



## LJMU Research Online

Panara, C

**The Enforceability of Subsidiarity in the EU and the Ethos of Cooperative Federalism**

<http://researchonline.ljmu.ac.uk/id/eprint/2241/>

### Article

**Citation** (please note it is advisable to refer to the publisher's version if you intend to cite from this work)

**Panara, C (2016) The Enforceability of Subsidiarity in the EU and the Ethos of Cooperative Federalism. European Public Law, 22 (2). pp. 305-331. ISSN 1354-3725**

LJMU has developed **LJMU Research Online** for users to access the research output of the University more effectively. Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. Users may download and/or print one copy of any article(s) in LJMU Research Online to facilitate their private study or for non-commercial research. You may not engage in further distribution of the material or use it for any profit-making activities or any commercial gain.

The version presented here may differ from the published version or from the version of the record. Please see the repository URL above for details on accessing the published version and note that access may require a subscription.

For more information please contact [researchonline@ljmu.ac.uk](mailto:researchonline@ljmu.ac.uk)

# The Enforceability of Subsidiarity in the EU and the Ethos of Cooperative Federalism: A Comparative Law Perspective

By Carlo Panara\*

In this article I will tackle the issue of the enforceability of subsidiarity in the EU and, more specifically, I will deal with the following questions: if and to what extent subsidiarity is justiciable; if the full justiciability of subsidiarity would be politically sustainable; and if there are any alternatives to the judicial enforcement of subsidiarity. I will argue that subsidiarity is justiciable, even though its judicial enforcement should be limited to particular situations. I will also argue that full justiciability of subsidiarity would be politically unsustainable in the long run and that a balanced combination of judicial review, procedural arrangements and political cooperation is the only alternative to an all-encompassing judicial enforcement of subsidiarity. In tackling this issue I will use a comparative law approach in that I will make extensive reference to the legal systems of Germany and Italy.

## A. Introduction

The driving idea of subsidiarity is that public functions should be exercised as close as possible to the citizen. Only if the ‘closest’ authority is not in a position to perform a function or to do so effectively, shall this function be allocated or passed onto a ‘higher’ level of government. Subsidiarity is based on the assumption that ‘closer’ authorities are in general better suited to respond to certain social demands stemming from the respective communities. Only those demands which are not limited to a given community, or which require action on a wider scale, or can be better fulfilled by another authority, shall be exercised by other (‘higher’) echelons of government. Ideally each, ‘higher’, tier of government should only perform a ‘subsidiary function’ in relation to another tier of government ‘closer’ to the citizen.<sup>1</sup>

Subsidiarity in the EU is meant to protect the autonomy of the Member States and of the sub-national authorities from unnecessary Union action. Indeed, pursuant to Article 5(3) TEU, “the Union shall act only if and insofar as the objectives of the pro-

---

\* Research Fellow of the Alexander von Humboldt Foundation at the Eberhard-Karls-Universität Tübingen, Germany, and Reader in EU Law and Comparative Public Law, Liverpool John Moores University (LJMU), UK. Corresponding address: Dr. Carlo Panara, Liverpool John Moores University, Redmonds Building, Brownlow Hill, L35UG, Liverpool, UK. E-mail: [c.panara@ljmu.ac.uk](mailto:c.panara@ljmu.ac.uk).

<sup>1</sup> Cf. Communication of the Commission to the Council and the European Parliament, The Principle of Subsidiarity, SEC(92) 1990 final, 27 October 1992, p. 1. The concept of subsidiarity is usually traced back to the encyclical *Quadragesimo Anno*: Encyclical of Pope Pius XI on Reconstruction of the Social Order (1931) at §§79-81. This document uses the expression ‘principle of subsidiary function’ [in Latin: ‘subsidiarii officii principio’] (§80). Cf. J.-P. Trnka, Subsidiarity: Competence Control or Political Masquerade?, in: N. Neuwahl and S. Haack (eds.), *Unsolved Issues of the Constitution for Europe. Rethinking the Crisis*, Montreal, Thémis, 2007, p. 239ff. (pp. 242-243).

posed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level".<sup>2</sup> The inclusion of subsidiarity in the Treaty on the European Union among the common provisions laying down the foundations of the Union legal order, along with the strong reference to subsidiarity in the Preamble to the Treaty,<sup>3</sup> corroborate the widely accepted idea that subsidiarity must be seen as a constitutional cornerstone of the EU.

Despite its prominence in the constitutional setting of the EU, a number of scholars argue that subsidiarity is a political or philosophical concept, as such, impossible or extremely difficult to enforce judicially.<sup>4</sup> According to some, this principle would be perceived by the Court of Justice as a 'threat to integration'<sup>5</sup> and for this reason its judicial enforcement would be in conflict with the 'broad ethos' of the Court.<sup>6</sup> It is a hard fact that in no single case landed before the Court of Justice the outcome has been the annulment of an act of the Union for a breach of subsidiarity.<sup>7</sup> Accordingly, the effective protection of the autonomy of the Member States raises the question of the justiciability of subsidiarity. The constitutional relevance of this problem is significant, because it is linked to the general problem of constitutionalism as a legal

---

<sup>2</sup> This is the full text of Art. 5(3) TEU: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." Originally this provision had been included in the Treaty Establishing A Constitution for Europe (cf. Art. I-11).

<sup>3</sup> Cf. Recital 13 of the Preamble to the TEU.

<sup>4</sup> Cf. N.W. Barber, The Limited Modesty of Subsidiarity, in: European Law Journal, 2005, Vol. 11, No. 3, p. 308ff.; A.G. Toth, Is Subsidiarity Justiciable?, in: European Law Review, 1994, Vol. 19, No. 4, p. 268ff. (p. 282 ff.). On the political nature of the principle of subsidiarity see also Working Group I of the European Convention on the Principle of Subsidiarity, Brussels, 23 September 2002, CONV 286/02: "The Group considered that 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" (p. 2).

<sup>5</sup> A. Estella, The EU Principle of Subsidiarity and Its Critique, Oxford, OUP, 2002, p. 178.

<sup>6</sup> N.W. Barber, Subsidiarity in the Draft Constitution, in: European Public Law, 2005, Vol. 11, No. 2, p. 197ff. (p. 199). Cf. also A.G. Toth, The Principle of Subsidiarity in the Maastricht Treaty, in: Common Market Law Review, 1992, Vol. 29, No. 6, p. 1079ff. (p. 1079), describes subsidiarity as "totally alien" to the EU since it "contradicts the logic, structure and wording of the founding treaties and the jurisprudence of the European Court of Justice".

<sup>7</sup> However Piet Van Nuffel, The Protection of Member States' Regions Through the Subsidiarity Principle, in: C. Panara and A. De Becker (eds.), The Role of the Regions in EU Governance, Heidelberg, Springer, 2011, p. 55ff. (pp. 65-66), criticises the opinion that depicts the Court of Justice as "consistently unwilling to review Community legislation for alleged violations of subsidiarity" (cf., for example, I. Cooper, The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU, in: Journal of Common Market Studies, 2006, Vol. 44, No. 2, p. 281ff. [p. 284]). See also J. Ziller, Le principe de subsidiarité, in: J.B. Aubry and J. Dutheil de la Rochére (eds.), Droit Administratif Européen, Bruxelles, 2007, p. 377ff.

limitation on the exercise of power<sup>8</sup>, which in turn presupposes the judicial review of the action of public authorities.<sup>9</sup>

In this article I will challenge the consolidated patterns according to which subsidiarity is not suitable for judicial enforcement and it is a merely philosophical notion incapable of practical impact. I will tackle the issue of the enforcement of subsidiarity in the EU and, more specifically, I will deal with the following questions: if and to what extent subsidiarity is justiciable; if the full justiciability of subsidiarity would be politically sustainable (i.e. acceptable for the Union legislator and compatible with integration); and if there are alternatives to the judicial enforcement of subsidiarity. Winter and May argue that enforcement as a concept is rather limited and a better perspective can be obtained by looking at the bigger picture of compliance, including deterrent means of enforcing the law, normative and social motivations as well as awareness of rules.<sup>10</sup> My conclusion will go into the same fundamental direction in that I will argue that subsidiarity is justiciable, even though its judicial enforcement should be limited to particular situations. I will also argue that full, unlimited, justiciability of subsidiarity would be politically unsustainable in the long run (i.e. it would unacceptable or difficult to cope with for the legislator and would cause conflicts between the judiciary and the legislator). Finally I will argue that a balanced combination of judicial review, procedural arrangements and political cooperation is the correct alternative to full and unlimited justiciability of subsidiarity. By full and unlimited justiciability I mean a judicial scrutiny that goes beyond cases of manifest error or clear abuse by the Union legislator and covers any profile of noncompliance with subsidiarity. Conversely, by limited justiciability I mean that the judicial scrutiny is limited to exceptional cases of manifest error or abuse by the central authority.

In tackling the subsidiarity problem I will use a comparative law approach in that I will make extensive reference to the legal systems of Germany and Italy. These two Member States have been selected because of the importance they ascribe to the principle of subsidiarity in the field of legislation and due to the existence of a significant case-law of the respective constitutional courts on this principle. The added value of the comparative perspective lays in that useful lessons for the EU multi-level system of governance can be learnt from the analysis of those national systems facing comparable dynamics between the central authority and the local/regional level.

This article will show that there are two different dimensions to the principle of subsidiarity potentially conflicting or complementing each other. The first dimension is

---

<sup>8</sup> Cf. C.H. McIlwain, *Constitutionalism. Ancient & Modern*, Ithaca-NY, Great Seal Books, 1947 (revised edition), p. 21: "constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law".

<sup>9</sup> See in particular N. Matteucci, *Breve storia del costituzionalismo*, Brescia, Morcelliana, 2010 [originally published in 1964], p. 91ff., and M. Barberis, *Stato costituzionale*, Modena, Mucchi, 2012, pp. 20-21.

<sup>10</sup> Cf. S. Winter and P. May, *Motivation for Compliance with Environmental Regulations*, in: *Journal of Policy Analysis and Management*, 2001, Vol. 20, No. 4, p. 675ff.

the protection of the mutual autonomy and of the own spheres of responsibility of the different levels of government (mutually exclusive). This is the best known facet of subsidiarity and the most studied by legal scholars. The second dimension is the cooperative dimension promoting participation of multiple players in the decision-making of the central authority (mutually inclusive). The cooperative dimension of subsidiarity reflects the ethos of cooperative federalism in that it creates proximity to the citizen by pushing towards the involvement in central decision-making of various players located at different levels (EU institutions, national or regional parliaments and governments, potentially other territorial stakeholders).<sup>11</sup>

## **B. Justiciability and sustainability of the justiciability of subsidiarity**

### **1. Judicial enforcement of subsidiarity in Germany**

The German model can offer a few lessons concerning the justiciability of subsidiarity. An accurate analysis of the case-law of the German Federal Constitutional Court shows that there is nothing in the intrinsic nature of subsidiarity preventing the judicial enforcement of the principle. The systematic judicial enforcement of subsidiarity in a court is ultimately a discretionary jurisprudential decision. However, as we shall also see, that decision may lead to clashes between the judiciary and the democratically legitimated legislature. In Germany that conflict has been overcome through a substantial limitation of the scope of application of the subsidiarity clause by a constitutional amendment.

Article 72(2) of the Grundgesetz (acronym GG), the constitution of the Federal Republic of Germany,<sup>12</sup> incorporates quite clearly the concept of subsidiarity. From the entry into force of the GG in 1949 and until the constitutional amendment of 1994 Article 72(2) GG laid down a ‘Bedürfnisklausel’ (need clause), pursuant to which in the fields of concurrent legislation (including key and wide-ranging areas, such as, civil law, criminal law, economic law, employment/labour law<sup>13</sup>) the Federation had only a subsidiary right to legislate; i.e., it could only legislate if certain issues could not be effectively regulated by the Länder and, as a result, needed to be regulated by the Federation. However, despite the clear wording and purpose of Article 72(2) GG, the Federal Constitutional Court consistently construed the need clause as a largely non justiciable provision. Since its first judgment on the matter (Ruling of 30

---

<sup>11</sup> On the notion of cooperative federalism (federalismo cooperativo) see A. Reposo, *Profili dello Stato autonomico. Federalismo e regionalismo*, Torino, Giappichelli, 2005 (2nd ed.), p. 119ff. See also G. Bognetti, *Federalismo*, in: *Digesto delle discipline pubblistiche*, Vol. VI, Torino, UTET, 1994, p. 273ff., and G. De Vergottini, *Stato federale*, in: *Enciclopedia del diritto*, Vol. XLIII, Milano, Giuffrè, 1990, p. 831ff.

<sup>12</sup> The German term ‘Grundgesetz’ can be translated into the English ‘Basic Law’.

<sup>13</sup> Cf. Art. 74 No. 1, 11, 12 GG.

April 1952<sup>14</sup>), the Court considered the assessment of whether a legislative intervention is ‘needed’ as a ‘non justiciable question falling within the discretion of the legislator’ (nicht-justiziable Frage des gesetzgeberischen Ermessens). The only exception envisaged by the Court was the ‘abuse of discretion’ (Ermessensmißbrauch) by the legislator<sup>15</sup>, provided that, as specified in a later case, the infringement of the need clause must be ‘clear and evident’ (eindeutig und evident).<sup>16</sup> The self-restraint of the Court on this matter undermined the spirit of the need clause and in effect it rendered it unable to limit the legislative intervention of the Federation.<sup>17</sup> As a result, the Federal Republic of Germany has been labelled by Konrad Hesse as a ‘unitary federal state’ (unitarischer Bundesstaat), i.e., a centralized federation.<sup>18</sup>

The position of the Federal Constitutional Court can be better understood if one considers that the need clause, having been imposed by the occupying powers during the post-war military occupation, had no roots in the German constitutional tradition.<sup>19</sup> Probably for this reason the Court chose to construe it in terms similar to the ‘legislation of need’ (Bedarfsgesetzgebung) of Article 9 of the Weimar Constitution (“If there is a need for passing uniform regulations, the Reich [the central government] has the right to legislate [...]”).<sup>20</sup> During the Republic of Weimar the question of whether there was such ‘need for passing uniform regulations’ was generally considered as a non justiciable matter falling entirely within the discretion of the legislator. An important element that helps understand the Court’s approach is also the participation of the Länder in the federal legislative process through the Bundesrat, the national legislative body in which the Länder are represented. Where a fed-

<sup>14</sup> This case dealt with the Federal Law of 22 January 1952 laying down rules on the age limit for the chimney sweep profession. The case is published in Entscheidungen des Bundesverfassungsgerichts (hereafter BVerfGE), Vol. 1, p. 264 ff.

<sup>15</sup> Ibid. p. 273 (para. 26).

<sup>16</sup> Cf. BVerfGE Vol. 34 p. 9 ff. (at p. 39). In the same wavelength cf. BVerfGE Vol. 2 p. 213 ff. (at p. 224); Vol. 4 p. 115 ff. (at p. 127); Vol. 10 p. 234 ff. (at p. 245); Vol. 13 p. 230 ff. (at p. 233); Vol. 26 p. 338 ff. (at p. 382); Vol. 33 p. 224 ff. (at p. 229); Vol. 39 p. 96 ff. (at p. 114); Vol. 65 p. 1 ff. (at p. 63); Vol. 65 p. 283 ff. (at p. 289); Vol. 67 p. 299 ff. (at p. 327); Vol. 78 p. 249 ff. (at p. 270).

<sup>17</sup> The position of the Court has been criticised by many legal scholars. Cf., for example, R. Scholz, Ausschließliche und konkurrierende Gesetzgebungskompetenz von Bund und Ländern in der Rechtsprechung des Bundesverfassungsgerichts, in: C. Starck (ed.), Bundesverfassungsgericht und Grundgesetz, Vol. II, Tübingen, Mohr 1976, p. 252ff. (p. 262); H.-W. Rengeling, Gesetzgebungszuständigkeit, in J. Isensee and P. Kirchhof (eds.), Handbuch des Staatsrechts, Vol. IV, Heidelberg, C.F. Müller, 1999 (2nd ed.), p. 723 ff. (Rn. 121 ff.). By contrast the light touch approach of the Court met the approval of, among others, H.-J. Vogel, Die bundesstaatliche Ordnung des Grundgesetzes, in E. Benda et al. (eds.), Handbuch des Verfassungsrechts, Vol. II, Berlin, de Gruyter, 1995 (2nd ed.), p. 1039 ff. (Rn. 64 ff.).

<sup>18</sup> Cf. K. Hesse, Der unitarische Bundesstaat, Karlsruhe, C.F. Müller, 1962.

<sup>19</sup> Cf. in particular W. Rüfner, Art. 72 Abs. 2 GG in der Rechtsprechung des Bundesverfassungsgerichts, in: O. Depenhauer et al. (eds.), Staat im Wort. Festschrift für Josef Isensee, Heidelberg, C.F. Müller, 2007, p. 389ff. (p. 390).

<sup>20</sup> Cf. Ruling of 30 April 1952, in: BVerfGE, Vol. 1, p. 264ff. (para. 26 at p. 272). This is the German text of Article 9 of the Constitution of Weimar of 1919: “Soweit ein Bedürfnis für den Erlass einheitlicher Vorschriften vorhanden ist, hat das Reich die Gesetzgebung über: 1. die Wohlfahrtspflege; 2. den Schutz der öffentlichen Ordnung und Sicherheit”.

eral law has received the approval of the Bundesrat, it becomes conceptually difficult for the Court to annul that law with the argument that it is not ‘needed’ and, ultimately, that it is in breach of the prerogatives of the Länder. This point was clearly sketched out since the Ruling of 30 April 1952, in which the Federal Constitutional Court held that the approval of the contested federal law by the Bundesrat revealed that the majority of the Länder had approved that federal regulation.<sup>21</sup>

With a view to limiting federal legislative action and to overcoming the lack of judicial enforcement of the need clause, in 1994 a constitutional amendment modified Article 72(2) GG and set more compelling conditions for federal intervention in the areas subject to concurrent legislation.<sup>22</sup> The amendment replaced the need clause with a more rigorous ‘necessity clause’ (Erforderlichkeitsklausel).

The Federation shall have the right to legislate in this field if and to the extent that the federal legislative regulation is necessary for the creation of equivalent standards of living within the federal territory or for the maintenance of legal or economic unity in the interest of the whole state.<sup>23</sup>

The term ‘necessary’ translates the German ‘erforderlich’. The meaning of ‘erforderlich’ is more stringent than that of ‘Bedürfnis’ (‘need’) of the previous need clause.<sup>24</sup> However, the new necessity clause produced its first results as late as eight years after the coming into effect of the constitutional amendment. Indeed, in the Ruling of 24 October 2002 on the Geriatric Nursing Act (Altenpflegegesetz), for the first time the Federal Constitutional Court held the necessity clause to be justiciable.<sup>25</sup> In the wake of that landmark decision between 2002 and 2005 the Court found 4 federal laws to be in breach of Article 72(2) GG.<sup>26</sup> Since 2002 the Court sees the scrutiny un-

---

<sup>21</sup> Ibid. p. 273 (para. 26).

<sup>22</sup> Law of 27 October 1994 Amending the GG (published in Bundesgesetzblatt, BGBl., Federal Law Gazette, I 1994 p. 3146).

<sup>23</sup> On the shift from the need clause to the necessity clause cf. S. Deimann, Re-federalising Germany: from ‘Uniform’ to ‘Equivalent’ Living-Conditions, in: Public Law Review, 1996, Vol. 7, No. 2, p. 110ff.

<sup>24</sup> In order to render the necessity clause even more clearly justiciable, the 1994 constitutional amendment introduced a specific provision in the Grundgesetz, cf. Art. 93(1) 2a GG: “[The Federal Constitutional Court shall rule] In the event of disagreements on whether a law meets the requirements of Article 72(2) on application of the Bundesrat or of the Government or the Legislature of a Land”.

<sup>25</sup> BVerfGE Vol. 106 p. 62ff. On this landmark case cf. M. Rau, Subsidiarity and Judicial Review in German Federalism: The Decision of the Federal Constitutional Court in the Geriatric Nursing Act Case, in: German Law Journal, 2003, Vol. 4, No. 3, p. 223ff. See also G. Taylor, Germany: The subsidiarity principle, in: International Journal of Constitutional Law, 2006, Vol. 4, No. 1, p. 115ff.

<sup>26</sup> See Ruling of 16 March 2004 on the Law on the Prevention of Vicious Dogs (Gesetz zur Bekämpfung gefährlicher Hunde); Ruling of 9 June 2004 concerning the Law on the Closing Times of Shops (Ladenschlussgesetz); Ruling of 27 July 2004 concerning the federal law modifying the recruitment of university professors (case ‘Juniorprofessur’, junior professorship); and Ruling of 26 January 2005 (case ‘Studiengebühren’, tuition fees) on the federal law prohibiting the introduction by the Länder of tuition fees for first degrees. So far the federal law on tuition fees is the last federal law to have been found by the Court in breach of Article 72(2) GG. In later cases the Court always rejected the claims against the contested federal acts. Cf. Ruling of 18 July 2005 (in BVerfGE Vol. 113 p. 167ff.) on the right of the Federation to legislate on the risk ad-

der Article 72(2) GG essentially as a control of the rationality of the law aimed to determine whether the federal legislator has exercised its discretion correctly and in an objectively persuasive manner against the criteria which, pursuant to the necessity clause, alternatively can justify a legislative intervention by the Federation (creation of equivalent standards of living, maintenance of legal unity, maintenance of economic unity). In the own words of the Court, “the constitutional review [of Article 72(2) GG] is not limited to a mere control of the tenability [of the federal legislator’s evaluation]. The constitutional review depends on the objective justifiability of [that] evaluation”.<sup>27</sup>

In 2006 an important constitutional reform came into effect (the Föderalismusreform, reform of the federal system<sup>28</sup>). An aspect of the reform concerned specifically the necessity clause of Article 72(2) GG. Whilst the wording of the clause was not modified, its sphere of application was reduced dramatically. The necessity clause does no longer apply to legislative activity in areas of key importance, including civil and criminal law, employment/labour law, land law, but only to a limited number of, according to some, ‘randomly selected’ areas of secondary importance.<sup>29</sup> Most areas

---

justment scheme (Risikostrukturausgleich); Ruling of 13 September 2005 on the federal law regulating the contribution rates to the health insurers operating in the field of health insurance (Krankenkassen); Ruling of 3 July 2007 on the federal law regulating the training of farriers; Ruling of 14 October 2008 concerning the federal law implementing EC Regulation No. 1782/2003; Ruling of 27 January 2010 on the Trade Tax Act (federal law obliging the Municipalities to levy a trade tax and to set not less than a minimum rate); Ruling of 21 July 2010 on the federal law modifying the Compensation Act (regarding issues arising after the German Reunification); Ruling of 24 November 2010 on the Genetically Modified Organisms Act (Gentechnikgesetz); Ruling of 28 January 2014 on the Law Supporting the German Film Industry (Filmförderungsgesetz); Ruling of 17 December 2014 on the Law on the Inheritance Tax (Erbschaftsteuergesetz).

<sup>27</sup> See the Ruling of 28 January 2014 on the Law Supporting the German Film Industry (Filmförderungsgesetz): “Dem Gesetzgeber steht insoweit zwar eine Einschätzungsprärogative zu; die verfassungsgerichtliche Kontrolle ist hier jedoch nicht auf eine bloße Vertretbarkeitskontrolle beschränkt (vgl. BVerfGE 106, 62 <148>; 110, 141 <174 f.>; 125, 141 <153>). Die verfassungsrechtliche Beurteilung hängt von der objektiven Rechtfertigungsfähigkeit der Einschätzung des Gesetzgebers ab (vgl. BVerfGE 106, 62 <150, 152>; s. auch BVerfGE 111, 226 <255>)” (para. 115).

<sup>28</sup> Law of 11 September 2006 Amending the Grundgesetz (in Federal Law Gazette, I 2006 p. 2098). On the reform of the federal system cf. C. Starck (ed.), Föderalismusreform. Einführung, München, C.H. Beck, 2007; R. Hrbek, The Reform of German Federalism: Part I, in: European Constitutional Law Review, 2007, Vol. 3, No. 2, p. 225ff.; A. Gunlicks, German Federalism Reform: Part One, in: German Law Journal, 2008, Vol. 8, No. 1, p. 111ff.; S. Burkhardt, Reforming Federalism in Germany: Incremental Changes instead of the Big Deal, in: Publius, 2009, Vol. 39, No. 2, p. 341ff.

<sup>29</sup> Law relating to residence and establishment of foreign nationals; public welfare (with the exception of social care homes); law relating to economic matters (with the exception of the law on shop closing times, restaurants, game halls, display of individual persons, trade fairs, exhibitions and markets); regulation of educational and training grants and promotion of research; expropriation for public purposes; economic viability of hospitals and hospital charges; food law, law on alcohol and tobacco; road traffic, motor transport, highways; state liability; medically assisted generation of human life, analysis and modification of genetic information; regulation of transplantation. Cf. Art. 74(1) No. 4, 7, 11, 13, 15, 19a, 20, 22, 25, 26. To this list should be added the provision of Article 105(2) GG under which the Federation has concurrent legislative responsibility on taxes if it is entitled to all or part of the proceeds or if the test laid down in Article

previously subjected to the necessity clause fall now within the core lawmaking responsibility of the Federation (for example, ‘civil law’, ‘criminal law’) or, more rarely, within the lawmaking power of the Länder (for example, ‘shops’ trading hours’, ‘university’). The intended, and fully achieved, result of the reform has been a significant decrease in the number of cases concerning the necessity clause (only eight in the 2006-15 period and three in the 2011-15 period). The proactive approach of the Court in the period 2002-2005 had generated uncertainty and dissatisfaction by the federal legislator. The 2006 constitutional reform addressed this concern by taking a large share of power away from the Court in relation to the enforcement of subsidiarity and by granting it to the political players at federal and Land level, who in certain areas (for example, hunting, territorial planning, admission to higher education institutions and degrees etc.<sup>30</sup>) are totally free to decide ‘if’ and ‘when’ to regulate a topic.<sup>31</sup>

The Federal Constitutional Court too appeared to loosen up slightly the theoretically strict constitutional review of Article 72(2) GG. Recently, in relation to a federal law on the inheritance tax, the Court clarified that the necessity clause does not imply that a federal regulation necessarily has to be indispensable for the maintenance of legal and/or economic unity. If the federal legislator has sufficiently solid grounds to expect that a lack of federal regulation may generate problematic developments for the legal and/or economic unity in the country, the federal legislative intervention would be justified under Article 72(2) GG.<sup>32</sup> Yet, in July 2015 the Court seemed to change direction again and to turn towards a stricter judicial attitude. It annulled on grounds of a breach of Article 72(2) GG a federal law introducing a childcare support scheme. On this occasion the Court failed to carry out a scrutiny of compliance with the criteria of the necessity clause and simply (and rather shortly) argued that the federal scheme encroaches upon the autonomy of the Länder and of the Municipalities and that it would impair actions by these authorities in the same policy area.<sup>33</sup> Some important lessons can be learnt from the German system. The first important lesson is that subsidiarity is not necessarily and by nature non justiciable. Admittedly, the necessity clause is more rigorous and detailed than the notion of subsidiarity in the EU. The necessity clause does not rely on a generic formula ('if an objec-

---

<sup>30</sup> Cf. G. Taylor, Germany: a slow death for subsidiarity?, in: International Journal of Constitutional Law, 2009, Vol. 7, No. 1, p. 139ff. (p. 149).

<sup>31</sup> Cf. Art. 72(3) GG pursuant to which in a number of subject-matters (including hunting, territorial planning etc.) the relationship between federal law and local law is governed by the principle *lex posterior derogat legi priori* (the later law is to prevail over the earlier law).

<sup>32</sup> In the literature cf. G. Taylor, Germany: a slow death for subsidiarity?, in: International Journal of Constitutional Law, 2009, Vol. 7, No. 1, p. 139ff. (p. 142). See also A. Uhle, [Commentary to] Article 72 GG, in: T. Maunz and G. Dürig (eds.), *Grundgesetz. Kommentar*, München, C.H. Beck, Vol. 5, 112pp. (pp. 58-59), May 2013.

<sup>33</sup> See the Ruling of 17 December 2014 (para. 110ff.) on the Law on the Inheritance Tax (*Erbschaftsteuerge- setz*).

<sup>34</sup> See the Ruling of 21 July 2015 (para. 70ff.) on the Law on Childcare Money (*Betreuungsgeldgesetz*).

tive cannot be sufficiently achieved’, ‘if an objective can be better achieved’), but on more specific criteria (‘legal unity’, ‘economic unity’, ‘equivalent standards of living’). However, it has to be highlighted that, while this aspect may have contributed to the justiciability of the necessity clause, for a few years (from 1994 to 2002) the same clause had remained only on paper. Therefore judicial enforceability of subsidiarity seems primarily due to a change of approach by the Federal Constitutional Court. No similar change has yet occurred in the Court of Justice of the EU.<sup>34</sup>

Another lesson emerging from the German pattern is that the political sustainability of a full justiciability of subsidiarity is limited, principally due to the fundamental uncertainty that the legislation passed by the Federation may be later upheld by the Court. Soon (after four years only) this situation led to a constitutional amendment which limited drastically the scope of application of the necessity clause. In a cooperative federal system like Germany, based on participation of the Länder in federal lawmaking through the Bundesrat (the legislative body representing the Länder), it may be politically difficult, albeit theoretically legally sound, to annul a federal law for breaching the autonomy of the Länder when the majority of these have previously consented to it. This explains why the 2006 reform of the federal system chose to limit the role of the judiciary and to return to a different, more predictable by the political players, pathway for the allocation of lawmaking authority within the federation.

In relation specifically to the EU these lessons corroborate the idea that the principle of subsidiarity, at least in theory, could be enforced in the Court of Justice. Yet, judicial enforcement of subsidiarity may lead to conflicts between Union judiciary and legislature (of which the Member States are an integral part). A fully justiciable principle of subsidiarity may impair the implementation of common policies by the institutions and ultimately the effective functioning of the EU. This needs to be borne in mind when invoking a more rigorous judicial scrutiny of subsidiarity by the Court of Justice.

## **2. Judicial enforcement of subsidiarity in Italy**

The Italian model too is a source of lessons concerning subsidiarity. A study of the case-law of the Italian Constitutional Court shall corroborate the conclusion that the principle of subsidiarity can be judicially enforced. The case-law will also highlight the importance of loyal cooperation between central and regional level in order to

---

<sup>34</sup> It has to be highlighted that the Amsterdam Subsidiarity Protocol of 1997 had laid down certain guidelines in order to assess whether the conditions of Article 3b of the EC Treaty were fulfilled. Such guidelines referred, inter alia, to situations where “the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States” or where “actions by Member States alone [...] would conflict with the requirements of the Treaty (such as the need [...] to avoid disguised restrictions on trade [...])” (cf. Point 5 of the Amsterdam Subsidiarity Protocol). The Lisbon Subsidiarity Protocol of 2007, which replaced the Amsterdam Protocol, does not contain similar guidelines.

counterbalance the allocation of a responsibility to the central authority by reason of subsidiarity.

In Italy the allocation of legislative responsibilities is strongly influenced by the jurisprudence of the Constitutional Court on subsidiarity. In the landmark Ruling No. 303 of 1 October 2003 the Court held that the principle of subsidiarity may justify a departure from the normal distribution of legislative powers. The Court stated that this principle, like the concurrent legislation in Germany (*konkurrierende Gesetzgebung*) and the Supremacy Clause in the United States, introduces an element of flexibility into what would otherwise be a too rigid distribution of powers between State and regional authorities. According to the Court, a State law can allocate administrative tasks to the central government in areas belonging to the legislative power of the Regions and can also regulate the exercise of these tasks. A State law can do so provided that certain criteria are fulfilled: there must be a need for uniform action by the central government (principle of subsidiarity and of adequacy<sup>35</sup>); the evaluation of the public interest underlying the allocation of regional responsibilities to the central government must be ‘proportionate’ (principle of proportionality); such evaluation must not be ‘unreasonable’ in the light of a ‘strict scrutiny’ (rationality); and, finally, the State law allocating an administrative function to the central government must provide for the involvement of the Region concerned in the exercise of that function through an agreement between the regional authority and the central government (principle of loyal cooperation). In summary, the key finding of Ruling No. 303 of 1 October 2003 is that the State, in addition to the enumerated State powers laid down by the Constitution<sup>36</sup>, can also legislate in other areas, if the principle of subsidiarity requires that a specific responsibility has to be exercised centrally. This construction of subsidiarity has paved the way to a (re-)centralization of lawmaking power rather than to the protection of regional autonomy in conformity with the idea of proximity to the citizen.<sup>37</sup>

---

<sup>35</sup> Compliance with the Constitution requires that an authority must be capable of achieving a certain result (adequacy). The principle of adequacy is defined at Article 4(3)(g) of the Law No. 59 of 15 March 1997. The lack of adequacy may even determine the exercise of a competence, by way of ‘subsidiary’, by a ‘lower’ tier of government, in case of failure to act by a ‘higher’ echelon of power. For example, in 2005 an administrative court found that subsidiarity allowed a Municipality to issue a bylaw on the use of organic fertilisers, given that the Province (normally responsible for that matter) had failed to take action. Cf. Regional Administrative Court [Tribunale Amministrativo Regionale, TAR in acronym], Puglia, Lecce, Second Division, Ruling No. 484 of 8 February 2005.

<sup>36</sup> See Article 117(2) and (3) of the Italian Constitution.

<sup>37</sup> On the Ruling No. 303 of 1 October 2003 cf. T. Groppi and N. Scattone, Italy: The Subsidiarity Principle, in: International Journal of Constitutional Law, 2006, Vol. 4, No. 1, p. 131ff. In that case the Court found that it is lawful for the central government to perform, and for the State law to regulate, administrative tasks concerning planning and authorisation of large-scale infrastructures of nationwide interest. In the wake of that judgment in a number of other rulings the Constitutional Court upheld the existence of subsidiary lawmaking powers of the State. See, among many, Ruling No. 6 of 13 January 2004 (construction and enlargement of power plants); No. 31 of 26 January 2005 (creation and management of a national funding body supporting research projects of exceptional scientific value); No. 62 of 29 January 2005 (choice of the location of

A paramount role in the jurisprudence of the Italian Constitutional Court on subsidiarity is played by loyal cooperation. Since the landmark Ruling No. 303 of 1 October 2003 the Constitutional Court has maintained that a State law taking a function away from the regional level and allocating it to the central government on grounds of subsidiarity must lay down adequate cooperation mechanisms. Accordingly the regional authorities need to be involved in the exercise of that function. The Constitutional Court has consistently applied the loyal cooperation requirement. Only in a small number of cases the Court failed to impose loyal cooperation mechanisms on the central government. This happened with the Rulings No. 31 of 26 January 2005 (on funding of research projects of exceptional scientific significance) and No. 151 of 12 April 2005 (on the introduction of €150 state subvention for the purchase of a decoder). However it needs to be highlighted that in both circumstances the Court held that State uniform action was primarily justified by the need to implement a constitutional objective (promotion of scientific research, Ruling No. 31 of 2005) or a constitutional principle (pluralism of information, Ruling No. 151 of 2005).

In Italy there is no national lawmaking body representing the Regions in the legislative process. Accordingly the cooperation required by the Constitutional Court shall take place in other fora. For example in Ruling No. 6 of 13 January 2004 on the creation of new power plants and the enlargement of existing ones, the Court stated that the national plan concerning the power plants needed to be agreed within the State-Regions Conference.<sup>38</sup> Similarly, in Ruling No. 242 of 24 June 2005, concerning a national fund supporting medium and large size enterprises, the Court held that

---

the national deposit of radioactive waste); No. 151 of 12 April 2005 (payment of an €150 State subvention for the purchase or the hire of a decoder); No. 242 of 24 June 2005 (creation and administration of a national fund supporting medium and large size companies); No. 270 of 23 June 2005 (transformation of certain public healthcare institutions into foundations); No. 285 of 19 July 2005 (financial support of cinematography); No. 383 of 14 October 2005 (licensing for building and/or enlarging and/or operating electricity transmission lines); No. 213 of 1 June 2006 (subvention of fisheries and approval of the 2004 National Plan for Fisheries and Aquaculture); No. 214 of 1 June 2006 (establishment of a national agency with responsibility for the promotion of tourism); No. 88 of 16 March 2007 (approval of plans for high quality touristic infrastructures in publicly owned coastal areas); No. 165 of 11 May 2007 (creation of industrial districts and of a national agency for the dissemination of new technologies); No. 339 of 12 October 2007 (promotion of Italian agritourism on the national and the international level); No. 63 of 14 March 2008 (creation and administration of a national fund for the bailout of companies facing financial difficulties); No. 166 of 23 May 2008 (national plan for social housing); No. 76 of 20 March 2009 (measures aimed at supporting undertakings operating in the touristic sector and support of national and international players investing in the touristic sector in Italy); No. 168 of 29 May 2009 (allocation of financial resources to families, with the aim to support the permanence of the elderly within their family as an alternative to old people's homes); No. 16 of 21 January 2010 (creation of a national fund for infrastructures); No. 79 of 11 March 2011 (establishment and administration of a national fund for infrastructures in seaports of national significance).

<sup>38</sup> Cf. para. 7 of the judgment. According to Article 12(2) of Act No. 400 of 23 August 1988 the State-Regions Conference (Conferenza Stato-Regioni) is composed of the President of the Council of Ministers (chair), the presidents of the Regions and the presidents of the Autonomous Provinces of Trent and Bolzano. On the powers of the State-Regions Conference cf. Legislative Decree No. 281 of 28 August 1997. In the view of the Constitutional Court the State-Regions Conference is the principal forum for discussion and negotiation of policy between the State and the Regions (cf. Ruling No. 116 of 31 March 1994).

the criteria for the administration of the fund had to be agreed within the same Conference.<sup>39</sup> An agreement with an individual Region is required where a decision of the central government has a specific impact on that regional authority. For example in Ruling No. 6 of 13 January 2004 the Court held that a power plant may be built in the territory of a Region only with the consent of the Region concerned.<sup>40</sup>

The need for cooperation raises the issue of how the State can overcome a refusal to cooperate or a lack of agreement by the regional authorities. In Ruling No. 6 of 13 January 2004 the Court held that the opposition of a Region to the installation of a power plant within its territory is an ‘insuperable obstacle’. However, elsewhere the Court accepted that the regional opposition can be overcome through a special procedure inspired to loyal cooperation. For example in the Ruling No. 121 of 26 March 2010 the Court dealt with the opposition of the Unified Conference (State-Regions-Local Authorities) to the implementation of the national plan on public housing. The Court held that such opposition could be overcome only through a special procedure involving further negotiations. Accordingly it invalidated a provision which established that, in case of failure to reach an agreement within 90 days, the central government could unilaterally decide on public housing. In fact the invalidated provision downgraded the position of the regional and local authorities to mere consultation.<sup>41</sup> In the Ruling No. 33 of 2 February 2011 the Court held that failure to reach an agreement with an individual Region on the identification of sites suitable for placing and operating nuclear power plants can be overcome only through further negotiations with the Region concerned. The negotiations have to take place within a committee comprised of an equal number of representatives of the central government and of the Region. If, after 60 days, no agreement is achieved, the central government will be entitled to decide where to locate the plants, but the president of the Region will be involved in the decision by taking part in the relevant session of the Council of Ministers.<sup>42</sup>

---

<sup>39</sup> Cf. para. 7 of the judgment. On the same wavelength cf. Ruling No. 163 of 27 June 2012 concerning a national strategic plan on broadband infrastructures (para. 2.2). When a function allocated to the central government also affects the position of the local authorities, as well as that of the Regions, the agreement has to take place within the Unified Conference (Conferenza Unificata, a forum merging the State-Regions Conference and the State-Cities-Local Authorities Conference). The Unified Conference (established by Legislative Decree No. 281 of 28 August 1997) is a forum for discussion of political issues affecting all tiers of government; national, regional and local level. In Ruling No. 33 of 2 February 2011, concerning the authorization to build nuclear power plants, the Court held that the ministerial decree identifying the locations suitable for such plants required an agreement within the Unified Conference (cf. para. 6.2.2 of the judgment).

<sup>40</sup> In the same wavelength cf. Ruling No. 163 of 27 June 2012 concerning a national strategic plan on broadband infrastructures (at para. 2.2) and Ruling No. 179 of 11 July 2012 concerning administrative cooperation between different public authorities and tiers of government (at para. 5.2.1).

<sup>41</sup> Cf. para. 9 of the judgment.

<sup>42</sup> Cf. para. 7 of the judgment. In the same wavelength cf. Ruling No. 39 of 15 March 2013 and Ruling No. 239 of 11 October 2013. No agreement, but mere consultation within the State-Regions Conference is required when a decision is not ‘political’ but merely ‘technical’ (i.e. it is based on the application of standards and methods derived from science). For example, in Ruling No. 278 of 22 July 2010 (licence to build and op-

Occasionally the cooperative requirement seemed to overtake even the subsidiarity concern and the Court seemed to take as a given the existence of a need for uniform State action. For example in Ruling No. 303 of 1 October 2003, regarding large-scale infrastructures, the Court held that it is not part of the Court's role, when reviewing legislation, to decide whether a given infrastructure is 'strategic' or 'of vital national interest'. On that occasion the Court attached an exclusively procedural meaning to subsidiarity and required only that the law had to include the involvement of the regional authorities in the form of an 'agreement' on the classification of an infrastructure as 'strategic' or 'of vital national interest'.<sup>43</sup> A further example of this approach can be seen in Ruling No. 79 of 11 March 2011 concerning Parma Subway. The Court held that the consent of the relevant Region (Emilia-Romagna) to the inclusion of Parma Subway in the national Plan of Strategic Infrastructures sufficed in order to justify the exercise by the State of legislative and administrative responsibilities relating to this infrastructure.<sup>44</sup>

Only in a small number of cases (five between 2003 and 2015) the Court refused to grant subsidiary lawmaking powers to the State due to the absence of a need for uniform action by the central government, i.e. on grounds of a breach of subsidiarity. For example, in the Ruling No. 219 of 8 June 2005 on the 'lavori socialmente utili' (socially useful jobs<sup>45</sup>), the Court found that administrative tasks concerning those jobs have an exclusively local dimension and, accordingly, should be handled by the Municipalities. Another interesting example is Ruling No. 148 of 7 June 2012, where the Court held that the need to tackle the economic recession, alone, did not justify a temporary exception to the constitutional distribution of responsibilities between the central government and the regional authorities.<sup>46</sup>

---

erate nuclear power plants) the Court found that a decision of the central government identifying the types of nuclear power plants that are considered to be suitable for the Italian territory does not require an agreement with the Regions. Such decision is not 'political', but merely 'technical'. Accordingly, simple consultation with the Regions within the State-Regions Conference would be enough for complying with the principle of loyal cooperation and for legitimising the lawmaking activity of the State. Cf. para. 16 of the judgment.

<sup>43</sup> Cf. para. 2.1 and 2.2 of the judgment.

<sup>44</sup> Cf. para. 3-5 of the judgment. See also: Ruling No. 121 of 26 March 2010 (national plan for public housing, cf. para. 6.1 of the judgment). It needs to be pointed out that this judgment relies on earlier cases decided by the Court on 'neighbouring' issues (see, for example, Ruling No. 166 of 23 May 2008 on social housing). In Ruling No. 94 of 11 April 2008 concerning funding made available by the central government for the development of tourism, the Court did not analyse the need for uniform State action. This is probably due to the fact that the claimant Region had not challenged the State's right to legislate on the issue and had only reported to the Court an infringement of the principle of loyal cooperation. It also needs to be taken into account that prior to this judgment the Court had already granted considerable powers to the State in the area of tourism on grounds of subsidiarity (cf. Ruling No. 214 of 1 June 2006 and Ruling No. 88 of 16 March 2007).

<sup>45</sup> These are jobs offered by local authorities to unemployed people in order to give them a source of income.

<sup>46</sup> See also: Ruling No. 285 of 19 July 2005, where the Court held that the Region is the adequate level of government in relation to licensing multiplex movie theatres; Ruling No. 168 of 23 May 2008, where the

To conclude, in Italy too subsidiarity is fundamentally justiciable. However only in a few cases justiciability led the Constitutional Court to maintain a legislative responsibility at the regional level. More often subsidiarity is used to lift responsibilities up to the State level and to justify State legislative intervention rather than for limiting it. Subsidiarity is politically sustainable for the State legislature because only rarely, i.e. only in extreme circumstances, it leads to the invalidation of State action (since 2003 this occurred only five times compared to a myriad of cases in which a competence was attributed to the State). At the same time the allocation of additional responsibilities to the State on grounds of subsidiarity becomes sustainable thanks to the involvement of the regional authorities in the exercise of those responsibilities pursuant to loyal cooperation, in this way promoting State-Region co-governance of certain policy areas.

The Italian case study strengthens the idea that the principle of subsidiarity could be judicially enforced in the Court of Justice too. However it needs to be taken into account that only in exceptional cases of a clear misuse of power a challenge of a piece of legislation by a Region has led to its annulment by the Constitutional Court. Subsidiarity in Italy mirrors a cooperative vision. According to this vision subsidiarity has to be combined with loyal cooperation and may lead (usually will lead) to the exercise of a responsibility by the central authority with the participation of the regional level rather than to a rigid vertical separation of powers. Subsidiarity may therefore implement proximity to the citizen not only by leaving the exercise of a responsibility to the level of governance which is closer to the citizen. It may achieve this result also through adequate arrangements for the participation by lower echelons of government in lawmaking and policymaking. A cooperative dimension of subsidiarity has progressively established itself in recent years also on the EU level (cf. infra section C2).

### **3. Justiciability of subsidiarity before the Court of Justice of the EU**

On the rare occasions in which subsidiarity concerns were submitted to the Court, this never led to the annulment of an act of the Union. However the Court does not uphold the action of the institutions without further scrutiny. This was probably the case in *UK v Council* concerning the Working Time Directive, where the Court appeared to accept the point of view of the Council without an independent and accurate analysis of the subsidiarity question. According to the circular argument used by the Court on that occasion, if the Council found that it is necessary to achieve a certain objective “to improve the existing level of protection as regards the health and

---

Court held that the promotion of energy-saving initiatives is not such as to require uniform State action; and, finally, Ruling No. 215 of 17 June 2010, where the Court found that the urgency of creating infrastructures in the energy sector did not justify the allocation to the central government of the responsibility for planning and building such infrastructures.

safety of workers and to harmonize the conditions in this area”, then, “achievement of that objective ... necessarily presupposes Community-wide action”.<sup>47</sup>

In other cases the Court developed a more substantial reasoning in support of Union action. For example, in *Netherlands v European Parliament and Council*, concerning Directive 94/44/EC, albeit with a somewhat concise explanation, the Court held that harmonisation of legislation and practice in the area of protection of biotechnological inventions “could not be achieved by action taken by the Member States alone”. In addition, according to the Court, as the scope of the protection had immediate effects on intra-Community trade, “it is clear that, given the scale and effects of the proposed action, the objective in question could be better achieved by the Community”.<sup>48</sup>

The same argument, i.e., that harmonization of laws is required in order to achieve common market objectives, arose also in later rulings. For example, in the case *British American Tobacco* the Court held that “the Directive’s objective to eliminate the barriers raised by the differences which still exist between the Member States’ laws ... on the manufacture, presentation and sale of tobacco products” could not be sufficiently achieved by the Member States individually and called for action at Community level. “It follows”, according to the Court, that “the objective of the proposed action could be better achieved at Community level”.<sup>49</sup> Also in the case *Vodafone*, concerning EC Regulation No. 717/2007 on the ‘Eurotariff’ for roaming services, the Court engaged in a sufficiently thorough analysis of the challenged act before accepting the view, contained in the Preamble to the Regulation, that the interdependence between wholesale and retail roaming charges renders the choice to impose a ‘ceiling’ on both quantities fully compliant with subsidiarity.<sup>50</sup>

In the recent case *Estonia v European Parliament and Council*, concerning the EU Accounting Directive 2013/34/EU, the Court engaged thoroughly with the subsidiarity plea filed by Estonia and had the opportunity to clarify another crucial point. The simple fact that a single Member State is already up-to-speed with the Union does not imply necessarily and per se a breach of the principle of subsidiarity: “The subsidiarity principle”, the Court held, “is not intended to limit the EU’s competence on

---

<sup>47</sup> Case C-84/94 *UK v Council* [1996] ECR I-5755 (para. 47).

<sup>48</sup> Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECR I-7079 (para. 32).

<sup>49</sup> Case C-491/01 *The Queen v Secretary of State for Health (ex parte British American Tobacco Ltd.)* [2002] ECR I-11453 (para. 181-183). A similar reasoning can be found in Joined Cases C-154/04 and C-155/04 *ANH v Secretary of State for Health* [2002] ECR I-6451, at para. 106-107, in relation to Directive 2002/46 on food supplements. The Court says: “To leave Member States the task of regulating trade in food supplements which do not comply with Directive 2002/46 would perpetuate the uncoordinated development of national rules and, consequently, obstacles to trade between Member States and distortions of competition so far as those products are concerned” (para. 106). Cf. also Case C-103/01 *Commission v Germany* [2003] ECR I-5369 (para. 47) and Case T-526/10 *Inuit Tapiriit Kanatami et al. v Commission* [ECLI:EU:T:2013:215] (para. 83-85).

<sup>50</sup> Case C-58/08 *The Queen v Secretary of State for Business (ex parte Vodafone)* [2010] ECR I-4999 (para. 78).

the basis of the situation of any particular Member State taken individually". Accordingly, "the principle of subsidiarity cannot have the effect of rendering an EU measure invalid because of the particular situation of a Member State, even if it is more advanced than others in terms of an objective pursued by the EU legislature, where, as in the present case, the legislature has concluded on the basis of detailed evidence and without committing any error of assessment that the general interests of the European Union could be better served by action at that level".<sup>51</sup> In summary, in the EU (like in Germany and Italy), subsidiarity concerns the relationship between levels of governance (the Union and *all* the Member States) and it shall not lead to asymmetry in the legislation in force across the EU.

An additional element must be taken into account. The Court of Justice's judgments consider the opinions of the Advocates General. In relation to subsidiarity, in no circumstance the Court came to a conclusion different from that envisaged by an Advocate General. Whilst admittedly some Advocates General's opinions entail a surface scrutiny of subsidiarity,<sup>52</sup> others are quite thorough when tackling the same issue.<sup>53</sup> Accordingly, the 'pro-Union' conclusions of the Court do not appear the result of an aprioristic 'ideology', but of an independent and generally thorough reflection upon the content and impact of a regulation.

In conclusion the Court of Justice does carry out a scrutiny of subsidiarity. The fact that until now no act of the Union has been annulled for a breach of that principle is probably due to the limited number of cases in which the issue has been brought before the Court and, according to some observers, to the fact that in all these cases there happened to be solid grounds for the action of the Union.<sup>54</sup> For this reason, so far, the justiciability of subsidiarity has remained politically sustainable for the EU and has not led to conflicts between the Union legislator and the judiciary. However, the alleged 'light touch' of the Court on subsidiarity triggered criticism and led to the

---

<sup>51</sup> Judgment of the Court (Second Chamber) of 18 June 2015, Case C-508/13, *Estonia v European Parliament and Council*, not yet published (para. 53-54).

<sup>52</sup> Cf., for example, AG Geelhoed Opinion in Joined Cases C-154/04 and C-155/04 *ANH v Secretary of State for Health*.

<sup>53</sup> See especially AG Poiares Maduro Opinion in Case C-58/08, *The Queen v Secretary of State for Business (ex parte Vodafone)* and AG Jääskinen Opinion in Case C-507/13, *UK v European Parliament and Council* (para. 101ff.), not yet published in ECR. See also AG Léger Opinion in Case C-84/94, *UK v Council* (Working Time Directive).

<sup>54</sup> Cf. in particular P. Van Nuffel, The Protection of Member States' Regions Through the Subsidiarity Principle, in: C. Panara and A. De Becker (eds.), *The Role of the Regions in EU Governance*, Heidelberg, Springer, 2011, p. 55ff. (pp. 65-66); and P. Craig, Subsidiarity: A Political and Legal Analysis, in: *Journal of Common Market Studies*, 2012, Vol. 50, No. S1, p. 72ff. (p. 80), who counted no more than ten real subsidiarity challenges in nearly twenty years, i.e. roughly only one every two years. See also the recent Judgment of the General Court of 25 February 2015, T-257/13, where the Court dismissed an action of Poland based on subsidiarity.

introduction of the early warning system in the Subsidiarity Protocol attached to the Treaty of Lisbon.<sup>55</sup>

## C. Alternative routes for the enforcement of subsidiarity

### 1. Judicial enforcement of subsidiarity through proportionality

Article 5 TEU allows for Union action not only ‘if’, but also ‘insofar as’, the objectives of the proposed action cannot be sufficiently achieved by the Member States and can be better achieved at Union level. The expression ‘insofar as’ refers to the proportionality requirement, according to which all Union action should not go beyond what is ‘appropriate’ and ‘necessary’ to achieve the proposed objective. More specifically, proportionality demands that Union action shall be kept to the minimum necessary, i.e., as specified in Article 5(4) TEU, “... the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties”. Accordingly, the Amsterdam Protocol on Subsidiarity and Proportionality required Union institutions to leave as much scope for national decision as possible, to prefer directives to regulations and framework directives to detailed measures, and to minimise the burden, financial or administrative, of Union measures for, *inter alia*, national governments and local authorities.<sup>56</sup>

Some scholars argue that the autonomy of the Member States could be better protected through judicial review of proportionality of Union action rather than through subsidiarity.<sup>57</sup> Allegedly, due to the traditionally more detailed character of the proportionality test if compared to subsidiarity, its use would favour the autonomy of the Member States.<sup>58</sup> In reality there is no evidence that, by focusing on proportionality rather than on subsidiarity the Court of Justice would be more likely to find on

---

<sup>55</sup> Cf. Articles 6 and 7 of Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality attached to the Treaty of Lisbon. The Lisbon Protocol on Subsidiarity was originally drafted by the European Convention (Working Group I on the Principle of Subsidiarity) and annexed to the Treaty Establishing A Constitution for Europe.

<sup>56</sup> Cf. Amsterdam Protocol on Subsidiarity and Proportionality, points 6, 7 and 9. These requirements are not entailed in the Lisbon Protocol. However the new Protocol requires that draft legislative acts contain an assessment of the proposal’s financial impact and, in the case of a directive, of its implications for the rules to be issued by the Member States, including, where necessary, regional legislation (cf. Art. 5). Draft legislative acts should also take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved (*ibid.*).

<sup>57</sup> Cf. R. Schutze, Subsidiarity after Lisbon: reinforcing the safeguards of federalism?, in: Cambridge Law Journal, 2009, Vol. 68, No. 3, p. 525ff. (pp. 525-536), who differentiates ‘federal proportionality’, protecting Member States’ autonomy, from ‘liberal proportionality’, protecting individual rights (*ibid.* p. 533). See also G. Davies, Subsidiarity: the wrong idea, in the wrong place, at the wrong time, in: Common Market Law Review, 2006, Vol. 43, No. 1, p. 63ff.

<sup>58</sup> G. Davies, Subsidiarity: the wrong idea, in the wrong place, at the wrong time, in: Common Market Law Review, 2006, Vol. 43, No. 1, p. 63ff. (p. 81 ff.), is very aware of the difficulties in the application of proportionality for the protection of Member States’ autonomy.

the side of the Member States.<sup>59</sup> For example, in *UK v Council*, concerning the Working Time Directive, the Court held that in order to establish whether a provision of Community law is compliant with proportionality, it must be ascertained “whether the means which it employs are suitable for the purpose of achieving the desired objective” and “whether they do not go beyond what is necessary to achieve it”.<sup>60</sup> In this case the Court pointed out that the judicial review of discretionary powers of Community lawmaking institutions must be limited to examining whether such exercise has been vitiated by a ‘manifest error’ or by a ‘misuse of powers’, or whether the institution concerned has ‘manifestly exceeded the limits of its discretion’.<sup>61</sup> After evaluating the content of the Working Time Directive against its objective to improve the protection of the health and safety of workers, the Court concluded that “... the measures on the organization of working time ... cannot ... be regarded as unsuited to the purpose of achieving the objective pursued”.<sup>62</sup> The Court also held that “the Council did not commit any manifest error in concluding that the contested measures were necessary to achieve the objective”,<sup>63</sup> or “in taking the view that the objective of harmonizing national legislation on the health and safety of workers ... could not be achieved by measures less restrictive”.<sup>64</sup> What counts, for the Court, is not whether an action is really ‘necessary’ or whether, in theory, ‘less restrictive measures’ are possible, but whether there is a ‘manifest error’ vitiating the discretion of the Union legislator.<sup>65</sup> Far from promising more rigour than the application of subsidiarity, the described approach indicates a self-restraint of the Union judiciary, which is strongly reminiscent of the self-restraint of the German Federal Constitutional Court in relation to the enforcement of the former need clause of Article 72(2) GG (cf. supra B.1.).

This conclusion is reinforced by the fact that in a number of cases the Court of Justice seems to blur the boundary between subsidiarity and proportionality even though, on a conceptual level, the distinction between the two quantities should be clear. Indeed, proportionality can be distinguished from subsidiarity as it presupposes the legitimacy of an action of the Union and it rather engages its intensity and scope.<sup>66</sup> In

<sup>59</sup> Cf. P. Craig, Subsidiarity: A Political and Legal Analysis, in: *Journal of Common Market Studies*, 2012, Vol. 50, No. S1, p. 72ff. (p. 82 ff.).

<sup>60</sup> Case C-84/94 *UK v Council* [1996] ECR I-5755 (para. 57), referring to Case C-426/93 *Germany v Council* [1995] ECR I-3723 (para. 42).

<sup>61</sup> Case C-84/94 *UK v Council* [1996] ECR I-5755 (para. 58).

<sup>62</sup> *Ibid.*, para. 59.

<sup>63</sup> *Ibid.*, para. 60.

<sup>64</sup> *Ibid.*, para. 66.

<sup>65</sup> See also Case C-58/08 *The Queen v Secretary of State for Business (ex parte Vodafone)* [2010] ECR I-4999 (para 52), Case C-110/03 *Belgium v Commission* [2005] ECR I-2801 (para. 68), Case T-526/10 *Inuit Tapiriit Kanatami et al. v Commission* [ECLI:EU:T:2013:215] (para. 87ff.) and, more recently, Judgment of the Court (Second Chamber) of 18 June 2015, Case C-508/13, *Estonia v European Parliament and Council*, not yet published (para. 29 and 37-39).

<sup>66</sup> Cf. P. Van Nuffel, The Protection of Member States’ Regions Through the Subsidiarity Principle, in: C. Panara and A. De Becker (eds.), *The Role of the Regions in EU Governance*, Heidelberg, Springer, 2011, p.

the case *British American Tobacco*, for example, the Court, while judging on subsidiarity, makes reference to the paragraphs of the same judgment examining and rejecting the submission on proportionality: "... the intensity of the action undertaken by the Community in this instance [as well as being in keeping with the requirements of proportionality] was also in keeping with the requirements of the principle of subsidiarity in that ... it did not go beyond what was necessary to achieve the objective pursued".<sup>67</sup> Accordingly, given that subsidiarity and proportionality are often fused together in the analysis of the Court rather than examined separately, it appears uncertain or even unlikely that the Court may adopt a more rigorous approach to proportionality than to subsidiarity.

In Italy, however, proportionality is an additional element of protection for regional and local authorities (cf. *supra* B.2.). In a few cases concerning subsidiarity the Italian Constitutional Court carried out also the proportionality test. From the analysis of its case law it emerges that, when testing proportionality, the Court looks at the 'breadth' and/or at the 'intensity' of a regulation. For example, in Ruling No. 214 of 1 June 2006, the Court focused on the range of tasks assigned to a certain public body ('breadth'). The Court held that the law establishing the National Committee for Tourism had gone beyond what is strictly necessary for the promotion of tourism. The law in question, instead of specifying and delimiting the remit of the Committee, had entrusted it with an all-embracing activity of policy coordination for the entire touristic sector and for this reason the scale of State intervention appeared disproportionate.<sup>68</sup> When checking proportionality, the Court may also look at the 'intensity' of a regulation. For example, in Ruling No. 166 of 23 May 2008, the Court held the national plan on social housing compliant with the principle, because the plan consisted of general guidelines leaving sufficient scope for regional implementation.

---

55ff. (p. 58). Cf. also AG Léger Opinion Case C-84/94 (para. 125 ff.) and K. Lenaerts and P. Van Nuffel, European Union Law, London, Sweet & Maxwell, 2011 (3rd ed.), pp. 144-145.

<sup>67</sup> Case C-491/01 *The Queen v Secretary of State for Health (ex parte British American Tobacco Ltd.)* [2002] ECR I-11453 (para. 184). Also in Case C-176/09 *Luxembourg v European Parliament and Council* [2011] ECR I-3727, in relation to Directive 2009/12/EC on airport charges, the subsidiarity plea brought by Luxembourg seems to be concerned with proportionality rather than with subsidiarity strictly speaking (cf. para. 73-84).

<sup>68</sup> Cf. para. 8 of the judgment. Only a few rulings dealt with proportionality in the context of subsidiarity. For example, in Ruling No. 165 of 11 May 2007, in relation to the national agency for the dissemination of new technologies, the Court held that the principle of proportionality had been respected as the responsibilities of the national agency are limited to the strictly necessary (cf. para. 4.4 of the judgment). In the Ruling No. 215 of 17 June 2010 the Court held that it was disproportionate, in addition to the task of planning infrastructures in the energy sector, to grant the central government the task of completing such infrastructures; a task which, in the view of the Court, could be effectively performed by the Regions (cf. para. 4). In the Ruling No. 232 of 22 July 2011 the Court invalidated another all-embracing State provision concerning the creation of 'no bureaucracy areas' in the South of Italy. The Court pointed to the lack of justification for the State provision in the light of subsidiarity, proportionality and rationality (cf. para. 5.5 of the judgment). On the same wavelength see also the Ruling No. 144 of 28 May 2014.

To conclude, due to the self-restraint of the Court of Justice and to the blurred distinction between proportionality and subsidiarity in the jurisprudence of the Court, proportionality is not necessarily more rigorous or favourable to the autonomy of the Member States than subsidiarity. However, the case-law of the Italian Constitutional Court shows that proportionality can be a valuable *auxiliary* tool, along with subsidiarity, for assessing the soundness of State action and for preventing unnecessary State action in the areas of responsibility of the sub-national authorities.

## 2. Subsidiarity and procedural arrangements

The Amsterdam Subsidiarity Protocol of 1997 followed both a ‘substantive’ and a ‘procedural’ approach to subsidiarity. It laid down substantive guidelines in order to assess whether the conditions of Article 3b of the EC Treaty were fulfilled. Such guidelines referred, *inter alia*, to situations where “the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States” or where “actions by Member States alone... would conflict with the requirements of the Treaty (such as the need... to avoid disguised restrictions on trade...)”.<sup>69</sup> Interestingly, the Lisbon Subsidiarity Protocol of 2007, which replaced the Amsterdam Protocol, does not contain similar guidelines, apparently preferring to focus on procedural rather than on substantive aspects of subsidiarity.

Yet, in addition to substantive criteria, the Amsterdam Subsidiarity Protocol also laid down procedural requirements, ensuring that subsidiarity received due consideration by the Union legislator during the lawmaking process. Point 4 of the Protocol established that “For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators”. This obligation received additional specification in relation to the Commission, who had to “justify the relevance of its proposals with regard to the principle of subsidiarity” (cf. Point 9), as well as in rela-

---

<sup>69</sup> Amsterdam Subsidiarity Protocol, point 5: “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;
- 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;
- action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.”

tion to the Parliament and the Council, who had to “consider their consistency with Article 3b of the Treaty” (cf. Point 11). Similar obligations are contained in the new Subsidiarity Protocol attached to the Treaty of Lisbon.<sup>70</sup>

These procedural requirements are not merely facultative. They are legally binding and judicially enforceable before the Court of Justice. Admittedly the judicial review of the duty to state reasons has always been light touch. Indeed, so long as the institutions adequately considered subsidiarity concerns during the lawmaking process, the Court does not require the act to contain an explicit explanation of compliance with subsidiarity.<sup>71</sup> Also, in the recent case C-508/13 on the EU Accounting Directive the Court of Justice found that there is no duty to state reasons in relation to every provision of an act and that a state shall know about the fundamental reasons of an act also from its participation in the Council.<sup>72</sup> Yet, the judicial enforceability of subsidiarity-related procedural requirements is clearly confirmed by a recent Opinion of Advocate General Jääskinen concerning the alleged breach of subsidiarity by the introduction by the Union of an obligatory maximum fixed ratio of 100% of fixed salary for variable remuneration of bank managers. Interestingly Advocate General Jääskinen says that: *“Subject to respecting procedural requirements, the legislature possesses a wide margin of discretion when assessing whether a Union measure adheres to the principles of proportionality and subsidiarity”* (emphasis added).<sup>73</sup> The Union judiciary shall scrutinize whether these procedural requirements have been respected.<sup>74</sup> At the same time, for what concerns the merits of a plea on subsidiarity and/or proportionality, the Court shall annul an act only if the applicant seeking a declaration of invalidity shows (the burden of proof being on the claimant) that the contested measure is ‘manifestly inappropriate’, having regard to the objective pursued by the institutions.<sup>75</sup>

The most important procedural innovation introduced by the Lisbon Subsidiarity Protocol is certainly the ‘early warning system’<sup>76</sup>, a mechanism aiming to create a dialogue between national parliaments and Union institutions during the legislative process. The rationale for the early warning system is to ensure appropriate consideration of

<sup>70</sup> Cf. Art. 5 Lisbon Subsidiarity Protocol. On the concept of procedural subsidiarity cf. A. D’Athena, *Diritto regionale*, Torino, Giappichelli, 2010, p. 183.

<sup>71</sup> See the Case C-233/94 *Germany v European Parliament and Council* [1997] ECR I-2405, at para. 25-29, and the Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079, at para. 33.

<sup>72</sup> Judgment of the Court (Second Chamber) of 18 June 2015, Case C-508/13, *Estonia v European Parliament and Council*, not yet published (para. 51 and 62 respectively).

<sup>73</sup> Cf. Opinion of AG Jääskinen, 20 November 2014, Case C-507/13, *UK v European Parliament and Council*, para. 100, not yet published in ECR. On 21 November 2014 the UK withdrew its application and, by Order of the President of the Court of 9 December 2014, the Case C-507/13 was removed from the Register of the Court.

<sup>74</sup> See also the Judgment of the Court (Second Chamber) of 18 June 2015, Case C-508/13, *Estonia v European Parliament and Council*, not yet published (para. 51 and 62 especially).

<sup>75</sup> Cf. Opinion of AG Jääskinen, 20 November 2014, Case C-507/13, *UK v European Parliament and Council*, para. 96, not yet published in ECR.

<sup>76</sup> Cf. Art. 6-7 of the Protocol.

subsidiarity by the proponent of a legislative act and by the Union legislator. The national parliaments are entitled to submit reasoned opinions concerning the compliance of a proposal with subsidiarity. However, it is not easy to reach the minimum number of votes for triggering a yellow or an orange card. So far only two yellow cards have been issued. On the first occasion, concerning the right to strike, the Commission chose to withdraw the proposal, mainly because the wide opposition to the act rendered its approval unlikely. On the second occasion, concerning the establishment of the European Public Prosecutor, the Commission chose to maintain its original proposal unchanged. However, this proposal is still awaiting approval by the Council where unanimity is required.<sup>77</sup>

In theory the early warning system could also offer a contribution to modify the traditional self-restraint of the Court of Justice in relation to subsidiarity. The evidence contained in the reasoned opinions of the national parliaments and of the Commission could be taken into account by the Court of Justice when addressing a subsidiarity complaint. Furthermore the procedural requirements of the early warning system seem to be judicially enforceable by the Court and failure to comply with these could lead to the invalidation of an act. In this way, however, the Court would be enforcing certain procedural requirements rather than subsidiarity ‘per se’.

A similar tendency can be seen in the role of the Committee of the Regions (CoR) in relation to subsidiarity. When performing its consultative role the CoR will normally express its point of view on the conformity of a legislative proposal with subsidiarity.<sup>78</sup> The Lisbon Subsidiarity Protocol gave the CoR the right to challenge a legislative act on grounds of infringement of subsidiarity.<sup>79</sup> Still, the CoR does not appear

---

<sup>77</sup> The first yellow card was issued on 7 July 2012 in relation to the Proposal for a Council regulation on the right to strike (cf. COM(2012)130, ‘Monti II’). The decision by the Commission to withdraw a proposal after a yellow or an orange card would be a sign of political realism. Indeed, where a large number of national parliamentarians across the EU oppose a proposal, its chances for being adopted by the lawmaking institutions might be significantly reduced. Cf. P. Van Nuffel, *The Protection of Member States’ Regions Through the Subsidiarity Principle*, in: C. Panara and A. De Becker (eds.), *The Role of the Regions in EU Governance*, Heidelberg, Springer, 2011, p. 55ff. (p. 72); P. Kiiver, *The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity*, in: *Maastricht Journal of European and Comparative Law*, 2008, Vol. 15, No. 1, p. 77ff. (p. 81). The second yellow card was issued on 28 October 2013 in relation to the Commission’s proposal on the establishment of the European Public Prosecutor’s Office (‘EPPO’; COM(2013)514 final). The Commission stated its intention to maintain the proposal in the Communication of 27 November 2013 COM(2013) 851 final. The proposal was approved by the European Parliament on 14 March 2014. On the limited effectiveness of the early warning system cf. D. Jančić, *The Game of Cards: National Parliaments in the EU and the Future of the Early Warning Mechanism and the Political Dialogue*, in: *Common Market Law Review*, 2015, Vol. 52, No. 4, p. 939ff.

<sup>78</sup> Cf. Art. 55(2) of the CoR’s Rules of Procedure. The CoR sees itself as the ‘custodian’ or ‘watchdog’ of the principle of subsidiarity. Cf. S. Ricci, *The Committee of the Regions and the Challenge of European Governance*, in: C. Panara and A. De Becker (eds.), *The Role of the Regions in EU Governance*, Heidelberg, Springer, 2011, p. 109ff. (pp. 123-126).

<sup>79</sup> Cf. Art. 8(2) of the Protocol. This only applies to those acts for whose adoption the consultation of the CoR is mandatory. The TFEU requires an opinion of the CoR for legislative proposals in the following policy areas: Transport (Art. 91(1)), including sea and air transport (Art. 100.2); Employment (Art. 148(2) and

particularly confident that subsidiarity can be enforced through judicial review. Until now no challenge has been lodged by the CoR against an act for an infringement of subsidiarity. Admittedly it cannot be excluded that the right to challenge, albeit not yet exercised, may have strengthened the opinions of the CoR vis-à-vis the lawmaking institutions and that, accordingly, the CoR may be playing a stronger role in the legislative process. Still, one more time compliance with subsidiarity seems to stem from dialogue between different political players.

Also the procedural requirement for the Commission to consult the CoR (albeit not only in relation to subsidiarity) in relation to proposals in certain policy areas is judicially enforceable. Pursuant to Article 263(3) TFEU the CoR has the status of a privileged applicant when challenging an act to protect its constitutional prerogatives. Like in the early warning system, however, there would be a shift of focus of the judicial review from subsidiarity ‘per se’ to the enforcement of certain subsidiarity-linked procedural criteria.<sup>80</sup> With specific reference to subsidiarity, Nettesheim has recently proposed the oxymoronic notion of ‘politisches Recht’ (political law), indicating those legal provisions which are only or principally enforceable through forms of political coordination (politische Koordination). The role of the courts in relation to these would be essentially limited to the enforcement of the procedures of political coordination.<sup>81</sup>

### **3. Subsidiarity and political cooperation**

The early warning system is not the only potential communication channel between the lawmaking institutions and the national and sub-national parliaments in relation to subsidiarity. Indeed not only is it difficult to achieve the quorum for a yellow or an orange card, but also the tight eight-week deadline might be a hurdle preventing the issuance of a reasoned opinion. Accordingly some parliaments or chambers (for example, the German Bundesrat, albeit only on issues perceived as particularly important by the Länder<sup>82</sup>) often voice their opinion (not necessarily limited to subsidiar-

---

149(1)); Social policy (Art. 153(2)); Education, Vocational training, Youth and Sport (Art. 165(4) and 166(4)); Culture (Art. 167(5)); Public health (Art. 168(4) and (5)); Trans-European networks (Art. 172); Economic, social and territorial cohesion (Art. 175(3), 177(1), and 178(1)); Environment (Art. 192 (1), (2) and (3)); Energy policy (Art. 194(2)). In all these fields the Union acts in the exercise of shared powers. Accordingly, the principle of subsidiarity should play a decisive role.

<sup>80</sup> From the Opinion of AG Jääskinen, 20 November 2014, Case C-507/13, *UK v European Parliament and Council*, para. 103, not yet published in ECR, one may argue that the procedural requirements imposed by EU primary law must be abided by and are judicially enforceable (even though Jääskinen does not specifically mention the early warning system or the mandatory opinions of the CoR).

<sup>81</sup> Cf. M. Nettesheim, Subsidiarität durch politische Koordination, paper presented at the symposium ‘Grenzen Europäischer Normgebung – EU-Kompetenzen und Europäische Grundrechte’, Frankfurt am Main, 19 March 2014, *passim*.

<sup>82</sup> Such as the 2013 directive on the added value tax (Council Directive 2013/43/EU of 22 July 2013, in: Official Journal of the EU, 26 July 2013, L 201/4).

ity) through the political dialogue launched by the Commission in 2006.<sup>83</sup> Not being rooted in primary law and being a mere soft law arrangement the political dialogue is not judicially enforceable and there is no yellow/orange card mechanism attached to it. However due to the flexibility of the political dialogue (which is not limited to subsidiarity and to legislative acts and is not bound to rigid deadlines), national parliaments use this tool more frequently than the early warning system (in 2014, 506 opinions were issued by national parliaments but only 21 of those were reasoned opinions issued through the early warning system<sup>84</sup>).

Finally it has to be taken into account the duty for the Commission to consult widely before proposing a legislative proposal (Article 2 Lisbon Subsidiarity Protocol).<sup>85</sup> This is another channel for political cooperation and dialogue which may help the Commission and the lawmaking institutions to focus on the potential impact of a regulation. It is unlikely that the Court of Justice would uphold the claim that a certain act is unlawful for lack of or inadequate preliminary consultation. However the Court has already expressly recognised that consultation contributes legitimacy to the Union lawmaking. More specifically in the case *UEAPME* the Court of First Instance held that whenever the European Parliament does not participate in the enactment of a legislative act, the principle of democracy requires an alternative form of participation of the people. If such participation takes the form of social dialogue, the Commission and the Council have the obligation to verify that the social partners involved are sufficiently representative. Only in this way the democratic legitimacy of the EU lawmaking process can be maintained.<sup>86</sup>

---

<sup>83</sup> See Communication from the Commission to the European Council, A Citizens' Agenda, Brussels, 10 May 2006, COM(2006) 211 final (p. 9).

<sup>84</sup> Cf. Commission, Annual report 2014 on relations between the European Commission and national parliaments, Brussels, 2 July 2015, COM(2015) 316 final (Annex 1). The figures were similar in 2013 (621 opinions and 88 reasoned opinions), 2012 (663 opinions and 70 reasoned opinion), 2011 (622 opinions and 64 reasoned opinions) and in previous years. However, it needs to be highlighted a considerable decrease in the number of reasoned opinions from 88 in 2013 to only 21 in 2014. It will be interesting to see whether this trend will be confirmed in following years.

Another example of multi-level cooperation on EU lawmaking/policymaking is the structured dialogue between the Commission and the European and national associations of sub-national authorities. Cf. Communication from the Commission, Dialogue with associations of regional and local authorities on the formulation of European Union policy, Brussels, 19 December 2003, COM(2003) 811 final and CoR's Bureau Decision CoR 380/2003 part II of 19 March 2004. In the literature see L. Domenichelli, *Le regioni nella Costituzione europea*, Milano, Giuffrè, 2007, p. 71 ff. However it must be highlighted that most and probably more fruitful (from the point of view of the sub-national authorities) contacts between the sub-national authorities and the European institutions (particularly the Commission) take place through intensive lobbying carried out by the representation offices of the sub-national authorities in Brussels.

<sup>85</sup> Such a duty had been introduced already by the Amsterdam Subsidiarity Protocol (Point 9).

<sup>86</sup> See the Case T-135/96, *UEAPME v Council* [1998] ECR II-2335 (para. 88-89). Cf. P. Popelier, Governance and Better Regulation: Dealing with the Legitimacy Paradox, in: European Public Law, Vol. 17, 2011, No. 3, p. 555ff. (p. 567). See also S. Smismans, Law, Legitimacy, and European Governance. Functional Participation in Social Regulation, Oxford, OUP, 2004 (p. 340ff.). The 2001 White Paper on European Governance clearly says that the legitimacy of the EU today depends on involvement and participation. Cf. Commission, European Governance – A White Paper, COM(2001)428, 25 July 2001 (p. 11). In a recent paper Marija Bartl

## **D. Concluding remarks – Subsidiarity in the EU between sustainable justiciability and multi-level cooperation**

Subsidiarity is a constitutional principle of the EU whose observance is achieved by cumulating judicial review and political cooperation in the lawmaking process. The litigious nature of judicial review reflects the aspiration to a more clear-cut separation of responsibilities between the different political units within the EU. By contrast political cooperation reflects the ethos of cooperative federalism, leading to collaboration between different political units and potentially to ‘co-governance’ of certain subject-matters. Yet judicial review and political cooperation do not mutually exclude one another. The previous analysis corroborates the submission that these rather do and shall complement one another in relation to subsidiarity in the EU.

More specifically the justiciability of subsidiarity, to be politically sustainable in a system like the EU, shall be limited to clear (always possible but rare) abuses of power committed by the Union legislator. This judgment on subsidiarity ‘per se’ can be integrated by an evaluation of the proportionality of the same regulation. However proportionality too can lead to the annulment of a regulation only in extreme scenarios of a manifest error or a clear abuse committed by the Union legislator. The limited justiciability of subsidiarity and proportionality explains why they can be politically sustainable without conflicting with the will of the democratically legitimated legislator incorporated into a final piece of legislation.

The gaps in the judicial enforcement of subsidiarity have to be filled through forms of multi-level political dialogue and cooperation. These include certain procedural requirements (such as, the early warning system introduced by the Lisbon Subsidiarity Protocol and the involvement of the CoR in the Union legislative process) with the aim, among other things, to promote appropriate consideration for subsidiarity in the lawmaking process. Compliance with these procedural requirements can become the subject of cases in Union courts (which may lead to the annulment of an act by the Court of Justice of the EU) and, potentially, in national courts. However, the infringement of a procedural requirement established by national law (such as, for example, a rule requiring consultation with regional parliaments with legislative powers pursuant to Article 6 of the new Protocol) would not/could not lead to the annulment of an act of the EU by a national court; it may possibly lead to the loss of legitimacy of a certain Union act from the perspective of a single Member State. A third level of implementation of subsidiarity, in addition to judicial enforcement of subsidiarity ‘per se’ and to compliance with procedural requirements, can be the

---

suggests that the rationale or, in any case, the effect of the early warning mechanism is to promote democratic legitimacy of Union action rather than to enforce proximity to the citizen. Cf. M. Bartl, *The Way We Do Europe: Subsidiarity and Substantive Democratic Deficit*, in: European Law Journal, Vol. 21, 2015, No. 1, p. 23ff.

employment of instruments promoting political dialogue and cooperation, such as the political dialogue and, but less, the structured dialogue. These instruments are not judicially enforceable, albeit they may contribute legitimacy to the EU decision-making and promote consideration for subsidiarity in the lawmaking process.