from the Commission to the Swedish Riksdag (COM (2010) 547), C/2011/7693 final (Nov. 4, 2011), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/sweden/2010/com20100547/com20100547_riksdag_reply_en.pdf. See also TFEU, *supra* note 31, art. 289 (defining “legislative acts”).

197. Letter from the Commission to the Italian Senate (COM (2010) 524), C/2011/2291 (Apr. 4, 2011), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/italy/2010/com20100522_524_525_526_527/com20100522_524_525_526_527_senato_reply_en.pdf.

198. Philipp Kiiver, *The Conduct of Subsidiarity Checks of EU Legislative Proposals by National Parliaments: Analysis, Observations and Practical Recommendations*, 12 ERA FORUM 535, 540 (2012); See also Portuguese Assembly of the Republic, European Affairs Committee, *Opinion: COM (2013) 37. Green Paper on Unfair Trading Practices in the Business-to-business Food and Non-food Supply Chain in Europe*, at 4 (Apr. 30, 2013), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/portugal/2013/com20130037/com20130037_assembleia_opinion_en.pdf. However, green and white papers are sent to national parliaments as part of the general political dialogue with the Commission. See Jančić, *supra* note 189, at 79.

199. *Resolution of the Sejm of the Republic of Poland containing a Reasoned Opinion on Non-compliance with the Principle of Subsidiarity of the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1698/2005 on Support for Rural Development by the European Agricultural Fund for Rural Development (EAFRD)* (COM (2010) 537 final), at ¶ 3 (Nov. 25, 2010), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/poland/2010/com20100537/com20100537_sejm_opinion_en.pdf. See also *Resolution of the Sejm of the Republic of Poland containing a Reasoned Opinion on Non-compliance with the Principle of Subsidiarity of the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1234/2007 as regards Contractual Relations in the Milk and Milk Products Sector*, at ¶ 2, COM (2010) 728 final (Feb. 3, 2011), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/poland/2010/com20100728/com20100728_sejm_opinion_en.pdf.

The national parliaments have adopted various procedures for the examination of the subsidiarity aspects of EU legislative proposals. For example, in Sweden subsidiarity scrutiny is conducted by the parliamentary committee that deals with the particular subject matter of the proposal. If the relevant committee concludes that the proposal is in breach of subsidiarity, the committee recommends that the parliament adopt a reasoned opinion to that effect.²⁰⁰

EU legislative proposals must contain a “detailed statement” regarding subsidiarity. The claim that the legislation would be better adopted at the EU level must be substantiated through qualitative and (where possible) quantitative indicators.²⁰¹ The House of Commons has repeatedly argued that since the “detailed statement” is required to be contained within the legislative proposal, it should appear in the explanatory memorandum, which is translated into every official language of the Union, thereby facilitating scrutiny by the national parliaments. By contrast, the impact assessment is not translated into all of the official languages.²⁰²

The practice of the national parliaments provides numerous illustrations of their expectations regarding the necessary level of detail and the consequences of a failure to provide sufficient detail. The House of Commons has emphasised that subsidiarity justifications must contain “sufficient detail and clarity that an EU citizen can understand the qualitative and quantitative reasons leading to a conclusion that EU action rather than national action is justified.”²⁰³

200. Riksdagsordning [Riksdag Act] 10 ch. 3 § (Svensk författningssamling [SFS] 2014:801) (Swed.).

201. Protocol No. 2, *supra* note 23, art. 5.

202. See e.g., *Reasoned Opinion of the House of Commons: Draft Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-executive Directors of Companies listed on Stock Exchanges and related measures*, ¶ 16 (Jan. 7 2013), available at http://ec.europa.eu/dgs/secretariat_general/rerelations/rerelations_other/npo/docs/united_kingdom/2012/com20120614/com20120614_commons_opinion_en.pdf; *Reasoned Opinion of the House of Commons: Draft Regulation of the European Parliament and of the Council on Measures to Reduce the Cost of Deploying High Speed Electronic Communication Networks*, ¶ 14 (May 21, 2013), available at http://ec.europa.eu/dgs/secretariat_general/rerelations/rerelations_other/npo/docs/united_kingdom/2013/com20130147/com20130147_commons_opinion_en.pdf; *Reasoned Opinion of the House of Commons: Draft Regulation of the Council on the Establishment of the European Public Prosecutor's Office (EPPC)*, ¶ 8 (Oct. 22, 2013), available at http://ec.europa.eu/dgs/secretariat_general/rerelations/rerelations_other/npo/docs/united_kingdom/2013/com20130534/com20130534_commons_opinion_en.pdf; *Reasoned Opinion of the House of Commons: Draft Directive on the Placing of the Market of Food from Animal Clones*, ¶ 13 (Feb. 12, 2014), available at http://ec.europa.eu/dgs/secretariat_general/rerelations/rerelations_other/npo/docs/united_kingdom/2013/com20130893/com20130893_commons_opinion_en.pdf; *Reasoned Opinion of the House of Commons: Draft Regulation on Indices used as Benchmarks in Financial Instruments and Financial Contracts*, ¶ 8 (Dec. 12, 2013), available at http://ec.europa.eu/dgs/secretariat_general/rerelations/rerelations_other/npo/docs/united_kingdom/2013/com20130641/com20130641_commons_opinion_en.pdf.

203. See e.g., *Reasoned Opinion of the House of Commons: Draft Directive on a Common Consolidated Corporate Tax Base*, ¶ 19 (May 11, 2011), available at http://ec.europa.eu/dgs/secretariat_general/rerelations/rerelations_other/npo/docs/united_kingdom/2011/com20110121/com20110121_commons_opinion_en.pdf; *Reasoned Opinion of the House of Commons: Draft Regulation on a Common European Sales Law for the European Union*, ¶ 13 (Dec. 7, 2011) available at http://ec.europa.eu/dgs/secretariat_general/rerelations/rerelations_other/npo/docs/united_kingdom/2011/com20110635/com20110635_commons_opinion_en.pdf (the latter adds the words “and

The lower house of the Spanish parliament issued a reasoned opinion which concluded that the absence of a detailed statement meant that it was unable to conclude that the proposal complied with the principle of subsidiarity.²⁰⁴ The Hungarian parliament argued that the Commission's justifications for a proposal were merely formal since they only reiterated the wording of the Treaties. However, the parliament considered that the substance of the proposal was consistent with subsidiarity.²⁰⁵

The Dutch parliament informed the Commission that it was unable to express a view regarding the compliance of a legislative proposal with subsidiarity until the Commission had clarified the scope of the proposal and provided further information concerning its "practical, legal and financial implications".²⁰⁶ In response the Commission provided further clarification of its proposal.²⁰⁷

On another occasion the Dutch parliament deferred its decision regarding compliance with subsidiarity until the Commission responded to the parliament's questions regarding the proposal.²⁰⁸ The parliament subsequently considered that the Commission's response was inadequate and assessed the proposal as inconsistent with subsidiarity.²⁰⁹

In one instance the Commission justified the omission of a subsidiarity justification on the ground that the proposal was for an amendment of an existing

their elected representatives").

204. *Opinion 1/2011 of the Joint Committee on the European Union concerning the Application of the Principle of Subsidiarity to the Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community Framework for the Taxation of Energy Products and Electricity* [COM (2011) 169 final], at ¶ 4 (June 14, 2011), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/spain/2011/com20110169/com20110169_both_opinion_en.pdf.

205. Hungarian National Assembly Committee on European Affairs, *Reasoned Opinion concerning the Subsidiarity Check of the Proposal for [a] Directive of the European Parliament and of the Council on Standards of Quality and Safety of Human Organs intended for Transplantation* COM (2008) 818, 2008/238/COD, available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/hungary/2008/com20080818/com20080818_assembly_opinion_en.pdf.

206. *Letter from States-General of the Netherlands to the Commission, Subject: Subsidiarity Test for the Proposal for a Council Directive on implementing the Principle of Equal Treatment between Persons irrespective of Religion or Belief, Disability, Age or Sexual Orientation* (COM (2008) 426), at 2 (Oct. 9, 2008), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/netherlands/2008/com20080426/com20080426_both_opinion_en.pdf.

207. *Comments of the European Commission on an Opinion from the Two Chambers of the States-General of the Kingdom of the Netherlands*, at 2 (Mar. 13, 2009), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/netherlands/2008/com20080426/com20080426_both_reply_en.pdf.

208. *Letter from States General of the Netherlands to the Commission, Subject: Subsidiarity Check on the Proposal for a Directive on Standards of Quality and Safety of Human Organs intended for Transplantation* (COM (2008) 818) (Feb. 12, 2009), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/netherlands/2008/com20080818/com20080818_both_opinion_en.pdf.

209. *Letter from the House of Representatives, Final report of the Standing Committee for Health, Welfare and Sport of the House of Representatives of the States-General concerning the Proposal for a Directive of the European Parliament and of the Council on Standards of Quality and Safety of Human Organs intended for Transplantation* (COM (2008) 818), at 2 (Sept. 3, 2009), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/netherlands/2008/com20080818/com20080818_tweedekamer_opinion_en.pdf.

Regulation, so that the subsidiarity justification for the original Regulation continued to apply.²¹⁰ The subsidiarity principle applies to the amendment of existing legislation,²¹¹ so the Commission's reliance upon the original subsidiarity justification was questionable. The Commission has since indicated that in such cases the explanatory material would now refer back to the original justification and confirm its continuing applicability.²¹²

Apart from the Commission, the subsidiarity principle also applies to the other actors in the EU legislative process. An Inter-Institutional Agreement on subsidiarity provides that the Parliament and Council are required to justify their proposed amendments in terms of subsidiarity if the scope of Union action would be expanded.²¹³ The Inter-Institutional Agreement was adopted shortly after the Maastricht Treaty came into force, but has not been revised in the light of subsequent amendments to the founding Treaties.

In the Parliament responsibility for ensuring observance of subsidiarity lies with both the specific Committee that considers the proposal and the Committee on Legal Affairs.²¹⁴ In the Council that responsibility rests with the Committee of Permanent Representatives (COREPER), which is an "auxiliary body of the Council"²¹⁵ that prepares the work of the Council.²¹⁶

EU legislative proposals have been described as a "paper tide" with which the national parliaments must now contend.²¹⁷ The enacted legislative output of EU institutions is huge. In 2013 alone there were 355 issues of the legislation series of the *Official Journal*. Of course there are even more legislative proposals than enacted legislation.

In view of this substantial addition to their normal legislative work, it is surprising that the national parliaments have only eight weeks in which to consider and respond to EU legislative proposals.²¹⁸ This deadline is far too short

210. *Letter from the Commission to the Polish Sejm* (COM (2010) 537 final), C/2011/3623 (May 24, 2011), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/poland/2010/com20100537/com20100537_sejm_reply_en.pdf.

211. Piet Van Nuffel, *The Protection of Member States' Regions through the Subsidiarity Principle*, in *THE ROLE OF THE REGIONS IN EU GOVERNANCE* 55, 57 (Carlo Panara & Alexander De Becker eds., 2011).

212. *Letter from the Commission to the Swedish Riksdag* (COM (2010) 547), C/2011/7693 final (Nov. 4, 2011), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/sweden/2010/com20100547/com20100547_riksdag_reply_en.pdf.

213. *Inter-Institutional Agreement Between the European Parliament, the Council and the Commission on Procedures for Implementing the Principle of Subsidiarity* Point II(3), 1993 O.J. (C 329) 135.

214. *Rules of Procedure of the European Parliament* R. 38a(2) and Annex VII Point XVI(2), 2011 O.J. (L 116) 1, 23, 90; *Report from the Commission on Subsidiarity and Proportionality (18th Report on Better Lawmaking covering the year 2010)*, at 4, COM (2011) 344 final (June 10, 2011). The website of the Committee on Legal Affairs is located at <http://www.europarl.europa.eu/committees/en/JURI/home.html>.

215. *Case C-25/94, Commission v. Council*, 1996 E.C.R. I-1469, ¶ 26.

216. *Treaty on European Union*, *supra* note 5, art. 16(7); *TFEU*, *supra* note 31, art. 240(1).

217. Ritzer, *supra* note 11, at 758.

218. *See Protocol No. 2*, *supra* note 23, art. 6; *Protocol (No. 1) on the Role of National Parliaments in the European Union*, art. 4, 2012 O.J. (C 326) 203. Since the Commission and national parliaments are in recess during August, that month is not included in calculating the eight-week deadline. *See Letter*

since forty-one national legislative chambers have to examine every submitted proposal within an eight week period.²¹⁹

The Committee on Constitutional Affairs of the European Parliament proposed that the Parliament resolve that there should be a “significant extension” of the eight week deadline provided for by the Protocol.²²⁰ The adopted version of the resolution did not take up this suggestion.²²¹ The deadline was even shorter under the Treaty of Amsterdam: a mere six weeks.²²² The Council may reduce the eight week period in cases of urgency.²²³

Within the eight week period a national parliament or one of its chambers may issue a reasoned opinion regarding subsidiarity aspects of the proposal.²²⁴ A reasoned opinion must state why the legislature considers that the proposal is in breach of subsidiarity.²²⁵ Only negative opinions are considered to be reasoned opinions under the subsidiarity control mechanism.²²⁶ Some national laws regulate the procedure for the adoption of a reasoned opinion. For example, Irish law provides that each House of the legislature may submit a reasoned opinion on a proposal after passing a resolution to that effect.²²⁷

The reasoned opinion procedure is extensively used by the parliaments of the Member States. In 2013 national parliaments issued 88 reasoned opinions relating to 36 legislative proposals.²²⁸ Nevertheless, the majority of Commission proposals do not produce reasoned opinions arguing that subsidiarity

from the President of the Commission to Member State Parliaments, at 4 (Dec. 1, 2009); Kiiver, *supra* note 198, at 541.

219. KAISA KORHONEN, GUARDIANS OF SUBSIDIARITY: NATIONAL PARLIAMENTS STRIVE TO CONTROL EU DECISION-MAKING 7 (2011), available at <http://www.fiia.fi/assets/publications/bp84.pdf>. This figure rose from 40 to 41 with the accession of Croatia.

220. European Parliament Committee on Constitutional Affairs, Opinion on Better Legislation, Subsidiarity and Proportionality and Smart Regulation, at 19, 2011/2029(INI) (June 28, 2011) available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2011-0251+0+DOC+PDF+V0//EN>.

221. European Parliament Resolution of 14 September 2011 on Better Legislation, Subsidiarity and Proportionality and Smart Regulation, 2013 O.J. (C 51E) 87.

222. Treaty of Amsterdam, Protocol on the Application of the Principles of Subsidiarity and Proportionality, *supra* note 3, art. 3.

223. Protocol (No. 1) on the Role of National Parliaments in the European Union art. 4, 2012 O.J. (C 326) 203; Council Decision 2009/937 of 1 December 2009 adopting the Council’s Rules of Procedure Annex, 2009 O.J. (L 325) 35, art. 3(3).

224. 15 Member State legislatures are unicameral and 13 are bicameral. See HOUSE OF LORDS EUROPEAN UNION COMMITTEE, THE ROLE OF NATIONAL PARLIAMENTS IN THE EUROPEAN UNION, 2013-4, H.L. 151, ¶ 60 (U.K.).

225. Protocol No. 2, *supra* note 23, art. 6.

226. Letter from the Commission to the Swedish Riksdag (COM (2011) 345 final), C/2012/6193 final (Sept. 18, 2012), available at http://ec.europa.eu/dgs/secretariat_general/reactions/reactions_other/npo/docs/sweden/2011/com20110345/com20110345_riksdag_reply_en.pdf; Letter from the Commission to the House of Commons (COM (2011) 345 final), C/2012/39 final (Jan. 11, 2012), available at http://ec.europa.eu/dgs/secretariat_general/reactions/reactions_other/npo/docs/united_kingdom/2011/com20110345/com20110345_commons_reply_en.pdf.

227. European Union Act 2009 (Act No. 33/2009), § 7(3) (Ir.).

228. Report from the Commission. Annual Report 2013 on Subsidiarity and Proportionality, at 4, COM

has been breached, so the pre-legislative process may have had some effect in reducing proposals that give rise to subsidiarity concerns.²²⁹ Proposals that are entirely inconsistent with subsidiarity are “rare”, but it is relatively common for national parliaments to identify particular aspects of proposals that infringe subsidiarity.²³⁰ The Commission website makes available the texts of the reasoned opinions of national parliaments and its replies to those opinions.²³¹

The European institutions are to “take account” of the reasoned opinions of the national legislatures.²³² This obligation is relatively weak. It is arguable that a “mere acknowledgement by the Union institutions suffices.”²³³ The reasoned opinions are “merely advisory”²³⁴ and the national parliaments must rely upon their powers of persuasion.²³⁵ The point of the procedure is that the Commission’s interpretation of subsidiarity is subject to regular challenge.²³⁶

B. The ‘Yellow Card’ and ‘Orange Card’ Procedures

Since the Treaty of Lisbon one third of the national legislatures are able to require the reconsideration of a proposed EU law that they believe infringes subsidiarity (the ‘yellow card’ procedure). If the majority of national legislatures reject the proposed law, and the Council or the Parliament demurs to their objections, the proposed law will be blocked (the ‘orange card’ procedure).

The yellow card procedure is based on a soccer analogy²³⁷ while the orange card procedure is based on a traffic light analogy.²³⁸ To continue the soccer analogy, the Protocol does not include a ‘red card’ procedure that would give the national parliaments a power of ‘veto’ over EU legislation.²³⁹

(2014) 506 final (Aug. 5, 2014). There has been a steady rise in the number of reasoned opinions. In 2012 national parliaments issued 70 reasoned opinions. See *Report from the Commission. Annual Report 2012 on Subsidiarity and Proportionality*, at 3, COM (2013) 566 final (July 30, 2013). In 2011 national parliaments issued 64 reasoned opinions. See *Report from the Commission on Subsidiarity and Proportionality (19th Report on Better Lawmaking covering the year 2011)*, at 4, COM (2012) 373 final (July 10, 2012).

229. *Report from the Commission on Subsidiarity and Proportionality (18th Report on Better Lawmaking covering the year 2010)*, at 10, COM (2011) 344 final (June 10, 2011).

230. House of Commons European Scrutiny Committee, *supra* note 60, at ¶ 29.

231. EUROPA EU, available at http://ec.europa.eu/dgs/secretariat_general/reactions/relations_other/npo/index_en.htm. Reasoned opinions are also available at <http://www.ipex.eu/IP-EXL-WEB/search.do>.

232. Protocol No. 2, *supra* note 23, art. 7(1).

233. Ritzer, *supra* note 11, at 753.

234. Ian Cooper, *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, 44 J. COMMON MKT. STUD. 281, 283 (2006).

235. *Id.* at 293.

236. *Id.* at 294.

237. Jean-Victor Louis, *National Parliaments and the Principle of Subsidiarity – Legal Options and Practical Limits*, 4 EUR. CONST. L. REV. 429, 438 (2008); Federico Fabbrini and Katarzyna Granat, ‘Yellow Card, but no Foul’: *The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike*, 50 COMMON MKT. L. REV. 115, 118 n.13 (2013).

238. Louis, *supra* note 237, at 438.

239. Schütze, *supra* note 123, at 530; Fabbrini, *supra* note 237, at 119-20, 122.

These procedures are often referred to as the early warning system.²⁴⁰

In these procedures the reasoned opinions of national parliaments are treated as votes. Each national parliament has two votes, which are divided into one vote for each chamber if the legislature is bicameral.²⁴¹ In a declaration to the Final Act of the Treaty of Lisbon, the Belgian government stated that the two chambers of its federal Parliament and the subnational legislatures of its Communities and Regions were all “chambers of the national parliament”.²⁴²

For example, the Flemish Parliament issued an opinion expressing its view that an EU legislative proposal was consistent with subsidiarity.²⁴³ Belgian law requires the federal government to inform the subnational legislatures of EU legislative proposals.²⁴⁴ The Constitutional Court held that the absence of a cooperation agreement between the federal and subnational parliaments in relation to the Subsidiarity Protocol did not invalidate the Belgian ratification of the Treaty of Lisbon.²⁴⁵

If the yellow card threshold is triggered the proposal must be reviewed.²⁴⁶ There are two ways in which the yellow card may be triggered. It may be triggered by a one third threshold out of 56 votes (based on a 28 member Union).²⁴⁷ In relation to proposals concerning the “area of freedom, security and justice” the procedure may be triggered by a one quarter threshold²⁴⁸ out of 56 votes. After its review the Commission may maintain, amend or withdraw its proposal, but must provide reasons for its decision.²⁴⁹

The yellow card procedure has potential as a political tool for the protection of subsidiarity. The United Kingdom government emphasised the potential of a similar power that formed part of the ill-fated Constitution Treaty: “if a third of national parliaments were against any proposal, so too would

240. This phrase was coined by the European Convention. See *Conclusions of Working Group I on the Principle of Subsidiarity*, at 5, CONV 286/02 (Sept. 23, 2002). See generally PHILIPP KUIVER, *THE EARLY WARNING SYSTEM FOR THE PRINCIPLE OF SUBSIDIARITY: CONSTITUTIONAL THEORY AND EMPIRICAL REALITY* (2012).

241. Protocol No. 2, *supra* note 23, art. 7(1).

242. Declaration (No. 51) by the Kingdom of Belgium on National Parliaments, 2007 O.J. (C 306) 267. See 1994 CONST. arts. 2-3 (Belg.).

243. *Resolution of the Flemish Parliament concerning the ‘Proposal for a Regulation of the European Parliament and of the Council establishing a Framework on Market Access to port Services and Financial Transparency of Ports COM (2013) 296 – Reflections on Subsidiarity* (July 10, 2013), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/belgium/2013/com20130296/com20130296_representants_opinion_en.pdf.

244. *Bijzondere wet tot hervorming der instellingen* [Special Law on Institutional Reform] of Aug. 8, 1980 art. 92quater, BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium], Aug. 15, 1980, 9434.

245. *Grondwettelijk Hof* [Constitutional Court] decision no. 58/2009, Mar. 19, 2009; B.S., May 19, 2009, 37,853; translated in 3 C.M.L.R. 7, § B.12 (2010) (Belg.). Prior to the constitutional amendment of May 7, 2007 the Constitutional Court was known as the Court of Arbitration (B.S., May 8, 2007, 25,102).

246. Protocol No. 2, *supra* note 23, art. 7(2).

247. Croatia became a Member State on 1 July 2013, bringing total EU membership to 28 nations. See *Treaty of Accession of Croatia*, Dec. 9, 2011, 2012 O.J. (L 112) 10.

248. See TFEU, *supra* note 31, art. 67.

249. Protocol No. 2, *supra* note 23, art. 7(2).

their Governments be, and it would be hard to put together the qualified majority needed to pass the law in question.”²⁵⁰

The orange card procedure relates to the ordinary legislative procedure.²⁵¹ This procedure is triggered by a simple majority threshold among the national parliaments. If this threshold is reached, the proposal must be reviewed. After its review the Commission may maintain, amend or withdraw its proposal. The Commission must issue a reasoned opinion regarding subsidiarity if it decides to maintain the proposal. All of the reasoned opinions are to be submitted to the European Parliament and the Council.²⁵² Before the first reading of the proposal the European Parliament and the Council must consider whether the proposal breaches subsidiarity. If 55% of the Council or a majority of the votes cast in the European Parliament take the view that the proposal is in breach of subsidiarity, the proposal may not be further considered.²⁵³

If either the yellow or orange card procedures was activated in relation to a proposal that was ultimately adopted by the EU institutions, it is conceivable that this might result in a more exacting scrutiny by the Court of Justice as the Court would be in possession of a more detailed legislative record than has hitherto been the case in subsidiarity-based challenges to legislation. The Court might be prompted to consider whether EU institutions had given proper consideration to the reasoned opinions.²⁵⁴

The early warning system procedure concerns only alleged breaches of subsidiarity, not alleged breaches of the principle of proportionality.²⁵⁵ While reasoned opinions may be issued only in relation to alleged breaches of subsidiarity,²⁵⁶ in practice reasoned opinions frequently discuss alleged breaches of proportionality as part of the broader political exchange between the Commission and the Member States.²⁵⁷

In 2008 a Member of the European Parliament told a House of Commons Committee that the early warning procedure “was not really intended to be used”.²⁵⁸ However, in May 2012 the one third threshold for a yellow card was

250. FOREIGN AND COMMONWEALTH OFFICE, WHITE PAPER ON THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, 2004, Cm. 6309, at 19 (U.K.).

251. See TFEU, *supra* note 31, art. 294.

252. Protocol No. 2, *supra* note 23, art. 7(3).

253. *Id.* at art. 7(3)(a)-(b).

254. House of Commons European Scrutiny Committee, *supra* note 60, at Ev 6 (evidence of Prof Alan Dashwood).

255. Fabbrini, *supra* note 237, at 121; House of Commons European Scrutiny Committee, European Public Prosecutor’s Office: Reasoned Opinion. Reform Of Eurojust European Anti-Fraud Office, 2013-14, H.C. 83-xv, at ¶ 1.19; Letter from the Commission to the German Bundesrat, C/2014/1511 final (Mar. 13, 2014), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/germany/2013/com20130566/com20130566_bundesrat_reply_en.pdf; Letter from the Commission to the Italian Senate, C/2014/1520 final (Mar. 19, 2014), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/italy/2013/com20130565_566/com20130565_566_senato_reply_en.pdf.

256. Cooper, *supra* note 234, at 293.

257. Craig, *supra* note 18, at 79.

258. European Scrutiny Committee, *supra* note 60, ¶ 21.

reached in relation to a proposed Council Regulation on collective action.²⁵⁹ Twelve national parliaments presented reasoned opinions. These twelve legislatures consisted of seven unicameral legislatures (fourteen votes) and five legislative chambers of bicameral parliaments (five votes).²⁶⁰

On 10 January 2013 the Commission withdrew the proposal. The Commission denied that the proposal breached the principle of subsidiarity, but acknowledged that the proposal was unlikely to be supported by the Parliament and Council.²⁶¹ In this case the reasoned opinions failed to establish a breach of subsidiarity since the proposal was limited to cross-border labour disputes. The opinions addressed other issues such as the legal basis of the proposal and proportionality.²⁶²

However, the Commission is not always so accommodating. In October 2013 the yellow card threshold was again reached in relation to a proposed Council Regulation on the Establishment of the European Public Prosecutor's Office.²⁶³ The one quarter threshold applied in this case as the proposal concerned the "area of freedom, security and justice".²⁶⁴ One quarter of the votes was 14 out of 56. A total of 18 votes were cast against the proposal by 14 national parliamentary chambers.²⁶⁵ Nevertheless, after its mandatory review the Commission quickly decided to press ahead with its proposal. The Commission did indicate that it would "take due account" of the reasoned opinions during the legislative process.²⁶⁶

The Commission's rather high-handed attitude drew incensed responses from several national parliaments. As a House of Lords Committee put it, the Commission had "briskly dismissed the Yellow Card", the speed of its response being inconsistent with a serious reconsideration.²⁶⁷ A House of Commons Committee was even more critical of the Commission:

The precipitate nature of the Commission's response (published just one

259. *Commission Proposal for a Council Regulation on the Exercise of the Right to take Collective Action within the Context of the Freedom of Establishment and the Freedom to provide Services*, COM (2012) 130 final (Mar. 21, 2012). See European Parliament Committee on Legal Affairs, Report on the 18th Report on Better Legislation, at 5, A7-0251/2012 (July 23, 2012). See generally, Monti II: *The Subsidiarity Process Comes of Age ... Or Then Again Maybe It Doesn't*, 19 Maastricht J. Eur. & Comp. L. 595, 597-98 (2012).

260. Fabbrini, *supra* note 237, at 116, 135. At the time there were 27 Member States so the national parliaments had a total of 54 votes.

261. Letter from the Commission to the Speaker of the United Kingdom House of Commons, Ares(2012)1058907 (Sep. 12, 2012), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/pdf/pdfletters/uk_house_of_commons_-_letter_vp_sefcovic_on_monti_ii_-_withdrawal_procedure_com20120130.pdf.

262. Fabbrini, *supra* note 237, at 116, 136-37, 139.

263. *Commission Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office*, COM (2013) 534 final (July 17, 2013).

264. Protocol No. 2, *supra* note 23, art. 7(2). See TFEU, *supra* note 31, art. 67.

265. *Communication from the Commission to the European Parliament, the Council and the National Parliaments on the Review of the Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office with regard to the Principle of Subsidiarity, in accordance with Protocol No. 2*, at 3, COM (2013) 851 final (Nov. 27, 2013).

266. *Id.* at 13.

267. European Union Committee, *supra* note 224, ¶ 89.

month after the deadline for Reasoned Opinions), the absence of any new evidence in the response, its complete rejection of every single argument raised by 14 different chambers of national Parliaments and its collective approach are all suggestive of the Commission treating the exercise as a formality rather than a conscientious review.²⁶⁸

The Dutch House of Representatives lamented that the Commission's response "may have undermined faith in the yellow card procedure as a whole".²⁶⁹ The British Parliamentary Committees shared this concern.²⁷⁰ This fear may be too pessimistic. While the Commission's response is a setback to the scrutiny procedure, it is unlikely that the national parliaments will easily give up on the early warning mechanism. There are likely to be many political battles ahead for the Commission as the national parliaments exercise their power of scrutiny.

C. Subsidiarity and Regional Governments

The regional dimension of subsidiarity requires further consideration by the Union. The founding Treaties focus upon the Union and the Member States. The Treaties contain only a few sparse passages about regional and local governments. The Treaty's formulation of the principle of subsidiarity adverts to regional and local governments when contrasting action at the Union and Member State levels.²⁷¹ The Subsidiarity Protocol requires that Commission pre-legislative consultations "take into account the regional and local dimension of the action envisaged."²⁷² The detailed statement regarding subsidiarity must consider the implications for regional legislation where relevant.²⁷³ However, with the exception of Belgium, regional legislatures do not participate in the early warning system.²⁷⁴

The Subsidiarity Protocol provides that it is for the national parliaments to consult regional legislatures "where appropriate".²⁷⁵ The European Union Committee of the House of Lords has undertaken to inform the devolved legislatures about EU legislative proposals that raise subsidiarity concerns in

268. *European Scrutiny Committee, Thirty-First Report, 2013-4*, H.C. 83-xxviii, ¶ 8.30.

269. Letter from the Dutch House of Representatives Standing Committee for Security and Justice to the Commission, at 3 (Apr. 16, 2014), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/netherlands/2013/com20130534/com20130534_tweedekamer_opinion2_en.pdf.

270. Letter from the House of Commons European Scrutiny Committee to the Commission, at 1 (May 7, 2014), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/united_kingdom/2013/com20130851/com20130851_commons_opinion2_en.pdf; Letter from the House of Lords European Union Committee to the Commission, at 2 (Apr. 2, 2014), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/united_kingdom/2013/com20130851/com20130851_lords_opinion2_en.pdf.

271. Treaty on European Union, *supra* note 5, art. 5(3).

272. Protocol No. 2, *supra* note 23, art. 2.

273. *Id.* at art. 5.

274. Cygan, *supra* note 39, at 167.

275. Protocol No. 2, *supra* note 23, art. 6.

relation to devolved matters, though not in relation to matters which are reserved for the United Kingdom government.²⁷⁶

Reasoned opinions of the British parliament have referred to the views of the devolved assemblies. A reasoned opinion of the House of Commons pointed out that the Welsh National Assembly considered that two draft Directives were inconsistent with the devolution scheme of the United Kingdom because they sought to impose a duty on a single national body without regard to the responsibilities of the devolved governments.²⁷⁷ The Scottish Parliament also considered that the proposal would breach the principle of subsidiarity.²⁷⁸ The views of the Scottish Assembly were appended to the reasoned opinion of the House of Commons regarding the proposed European Public Prosecutor's Office.²⁷⁹

If the Spanish parliament submits a reasoned opinion it will append any reasoned opinions from the parliaments of the Autonomous Communities. However, if the Spanish parliament does not submit a reasoned opinion of its own, any reasoned opinions of the Autonomous Communities will not be submitted to the EU institutions.²⁸⁰ Some of the autonomy statutes for the individual Communities make specific reference to the subsidiarity monitoring process.²⁸¹ For example, the revised autonomy statute of Catalonia expressly provides that the Catalan Parliament participates in the subsidiarity scrutiny process in relation to EU proposals that affect its jurisdiction.²⁸²

The Committee of the Regions does not share the power of the national parliaments to give a 'yellow card' or an 'orange card'.²⁸³ However, the Committee has taken a keen interest in subsidiarity monitoring. In 2005 the Committee issued an opinion that a legislative proposal was not entirely consistent with subsidiarity. The Commission subsequently withdrew the proposal.²⁸⁴

276. European Union Committee, Report On 2010-12, 2012-3, H.L. 13, at ¶ 115.

277. *Reasoned Opinion of the House of Commons concerning a Draft Directive on procurement by entities operating in the water, energy, transport and postal services sectors and a Draft Directive on public procurement*, ¶ 18 (Mar. 6, 2012), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/united_kingdom/2011/com20110895_896/com20110895_896_commons_opinion_en.pdf.

278. Reasoned Opinion, *supra* note 277, ¶¶ 26-27.

279. *Reasoned Opinion of the House of Commons concerning a Draft Regulation of the Council on the establishment of the European Public Prosecutor's Office (EPPO)*, ¶ 15 (Oct. 22, 2013), available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/united_kingdom/2013/com20130534/com20130534_commons_opinion_en.pdf.

280. Thomas Vandamme, *From Federated Federalism to Converging Federalism? The Case of EU Subsidiarity Scrutiny in Spain and Belgium*, 22 *Regional & Fed. Stud.* 515, 523 (2012).

281. See Sergio Alonso de Leon, *Regions and Subsidiarity in the European Union: A Look at the Role of the Spanish and Other Regional Parliaments in the Monitoring of Compliance with the Principle of Subsidiarity*, 18 *EUR. L. REV.* 305, 318-319 (2012).

282. Ley Orgánica 6/2006, de 19 de julio, de reforma del Estatuto de Autonomía de Cataluña [Organic Law 6/2006 of July 19, on the Reform of the Statute of Autonomy of Catalonia] art. 188, Boletín Oficial del Estado, n. 172, July 20, 2006, 27269, 27303 (Spain).

283. Cygan, *supra* note 39, at 169.

284. 'Better Lawmaking 2005' Report from the Commission pursuant to Article 9 of the Protocol (13th Report), at 8, COM (2006) 289 final (June 13, 2006).

The Committee's Subsidiarity Monitoring Network informs local and regional governments of EU legislative initiatives and collects their responses for use in its advisory role in the legislative process.²⁸⁵ The Committee's Rules of Procedure provide that its opinions must refer to the application of the subsidiarity principle.²⁸⁶ Since 2010 the Committee has issued an annual report on the application of the subsidiarity principle.²⁸⁷

V. CONCLUSION

Subsidiarity has been neither a panacea nor a placebo in the European integration process, and its success thus far lies somewhere between those extremes. The exercise of power by the European Union in areas of shared competence must respect the principle of subsidiarity. The founding Treaties make clear that subsidiarity is a judicially enforceable legal principle. However, the case law of the Court of Justice reveals that the enforcement of subsidiarity as a judicial principle has been strikingly ineffective. The Court has applied a very weak standard of review for both substantive and procedural compliance with the subsidiarity principle. It is possible that the lack of commitment to meaningful enforcement of subsidiarity as a judicial principle may be motivated by a perception on the part of the Court that compliance with subsidiarity is a political judgment that should be made by the political institutions of the Union.

The European Court's under-enforcement of subsidiarity should be contrasted with the Court's history of judicial activism. While the Court has often fashioned novel legal doctrines without express support in the founding Treaties, in the case of subsidiarity an express guarantee in the Treaties has been emptied of content by judicial interpretation. Excessive deference to the political branches can constitute a form of judicial activism since the effect may be to render constitutional provisions ineffective. Some European constitutional courts have begun to set up national constitutional boundaries against serious infringements of the division of powers between the EU and the Member States. The national courts may police the boundaries of EU competences if the European Court fails in that task.

By far the most significant application of the subsidiarity principle is its consideration as part of the EU legislative process. This process involves both EU institutions and the parliaments of the Member States. A national parliament or one of its chambers may issue a reasoned opinion regarding subsidiarity aspects of a legislative proposal. These reasoned opinions may trigger the yellow card procedure, forcing the Commission to review its proposal, or the orange card procedure, where the Parliament or Council can block the proposal. These procedures have some potential as legislative protections for subsidiarity:

285. See <https://portal.cor.europa.eu/subsidiarity/Pages/default.aspx>.

286. Committee of the Regions Rules of Procedure R. 51(2), 2010 O.J. (L 6) 14.

287. These reports are available at <https://portal.cor.europa.eu/subsidiarity/Publications/Pages/Publicationsandstudies-.aspx>.

the Commission withdrew its proposal for a Council Regulation on collective action after the yellow card procedure was activated, though it declined to do so in the case of its proposal for a European Public Prosecutor's Office.