

This article is published in a peer-reviewed section of the Utrecht Law Review

Shared Regulatory Regimes through the Lens of Subsidiarity: Towards a Substantive Approach

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1. Introduction

The division of competences between the EU and the Member States is both a matter of constitutional law and pragmatic considerations. Although the EU Treaties and the principles of conferral, subsidiarity and proportionality set boundaries on the exercise of power at the EU level, they give very general substantive criteria that need further interpretation and elaboration, especially with regard to the exercise of shared competences. In this process, more pragmatic and political considerations play a role as well. The resolution of collective action problems, economies of scale and the prevention of cross-border externalities may all provide us with arguments to tackle certain issues at the EU level. Even so, political sensitivities, a lack of consensus on normative issues and the limited capacity of the EU institutions may force them to rely on the cooperation of the Member States for the execution and enforcement of their policies, and sometimes even for standard setting where universal standards for the whole territory of the EU are not feasible. It is difficult to use these considerations as hard legal criteria, and hence the principle of subsidiarity is often considered to be political in nature rather than legal. Some authors have gone so far as to argue that we should refrain from further attempts to elaborate upon the principle of subsidiarity in favour of a bottom-up approach that looks at the reality of how decisions on competence are produced.¹ Others still argue that subsidiarity is of essential importance, as a legal principle as well as a political principle, and that it should be subject to judicial scrutiny. Its position in the Treaty and as a part of the triad of conferral, subsidiarity and proportionality suggests this approach.² However, for such an approach to be successful some substantive criteria for establishing whether the principle has been complied with are needed. This contribution identifies some considerations of a practical nature that play a role when designing regulatory regimes, and assesses their potential value as elaborations upon the requirements of subsidiarity.

2. The policy cycle

Before discussing the legal and practical arguments that affect the division of competences between the EU institutions and the Member States, it is wise to have a better view of what tasks are involved.

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1 S. Constantin, 'Rethinking Subsidiarity and the Balance of Powers in the EU in Light of the Lisbon Treaty and Beyond', 2008 *Croatian Yearbook of European Law and Policy* 4, pp. 151-179, p. 151.

2 C. Ritzer et al., 'How to Sharpen a Dull Sword – The Principle of Subsidiarity and its Control', 2006 *German Law Journal* 7, no. 9, pp. 733-760.

Regulation and enforcement are an important part of the policy cycle, but as we will see, they are best understood in a wider context. Whether regulatory and enforcement tasks are best attributed to the Member States or to EU institutions is affected by who performs the other tasks in the policy cycle.

Descriptions of the policy cycle differ in their details, but the main idea remains the same. Policy objectives are decided upon and the policy to reach those objectives is designed. Next, policy is implemented and executed. The necessary legislation is drafted and adopted, and rules for its enforcement are put into place. These rules are then applied in practice, enforced where necessary and finally evaluated. The links between policy formulation, implementation and evaluation are clear. It stands to reason that there are links between the division of tasks during the different phases of the policy cycle as well: for example, the extent that regulation and enforcement should involve the EU level is partly determined by who formulates the policy objectives.

3. The distribution of competences in the EU: conferral and subsidiarity

Article 5 TEU contains the principles guiding the division and exercise of competences in the shared EU legal order: conferral, subsidiarity and proportionality. Conferral means that the EU has only those competences that have been given to it. It has no *Kompetenz Kompetenz*: it cannot create new competences for itself.³ Competences that have not been conferred upon the EU institutions remain with the Member States. Competences conferred upon the EU institutions can be either exclusive or shared. Exclusive competences reside exclusively with the EU institutions, whereas shared competences are exercised jointly by the EU and the Member States. Exclusive competences must be exercised in compliance with the principle of proportionality. The exercise of shared competences must comply with both the principle of subsidiarity and the principle of proportionality. The principle of proportionality is an incentive for legislative restraint: EU action can only be justified if it is suitable and necessary to realise EU goals, and if other interests are not disproportionately affected. It has no bearing on the division of power, though: compliance with the principle of proportionality is a condition for government interference as such, irrespective of what authority is doing the interfering. The principle of subsidiarity governs the exercise of shared powers by prescribing when EU action is justified. If it is not, the power to act remains with the Member States.

The Treaty mechanism suggests that the division of competences in the EU shared legal order is guided by a more inclusive principle of subsidiarity, which prescribes that power should be exercised as closely as possible to citizens: power should only be exercised on higher levels if there is a need for it.⁴ This is also confirmed in Article 1 TEU. Weber argues that the principle of conferral is a presumption in favour of the competence of the Member States.⁵ He discerns this higher level idea from the Treaty principle of subsidiarity, which applies only to the exercise of shared competences.⁶ Arribas & Bourdin argue that this idea is also reflected in the inclusion of the regional and local levels in Article 5 TEU.⁷ In international law, it can be seen in the European Charter of Self-Government, which is likewise based on the idea that authority should be exercised as close as possible to citizens in order to allow them to participate effectively in decision-making about their everyday environment.⁸

In the EU, the principle of subsidiarity is often conceived of as a shield for the Member States.⁹ It guards against overenthusiastic EU interference, which ignores cultural differences and local peculiarities, and thus protects local traditions and customs.¹⁰ Subsidiarity does indeed to some extent allow for local diversity and cultural differences, which is a valuable attribute in itself. But this argument

3 A. Weber, 'The Distribution of Competences Between the Union and the Member States,' in H.-J. Blanke & S. Mangiameli (eds.), *The European Union After Lisbon: Constitutional Basis, Economic Order and External Action*, 2012, pp. 311-321, p. 313.

4 See also T. Schilling, 'A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle,' 1994 *Yearbook of European Law* 14, no. 1, pp. 203-255, p. 215.

5 Weber, *supra* note 3, p. 313.

6 *Ibid.*, p. 314.

7 G. Vara Arribas & D. Bourdin, 'What Does the Lisbon Treaty Change Regarding Subsidiarity within the EU Institutional Framework?', 2012 *EIPAScope*, no. 2, pp. 13-17, p. 14.

8 Council of Europe, Explanatory report to the European Charter of Self-Government, ETS no. 122, Para. B.

9 See Ritzer et al., *supra* note 2.

10 *Ibid.*, p. 736.

also frames subsidiarity as a sort of defence mechanism which protects the status quo, and the interest of conservative individual Member States. It obscures some of the other very sound arguments that can be given for the exercise of power at the local level by pitching the Member States and the EU against each other. In addition to protecting national traditions, the exercise of power at Member State level may in some instances simply be the best way to achieve EU policy objectives.

When we perceive of democracy as a system that aims to respect people's autonomy, and that tries to allow them to make informed decisions about their own lives and communities, it is only natural that those communities should be able to decide on the course of action that they want to follow. The exercise of power at levels more removed from citizens will detract from their power to determine their own fates and that of their community, as the increase in scale necessitates compromises with other groups which have different interests. In addition, the exercise of power at a level closer to citizens may be more effective, for several reasons. Communities have specific knowledge about local circumstances. In addition, they have their own values and rules, either formal or informal, and mechanisms to enforce them. Regulation that builds upon these values is easier to enforce. A review of case studies and theoretical work by Ostrom et al. shows that local communities are often able to solve very challenging problems, and that outside interference, no matter how well intentioned, may be less effective than the local regulatory systems that were in place.¹¹ That peculiarities in the local institutional design can hinder the effectiveness of EU regulation is also shown in the contribution of Janssen, elsewhere in this special issue of the *Utrecht Law Review*.¹² He argues that the Member States' inability to construct a common wording for the so-called Teckal exemption can be explained by the organisational differences of these 'separate legal entities' throughout the European Union. It is not easy to create central regulation that fits well with different national structures. The idea that central regulation is more effective if it takes existing institutional structures at the local level into account is also reflected in the notion of national procedural autonomy, and the rule of thumb that Member States are free to implement those supervisory and enforcement regimes that they see fit. As Van den Broek points out elsewhere in this special issue, EU law only requires 'adequate regulation and supervision'.¹³ It is only natural that the principle of national procedural autonomy leads to differences in national regimes. Member States will tailor their system to their own institutional structures and enforcement cultures. In addition, it allows Member States to make some choices as to what objectives they want to promote through their enforcement and supervisory systems. Van den Broek shows how different models of supervision have different strengths and weaknesses. Member States can take these strengths and weaknesses into consideration when transposing EU law, and in that way make substantive choices as to what objectives of supervision they want to emphasise. From the perspective of subsidiarity, this is not a problem. Indeed, differences between the Member States should be respected, unless there is a convincing reason not to do so. Finally, Ritzer et al. point out that the loss of competence by the Member States may lead to a decrease in the acceptance of EU acts,¹⁴ and that subsidiarity promotes the efficiency and transparency of political decisions.¹⁵

Taking into account that the exercise of power at the local level is more in line with the ideas of democracy and public autonomy, is more respectful of differing local values and cultures and is often more effective, it is easy to see why the exercise of power on a hierarchically superior, more removed level, requires justification.

EU law at first sight seems to comply with this idea. Subsidiarity appears to be the fundamental notion underlying the division of competences. What is less clear though, is how the exercise of power at the EU level is justified substantively. Indeed, some argue that the principle of subsidiarity plays a very limited role in the division of competences between the EU and the Member States. Constantin argues that 'the competences between the EU and its Member States are demarcated in daily practice by negotiating and balancing national discretionary powers, rather than defined through the legal framework and

11 E. Ostrom et al., 'Revisiting the Commons: Local Lessons, Global Challenges', 1999 *Science*, vol. 284 no. 5412, pp. 278-282, p. 291.

12 W.A. Janssen, 'The Institutional and Non-Institutional Exemptions from EU Public Procurement Law: Towards a More Coherent Approach?', 2014 *Utrecht Law Review* 10, no. 5, pp. 168-186.

13 M. van den Broek, 'Designing Supervision under the Preventive Anti-Money Laundering Policy in the European Union', 2014 *Utrecht Law Review* 10, no. 5, pp. 151-167.

14 Ritzer et al., *supra* note 2, p. 733.

15 *Ibid.*, p. 736.

application of subsidiarity.¹⁶ Although it is no doubt true that negotiations play an important part, is it really true that we cannot say more about the division of powers from a legal point of view?

4. The justification of EU powers

As we have seen, the starting point in the division of powers is that they are executed at the national (or even the sub-national) level. Thus, the conferral of powers upon the EU institutions, whether they are exclusive or shared competences, requires justification. Broadly speaking, there are two ways to ensure that competences are only exercised at the EU level if this is appropriate. First, one can prescribe procedures that must be followed to ensure that the principle of subsidiarity (in its broad sense) is complied with. Second, one can formulate substantive criteria that justify the exercise of power upon the EU level. The EU shared legal order shows a preference for the first option, especially post-Lisbon.

First, the EU has no *Kompetenz Kompetenz*. That means that in the end, powers are only conferred upon EU institutions if the Member States agree to do so, and, because the exercise of these powers must comply with the principle of proportionality, the institutions can only exercise these powers to the extent that this is necessary to achieve the objectives of the Treaty.¹⁷ The objectives for which exclusive competences can be exercised are included in Article 3(1) of the Treaty and are therefore under the ultimate control of the Member States. Assuming the Member States have no reason to confer powers upon the EU if there is no advantage in doing so, one can assume that this guarantees that powers are only conferred if there is a reason to do so. For exclusive competences, this argument is relatively unproblematic, at least theoretically: the Member States agree that a certain issue is best regulated at the EU level, and their assessment can be respected. Although the designation of policy fields as areas of exclusive EU competence was originally a task for the Court, with the introduction of a catalogue of competences in the Treaty, this issue has been resolved.¹⁸ For shared competences, the issue is not quite so simple. The Member States agree that there is a benefit in having the EU involved in these areas, but they did not have the intention to give it free reign, as witnessed by the inclusion of the principle of subsidiarity in the Treaty. The EU may act, but only when there is a need to do so. This need is not a given, but must be shown to exist whenever the EU enacts new legislation in these areas. There are ample procedural safeguards to guarantee that the EU only uses its shared competences in compliance with the principle of subsidiarity, many of which were introduced with the adoption of the Lisbon Treaty. There is political debate in the Council, there is an obligation to give reasons, a procedure for the involvement of national parliaments and the Committee of the Regions (COR), and if all else fails, the issue of subsidiarity can be submitted to the Court of Justice.¹⁹ If a disagreement on subsidiarity makes it to the Court, it has little substantive criteria to go by, however. This is unfortunate, because a lack of substantive review creates the risk that compliance with the principle of subsidiarity becomes a matter of ticking the boxes: no amount of procedural safeguards will ensure respect for the Member States' point of view if their opinions can be ignored without consequence, no matter how convincing their arguments are. A more substantive approach may help to prevent this problem. If that proves to be impossible, at the very least it would be helpful to set some standard on what qualifies as a good justification for the exercise of shared competences, and what does not.

5. Substantive criteria for subsidiarity?

Such an approach is anything but self-evident. The Commission has stated that subsidiarity is essentially a political principle.²⁰ Many authors share its vision. According to Constantin, the application of

16 Constantin, *supra* note 1, p. 151.

17 Art. 1 Protocol (No 30) on the application of the principles of subsidiarity and proportionality (1997) (hereafter: Amsterdam Protocol), OJ C 321E, 29.12.2006, pp. 308-311.

18 F.A.N.J. Goudappel, *Subsidiarity under the Constitution for Europe*, 2006, Erasmus University Rotterdam. Available at <<http://hdl.handle.net/1765/7791>>, last visited 8 July 2014, pp. 6-7.

19 See extensively Arribas & Bourdin, *supra* note 7.

20 Constantin, *supra* note 1, p. 161; Commission Communication on the principle of subsidiarity, Bull. EC 10, 1992, point 1.1.4.

subsidiarity is left to inter-institutional interaction in the political arena.²¹ According to Goudappel, the wording of the principle of subsidiarity is too vague to play an important role in EU law and in the legal decisions under EU law.²² It is not surprising that the Court of Justice has not been enthusiastic in adjudicating on the principle of subsidiarity.²³ An example of its approach can be seen in *Directive Concerning Working Time*. In this case the UK relied upon the principle of subsidiarity. It argued that the working hours directive violated the principle of transparency because the EU legislator had not shown that the organisation of working time could not be sufficiently governed at the national level.²⁴ The Advocate General and the Court did not delve deeply into the matter. They argued that the goal of harmonisation by its nature required EU intervention, and deferred to the Council's assessment of whether it was necessary to harmonise in order to improve the existing level of health and safety for workers. Once this need was established, the necessity for EU action was a given.²⁵ In other cases, the Court has adopted a very hands-off approach to subsidiarity as well.²⁶ A recent example can be found in the *Vodafone* case, where the Court held that the Commission had implicitly satisfied the subsidiarity requirement by introducing a common approach.²⁷

The Courts have reviewed consistently whether the duty to give reasons for the exercise of a shared competence has been met.²⁸ The substantive criteria on when the EU institutions can take action – if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and if the objective could be better achieved by the EU – are harder to adjudicate.²⁹ The Court can hardly be blamed for its cautious approach. According to Goudappel, the application of vague notions like 'sufficiently achieved,' 'better achieved' and 'scale of effects' require a subjective weighing of the circumstances that a Court cannot execute, because it would require the expression of a political opinion.³⁰ Constantin argues that it is hard to define clear and strict criteria for implementing subsidiarity on the basis of the guidelines in the Amsterdam Protocol.³¹ Because of all this, the role of the principle of subsidiarity as a political principle and a tool to structure debate has been emphasised.³² The question of whether power is best exercised at the EU or the Member State level is seen primarily as a political one, and the usefulness of subsidiarity as a legal principle is debated.³³ The Lisbon Treaty might change the Courts' reluctance to review compliance with the substantive standards inherent in the principle of subsidiarity: Member States, now at the instigation of their national parliaments, as well as the Committee of the Regions have explicitly been given the possibility to challenge the subsidiarity of a measure before the Court. The Court is obliged to give a ruling on the issue. A purely procedural review would significantly detract from the usefulness of giving this power to the Member States and the COR, and would therefore be undesirable.³⁴ Goudappel acknowledges that a potential effect of the changes with regard to subsidiarity in the Lisbon Treaty and the new protocol is the growing involvement of the Court. The political concept of subsidiarity could transform into a legal concept.³⁵ Likewise, Constantin holds that 'the effect of the new framework on subsidiarity will depend at last resort on the stance taken by the ECJ as regards the legal review of this principle.'³⁶

21 Constantin, *supra* note 1, p. 161.

22 Goudappel, *supra* note 18, p. 2.

23 Goudappel, *supra* note 18, p. 3 ; Ritzer et al., *supra* note 2, p. 740.

24 Case C-84/94, *Directive Concerning Working Time*, [1996] ECR I-5755.

25 *Ibid.*, Para. 47.

26 Case C-491/01, *Ex parte British American Tobacco*, [2002] ECR I-11453; Case C-377/98, *Netherlands v European Parliament and Council*, [2001] ECR I-7079, Para. 33. See for a review of the case law A. Biondi, 'Subsidiarity in the Courtroom,' in A. Biondi et al. (eds.), *EU Law after Lisbon*, 2012, pp. 213-227.

27 Case C-58/08, *Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform*, [2010] ECR I-4999.

28 Ritzer et al., *supra* note 2, p. 241; Constantin, *supra* note 1, p. 163: 'it usually restricts itself to checking whether motivation has been provided within the preamble of the legal acts adopted'.

29 Ritzer et al., *supra* note 2, p. 739.

30 Goudappel, *supra* note 18, p. 4.

31 Constantin, *supra* note 1, p. 157.

32 Goudappel, *supra* note 18, p. 5 ; Constantin, *supra* note 1, p. 152.

33 Constantin, *supra* note 1, p. 157.

34 See also Biondi, *supra* note 26, p. 214.

35 Goudappel, *supra* note 18, p. 10. She deems this development undesirable, however.

36 Constantin, *supra* note 1, p. 166.

It is true that EU law gives little guidance to help in a substantive interpretation of the principle of subsidiarity. The Treaty merely holds in Article 5(3) TEU that 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. For some policy fields, the Treaty itself provides guidance on what kind of EU interference is required. Supporting, coordinating and supplementing measures are covered by Article 2(5) TFEU. These can be understood as a sub-category of shared competences.³⁷ In terms of the division of competences, the Treaty seems to assume that EU action in the fields covered in this article (the protection and improvement of human health; industry; culture; tourism; education; vocational training, youth and sport; civil protection; and administrative cooperation) can be relatively light-handed. For other policy fields, the Treaty provides no such help, though. Earlier, the Protocol on the application of the principles of subsidiarity and proportionality to the Amsterdam Treaty gave some guidance on the interpretation of the principle of subsidiarity. In particular, it clarified what it means for local, regional and national authorities not to be able to achieve their objectives ‘sufficiently.’ However, the Amsterdam Protocol has been replaced by a new protocol to the Treaty of Lisbon, which foregoes substantive guidance and favours a more procedural approach.³⁸ We can assume, though, that the criteria from the old protocol are still valid, since the new protocol does not aim to affect the *acquis* developed so far.³⁹ According to Article 5 of the Amsterdam Protocol, for Community action to be justified, first, the objectives of the proposed action cannot be sufficiently achieved by Member States’ action in the framework of their national constitutional system, and second, can be better achieved by action on the part of the Community.⁴⁰ A number of criteria must be taken into account when making this assessment: the issue under consideration has transnational aspects which cannot be satisfactorily regulated by actions by Member States; actions by Member States alone or a lack of Community action would conflict with the requirements of the Treaty (such as the need to correct a distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States’ interests; and 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. These criteria may not look like much. It is not easy to assess when they are met. Nevertheless, they can be substantiated further using insights from governance and economic theory. This does not mean that political considerations no longer have any importance – I merely propose some legal boundaries that can steer the political debate. Even if the Court refrains from real substantial review, and keeps reviewing whether the duty to give reasons as regards the principle of subsidiarity has been complied with, it is useful to give some pointers on how a robust argument that EU interference is needed should look.

6. Elaborating substantive subsidiarity criteria

According to the principle of subsidiarity, as elaborated in the Amsterdam Protocol, EU action can be justified if Member States are unable to solve problems on their own. Hence, it is important to look at what we can say in general about problems that the Member States cannot solve: what sort of issues pose problems, and under what conditions? In addition, we must address in general terms the EU’s capacity to do better.

First, we must look at the aims of the Union as included in Article 3 TEU.⁴¹ The EU institutions can only act to realise those goals, no others. If it would be otherwise, what is left of the Member States’

37 Weber, *supra* note 3, p. 320.

38 *Ibid.*, p. 315.

39 Ritzer et al., *supra* note 2, p. 749.

40 *Ibid.*, p. 738.

41 ‘1. The Union’s aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social

ability to decide on their own policy goals and agendas would be illusory. It is wise to remember that some of these goals are intermediate values, such as the creation of the internal market. They are included because they are believed to contribute, generally speaking, to the realisation of ultimate values like peace in Europe and the welfare of EU citizens, and it is believed that the Member States are unable to fully use these instruments without EU interference. However, we must keep in mind what the ultimate goal is. A single European market, for example, is believed to contribute to the welfare of EU citizens, and for this reason, it has gained enormous weight as a value in EU law and in political discourse. Arguably, though, the EU should only aim to realise a single European market to the extent it can do so to contribute to the welfare of EU citizens. The assumption that EU efforts to promote the internal market lead to an increase in welfare should be rebuttable. In those cases where it does not, because the arguments in favour of subsidiarity carry a lot of weight (EU policy is not effective, because it is not enforceable, or diverging local values conflict with efficiency considerations), the EU should practice restraint. Although the EU can legitimately use its competences to strive for a unified market if the Member States cannot succeed in establishing one by themselves (and we will see below that it is very unlikely that they can), it should only do this to the extent that its efforts will contribute to the welfare of EU citizens.

Second, we must assess when Member States are unable to solve these issues themselves, even though it would benefit them to do so. Two reasons for such inability come to mind: first, Member States may be faced with collective action problems. The creation of a single European market arguably requires strong interference, because Member States have constant incentives to undermine it, even when they agree on its desirability. The danger of the discrimination of non-nationals always looms over the European project, even though it is ultimately not in the interest of Member States to do so. This is known as the ‘beggar thy neighbour’ approach, where states try to increase their own economic performance at the expense of their neighbours. Economic analyses show that this strategy will eventually leave everybody worse off.⁴² Fortunately, this behaviour can be prevented by an external authority with the power to ensure that everybody acts in the collective best interest.⁴³ The risk of this kind of behaviour provides a strong argument for the exercise of power on the EU level. With regard to state aid, Vedder says: ‘The very nature of this field, so closely related to economic growth, thus involves a risk of abuse by the Member States to the advantage of their own economies. This situation, which is best described as regulatory competition, thus requires an exclusive competence, as any other division of competences would entail the risk of national competition rules that would distort competition in the internal market.’⁴⁴

A related problem is how to deal with the management of shared resources and public goods, such as clean air, rivers that cross boundaries between Member States and environmental quality. Such goods are consistently under-produced by the market. It is difficult or impossible to prevent people from using them, and thus it is hard to make a profit if you produce them.⁴⁵ A common solution is to have the state produce these goods, and use tax money to pay for them.⁴⁶ This can be done at Member State level, and in the absence of an internal market, this problem would only be relevant for resources that are shared by Member States. For these kinds of resources, states must coordinate who will pay for the production

exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.’

42 J. Haucap & U. Schwalbe, *Economic Principles of State Aid Control*, 2011, pp. 4-5.

43 *Ibid.*, p. 5.

44 H. Vedder, ‘The Formalities and Substance of EU External Competence on Environmental Protection and Climate Change: Stuck Between Climate Change and Competitiveness’, in E. Morgera (ed.) *The External Environmental Policy of the European Union EU and International Law Perspectives*, 2012, pp. 11-32, p. 16.

45 R. Cooter & T. Ulen, *Law & Economics*, 6th ed., 2012, p. 40.

46 *Ibid.*, p. 41. See also W.B.T. Mock, ‘On the Centrality of Information Law: a Rational Choice Discussion of Information Law and Transparency’, 1999 *Journal of Computer & Information Law* XVII, pp. 1069-1100, p. 1087.

of a public good that can be consumed by both its constituents. But because of the internal market, the problem is exacerbated. Measures to protect public goods can become either a disadvantage to the nationals of the regulating state who must comply with norms that their competitors can ignore, or, if foreign undertakings must comply with the norms to gain access to the market, a prohibited trade barrier. In the first case, the existence of the internal market creates a disincentive for Member States to regulate within their borders. The creation of the internal market thus creates a need for EU interference. In the second case, EU law prohibits Member States from regulating the issue themselves. The internal market creates a legal incapacity to deal with the problem on the national level. Again, the internal market creates a need for EU interference. The same can be said for certain social objectives, like equal pay for men and women. However, Member States may still differ on the importance they attach to preserving the resource or achieving social justice. Thus, Member States whose citizens attach importance to environmental quality or gender equality will push for EU regulation – after all, the very existence of the EU has made it difficult or impossible to regulate nationally – whereas Member States which do not care will advocate against it (e.g. Germany and Poland on environmental regulation⁴⁷). Both are right: the Member States in favour of EU action *need* EU action to ensure that policy aims are achieved, whereas the Member States who are against EU action have no such need. This is the political aspect of subsidiarity which so many authors refer to, but it is in fact caused by a very perversion of the principle: Member States have lost the ability to take action to realise their own policy goals, those that they do not necessarily agree upon, because of their interrelatedness with the internal market.⁴⁸ This is decidedly different from the beggar thy neighbour problem, where the parties agree on the ultimate aim, and all suffer from their failure to achieve it without outside help. Vedder explains this issue in the context of climate change. He argues that there is a close relation between climate change and competitiveness which result in the external competence of the EU in the field of climate change being a de facto exclusive competence, even though it is officially shared: ‘The enormous impact of climate change policies and the far-going economic and energy interdependence of the Member States result in the requirement to no longer deal with climate change as a purely environmental problem.’⁴⁹ Even apparently local problems can therefore justify EU action: some Member States, for example, expressed doubts about whether soil protection required action at the EU level. Soil is after all by its very nature stationary, and will rarely have cross-border relevance. The Commission referred to ‘different costs arising from different national standards on soil protection and the resulting distortion of competition conditions.’⁵⁰ This line of reasoning can only lead to the conclusion that EU interference is always justifiable: no matter what a Member State wants to regulate, if its regulation targets economic actors, it will have an impact on the internal market.

Apart from collective action problems, Member States may be less effective than the EU because of issues of scale. They may lack oversight because they do not have information on other countries, or it may be simply ineffective to use administrative capacity to figure out the same complex issues 27 times. This is the scale justification the Amsterdam Protocol refers to. ‘EU action to deal with a global environmental problem such as climate change will pass the subsidiarity test easily,’ explains Vedder.⁵¹

Third, we must assess whether the EU is able to address these issues any better. Can EU institutions succeed where Member States fail? This is not a given, not even if it is clear that Member States have failed to address an issue. As we have discussed above, there are practical considerations that make the exercise of power at the local level the more obvious choice. The local exercise of power is more likely to take account of existing values, can rely on local knowledge, and is therefore easier to enforce. The EU institutions lack knowledge of local circumstances and local values, and will often be ill-positioned to assess what is needed for their policies to be effective. Thus, for those goals the realisation of which relies on local knowledge, or conflict with local values, EU action may not be very helpful. This issue is somewhat ameliorated by the preference for directives over regulations, and for framework directives

47 Vedder, *supra* note 44, pp. 28-29.

48 It is not always an absolute prohibition, but now the Member States need a justification to act, not just the EU.

49 Vedder, *supra* note 44, abstract at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009251>, last visited 24 November 2014.

50 *Ibid.*, p. 19, Commission Proposal for a directive establishing a framework for the protection of the soil and amending Directive 2004/35/EC, COM(2006) 232 final, 22 September 2006, p. 6.

51 Vedder, *supra* note 44, p. 18.

over detailed regulation. Such instruments define the policy goals that need to be established, but leave the choice of means to the Member States, to a varying extent.

We have seen that the arguments in favour of the local exercise of power apply to enforcement as well. Nevertheless, several contributors to this special issue observe a trend towards Europeanisation in enforcement.⁵² The differences between the Member States are increasingly seen as problematic, especially in cross-border situations, and are a cause for EU interference. Apparently, the disadvantages of divergent national regimes – a lack of equality and an obstacle for economic actors to enter foreign markets, as well as the Member States' ability to tailor their national regimes to realise their own policy goals rather than those of the EU – are increasingly thought to outweigh the advantages of national procedural autonomy, leading to a desire to harmonise. It is important to note, though, that an appeal to the advantages of harmonisation – more competition and thus a more efficient internal market – is in itself insufficient to justify greater EU involvement in enforcement. The advantages of harmonisation must be balanced against the disadvantages of having less procedural autonomy, which may detract from the effectiveness of enforcement.

Ironically, EU involvement itself may cause problems that can only be solved on the EU level. EU competences become self-propagating. This special issue of the *Utrecht Law Review* contains several examples of this. Van Rijsbergen shows that 'soft' harmonisation measures for enforcement lead to uncertainties regarding applicability, a lack of clarity regarding status and differences in 'bindingness' between Member States.⁵³ These soft harmonisation measures cause problems of their own that may then provide the EU institutions with new arguments for their involvement. Similarly, Wissink, Duijkersloot & Widdershoven show that the Europeanisation of enforcement leads to a host of problems with regard to judicial protection.⁵⁴ Further harmonisation of legal protection seems likely. Even the successful realisation of the internal market can be a cause for subsequent additional action at the EU level. In markets that are still divided, the principle of subsidiarity weighs heavily. A good example is the market for electronic communication services, which despite decades of effort is still not a single European market, but rather a collection of 27 national markets.⁵⁵ Cross-border interactions between consumers and service providers is relatively rare, and we see a large degree of discretion awarded to the Member States in regulating their national markets. Contrast this with the market for air transport, where cross-border contracts are common, and consumer protection is fully harmonised as well: the completion of the internal market provides the very arguments for the EU regulation of non-economic objectives as well.⁵⁶ The prevalence of cross-border activity is an important argument for EU involvement in enforcement as well, as shown in the contributions of Van den Broek and Luchtman & Vervaele in this issue.⁵⁷ The latter also show that although for now the EU practises restraint, this leads to some problems that call for solutions at the EU level. Agencies are faced with legal uncertainty about their powers, and legal subjects are confronted with disadvantages as well: '(...) the national empowerment of European Agencies is also problematic from the point of view of the addressees of the enforcement in criminal matters: witnesses, victims, third parties, and certainly also defendants. Their civil rights and liberties depend on discretionary choices in a regulatory patchwork, which can end up in forum shopping and a run to the bottom of the lowest protective denominator of safeguards.'⁵⁸ It is the very prevention of this race to the bottom that is one of the classical arguments for EU interference.

52 See the contributions of Scholten & Ottow and Wissink, Duijkersloot & Widdershoven in this special issue: M. Scholten & A. Ottow, 'Institutional Design of Enforcement in the EU: The Case of Financial Markets', 2014 *Utrecht Law Review* 10, no. 5, pp. 80-91; L. Wissink et al., 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection', 2014 *Utrecht Law Review* 10, no. 5, pp. 92-115.

53 M. van Rijsbergen, 'On the Enforceability of EU Agencies' Soft Law at the National Level: The Case of the European Securities and Markets Authority', 2014 *Utrecht Law Review* 10, no. 5, pp. 116-131.

54 Wissink et al., *supra* note 52.

55 H. Ungerer, 'Back to the roots: the 1987 telecom green paper 25 years after – has European telecom liberalization fulfilled its promise for Europe in the internet age?', 2013 *info* 15, no. 2, pp. 14-24, pp. 15-16, p. 18.

56 See in greater detail A. Buijze, I. de Koning and L. Senden, 'Efficiency or justice? Compensating for power imbalances under EU telecommunications, air transport and gender equality law,' in A. van den Brink, M. Luchtman and M. Scholten (eds.), 2014 (forthcoming).

57 Van de Broek, *supra* note 13; M. Luchtman & J. Vervaele, 'European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)', 2014 *Utrecht Law Review* 10, no. 5, pp. 132-150.

58 Luchtman & Vervaele, *supra* note 57, p. 149.

7. Limited rights and environmental regulation

We will look at two areas of shared competence to see how the principle of subsidiarity plays out in practice. On the one hand, this shows how the substantive criteria above play a role in the division of competences between the EU and national levels. On the other hand, these cases illustrate why even the conscientious application of substantive criteria does not resolve the problems surrounding this division completely. The first is the allocation of limited rights, such as public contracts, telecom frequencies, and emission rights. These rights are characterised by the fact that a limited number of licences, authorisations or contracts are available, and that the demand is larger than the supply.⁵⁹ The second is environmental regulation.

Regulating the allocation of limited rights could contribute to the realisation of the Union's goals. Limited rights represent economic value, and their allocation provides a choice opportunity for national and local authorities to favour their own nationals. Because the value that these rights represent can be quite high, their allocation has real market distorting potential. The beggar thy neighbour approach is a real temptation. If this is not prevented, the subsequent market distortions will lead to an overall decrease in efficiency and hence to a drop in economic wealth for EU citizens. Thus, EU law is relevant for the division of scarce rights because it can ensure the efficient allocation of resources through the internal market.⁶⁰

There are arguments against European action as well. First, allocation procedures can be an important policy tool for Member States. There are many legitimate goals that they can achieve, irrespective of their consequences for the internal market.⁶¹ Goals of the kind discussed above, where Member States can differ on their assessment of how important these goals are, or even if they are goals at all. Examples are the use of procurement procedures to stimulate environmentally friendly production or corporate social responsibility. Second, the consequences for the realisation of both national and EU policy goals of a chosen method of allocation will vary, depending on the circumstances on the relevant market. The Member States' authorities are much better positioned to assess what the proper allocation procedure is to realise all policy goals involved. Thus, Member States are free to design their own allocation procedures under, for example, the Authorisation Directive, although they have to comply with some general requirements: procedures must be transparent, objective and proportional.⁶²

In practice, there is limited regulation on the allocation of limited rights. Most legislation on the issue establishes the principles that allocation procedures have to comply with, and sometimes the goals that the allocation must aim to realise, but the design of the allocation procedure is left to Member State authorities.⁶³ In the procurement directives, which are by far the most detailed pieces of legislation on this issue, the EU has outlined several procedures, but even in this field it is up to the Member State authorities to assess their own needs and the prevalent market conditions, and to select the appropriate procedure accordingly.

It is difficult to determine to what extent EU action will result in a more positive outcome than Member State action. However, this does not mean that the EU is willing to relinquish control. It cannot outperform the Member States in determining what allocation procedure is best suited to help realise Union goals in all circumstances, but neither is it willing to trust that Member States will comply with the principles it has enacted. Thus, several directives impose far-reaching procedural requirements on Member State authorities to ensure that they execute them in good faith.⁶⁴ This is most obvious in public procurement, where contracting authorities are obliged to draw up a report for every agreement that they

59 F.J. van Ommeren, *Schaarse vergunningen. De verdeling van schaarse vergunningen als onderdeel van het algemene bestuursrecht* (inaugural speech, VU Amsterdam), 2004, p. 2.

60 See also A. Buijze, *The Principle of Transparency in EU Law*, 2013, pp. 147, 210-211.

61 C.J. Wolswinkel, *De verdeling van schaarse publiekrechtelijke rechten. Op zoek naar algemene regels van verdelingsrecht*, 2013, pp. 196-199.

62 Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, OJ L 108, 24.4.2002, pp. 21-32.

63 Buijze, *supra* note 60, pp. 207-212.

64 *Ibid.*, pp. 221-216.

conclude. These reports must be sent to the Commission if it so requests.⁶⁵ In addition, Member States are obliged to draft a statistical report addressing their procurement contracts during the preceding year and to send it to the Commission.⁶⁶

This inclination towards proceduralisation is easy enough to understand, but from the perspective of subsidiarity it can be questioned. Although it is not unlikely that when left to their own devices Member States will use allocation procedures to benefit their own nationals, it is unsure how much benefit additional EU control brings. The EU has to allow the Member States to use allocation procedures to realise their legitimate policy goals as long as this is in compliance with the free movement rules and the principle of non-discrimination, but it is difficult to see from a distance which procedures legitimately aim to achieve such policy goals, and which procedures use them as a pretext to interfere with the market. The discretion awarded to the Member States, as required based on the principle of subsidiarity, might at the same time make it more likely that EU aims are realised (because of their knowledge of specific circumstances), and also less likely (because their tendency to interpret what legislation there is in conformity with their own values and interests). Procedural controls might not be effective in ameliorating this tension, and can be seen as problematic in the light of the principle of subsidiarity.

The same tendency towards proceduralisation can be seen in environmental law. According to Article 3(3) TEU the Union works for a high level of protection and an improvement of the quality of the environment. The threat of a tragedy of the commons justifies EU interference in the management of shared resources, like the regulation on CO₂ emissions, air quality and transboundary river basins. However, EU regulation seems to go above and beyond this goal, embracing the political need for additional EU action to promote a high level of protection of the environment. As said, it is hard to see why the EU would need to come to the assistance of the Member States for this without taking into account the relation of environmental measures and competition. By conferring this power upon the EU, environmentally conscious Member States prevent that environmental protection has a negative impact upon their economic position. Thus, EU environmental regulation should aim to protect and improve environmental quality without distorting the market. It must reconcile environmental and economic interests.

Unfortunately, this is notoriously difficult. Again, local actors are in a much better position to assess local environmental conditions and what is needed to protect or improve them.⁶⁷ This is reflected in EU environmental regulation, where we see a tendency to set out policy aims and leave it up to the Member States to determine how to realise them.⁶⁸ In fact, the discretion awarded to the Member States is even larger than with the allocation of limited authorisation, because it is occasionally also left to the Member States to contextualise the standard that must be complied with. The EU might determine that Member States should strive to achieve the best water quality achievable, but leave it to the Member States to set the exact standard.⁶⁹

And again, Member States might differ in their level of commitment to the environment. Thus, the standard set by one Member State may be very different from the one another would set under the same circumstances. The level of environmental protection may in fact be lower than if the EU took a more centralised approach.⁷⁰ From the perspective of subsidiarity, this is not problematic. Yet, we see again that the Union tries to assert control through procedural safeguards, to little avail.⁷¹ Again, the variety in views and values between the Member States in combination with deference to the principle

65 Art. 43 Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (the Public Sector Directive), OJ L 134, 30.4.2004, pp. 114-240.

66 Art. 76 Public Sector Directive.

67 W. Salet & J. de Vries, *The Innovative Potential of Contextualising Legal Norms in Processes of Urban Governance: The Case of Sustainable Area Development*, CONTEXT Report 1, 2013.

68 J. Scott, 'Flexibility, "Proceduralization", and Environmental Governance in the EU', in G.D. De Búrca & J. Scott (eds.), *Constitutional change in the EU*, 2010, pp. 259-280.

69 Water quality standards are determined in part by the Member States based on Annex V to the Water Framework Directive.

70 S. van Holten & H.F.M.W. van Rijswijk, 'The Consequences of a Governance Approach in European Environmental Directives for Flexibility, Effectiveness and Legitimacy', in M. Peeters & R. Uylenburg (eds.), *EU Environmental Legislation: Legal Perspectives on Regulatory Strategies*, 2014, pp. 13-47.

71 Scott, *supra* note 68.

of subsidiarity in the sense that it is left to the Member States to assess which instruments will be most effective, taking into account national and local circumstances, leads to overregulation, the effectiveness of which is doubtful at best.⁷²

8. Conclusions

The exploration of EU competences and arguments for EU competences above has shed light on a number of issues, some of them helpful for elaborating upon the principle of subsidiarity, some of them clarifying why it is so difficult to give legal content to the said principle. We have seen that EU action is justified if Member States fail to resolve a problem without EU interference. The criteria developed in the Amsterdam Protocol regarding the presence of transnational aspects, the negative effects of non-interference on the realization of EU goals, and issues of scale, can be further substantiated using insights from economic and governance theory. Thus, the presence of collective action problems and the attractiveness of the beggar thy neighbour approach provide more refined arguments for EU interference. Although these theories can be helpful, the discussion in the previous section shows that they do not resolve all issues. A complicating issue is the manner in which policy objectives become intertwined. EU goals tend to be formulated in a broad sense, and are open to interpretation. This means, on the one hand, that there are ample opportunities for the EU institutions to justify taking action, but also for the Member States to sustain different interpretations of the aims of EU regulation. There is a certain tension between allowing the Member States to do what they do best and the single European market. Measures that address policy problems that the Member States could solve on their own, and even problems that only the Member States can solve, will often affect the internal market, which is a cause for EU interference. This prevents the straightforward application of the principle of subsidiarity: since the objectives of regulation become intertwined, it becomes difficult to argue convincingly whether Member States fail to resolve a problem, and whether EU institutions would fare better. In fact, when internal market objectives are intertwined with other policy objectives, the discussion about subsidiarity confuses another dilemma: if Member States are better able to regulate an issue, but this may have a detrimental effect on the internal market, this gives the EU a motive to harmonise protective measures, apparently even if harmonisation is less effective. There is an implied balancing of policy goals here, where the internal market defeats the other policy goal. When harmonizing protective measures based on internal market competence, this issue should be addressed explicitly. In particular, since the internal market is merely an intermediate goal, it should be shown that its promotion through yet another legislative measure contributes more to the welfare of EU citizens than allowing the Member States to adopt those measures best suited to their national circumstances. This ties in nicely with the concept of ‘market fatigue’ discussed in the contribution of Janssen.⁷³ The belief that introducing competition into markets is beneficial is not as commonly accepted, which requires proposals for market integration and competition to be better reasoned.

As argued above, the debate about regulation and enforcement must be seen in the context of the policy cycle as a whole. That raises the question of who should determine the policy objectives that are to be realised. Is it the Member States that collectively decide what policy objectives they want to realise, and do EU institutions then take over if they are better able to realise these objectives? Or is it the EU level that decides on policy objectives and then determines whether the Member States can be trusted to design and implement the measures needed to realise them? If the principle of subsidiarity is to be understood as a broad principle on which the division of competence in the shared EU legal order is based, it must be the first option: Member States should be free to decide on policy objectives. That would mean that the EU should practice restraint even if it feels that the Member States are underperforming. After all, subsidiarity then also means that the Member States have the competence to try to achieve their own policy goals, and to disagree on what policy goals they want to aim for in their own jurisdictions. That does not seem to reflect EU law as it stands: with harmonisation being an objective that justifies EU interference, each and every policy field is up for grabs. Again, when giving reasons for

⁷² *Ibid.*, p. 273; Van Holten & Van Rijswick, *supra* note 70.

⁷³ Janssen, *supra* note 12.

the exercise of a shared competence, the EU institutions should address this issue: why is harmonisation so important that it justifies removing Member States' ability to have divergent national policies? The mere fact that harmonisation has a positive impact on the market seems insufficient. The alternative is to further harmonise the policy formulation and design stage, and to take away from Member States the possibility to disagree on policy aims and standards. An optimal realisation of the internal market will require the harmonisation of all other policy areas that can affect that market.

Is all hope lost for a more substantive approach of the principle of subsidiarity? I would argue it is not. A need for EU intervention suggests the existence of a collective action problem, a potential tragedy of the commons, or a difference in values where one Member State's social, environmental or other policies will lead to distortions in the market, leading to a call for EU action to impose those same values on other Member States. The latter 'need' is political, but the others can be objectified to some extent. When reviewing compliance with the principle of subsidiarity, the Court can at least review whether these issues have received sufficient attention. However, their presence is not a sufficient argument for the exercise of shared competence: the arguments for preserving Member State competence have to be addressed specifically, and balanced against the gains of EU intervention.

Regardless of how the principle of subsidiarity is interpreted and elaborated, we can observe a strong trend towards Europeanisation. This does not happen because subsidiarity is not taken seriously (or at least not exclusively), but because the success of the European project provides sound arguments for more EU involvement. A clearer elaboration of the principle of subsidiarity may slow this process, but it is unlikely to stop it. ¶