Subsidiarity in EU law

English Summary / Abstract

The upcoming 30th anniversary of the Maastricht treaty is an opportunity to celebrate but also to critically evaluate the overall success of this significant political step towards deeper European integration. The Maastricht treaty incorporated the Principle of Subsidiarity as a general principle of law into the EU legal system. The Principle of Subsidiarity was intended as a safeguard against a creeping centralization and federalization of the alliance and a means of regulating the exercise of the Union's non-exclusive powers. Thirty years of experience is a good time to evaluate the success and fulfillment of that mission. This is all the more pertinent in 2021 as the EU finds itself on the threshold of a new public debate about the future of Europe.

The Principle of Subsidiarity underwent several textual changes on the way to being anchored in the Treaties. Despite these changes the case law of the ECJ has remained for unclear reasons underdeveloped in comparison with other issues and areas of judicial review. The original emphasis placed on a judicial review of the fulfillment of substantial conditions and ex-post control of the principle has lately shifted to the ex-ante procedural one. Unfortunately, even this change did not bring the expected results.

The aim of this work is to get as close as possible to the very core of the issue and to offer possible answers to five questions that are of uppermost interest to lawyers. These relate mainly to legal and technical issues. The aim is to explain the failure of the expected role of judicial review in monitoring the application of the principle of subsidiarity.

My ambition is therefore to identify, as precisely as possible, the practical weakness of the principle, to decide whether this weakness stands in its definition, substance or interaction with other external factors. The answers should cast light on the main reasons for the failure of the role of judicial review – i.e. if there are objective difficulties or politically motivated reasons on the part of the ECJ in its refusal to implement a more intensive approach.

The thesis is divided into three main segments (introduction, main analytical part, conclusions) with a total of eight consecutive chapters: 1) Introduction, 2) Analytical framework, 3) Historical context, 4) Legal theory, 5) Case Law, 6) Legislative framework, 7) National parliamentary scrutiny, 8) Conclusions. The main legal analytical part is represented by chapters 5, 6,7 and partly by chapters 3 and 4.

The objective of the introductory part is to present the relevance of the topic and to introduce the main sources.

The second part presents the analytical framework of the theses and defines its main tools, concepts and methods used in this work.

The historical study of the principle of subsidiarity in the third chapter offers a theoretical explanation for the systemic failure of all normative forms of the original philosophical idea of subsidiarity. We focus on the intuitive historical understanding of the principle of subsidiarity and try to answer the question whether we are still dealing with the original philosophical idea of subsidiarity or not.

The fourth chapter of my thesis is a theoretical one. It introduces the main scientific findings on the principle of subsidiarity. The purpose of this section is not to answer questions, but to present scientific tools, i.e. findings, theories and scientific opinions on subsidiarity that are to be used and verified in this work. This chapter represents a supporting part of the thesis. This is the reason why there are no research questions in this part.

The fifth chapter is the main case law analysis part of this work. In this part I draw essential conclusions on the ECJ practice of judicial review of the principle of subsidiarity. This part offers theoretical explanations for the failure of the systematic control of the principle of subsidiarity by the court on the basis of empirical experience drawn from the judgements of the ECJ and from the opinions of advocate generals. The aim is to identify the key factors and critical moments in the judicial review by the ECJ. The findings point to a very unfortunate situation that stems from a combination of the principle of subsidiarity (Art. 5 TEU) and harmonization of internal market (Art.114 TEU). The theoretical approach was applied on the empirical case studies of five relevant cases. I have worked in a relatively extensive way with technically well elaborated argumentations by advocate generals. Their opinions offer more detailed views on the legal issue in comparison with the fairly brief descriptions in the final verdicts of the Court.

The sixth chapter focuses on gradual changes in the legislative set up of the principle of subsidiarity in the Treaties. It compares the advantages and disadvantages. The findings of this chapter also serve to verify our previous findings in chapter five on judicial review. It means that the second goal of the chapter is to show the differences between the legislative anchoring of the principle of subsidiarity and the way it is applied by the Court (ECJ). The findings show that the ECJ apparently interprets the Art. 5 (3) TEU and the Protocol n.2 in a broad sense in favor of the EU legislator. There is only a formal review of the fulfilment of the legislator duties. This chapter offers an explanation on the reserved approach of the ECJ on the basis of a broader perception of the presence of the principle of subsidiarity and its interaction between law and politics. The chapter accumulates the arguments to answers the third research question.

The seventh chapter focuses on the new role of national Parliaments (NPs) in scrutinizing the control of the principle of subsidiarity and predicts the future development of the principle. This chapter evaluates the efficiency of the EWS[1] on a one case study (Workers Posting Directive) and on a tabular overview of the summary of the EU activities in this field in the last twelve years. The chapter formulates the main arguments to answers both question n.4 (EWS' effectiveness) and n.5 (level of protection achieved and expectations of future development). I have drawn the main conclusions of this chapter from my own tabular overview and from the conclusions of the Working Group on Subsidiarity of Juncker's Commission (2018).

In the final summary, we find answers to all five research questions. These represent a summary of the most relevant conclusions from each particular chapter. There is a possibility to return to the conclusions of previous chapters to check the technical details and justifications for the presented conclusions of this last chapter.

The main conclusion is that the level of control over the principle of subsidiarity is insufficient even after two attempts in Amsterdam Treaty and in Lisbon Treaty to make it more efficient. My findings firstly reveal a strong incoherence between the abstract definition of the principle of subsidiarity and the accuracy generally required by the Court for its legal assessment.

[1] EWS – Early Warning System

Secondly, they reveal a complicated relation between the political and legal dimension of the principle of subsidiarity. Following the evaluation of the two attempts that both proved futile (ECJ control and NPs control) there is still a long way to go to ensure that the principle of subsidiarity is truly effective. An effective solution will be hard to achieve without a change in the Treaties. The final result will depend to a great extent on the political will of the member states to get involved in helping to ensure real judicial control of the principle of subsidiarity. We have not seen such an approach so far. The way how the principle of subsidiarity was defended by the ECJ speaks for itself and makes us to think more about pessimistic legal doctrines on principle of subsidiarity expressed by A. G. Toth or G. Davies. There is only one chance how to change this negative trend. This can be done by a strong expression of political will. This will have to confirm the intention to get involve in much stronger judicial control and to bring the EU law making process as close as possible to citizens. We will see what happens later in 2022.