

The Principle of Subsidiarity and its Enforcement in the EU Legal Order

The Role of National Parliaments in the
Early Warning System

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Introduction

THIS BOOK CRITICALLY reviews and evaluates the European Union's (EU) experience with the principle of subsidiarity and its policing by national parliaments under the Early Warning System (EWS). A landmark reform launched with the Lisbon Treaty (2009), the EWS was seen as an answer to the EU's democratic deficit and 'competence creep' and an attempt to strengthen perceived federal and democratic safeguards within the EU.¹ This book presents an analysis of the principle of subsidiarity through the lens of the EWS and the role that the newly empowered national parliaments have played within in the EU on the basis of this system.

The Treaty on the European Union (TEU) enshrines the principle of subsidiarity that governs the exercise of competence, and was first introduced in the Maastricht Treaty (1993). The subsidiarity principle requires that

the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.²

Under the EWS, national parliaments, as arguably the most democratically legitimated national institutions, can assess any draft legislative proposal submitted by the Commission for its compatibility with the subsidiarity principle and can issue a reasoned opinion to indicate a violation. The Lisbon Treaty thereby offered a new avenue for the policing of the subsidiarity principle, complementing its judicial enforcement by the Court of Justice of the European Union (the Court/CJEU).

The main questions this book addresses are rooted in the practice of the subsidiarity review mechanism as observed thus far, especially, but not limited to, the three 'yellow cards' that national parliaments had triggered by the end of 2016. How is the subsidiarity principle understood under the Lisbon Treaty? What is the role of national parliaments in its policing? Why do national parliaments participate in the EWS, and why do they go beyond the narrow role granted by Protocol No 2? And what does this say about the purpose of the EWS? Finally, how does the EWS contribute to limiting and reversing the 'competence creep' and improving the EU's democratic credentials?

These questions are posed within the framework provided by a series of recent and ongoing challenges to the project of European integration that have taken place since the entry into force of the Lisbon Treaty. Those challenges include first and foremost the eurozone debt crisis, which began in 2009 on the heels of the global financial crisis, and which peaked in 2011 and 2012 with profound consequences for EU economies and political systems. The crisis arguably fuelled the rise of populist movements often sceptical or openly hostile to the

¹ R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press, 2009) 257.

² Art 5(3) TEU.

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European Project in many Member States including France (Front National) and Germany, where the right-wing party, Alternative für Deutschland (AfD), entered Parliament as the third largest party after the 2017 federal elections. In addition, the foundations of the EU as a community of liberal values and the rule of law have been challenged from within, in particular by governments in Poland and Hungary. Finally, on 23 June 2016 the United Kingdom (UK) in a referendum voted to leave the Union. On 29 March 2017, the UK government triggered the EU withdrawal procedure under Article 50 TEU, thereby putting a stop to decades of deeper integration and EU expansion. Keeping in mind the problems currently faced by the EU, this book will hence discuss how can we ‘live with subsidiarity’ without undermining the EU’s ‘capability to function’.³

The key finding of the book is that national parliaments in their active participation in the EWS exercise a broad scrutiny of the subsidiarity principle, which generally includes a check on the competence of the EU to act, the proportionality of the proposal and its political merits. This approach goes significantly beyond the narrow subsidiarity question as to which level of government is best placed to act. The analysis in this book suggests that this approach presents an attempt by the national parliaments to leverage the new tool granted to them by the Lisbon Treaty to increase their influence in the EU legislative procedure across the board.

I. EXISTING SCHOLARSHIP ON THE SUBSIDIARITY PRINCIPLE AND NATIONAL PARLIAMENTS

The book draws upon two streams of research by legal scholars and political scientists. The first is the literature concerning the subsidiarity principle. Since the Maastricht Treaty, scholars extensively contributed to the understanding of subsidiarity and the procedures aiming at making it more operative introduced in subsequent treaties. In particular, Antonio Estella provided a legal and political critique of the subsidiarity principle, 10 years after the entry into force of the Maastricht Treaty, focusing on the role of the Court in its interpretation and application.⁴ One of his key arguments was that the subsidiarity principle failed as a counter-majoritarian instrument binding the EU’s legislation, because of the Court’s concerns about its own legitimacy and its own integration agenda. Specifically, subsidiarity—a principle that could endanger further EU integration—demanded from the Court scrutiny that was political rather than legal in character, and as such, the principle was largely left ignored. The entry into force of the Lisbon Treaty that brought to the forefront the subsidiarity principle has resulted in a number of new studies of the subsidiarity principle, often offering a comparative or global perspective.⁵

The second body of literature that this study builds upon is formed by research on the involvement of national parliaments in EU affairs. Academic interest in national parliaments

³ P Pescatore, ‘Mit der Subsidiarität leben’ in O Due, M Lutter and J Schwarze (eds), *Festschrift für Ulrich Everling* (Baden-Baden, Nomos, 1995) 1080 (own translation).

⁴ A Estella de Noriega, *The EU Principle of Subsidiarity and its Critique* (Oxford, Oxford University Press, 2002).

⁵ See M Evans and A Zimmermann, *Global Perspectives on Subsidiarity*, vol 37 (Dordrecht, Springer, 2014); M Jachtenfuchs and N Krisch, ‘Subsidiarity in Global Governance’ (2016) 79 *Law and Contemporary Problems* 1.

dates back to well before the Lisbon Treaty.⁶ The seminal edited volume of Maurer and Wessels studied the institutional and procedural developments in national parliaments as a response to the challenges of EU integration.⁷ They established a ‘considerable’ change in the legal and institutional aspects over time: the creation of EU affairs committees (EACs); the establishment of the procedure of ‘mandating’ in some Member States; and an early involvement of parliaments in the scrutiny of EU documents. Yet, they also highlighted the only ‘modest’ impact of national parliaments on the real life patterns of access to information and influence, scoring below what the EU Treaties and national provisions offered.⁸ The analysis of real patterns of behaviour of national parliaments led Maurer and Wessels to define four models of parliamentary involvement: first, strong policymakers and ‘national players’; second, ‘potential’ or latent ‘national players’; third, ‘modest policymaking legislatures’; and fourth, ‘slow adapting parliaments.’⁹ O’ Brennan and Raunio confirmed these results in another volume on the topic. In their view, ‘national parliaments have proven that they are capable of institutional adaptation and learning’, and hence they ‘should no longer be simply labelled as losers or victims of integration.’¹⁰ A subsequent volume edited by Tans, Zoethout and Peters sought to identify common elements in the ways in which national parliaments are involved in the EU decision-making process.¹¹ The findings point to a set of shared values: adherence to democratic principles; adherence to the principle of ministerial accountability; a leading role for EACs; and mutual dependence in the executive–legislative relationship. However, practical problems in investing national parliaments as sources of input legitimacy led the authors to suggest other avenues for parliamentary participation, for example, direct accountability of EU institutions to parliaments or the possibility to bring actions before the Court.¹² The Lisbon Treaty reforms strengthened the role of national parliaments in the EU and prompted multiple enquiries into how national parliaments make use of their new powers. Most prominently, the *Palgrave Handbook of National Parliaments and the European Union*, based on a comparative study of all 28 Member State parliaments, proposed five ideal types of parliamentary involvement: ‘policy shaper’; ‘government watchdog’; ‘public forum’; ‘EU expert’; and ‘European player.’¹³ Nevertheless, most

⁶ P Norton (ed), *National Parliaments and the European Union* (London, Frank Cass 1996); A Cygan, *National Parliaments in an Integrated Europe: An Anglo-German Perspective* (The Hague, Kluwer Law International, 2001); P Kiiver, *The National Parliaments in the European Union: A Critical View on EU Constitution-Building*, vol 50 (The Hague, Kluwer Law International, 2006); P Kiiver (ed), *National and Regional Parliaments in the European Constitutional Order* (Groningen, Europa Law Publishing, 2006).

⁷ A Maurer and W Wessels, ‘Major Findings’ in A Maurer and W Wessels (eds), *National Parliaments on their Ways to Europe: Losers or Latecomers?* (Baden-Baden, Nomos, 2001).

⁸ A Maurer and W Wessels, ‘National Parliaments after Amsterdam: From Slow Adapters to National Players’ in A Maurer and W Wessels (eds), *National Parliaments on their Ways to Europe: Losers or Latecomers?* (Baden-Baden, Nomos, 2001) 435.

⁹ *ibid* 461–62.

¹⁰ J O’ Brennan and T Raunio, ‘Introduction: deparliamentarization and European integration’ in J O’ Brennan and T Raunio (eds), *National Parliaments within the Enlarged European Union: from ‘victims’ of integration to competitive actors?* (London, Routledge, 2007) 16.

¹¹ O Tans, ‘Introduction: National Parliaments and the European Union: In Search of Common Ground’ in O Tans, CM Zoethout and J Peters (eds), *National Parliaments and European Democracy: A Bottom-up Approach to European Constitutionalism* (Groningen, Europa Law Publishing, 2007) 4.

¹² O Tans, ‘Conclusion: National Parliaments and the European Union: Coping with the Limits of Democracy’ in O Tans, CM Zoethout and J Peters (eds), *National Parliaments and European Democracy: A Bottom-up Approach to European Constitutionalism* (Groningen, Europa Law Publishing, 2007) 247.

¹³ C Heffler et al (eds), *The Palgrave Handbook of National Parliaments and the European Union* (Basingstoke, Palgrave Macmillan, 2015).

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national parliaments act as ‘government watchdogs’ showing that EU scrutiny is focused on the national level.¹⁴

In the particular area of the EWS, Philipp Kiiver enquired into the procedure and the content of the reasoned opinions issued within the COSAC pilot project between 2004 and 2011, identifying different approaches in parliaments towards the EWS.¹⁵ Kiiver’s research brought out two issues. First, the EWS can be seen as an ‘imperfect’ accountability mechanism: the Commission must justify its measure, but this justification covers the proposal only at an initial stage and the only sanction available is indirect, through opposition in the Council.¹⁶ The accountability within the EWS according to Kiiver is also at least partially a legal one—national parliaments often bring forward legal arguments, normally typical of courts rather than parliaments—which in turn means parliaments are willing to look for new ways to enforce accountability.¹⁷ The motive of accountability through the involvement of national parliaments is also discussed in Adam Cygan’s monograph. According to the latter, ‘national parliaments have a duty to pursue accountability’, which is required for achieving greater EU legitimacy.¹⁸ The EWS arguably does not present an adequate answer, because it does not provide sufficient output legitimacy.¹⁹

Kiiver’s second point builds upon the fact that arguments from national parliaments often have a legal character, although they are likely inherently politically motivated. Kiiver’s idea of national parliaments as a Council of States is based upon the role of the French Conseil d’Etat, which is consulted by the government before a bill is sent to the Parliament.²⁰ Kiiver sees a possibility that a coalition of active chambers, most likely the upper chambers, which are more independent from national executives, will develop and assess the lawfulness and justifications of EU drafts in an advisory rather than a co-legislative manner.²¹ In addition to granting national parliaments a formal role in the EU legislative process, the EWS has also been seen elsewhere as a forum of representation connecting citizens with the EU, and as a forum for deliberation of substance of EU policies thereby constituting a ‘virtual third chamber’ in addition to the two EU legislators, the European Parliament (EP) and the Council.²²

Other studies of the EWS have shown that the EWS has made national parliaments more aware of their European function²³ and overall mobilised them in EU affairs.²⁴ National

¹⁴ C Neuhold and J Smith, ‘Conclusion: From “Latecomers” to “Policy Shapers”?’—The Role of National Parliaments in the “Post-Lisbon” Union’ in C Heffler et al (eds), *The Palgrave Handbook of National Parliaments and the European Union* (Basingstoke, Palgrave Macmillan, 2015) 675 and 684.

¹⁵ P Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality* (London, Routledge, 2012) 77 and 136.

¹⁶ *ibid* 103.

¹⁷ A Cygan, *Accountability, Parliamentarism and Transparency in the EU* (Cheltenham, Edward Elgar Publishing, 2013) 125.

¹⁸ *ibid* 7–9.

¹⁹ *ibid* 214.

²⁰ Kiiver, *The Early Warning System for the Principle of Subsidiarity* (n 15) 127.

²¹ *ibid* 133.

²² I Cooper, ‘A “Virtual Third Chamber” for the European Union? National Parliaments after the Treaty of Lisbon’ (2012) 35 *West European Politics* 441.

²³ A Jonsson Cornell and M Goldoni, *National and Regional Parliaments in the EU-Legislative Procedure Post-Lisbon: The Impact of the Early Warning Mechanism* (Oxford, Hart Publishing, 2017) 353.

²⁴ D Fromage, *Les parlements dans l’Union Européenne après le Traité de Lisbonne: la participation des parlements allemands, britanniques, espagnols, français et italiens* (Paris, L’Harmattan, 2015) 415.

parliaments remained generally resilient despite such obstacles for their powers as the eurozone crisis.²⁵ Nonetheless, the EWS is perceived as failing to generate the expected democratisation of the EU.²⁶ The practice of the EWS arguably did not enhance the democratic character of the EU legislative process,²⁷ and further reforms are necessary to make the views of national parliaments ‘constitutionally relevant’.²⁸

Against the background of the existing literature on the topic, this monograph contributes to the studies on the role of national parliaments in EU affairs, and explores the functioning of the EWS in a number of new ways. The focus of the book is exclusively on the EWS, which demands a careful analysis of the principle of subsidiarity and its scrutiny, taking into account the first six years of practice of the EWS. The book considers novel aspects of the procedure that have not been studied yet, such as, for example, the relationship between the Member State governments and their national parliaments under the EWS and the scrutiny of delegations to the Commission by national parliaments. In addition, the book encompasses ‘classic’ aspects of the EWS such as the historic development of the subsidiarity principle and the adjustment of national provisions for the operation of its scrutiny. The combination of both perspectives makes the book a particularly focused and comprehensive study of the principle of subsidiarity and its enforcement within the newly introduced EWS.

II. RESEARCH APPROACH

This book studies the role of national parliaments in the policing of the subsidiarity principle primarily from a legal point of view, but also takes into account the political context of the mechanism. This concerns, in the first place, the design and the role of the subsidiarity review process. Going beyond existing studies on the subsidiarity principle and national parliaments, the book conducts an empirical analysis of all the reasoned opinions issued by national parliaments between the introduction of the EWS in 2009 and the end of 2016.²⁹

The methodological approach of the book is novel within the field. The book explores in depth three specific case studies of the EWS on the types of concerns that parliaments bring out in their reasoned opinions. Those case studies present instances where participation by national parliaments was particularly active and offer a thorough examination of key issues linked to the application of the subsidiarity principle: (i) the connection between the scrutiny of the principle of conferral and the principle of subsidiarity; (ii) the unexpected use of the EWS to scrutinise delegations to adopt a delegated or implementing act; and (iii) the application of the principle of subsidiarity to EU fundamental rights proposals. The choice of case studies does not try to be representative of all the possible ways national parliaments can act within the EWS but is instead driven by the following considerations. The first case

²⁵ D Jančić, ‘EU Law’s Grand Scheme on National Parliaments: Perpetual Missing Link or a Solution for Democratic Legitimacy?’ in D Jančić (ed), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?* (Oxford, Oxford University Press, 2017) 299.

²⁶ *ibid* 308.

²⁷ Cornell and Goldoni (n 23) 353.

²⁸ Jančić (n 25) 302.

²⁹ Note that some of the Commission proposals with the reference COM(2016) were issued in 2017. Those proposals and the reasoned opinions concerning them have also been taken account of in this book.

study on competence review was chosen due to its predictability: the principle of conferral and the principle of subsidiarity are close neighbours, and the existence of a competence to act is a pertinent legal and political issue in the EU legislative process. The second case study, instead, shows a rather unexpected use of the EWS to scrutinise draft legislative acts with the delegations to the Commission to adopt delegated or implementing acts. Finally, the third case study was selected to show how the EWS interacts with a very relevant EU law issue, fundamental rights protection, which does not involve any of the externalities that are often at stake in other Commission proposals, for example in the field of the internal market.

In exploring diverse groups of national parliaments, the book adopts what might be termed an accordion approach. Depending on the purpose of each chapter, the scope of the legislatures subject to analysis might stretch or squeeze much in the manner of an accordion, varying between broad sweeps and narrowly focused sections. In particular, chapter four provides a comprehensive overview of the measures adopted in the national parliaments of *all* Member States to enable the subsidiarity review process, and categorises them into groups. The idea is to present a complete catalogue of the different designs of *ex ante* subsidiarity scrutiny. Chapter five examines the impact of the Lisbon Treaty on executive–legislative relations; parliamentary majority–opposition relations; and the representation of the regional interests. This demands an analysis of a narrow sample of Member States selected according to a number of relevant features such as federal and centralised structure of the Member State; majoritarian (Westminster model) and consensus models of executive–legislative relations; and elected and unelected chambers within the bicameral structure of parliaments. The limited number of national systems aims to represent the main archetypical political systems, while not claiming that all the possibilities are exhaustively explored. The following chapters, which focus on the principle of conferral; delegated and implementing acts; and fundamental rights, respectively, have a two-tiered structure. To establish the role of national parliaments in these fields it is necessary to first ‘stretch the accordion’ by giving an overview of the concerns of national parliaments expressed in their reasoned opinions, and then to ‘squeeze’ it by focusing narrowly on the three specific case studies of Commission proposals.

III. STRUCTURE

This book is divided into two main parts. The first part concentrates on the notion of subsidiarity; the design of the EWS; and its implementation at the European and national level. The second part focuses on the content of the reasoned opinions issued by national parliaments. Three case studies tackle concerns of national parliaments with regard to the principle of conferral; delegations to adopt a delegated or implementing act; and fundamental rights.

To discuss the role of national parliaments in the EWS, it is first necessary to delve in detail into the notion of the subsidiarity principle. Accordingly, chapter one examines the origin and the characteristics of the subsidiarity principle in the EU Treaties. This chapter also discusses the reasons behind the introduction of the EWS: the EU’s ‘competence creep’ and its democratic deficit. Chapter two reviews the growing role of national parliaments in the EU and their investment with the scrutiny of the subsidiarity principle by the

Lisbon Treaty. The basic rules of the operation of the EWS; the ‘Barroso initiative’, the other main avenue for national parliaments’ involvement; and the possibilities of interparliamentary cooperation are discussed here. Chapter three then focuses on the scope of the EWS. Based on a textual, structural and functional interpretation of the Treaties, this chapter presents a set of arguments supporting a narrowly tailored subsidiarity scrutiny. In this regard, the three ‘yellow cards’ triggered so far by national parliaments are assessed to draw conclusions on the possible consequences for the EWS. Chapter four deals with the mechanisms adopted by Member States at the national level to conduct subsidiarity scrutiny and, based on the involvement of relevant committees, indicates three possible procedures: centralised, decentralised and mixed, combining both of the former. Having established the applicable procedures and their impact on the number of reasoned opinions issued, chapter five analyses in detail the content of reasoned opinions of parliaments in the UK, Germany, Poland and Belgium. The aim is to show how the subsidiarity review impacts upon the executive–legislative relationship; the rapport between the majority and opposition in EU affairs; and whether it gives any voice to regional interests. The detailed analysis of the parliamentary debates also enables drawing some conclusions on the motivation of national parliaments to participate in the EWS.

The second part of this book investigates the application of the EWS in three different areas: (i) competence; (ii) delegated and implementing acts; and (iii) fundamental rights. First, chapter six assesses the scrutiny of the principle of conferral under the EWS. To this end, this chapter offers a case study of the Commission proposal on the right to strike. Second, chapter seven analyses the scrutiny of delegations of powers to the Commission to adopt delegated and implementing acts under the EWS. The case study of the Commission proposal for a Tobacco Products Directive illustrates this activity of the national parliaments. Third, chapter eight considers the scrutiny of fundamental rights proposals under the EWS. The case study of the Commission proposal concerning the share of women on company boards tackles the question how the subsidiarity principle interacts with the protection of fundamental rights in the EU.

The conclusion draws upon the analysis in the previous chapters of this book and assesses whether national parliaments, through their reasoned opinions, help to diminish the ‘democratic deficit’ and the ‘competence creep’ in the EU. In this light, the chapter also discusses some recent suggestions for reform of the EWS.