

## **From Subsidiarity to Better EU Governance: A Practical Reform Agenda for the EU**

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### **1. Introduction: The Politics of Subsidiarity**

Subsidiarity is one of the core organising principles of the European Union (EU) and can be considered from legal, political and administrative perspectives. Legally, the subsidiarity principle, as laid down in Article 5 of the Treaty on European Union (TEU), determines whether action should be taken at the European level or at state level, thus helping to settle disputes concerning the division of competences.<sup>1</sup> The procedures to monitor compliance with subsidiarity are set out in Protocol No. 2, with national parliaments at the forefront. Politically, subsidiarity relates to a wide variety of instances, in some of which the member states make demands of, and in others voice reservations about, supranational authorities, pointing to the desirability of more extensive EU policies in some areas and less in others. In terms of administrative adaptations, the European Commission and national parliaments have invested in procedures to apply more consistently certain regulatory principles (including subsidiarity and proportionality) in political decisions.<sup>2</sup> In combination, these

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<sup>1</sup> P. Craig and G. De Búrca (2011), *EU Law: Text, Cases and Materials*, Oxford: Oxford University Press, fifth edition; and P. Craig (2012), "Subsidiarity: A political and legal analysis", *Journal of Common Market Studies*, Vol. 50, No. 51, pp. 72-87.

<sup>2</sup> A. Schout and J. Sleifer (2014), "A Public Administration Take on Legitimacy: Better Regulation as Multilevel Governance Challenge", in m; Ambrus, K. Arts, E. Hey and H. Raulus (eds), *The Role of 'Experts' in International Decision-Making: Advisors, Decision-Makers or Irrelevant*, Cambridge: Cambridge University Press.

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approaches have gone a long way towards facilitating the practical application of the thorny legal concept of subsidiarity since its introduction in the Maastricht Treaty of 1992.

The first twenty years of subsidiarity were about gaining wide acceptance for it as a political, legal and administrative tenet. Phase two in the development of the principle is about exploring possibilities for deepening and fine-tuning its application. For different reasons, the search for practical applicability of subsidiarity resonates in member states and EU institutions. The first wave of subsidiarity debates occurred around 1990 with the efforts to 'complete the internal market'.<sup>3</sup> The current, phase-two debates are connected to the deepening of European integration and the growing popular concerns this has provoked regarding democratic legitimacy, the perception of centralisation and the threat of an omnipresent EU.<sup>4</sup>

This paper explores the political and practical relevance of some of the ideas currently being considered to solidify the principle of subsidiarity in day-to-day decision-making.<sup>5</sup> Section two maps the current political contours of subsidiarity as they appear in speeches and policy papers. The third section reflects the discussion on some of the main ideas in the current debate on deepening subsidiarity. The conclusions finalise the paper.

The outcome of this exploration of the current state of play is that there is broad political support for deepening the application of subsidiarity. It is also evident that a lot has already been achieved in the creation of tools to support subsidiarity, such as better annual planning, impact assessments and efforts to involve national parliaments. Another finding is that much can be done '*à droit constant*' – that is, within the given legal frameworks and procedures. Yet, there are also serious concerns about putting subsidiarity into practice and respecting self-restraint when formulating EU policies. Member states' governments and national parliaments have difficulties being proactive in providing information to the Commission concerning the costs and benefits of new initiatives. Moreover, the Council, Commission and European Parliament seem to lose their focus on smarter regulation in the course of their trialogues. Evidently, more can still be done to enhance EU policy and self-restraint, but the political momentum and the basic legal and organisational preconditions are well established by now. The time seems ripe for addressing the challenges of phase two: deepening the practical application of the principle of subsidiarity.

## 2. Political Balance of Interests

The notion of subsidiarity – with varying degrees of backing – has once again become a prominent theme on the EU's agenda, propelled by a multitude of challenges, including eroding EU legitimacy, the need for better EU output, insecurity over deepening economic integration, the feeling that European regulation is sometimes overly burdensome and a

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<sup>3</sup> M; Wilke and H. Wallace (1990), *Subsidiarity: Approaches to Power-sharing in the European Community*, London: Royal Institute of International Affairs.

<sup>4</sup> Craig, "Subsidiarity: A political and legal analysis", *op. cit.*

<sup>5</sup> On 23 January 2014, a group of 73 member states' officials and representatives from the European institutions and academia gathered at Clingendael Park in The Hague for a day-long seminar co-organised by the Netherlands Institute of International Relations and CEPS for the Ministry of Foreign Affairs of the Netherlands. The seminar's aim was to discuss whether subsidiarity can offer a way forward that reconciles the need for better EU governance with concerns about legitimacy. This paper is based on subsidiarity literature, on preparatory talks with officials from member states and EU institutions and on the discussions in the seminar in The Hague. The discussions and interviews were held under the Chatham House rule.

rising concern about the growing distance between the public and EU decisions. Still, member states and EU institutions place different emphases and have varying priorities within this debate, and commitment varies. Considering both its legal and political bases, European Commission President José Manuel Barroso remarked that subsidiarity is not a luxury but an obligation.<sup>6</sup> After a pro-federalist national campaign for the Social Democratic Party of Germany in 2013, Martin Schulz, the lead candidate for the Party of European Socialists in the European Parliament elections of 2014, stressed that subsidiarity is “about finding a more rational division of labour between the member states and the EU”.<sup>7</sup> Several member states also voiced their wish for better EU governance, with the United Kingdom looking into ways to reduce bureaucracy with its ‘cut EU red tape’ reports and its attempt, which has met with mixed success, toward a rollback or improvement of ‘EU competences’<sup>8</sup> and with the call by (then) Prime Minister Enrico Letta of Italy and Prime Minister Jyrki Katainen of Finland for a reduction in the administrative burden.<sup>9</sup> Some countries, however, seem to prefer more detailed EU law, so that legislation can simply be adopted without further demands on limited national legislative capacities. The overriding principle in a subsidiarity exercise conducted by the Netherlands in 2013 was “European where necessary, national where possible”.<sup>10</sup> In these early discussions on rekindling the subsidiarity debate, other member states have not yet formulated an official government position on EU reform, some out of fear for steps that could lead toward treaty change and others simply because they have other priorities. Yet, overall, there seems to be support, whether actively or by acquiescence, for the concept.

Subsidiarity has to be seen in a context that is wider than the definition of the appropriate administrative or regulatory level for action. Interviews with experts and officials have revealed that at times a narrower and at other times a more inclusive view of subsidiarity is applied in practice. Subsidiarity is inherently connected to debates on smarter regulation, deregulation, improving the democratic accountability of EU policies and institutional equilibrium. In any case, the overall objective of better regulation<sup>11</sup> is regarded as central,

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<sup>6</sup> José Manuel Durão Barroso (2013), “From 1946 till Today - A European Success Story: Why Leadership Matters”, SPEECH/13/900, European Commission, 8 November.

<sup>7</sup> M. Schulz (2013), prepared Address by President Schulz to Tweede Kamer - The Netherlands, 2 December, ([www.europarl.europa.eu/the-president/en/press/press\\_release\\_speeches/speeches/sp-2013/sp-2013-december/html/prepared-address-by-president-schulz-to-tweede-kamer--the-netherlands](http://www.europarl.europa.eu/the-president/en/press/press_release_speeches/speeches/sp-2013/sp-2013-december/html/prepared-address-by-president-schulz-to-tweede-kamer--the-netherlands)).

<sup>8</sup> M; Emerson and S. Blockmans (2013), “British Balance of Competence Reviews, Part I: ‘Competences About Right, So Far’”, European Policy Institutes Network Working Paper No. 35, CEPS, Brussels, October; A. Schout and J. M. Wiersma (2014), “Britain and the Netherlands: Similar Concerns but Different Approaches in Reforming the EU”, in A. Hug (ed.), *Renegotiation, Reform and Referendum: Does Britain Have an EU Future?*, London: Foreign Policy Centre, February 2014.

<sup>9</sup> J. Katainen and E. Letta (2013), “Die EU-Rechtsetzung vereinfachen”, *Frankfurter Allgemeine Zeitung*, 18 October.

<sup>10</sup> Ministry of Foreign Affairs, Netherlands (2013), *Uitkomsten subsidiariteitsexercitie*, MINBUZA-2013.184321, 21 June.

<sup>11</sup> European Commission (2002), *European Governance: Better Lawmaking*, COM(2002) 275 final, Brussels; European Commission (2006), *Better Lawmaking 2005*, COM(2006) 289 final, Brussels; Council of the European Union (2006), *Better Regulation - Handling of Impact Assessments*, COMPET DS 150/06, Brussels, 1 March.

whether that is achieved through subsidiarity, proportionality,<sup>12</sup> the choice of the least disruptive instrument, deregulation or quality of output. Subsidiarity is a tool to provide more focus to EU policies and thus to render them more effective, but in itself the principle is insufficient to forge a constructive European reform agenda.

The need for EU reform is broadly felt. Nevertheless, some general parameters of the reform debate seem clear. Reform should preferably take place within the limits of the current treaties (also with a view to delivering results in the short run), the ‘Community method’ (the outline of how supranational powers are distributed among the main institutions in the cycle of EU decision-making) should not be undermined and there should be no repatriation of competences. Similarly, more EU powers are needed in certain policy areas, for example, to strengthen the economic, banking and monetary unions. In the meantime, a better-run European Union may imply a sharper prioritisation of policies where possible.

Tensions between collective interests and diversity of national practices and preferences often surface in the negotiations between EU institutions and member states. There exists a widely shared impression that the European Commission and European Parliament are more inclined toward action at the EU level to attain Union-wide policy objectives. However, as the European Commission has often remarked, the Commission aims at producing lean proposals, but subsequent negotiations between the Council and European Parliament lead to all kinds of additions, details and qualifications.<sup>13</sup> The three European institutions are bound by the Interinstitutional Agreement (2003)<sup>14</sup> to respect the principles of better regulation and to pay attention to the impact assessments attached to legislative proposals. With the evolving role of national parliaments as guardians of subsidiarity, it is likely that the Commission’s motivations for regulatory initiatives will be scrutinised more thoroughly. The European Parliament has thus far had a limited active role in guarding the principle of subsidiarity.<sup>15</sup> All submissions of reasoned opinions from national parliaments are dealt with in its Committee on Legal Affairs. Most of the input from national parliaments is considered a ‘contribution’ and not a ‘reasoned opinion’, as it is not considered to include substantive subsidiarity claims.<sup>16</sup>

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<sup>12</sup> Under this rule, the involvement of the institutions must be limited to what is necessary to achieve the objectives of the Treaties. In other words, the content and form of the action must be in keeping with the aim pursued. See article 5(4) TEU and Protocol No. 2

<sup>13</sup> Schout and Sleifer, “A Public Administration Take on Legitimacy”, *op. cit.*

<sup>14</sup> European Parliament, Council and Commission, Interinstitutional Agreement on Better Law-making, 2003/C 321/01, OJ C 321, 31 December 2003.

<sup>15</sup> European Parliament rules of procedure state that the European Parliament shall pay “particular attention” to respect for the principle of subsidiarity. The Secretariat of the European Parliament includes a directorate for ‘Impact Assessments and European Added Value’, screening the impact assessments of the European Commission in order to identify obvious strengths and weaknesses to support the legislative work in the committees.

<sup>16</sup> According to the latest “State of Play on Reasoned Opinions and Contributions submitted by National Parliaments under Protocol No. 2 of the Lisbon Treaty” of March 2014, the European Parliament has received a total of 1.662 submissions from national parliaments. Of these, 282 are reasoned opinions, while the remaining 1.410 are contributions. Compared with the European Commission, the official numbers for the European Parliament regarding reasoned opinions are lower. ‘Reasoned opinions’ are defined as submissions that indicate the non-compliance of a draft legislative act with the principle of subsidiarity and have been communicated to the European Parliament within the eight-week deadline referred to in Article 6 of Protocol No 2 of the Treaty of Lisbon. ‘Contributions’ indicate any other submissions that do not fulfil the criteria listed above for a reasoned opinion.

### 3. Practical Proposals for Better EU Governance

The discussions over subsidiarity in its more inclusive dimension have resulted in a large variety of practical suggestions for deepening its application (see the Annex). Many proposals have been raised, ranging from new institutional structures to refinement of existing procedures. Proposals such as the creation of an independent subsidiarity court (which, unlike the European Court of Justice, would not be related to the objective of an ever-closer union),<sup>17</sup> limiting the powers of the European Commission or reducing its size, fall outside the scope of the practical steps considered here. Such alternatives demand treaty changes or are unfeasible in the near future because, for example, the number of commissioners has already been settled on until 2019.

What follows addresses only the practical measures, as they have emerged in discussions and interviews. The suggestions relate to the national perspectives on reform (national parliaments and the involvement of national administrations), the EU institutions and, naturally, cooperation between the national and EU levels. Still, this leaves ample room for adjustments and improvements.

#### 3.1 European Level

In his State of the Union speech of 2013, referring to a growing concern for a more focused EU, European Commission President Barroso argued that the EU “needs to be big on big things and smaller on smaller things”. Moreover, he added that the EU “needs to show it has the capacity to set both positive and negative priorities”.<sup>18</sup> Public worries over ‘creeping competences’ or avoidable administrative burdens resulting from EU regulation have found receptive ears within the Commission and have fuelled efforts at greater subsidiarity and better regulation. Given the Commission’s right of initiative in accordance with the ‘Community method’ and its advanced analysis of the application of the subsidiarity principle in performing impact assessments, the EU’s self-restraint and content analysis start with that executive body. Most efforts at the European level are directed toward regulatory reform and not specifically toward a better application of the subsidiarity principle. Yet, subsidiarity is instrumental in contributing to the better regulation objectives of the EU.

Member states routinely express support for the REFIT (Regulatory Fitness and Performance)-type programmes set up by the Commission to revisit periodically the stock of regulation in order to detect restraints on competitiveness and the functioning of the single market, with the aim of improving the EU’s regulatory appropriateness, including respecting the principles of subsidiarity and proportionality. Such programmes have already been going on under different names over the past twenty years (although mostly concerning deregulation – not subsidiarity).<sup>19</sup> There is, however, ample support for further rigorous assessments, including those specifically related to subsidiarity.

The European Commission’s impact assessments are an important tool to achieve this goal. Member states have encouraged the Commission to pay more attention in the impact assessments to subsidiarity, competitiveness, effects on local circumstances and implementation and other costs. However, the knowledge to address these issues must also come from the national level since the quality of impact assessments depends on the

<sup>17</sup> A. Browne and M. Persson (2011), *The Case for European Localism*, London: Open Europe, September.

<sup>18</sup> José Manuel Durão Barroso, “State of the Union Address 2013”, SPEECH/13/684, European Commission, 11 September (emphasis added).

<sup>19</sup> Schout and Sleifer, “A Public Administration Take on Legitimacy”, op. cit.



information that member states – as well as stakeholders – provide. The Commission has been stressing the need for feedback from the member states on subsidiarity, proportionality and administrative burdens at early stages of the legislative procedure, preferably after publication of its ‘roadmaps’ and during the consultation process. National parliaments can also use the consultation phase to present their opinions and air their particular concerns. This should help to avoid complications during the negotiations, the blocking of legislation at a later stage with a ‘yellow card’ (at least one-third of the national parliaments raise objections) and tight deadlines once the proposal is sent to the parliaments. Moreover, it would be beneficial if the Council of the EU and the European Parliament took more time to discuss the impact assessments, as well as the results of the consultation process, before moving to a political discussion during the first reading.

There is a perceived disconnect between these early moments in the process, when mostly civil servants are involved, and the official negotiations, when the national and European politicians take command. To coordinate these stages, the Council could start discussions about Commission ideas earlier on (for example, on the basis of a white paper or the annual work plan).<sup>20</sup>

Another way to achieve better regulation is by strengthening *ex post facto* control on subsidiarity and proportionality. Checks could be built in before the proposal is accepted, after changes have been inserted in the negotiations. Currently, if substantial changes are made to the legislative proposal during the negotiations in the first or second reading, the likely impacts of the final legislative act remain indeterminate, given that neither the Council nor the European Parliament provides a systematic analysis of those amendments. An additional check would, however, involve criticism of the political changes that had just been made to the proposal, and politicians have not responded enthusiastically to this alternative. Another option would be to undertake more systematic evaluations of policies. However, policies are already generally evaluated after three or five years, and REFIT-type programmes are also regularly scheduled.

The Commission and European Parliament are perceived to suffer from a lack of self-control. They should strive for the goals identified in the treaties and follow the European interests, but, at the same time, they must abide by the principle of subsidiarity. The Commission’s regulatory ambitions are considered high by member states, and doubts persist over its focus to initiate regulatory action in critical policy areas. However, Commission initiatives often originate from Council conclusions and demands from member states. One possibility for improving the dialogue over priorities and focus is to have an annual debate in the General Affairs Council (GAC) on the draft Commission working programme for the upcoming year, before it is published. This is not to say that the Council should define the priorities but it might help to create insights at an early stage in terms of needs and focal points – it would not alter the institutional balance. The European Parliament already has a similar procedure. Moreover, it would help member states (and hence national parliaments) to get engaged sooner.

It is unlikely that the introduction of a ‘clean slate’ (or ‘discontinuity’ principle) for each incoming Commission would receive sufficient support from member states and the European Parliament. Alternatively, a check on unfinished Commission work and European institutions’ priorities could be considered at the start of the new Commission’s mandate.

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<sup>20</sup> A. Jordan and A. Schout (2006), *The Coordination of European Governance: Exploring the Capacities of Networked Governance*, Oxford: Oxford University Press.

The Commission's rules of procedure and those of the European Parliament as well<sup>21</sup> already offer a self-check at the start of each five-year term. Overall, member states do not wish to interfere with the Commission's right of initiative or to make structural alterations in the inter-institutional balance of the Commission, Council and European Parliament.

The measures discussed above concern the European institutions, though of course they also impose demands on member-state governments. Yet, there are also measures to be explored specifically at the national level.

### 3.2 National Level

A lot of attention is given to the role of national parliaments as co-guardians of the subsidiarity principle and as primary sources of European legitimacy. This has triggered discussions about the possibilities for better scrutiny of EU policies by national governments and for closer involvement of national parliaments in EU legislative procedures. Following the innovations introduced in the Lisbon Treaty, practical questions remain concerning how national parliaments can actually assume their enhanced role in EU decision-making and implementation. There is a perceived need among member state governments for the mobilisation of national parliaments and more education on their role in the EU legislative procedures to ensure better use of the powers and instruments available. More effective inter-parliamentary cooperation, both horizontally and vertically, and an exchange of best practices within the framework of the Conference of Parliamentary Committees for Union Affairs (COSAC) could be a starting point.

To allow for closer *ex ante* scrutiny, the Commission could explain major initiatives in national parliaments – or in more detail in the Council – to trigger political reactions from national assemblies. Conversely, member states' parliaments could be more proactive in calling on European commissioners to explain their plans and actions. To go one step further, binding mandates for national governments would engage parliaments more closely in EU policy shaping and make them co-responsible for the decisions taken in the Council. Moreover, national parliaments could engage in annual discussions on the Commission's work programme and organise yearly subsidiarity debates on recent political agreements or the overall state of play in specific areas. The Commission would encourage national parliaments and other stakeholders to voice their concerns on subsidiarity, proportionality or other grounds at early (consultative) stages. These measures would not alter the institutional balance.

The involvement of national parliaments has been complicated by political disincentives (it is hard for parliamentarians to be involved when negotiations among 28 states, the European Parliament and the Commission have yet to start and when decision-making could well still be two years away). Member states have also expressed disagreements over the question of whether the subsidiarity card should be considered. Moreover, member states have displayed inconsistent preferences with regard to subsidiarity because of government changes over time or shifting political priorities. A further complicating issue is that national parliaments have no scrutiny over the delegated powers of the Commission ('comitology'). Practical and legal challenges to suggestions to grant them such oversight are inevitable.

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<sup>21</sup> According to the rules of procedure of the European Parliament, the Conference of Presidents at the first plenary of the new European Parliament also decides on the (dis)continuity of legislative files from the previous legislature. Traditionally, the Conference decides in favour of continuity.

The yellow card procedure is the most concrete tool for national parliaments to intervene in the EU legislative process, potentially blocking a Commission proposal. On the other hand, national parliaments have no tools to shape EU legislation in a positive manner. Even though the card threshold (one third of national parliaments) has only been reached twice, the Commission has formed the impression that the procedure is fairly successful, and expects parliaments to make more use of it. Yet, the yellow card option could also result in frustration. Even though there has been a gradual increase in reasoned opinions over recent years (34 in 2010, 64 in 2011 and 83 in 2012), there have been only nine Commission proposals that triggered six or more reasoned opinions from national parliaments, indicating that the concerns about subsidiarity – and also proportionality – vary greatly among national parliaments.<sup>22</sup> Moreover, four chambers (the Swedish *Riksdag*, the French *Sénat* and the Dutch lower and upper chambers) are responsible for a disproportionate quantity of the reasoned opinions. A significant number of the reasoned opinions fail to justify a violation of the subsidiarity principle in the strict legal sense, rather focusing on the content of the legislative proposal, with concerns motivated by domestic politics.<sup>23</sup> As such, the process is still ineffective and inefficient.

To facilitate the yellow card procedure, the time frame could be expanded from eight to twelve weeks, the grounds for a reasoned opinion could be widened to include proportionality and the threshold could be lowered to one-quarter of all chambers (instead of one-third). These suggestions have triggered mixed reactions from member states and EU institutions, with the first idea resonating most among member states. In any case, giving parliaments more time could be obviated through earlier involvement by parliaments in decision-making, for example, on the basis of work plans and roadmaps.

A specific concern among member-state governments and national parliaments regarding the yellow card procedure is the perceived lack of Commission response or substantial follow-up to the reasoned opinions. A few national parliaments also complain that the reply letters are sometimes worded too generally and do not properly deal with the specific objections raised.<sup>24</sup> In the effort to create a European Public Prosecutor's Office (EPPO), the Commission might consider pushing through its proposal under the procedure of enhanced cooperation, thus ignoring the yellow card altogether. In a detailed explanation of its actions, the Commission noted that the reasoned opinions contained several arguments relating to the principle of proportionality, to policy choices unrelated to subsidiarity or to other policy or legal issues. It concluded that there is no breach of the principle of subsidiarity.<sup>25</sup> Even though the threshold for the yellow card was reached, the political consequences are unclear. Overall, apart from more proactive involvement by national parliaments, there was little support for limiting the Commission's right of initiative in

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<sup>22</sup> European Commission, *Annual Report 2012 on Subsidiarity and Proportionality*, COM(2013) 566 final, Brussels, 30.7.2013; Piedrafita, S. (2013), "EU Democratic Legitimacy and National Parliaments", Essay No. 7, CEPS, Brussels, 25 November.

<sup>23</sup> S. Piedrafita and S. Blockmans (2014), *Shifting EU Institutional Reform into High Gear: Report of the CEPS High-Level Group*, CEPS, Brussels.

<sup>24</sup> COSAC Secretariat (2011), *Sixteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny*, Report presented to the XLVI Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union, Warsaw, 2-4 October 2011.

<sup>25</sup> European Commission, Communication to the European Parliament, the Council and the national parliaments on the review of the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No. 2, COM(2013) 851 final, Brussels, 27.11.2013.



relation to yellow cards – the political negotiations offer ample room to respond to the Commission, including the option, as in the EPPO case, to move forward with differentiated integration.

There seems little appetite for the introduction of additional cards, such as the ‘red card’, giving national parliaments a veto, the ‘late card’, giving national parliaments an opportunity to block a proposal in a later phase of the legislative procedure, or the ‘green card’, allowing for a joint initiative by national parliaments.

#### **4. Conclusions: More Focus on Regulatory Quality in the Context of Better Governance**

Subsidiarity has once again risen to the top of the EU’s political agenda. The evolving political discussion has resulted in support (ranging from passive to more active endorsement) for the concept from member states and the EU Commission. The European Parliament has so far been relatively quiet about subsidiarity. A wide-ranging list of practical solutions has been suggested. One general conclusion from the debates is that there seems to be – to varying degrees of commitment – broad consensus for a generic and goal-oriented approach to better EU legislation (including subsidiarity, proportionality, burden reduction, etc.). Second, putting subsidiarity into practice from 1992 onward has resulted in a range of mechanisms. The issue now seems to be how to make better use of these instruments and procedures. Third, the political signals emerging from the debates are that the EU should be more careful in formulating new policies and about going into (unnecessary) detail when formulating policies. This is a message to the Commission, Council and European Parliament alike.

Many possible initiatives have been suggested, yet far-reaching proposals for the reform of legislative procedures or the functioning of the Commission do not find much favour because of questions of practical feasibility, treaty revision and institutional balance. Ideas about improving existing methods, ranging from the yellow card procedure to putting more effort into impact assessments, REFIT-type programmes, etc. are generally deemed to be a vital component of strengthening the legitimacy of EU policies. With European elections in the offing and the start of a new Commission term later in the year, the momentum of 2014 can and should be used to intensify these discussions.

Deepening subsidiarity will entail greater efficiency in existing procedures and continuation with deregulation-type programmes. Therefore, a great deal will depend on the ability of the member states (stakeholders, parliaments and administrations) in particular to provide input into the policy deliberation processes. Making subsidiarity (as broadly defined) work will require vigilance from all concerned. It will involve further investments of effort in the available procedures, for example, in the form of member states working together on impact assessments in the early phases of decision-making. Improving EU legislation will also demand resources and attention from national administrations.

Finally, the very nature of subsidiarity calls for restraint. Regardless of the practical suggestions that politicians want to prioritise, the mind-set counts, too. The tenor of the current discussions indicates that all involved should be sensitive to the questions involved in screening EU policies for their rationale and the value they contribute.

## Annex: Practical Ideas to Strengthen Subsidiarity and Improve Focus

In addition to the call to make better use of existing subsidiarity tools, the following practical ideas for furthering subsidiarity are circulating. There is no rigid division between the European and national levels, and several ideas concern both.

### *European Level*

- Introduce an annual subsidiarity debate in the General Affairs Council. The Council could hold discussions on the five-year working programme of the Commission, with annual follow-ups to discuss the working programme and inform the Commission on policy priorities in the Council.
- Introduce a ‘discontinuity’ principle, whereby a new College of Commissioners ought to start with new proposals. It should be noted here that that the Commission’s rules of procedure already state that the Commission performs a self-check on the necessity of floating proposals.
- Appoint a number of ‘core’ commissioners with initiating powers, instead of 28 commissioners with law-making powers in 28 policy portfolios.
- Give one of the commissioners a subsidiarity portfolio.
- Include no unnecessary non-binding communications and recommendations from the Commission in areas where the treaties do not give the EU specific competence.
- Negotiate a political agreement between the Council and the Commission (possibly involving the European Parliament as well), determining certain domains or certain issues where the European institutions will refrain from further initiatives. A closely related alternative is the idea of a moratorium, agreeing not to present new proposals in a specific area for a certain period.
- Maximise member states’ involvement in all legislative procedures, including the processes of implementing acts, delegated acts or implementation and elaboration by EU agencies.
- Establish a separate subsidiarity court to monitor EU legislation.
- Encourage a proactive approach by EU and national legislators to prevent unintended interpretations by the European Court of Justice.
- Act accordingly; in advancing rules, the EU should always be capable of citing a clear legal basis in the treaties. This basis should be concisely formulated and clearly related to the proposed action.
- Reorient EU legislation; it should be less detailed or invasive but take a more goal-oriented approach. There should be no micro-management of the EU.
- Create the possibility to pause the legislative process in cases of major changes/amendments to give all involved the chance to (re)formulate a position.
- Prevent the EU from intervening in an unjustified way while preserving the institutional equilibrium.
- Ensure that the European Parliament, in taking advantage of its role in selecting the next Commission president, does not dictate the Commission’s agenda.

- Ensure better cooperation between the Commission and member states on the REFIT programme.
- Undertake further work on impact assessments, with explicit information on implementation and other costs, both at the EU and national levels, and more focus on the fulfilment of the subsidiarity principle in impact assessments.
- Undertake impact assessments by the Council and the European Parliament at the outset or during the legislative procedure after significant amendments.
- Pay more attention to the subsidiarity test in the impact assessments by the Council and European Parliament at the start of the legislative procedure.
- Take care in the impact assessments to foster a better balance between local circumstances in the member states and common European goals.
- Reduce administrative and regulatory burdens for companies, first of all for small and medium-sized enterprises. Introduce criteria for whether EU legislation truly improves the internal market and competition.
- Make better use of the roadmaps and consultation practice of the Commission, before a legislative proposal is published, to voice concerns about subsidiarity, proportionality or burdensome regulation.
- Introduce ex post facto subsidiarity control on existing EU legislation to demonstrate whether subsidiarity was respected and to justify the necessity of EU legislative acts on a case-by-case basis. Both member states and the EU institutions should be involved.

### *National Level*

- Introduce the 'right' for national parliaments to request clarification from commissioners regarding a proposal, communication or reaction to a reasoned opinion. Ensure better cooperation between national parliaments and the European Commission, especially when it comes to the yellow card procedure.
- Ask the European Commission to respond to reasoned opinions from national parliaments in the yellow card procedure within eight weeks of submission.
- Increase the effectiveness of the yellow card procedure by extending the grounds for reasoned opinions, in particular allowing proportionality arguments alongside subsidiarity objections.
- Extend the time frame in the yellow card procedure to give national parliaments more time to submit reasoned opinions and coordinate among themselves.
- Lower the threshold in the yellow card procedure from one-third to one-quarter of all parliamentary chambers of the member states.
- Follow the example of the Danish scrutiny model and introduce a mandating system for national parliaments in *ex ante* control, making national parliaments policy shapers in the EU legislative procedure.
- Organise an annual subsidiarity debate in national parliaments to consider current and proposed EU legislation.
- Request that all member states make a list of subsidiarity concerns and perceived overly burdensome regulations. The Commission should collect all the input and process it.

- Mobilise and educate national parliaments to improve their involvement in existing EU procedures.
- Intensify the monitoring of impact assessments at the national level.
- Encourage better cooperation and coordination between national parliaments and governments. Governments could better explain their positions in the Council, so as to trigger a reaction from the national parliament.
- Exchange best practices on approaches to subsidiarity and the use of the subsidiarity check by national parliaments. COSAC could be the right platform for such an information exchange.
- Introduce an informal 'red card' for national parliaments, by proposing a political agreement that the Commission will use its discretion to withdraw legislation if one-third of national parliaments raise subsidiarity objections.
- Introduce a 'late card', giving national parliaments the opportunity to voice their concerns at a later stage of the ordinary legislative procedure.
- Introduce a 'green card' for national parliaments, which would give them the option to table a joint legislative proposal if a substantial number of member states' parliaments supported it.



## ABOUT CEPS

Founded in Brussels in 1983, the Centre for European Policy Studies (CEPS) is widely recognised as the most experienced and authoritative think tank operating in the European Union today. CEPS acts as a leading forum for debate on EU affairs, distinguished by its strong in-house research capacity, complemented by an extensive network of partner institutes throughout the world.

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- Carry out state-of-the-art policy research leading to innovative solutions to the challenges facing Europe today,
- Maintain the highest standards of academic excellence and unqualified independence
- Act as a forum for discussion among all stakeholders in the European policy process, and
- Provide a regular flow of authoritative publications offering policy analysis and recommendations,

### Assets

- Multidisciplinary, multinational & multicultural research team of knowledgeable analysts,
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