The Principle of Subsidiarity

An Examination of the Swedish Parliament’s Application of the New Protocol on Subsidiarity

Author: Linn Lööw
Supervisor: Professor Carl Fredrik Bergström
“Subsidiarity cannot be reduced to a set of procedural rules; it is primarily a state of mind.”\textsuperscript{1}

\textsuperscript{1}“Subsidiarity cannot be reduced to a set of procedural rules; it is primarily a state of mind which, to be given substance, presupposes a political answer to the fundamental questions which application of the principle will undoubtedly raise” from COM(93) 545 final, p 2.
Table of contents

1 Introduction ......................................................................................................................... 7
  1.1 The Revival of Subsidiarity? .......................................................................................... 7
  1.2 Purpose and Outline ....................................................................................................... 8
  1.3 Method ......................................................................................................................... 9
  1.4 Delimitations .............................................................................................................. 10
  1.5 Terminology ............................................................................................................... 11

2 Origin and Evolution of Subsidiarity in EU Law ................................................................. 12
  2.1 Historical Background ............................................................................................... 12
  2.2 Evolution in EU Law .................................................................................................. 13

3 The Principle of Subsidiarity ............................................................................................... 17
  3.1 Introduction ............................................................................................................... 17
  3.2 Is EU Competent to Act? ............................................................................................ 20
  3.3 Does EU Have Exclusive Competence? ....................................................................... 21
  3.4 Can the Objective be Sufficiently Achieved by the Member States or Perhaps Better
      Achieved By the Union? ............................................................................................... 21
    3.4.1 Subsidiarity in Theory ......................................................................................... 22
    3.4.2 Subsidiarity in Practice ....................................................................................... 28
  3.5 Subsidiarity and Its Relation to Proportionality ............................................................ 33
  3.6 Conclusions on the Contents of the Principle of Subsidiarity ....................................... 35

4 Supervision by National Parliaments ............................................................................... 38
  4.1 Introduction ............................................................................................................... 38
  4.2 National Parliaments as Union Actors ....................................................................... 39
  4.3 Contents of the New Protocol ..................................................................................... 40
    4.3.1 General Contents ................................................................................................. 40
    4.3.2 Provisions on the Monitoring Mechanism Attributed to national Parliaments ...... 41

5 Supervision by the Swedish Parliament ........................................................................... 43
  5.1 Rules and Guidelines Applied by the Swedish Parliament ........................................... 43
    5.1.1 Some Comments on the Guidelines Applied by the Swedish Parliament ........... 45
  5.2 Notes on Formal and Substantive Aspects of the Reasoned Opinions Submitted by the
      Swedish Parliament in 2012 ....................................................................................... 46
    5.2.1 Opinions From the Government on Subsidiarity ............................................... 47
    5.2.2 Aspects Included in the Opinions ....................................................................... 48
    5.2.3 Recurring Substantial Arguments ..................................................................... 50

6 Conclusions ....................................................................................................................... 52

7 References ......................................................................................................................... 56
1 Introduction

1.1 The Revival of Subsidiarity?

Subsidiarity is a concept which is gaining increasing topicality in the context of the European Union (EU) and the incentives to respect the principle and to enhance the ways to enforce it are perhaps stronger than ever before. The concept relates to questions of distribution of powers between different levels of authority. Within the European Union its objective is to bring action as close to the Union citizens as possible and originally it was introduced into the Treaties as a counterweight to the Union’s enlarged competence.\(^2\)

There are several different aspects of how and why subsidiarity is and can be important. One relates to the core function of the principle of subsidiarity as a mean to distribute the Union’s powers (not competence) between the Union legislator and the national legislator. In times as the present, where the European cooperation and the Union’s ever-expanding competence is questioned and, for instance, the Prime Minister of the United Kingdom has induced an examination to see if there are any areas where EU competence should be returned to the Member States and opened up for the possibilities of having a new referendum on the UK’s membership in the EU, principles such as subsidiarity can possibly turn out to be of great importance in re-legitimising the cooperation.

Another much newer aspect relates to subsidiarity as a mean to increase the focus on national Parliaments in the Union. This new focus is, amongst other things, an effect of the critique that the Union struggles with a democratic deficit.\(^3\) After concluding that the principle of subsidiarity, since its introduction into the Union Treaties, had failed to yield the expected results and that compliance with it had often been overridden\(^4\) steps have been taken in the Lisbon Treaty to strengthen the principle in a way which also make national Parliaments directly involved in the legislative process of the Union. The Parliaments shall oversee how draft legislative acts comply with the principle of subsidiarity before they are adopted and may submit their view on this to

---

\(^2\) Nergelius, p 106 ff.

\(^3\) Barrett, p 595.

\(^4\) CONV 71/02, p 3 f.
the Union. This is the first time that national Parliaments have been directly involved as actors in the legislative process in the European Union and the rules contribute to a generally increased focus within the Union on national Parliaments.

How important the principle of subsidiarity and the new role played by the national Parliaments will be or become does however depend on how the principle and the new rules are defined in theory and applied in practice. Therefore, this essay will present an overview on what the principle of subsidiarity encompasses, how it can be defined, and how it is applied in practice by the Court of Justice of the European Union (CJEU) and by national Parliaments.

1.2 Purpose and Outline

The purpose of this essay is, as mentioned briefly above, to analyse how the principle of subsidiarity is to be applied in practice, both in general by the for instance the CJEU, and in particular by the Swedish Parliament when it performs its new task to monitor how, and if, draft legislative acts from the Union comply with subsidiarity. Based on these findings the essay will also briefly touch upon what effects the new rules and the role they attribute to national Parliaments can possibly have, both with regards to the Union system and to the National forms of government.

In the first part of this essay the principle of subsidiarity and its background in EU law is examined. It is discussed what parts the principle consists of and how these parts relate to each other. Thereafter the attention is turned towards the new rules in the Protocol on the Application of the Principles of Subsidiarity and Proportionality which attributes the task of monitoring compliance with subsidiarity to the national Parliaments. The Swedish Parliament’s application of the new rules is discussed and both formal questions on method and substantial questions on the arguments presented by the Parliament on subsidiarity are touched upon. Finally a method containing examples of questions and an order in which to ask these questions to sustain when a draft legislative act does or does not comply with the principle of subsidiarity is presented alongside with some general reflections on the principle of subsidiarity and the provisions in new protocol.
1.3 Method

To be able to produce an overview of what the principle of subsidiarity encompasses and how it is to be defined it is necessary to examine the principle in theory based on e.g. its wording in Article 5 of the Treaty on European Union (TEU). For this reason, in the first chapters of the essay, a method will be applied which is based on what could be called a classical legal method. The classical method is normally considered to include interpretation of the law by use of linguistic, systematic and teleological argumentation and by case law from the Court, in this case the CJEU. Often it is assumed when it comes to EU law, that the classical legal method does not include taking preparatory work, travaux préparatoires, of the Union into consideration when interpreting the law. This assumption does however not stand unchallenged. Several authors have objected to this view and in recent years the CJEU, and even more so the Advocate generals, has with increasing recurrence, referred to a wide range of different preparatory documents in many areas of the law and relating to both primary and secondary law.\(^5\) Advocate General Kokott wrote on this topic in one of her opinions as follows below.

5 Schønberg a nd Frick, p 170 and e.g. Case C-370/12, paragraph 135.

6 Opinion of Advocate General Kokott in Case C-583/11, paragraph 32.

Drafting history in particular has not played a role thus far in the interpretation of primary law, because the ‘travaux préparatoires’ for the founding Treaties were largely not available. However, the practice of using conventions to prepare Treaty amendments, like the practice of publishing the mandates of intergovernmental conferences, has led to a fundamental change in this area. The greater transparency in the preparations for Treaty amendments opens up new possibilities for interpreting the Treaties which should be utilised as supplementary means of interpretation if, as in the present case, the meaning of a provision is still unclear having regard to its wording, the regulatory context and the objectives pursued.\(^6\)

This implies that perhaps the idea that preparatory work is of no value in legal argumentation when it comes to EU law is about to change. In this essay such documents are to a large extent used to interpret the principle of subsidiarity and the method used is thus, though based on a classic method, expanded to encompass considerations based on statements in preparatory documents.

In the latter part of the essay a more empirical method is applied. An examination is made of the Swedish Parliaments application of the new rules in the Protocol on the Application of the Principles of Subsidiarity and Proportionality that is annexed to the Lisbon Treaty. The reasoned opinions from the Swedish parliament and the arguments presented in them form the base of the
analysis. From this conclusions are drawn on the Swedish Parliaments view on subsidiarity and on the effects of the new rules in a European and a national context.

1.4 Delimitations

This essay will analyse different aspects of the principle of subsidiarity. In doing so it is necessary to include a discussion regarding the principle of proportionality and to a limited extent also the principle of conferral and their relation to subsidiarity. Since the principle of subsidiarity is the main focus of the essay the actual contents and definition of the other principles will not be examined in detail.

The principle of subsidiarity is placed in Article 5.3 TEU and relates to the distribution of powers between the European Union and its Member States. In the article reference is made not only to these two levels but also to different levels within the Member States; the central, regional and local levels. In this essay this aspect of the article and its possible effects will not be analysed and the discussion will henceforth only refer to the Union and national levels.

The new Lisbon Protocol includes a rule which might be interpreted as giving national Parliaments a possibility to bring proceedings before the CJEU. Whether or not this is the case and what implications such a rule might have will not be analysed in this essay.

As mentioned above the Swedish Parliament’s application in practice of subsidiarity will be analysed. The reason why only the Swedish Parliaments application is analysed have several reasons. For once it is due to practical aspects such as the limitations of this study and the fact that the author is from Sweden and does therefore have a special interest in the Swedish Parliament’s application. Furthermore, while Swedish Courts have turned out to be amongst the most restrictive national Courts when it comes to requesting preliminarily rulings from the CJEU the Swedish Parliament is one of the most active Parliaments when it comes to using this new possibility to monitor compliance with subsidiarity. It is therefore interesting to look closer at the Swedish parliament’s application on the principle of subsidiarity and the new rules to see what this pattern may depend on.

---

7 Hallström 2011, p 10; Hartley, p 125 and Tridimas, p 190.
1.5 Terminology

In this essay the notion of EU and EU law is the general term mostly used for describing the European Union and its laws. This wording will be used to a larger extent than what might be legally and historically correct since it is used even when referring to what was earlier the European Community (EC). Occasionally, however, the notion of EC will be used when reference is made to something that very specifically concerns what was earlier the Community or when a citation is used which includes the notion of the EC.

Sometimes reference is made to "general principles" or "principle of general application". The usage of this terminology does not reflect an opinion on whether or not the principles referred to are actually to be regarded as general principles of EU law as the concept is normally understood in EU context.10

---

10 De Búrca, p 103 ff.
2 Origin and Evolution of Subsidiarity in EU Law

2.1 Historical Background

The principle of subsidiarity is often primarily associated with the constitutional laws of federal states and does normally concern the distribution of powers between the central federal state and the local states or regions. In this context traces of subsidiarity can be found as early as in the late 18\textsuperscript{th} century in e.g. the constitution of the United States of America.\textsuperscript{11} The very idea of subsidiarity is, however, by most considered to be much older than this. Though it has been suggested that the idea can be traced back as far as to the ancient Greek philosophers the general conception seems to be that the idea has its origin in the social laws of the catholic church.\textsuperscript{12} Here the principle was first introduced in 1891 by the pope Leo XIII but did not get its real breakthrough until in 1931 by when pope Pius XI in a circular note named “Quadragesimo Anno” concluded that

\begin{quote}
It is an injustice, grave evil and a disturbance of right order for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies.
\end{quote}

In this clerical context the principle had two balancing functions. For once the church was to refrain from interfering in the lives of individuals, on the other hand the church had a responsibility for the welfare of the people and could thus even be obliged to interfere and support the people when necessary.\textsuperscript{13} From this the principle of subsidiarity has evolved and is now, as mentioned above, primarily found in laws of federal states. The German constitutional law is frequently used as an example of subsidiarity in this context and art. 72(2) in the Grundgesetz reads as follows.\textsuperscript{14}

\begin{flushright}
\textsuperscript{11} SOU 1994:12, p 120.
\textsuperscript{12} See amongst others Hetne, p 13 ff; Horspool and Humphrey p 99; Melin and Schäder, p 56; Shaw, p 226; Steiner and Woods, p 158; Hallström 1992, p 181 and SOU 1994:12 p 117f.
\textsuperscript{13} SOU 1995:123, p 13.
\textsuperscript{14} SOU 1994:12, p 121.
\end{flushright}
In this field the [federal authorities] will have the right to legislate if federal legal regulation is needed:

1. because a matter could not be settled effectively by the legislator of the various [regions],
2. because the regulation of a matter by the law of a [region] could affect the interests of other or all [regions], or
3. to safeguard the legal or economic unity, and in particular, to safeguard the homogeneity of the living conditions beyond the territory of a [region].

Since a few decades back the principle of subsidiarity is also part of the EU law system.

### 2.2 Evolution in EU Law

In the law of the European Union the principle of subsidiarity made one of its very first appearances in a report emitted by the Commission as early as in 1975.\(^{15}\) Thereafter the principle appeared again in 1984 in the preamble to the Draft Treaty Establishing the European Union.\(^{16}\) In the Draft Treaty the principle reads as follows.

> The Union shall only act to carry out those tasks which may be more effectively undertaken in common than by Member States acting separately, in particular those whose dimension and effect extend beyond national frontiers.

The Draft Treaty was latter rejected since it was regarded as being far to federalist.\(^{17}\) Instead the principle of subsidiarity was first formally introduced into the law of the European Community in 1986 through the Single European Act. Though the principle was now expressly inserted into the Treaties it was only applicable in the area of environmental law and there read as follows.

> The Community shall take action relating to the environment to the extent to which the objectives … can be attained better at Community level than at the level of individual Member States.\(^{18}\)

It was not until in 1992 through the adoption of the Maastricht Treaty that the principle of subsidiarity was introduced as a principle of more general application.\(^{19}\) The principle was introduced into Article 3b of the EC Treaty alongside with the principles of conferral and proportionality and the part regarding subsidiarity was worded as below.

---

15 Bull EC, Supplement 5/75.
16 Horspool and Humphrey, p 99f; Hettne, p 15.
17 Horspool and Humphrey, p 99f.
18 Article 130r (4) SEA.
19 CONV 71/02, Mandate on the Working Group on the Principle of Subsidiarity, p 2.
In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Traces of the principle could also be found in other parts of the Treaties. For instance Article one of the Maastricht Treaty stated that “the treaty marks a new stage in the process of creating an ever closer Union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen”. In the preamble the same text was presented with the addition of an explicit reference to the principle of subsidiarity. Furthermore Article B, which numerated some of the Union’s objectives, held a reminder that the objectives should be achieved in accordance with the Treaties “while respecting the principle of subsidiarity”. There were also, in Article F, a provision stating that the Union “shall respect the national identities of its Member States”.

In 1999 when the Treaty of Amsterdam came into force no change was made in Article 3b EC and the principle of subsidiarity remained the same. However, a protocol on the application of the principles of subsidiarity and proportionality was introduced. This protocol obliged all Union institutions to ensure compliance with the principles and held instructions as to how the two principles were to be interpreted and used. It has been of great importance in defining the concept of subsidiarity which has not, as is the case with proportionality, been subject to extensive development and clarification by the CJEU. The protocol further declared that the two principles do not affect other principles developed by the Court and do not call into question the powers conferred on the community by the Treaties. Further it stated that subsidiarity is a dynamic concept which should be applied in the light of the objectives set out in the Treaties. It is also made clear that the principle allows community action to be restricted as well as expanded in accordance with the circumstances at hand.

Finally, in December of 2009 when the Lisbon Treaty entered into force and the concept of the Community and the three-pillar structure was abandoned in favour of the, from now on, all encompassing notion of European Union, the principle of subsidiarity became applicable in all areas of what is henceforth EU law. The principle was placed in Article 5.3 of the TEU and

20 Amsterdam 11th recital of the preamble and Article A and F (national identities shall be respected)
though some alterations were made to the wording the essence still remains the same as when the
principle was first introduced in the Maastricht Treaty.\textsuperscript{21}

As was the case in earlier treaties the principle was introduced into Article 5 TEU alongside the
principle of conferral (Article 5.2) and the principle of proportionality (Article 5.2). On
subsidiarity Article 5 reads as below.

\begin{quote}
Under the principle of subsidiarity, in areas which do not fall within its exclusive competence,
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.
\end{quote}

The principle has been described as a rule of common sense or a rule of reason and different
commentators have suggested that it means that “things should not be done at community level
unless they cannot be done at national level”,\textsuperscript{22} that “public powers should normally be located
at the lowest tier of government where they can be exercised effectively”\textsuperscript{23} and that “all other
things being equal, the choice should fall on the Member States”.\textsuperscript{24}

With the Lisbon Treaty the Amsterdam Protocol was repealed and a new Protocol on the
Application of the Principles of Subsidiarity and Proportionality was introduced.\textsuperscript{25} Reference is
made to the protocol in Article 5.3.

\begin{quote}
The institutions of the Union shall apply the principle of subsidiarity as laid down in the
Protocol on the application of the principles of subsidiarity and proportionality. national
Parliaments ensure compliance with the principle of subsidiarity in accordance with the
procedure set out in that Protocol.
\end{quote}

The new protocol does not include the guidelines on how to interpret the notions of subsidiarity
and proportionality from the Amsterdam Protocol, which are therefore as such no longer part of
EU law, but has a greater focus on procedure as it introduces a new system for monitoring the
compliance with the principle of subsidiarity. This monitoring task has been assigned to national

\textsuperscript{21} Weatherill, p 560, Dashwood and Wyatt et al., p 114.
\textsuperscript{22} Weatherill, p 561, citation by Francis Maude.
\textsuperscript{23} Dashwood and Wyatt et al., p 114 f.
\textsuperscript{24} Dashwood and Wyatt et al., p 115.
\textsuperscript{25} OJ 2007 C 306/169.
Parliaments. Though the guidelines from the Amsterdam Protocol are no longer formally in force they are still used by the Commission when interpreting the principle of subsidiarity.\textsuperscript{26}

As was the case already in the Maastricht Treaty, the principle of subsidiarity and traces of it can be found, not only in Article 5 TEU, but in various parts of the constituting Treaties. Thus already in the preamble of the TEU it is stated that the Member States are

\begin{quote}
  DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions,\textsuperscript{27}
\end{quote}

and are further

\begin{quote}
  RESOLVED to continue the process of creating an ever closer Union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity.\textsuperscript{28}
\end{quote}

The second recital is repeated in the second paragraph of Article one TEU with the exception that the explicit mentioning of the principles of subsidiarity and proportionality have been left out. Traces of the idea of subsidiarity can perhaps also be found in the articles relating to national identity such as Article 4.2 TEU and in Article 12 and 13, which concerns national Parliaments and the institutions of the Union.

\textsuperscript{26} COM 2010 (547) final, p 3.
\textsuperscript{27} 6th recital of the preamble to the TEU.
\textsuperscript{28} 13th recital of the preamble to the TEU.
3 The Principle of Subsidiarity

3.1 Introduction

The word subsidiarity comes from the Latin word “subsidior”, meaning to serve or to be a substitute. As presented in the previous chapter the concept of subsidiarity has been used in different contexts throughout the years. As the principle stands today in the Lisbon treaty it relates to the difficult problem of balancing the natural incompatibility between democracy and closeness to and inclusion of the peoples with necessary demands for efficiency. Though this is not a simple task the Union institutions have declared that effectiveness can and must be reconciled with democracy since “democracy comprises the very essence of the Union, while effectiveness is the precondition for its future”. Since applying the principle of subsidiarity involves the balancing of these aspects it is no wonder that application of the principle often includes difficult considerations of suitability. It is also natural that these considerations and the arguments they produce tend to get political rather than legal. However, since in the end all legal argumentation is to some extent based on political considerations this argument should not in itself impede the principle from being possible to define, at least to a certain limit, by legal criteria and from performing a legal function. Throughout the years various attempts have also been made to define the principle of subsidiarity but still commentators do not seem to be on equal footing when it comes to agreeing on its content. This chapter strives to produce some clarity on what the notion of subsidiarity as it stands in Article 5.3 TEU encompasses, how it can be defined, and how it has been applied in practice by the Court of Justice of the European Union.

To do this it is necessary to examine in more detail the principle’s background and evolution since its introduction in EU law. As mentioned in the previous chapter the principle of subsidiarity was formally introduced as a generally applicable principle of EU law through the Maastricht Treaty and as such entered into force in 1993. Between the time when the Maastricht Treaty was signed in February 1992 and the time when it entered into force in November of 1993

29 SOU 1994:12, p. 115.
31 Preface, to SEC(95) 731 final, p 4.
there was a European Council meeting in Edinburgh in December 1992.\textsuperscript{32} It is from this meeting that some of the first documents on the application of the principle pertain.

At the meeting the principle of subsidiarity and its implications were discussed both on a general and a more specific level. From the conclusions of the meeting it becomes clear that the principle of subsidiarity was intended to be given a new legal definition and was to be regarded as a general principle of community law and a basic principle of the European Union. It was to contribute to the respect for national identities and safeguard the member states’ powers while ensuring that decisions are taken as closely as possible to the citizens.\textsuperscript{33} The institutions were obliged to make the principle of subsidiarity work as intended and they where encouraged to conclude an interinstitutional agreement on its application. Furthermore the conclusions stated that the principle was not to affect or call into question the powers conferred on the Union by the Treaties, nor should it affect general Treaty provisions on for instance the primacy of EU law or the flexibility clause which grants the Union the power to provide itself with the means necessary to attain its objectives. It was also clearly stated that subsidiarity was intended to be a dynamic concept applied on a case by case basis and that it would work in both directions and could thus both require the Union to act and restrict it from doing so when action was not justified.\textsuperscript{34}

In large these conclusions where latter introduced into the Protocol on the Application of the Principles of Subsidiarity and Proportionality of the Amsterdam Treaty which entered into force in 1999.\textsuperscript{35} This protocol has, as mentioned in the previous chapter, been repealed and is as such no longer in force.\textsuperscript{36} Instead it was replaced by a new protocol and although the contents of the old protocol has not as a whole been transferred to the new protocol and are therefore no longer a valid source of EU law, the Commission has declared that it still considers the guidelines from the old protocol as relevant and will continue to apply them. The Commission also recommends other actors to do the same.\textsuperscript{37} Furthermore the specific guidelines have to a limited extent been inserted into an interinstitutional agreement\textsuperscript{38} between the Parliament, the Council and the Commission that was concluded 1993 in accordance with a proposal from the European Council meeting in Edinburgh and which is still in force. It is therefore reasonable to assume that it is still

\begin{itemize}
  \item \textsuperscript{32} European Council meeting in Edinburgh 11-12 December 1992.
  \item \textsuperscript{33} European Council meeting in Edinburgh 11-12 December 1992, Conclusions of the Precidency, Annex 1 to part A, p 1 and 3.
  \item \textsuperscript{34} European Council meeting in Edinburgh 11-12 December 1992, Conclusions of the Precidency, Annex 1 to part A, p 4-5.
  \item \textsuperscript{35} Ds 1997:64, Amsterdamfördraget, EU:s regeringskonferens 1996-1997, p 101; Hettne, p 18 f.
  \item \textsuperscript{36} OJ 2007 C 306/169.
  \item \textsuperscript{37} COM 2010 (547) final, p 3.
  \item \textsuperscript{38} OJ 1993 C 329/136.
\end{itemize}
relevant to look at the Edinburgh Conclusions and the Amsterdam Protocol when determining the contents of Article 5.3 in the Lisbon Treaty, if nothing else, at least for inspiration and understanding on how the discussions went on how the principle was intended to be applied.\(^{39}\)

The documents referred to above originate from when the principle of subsidiarity was first introduced into the Treaties. In Treaties subsequent to the Maastricht and the Amsterdam Treaties the principle of subsidiarity itself has not been altered. Through the Lisbon Treaty, however, some linguistic changes were made to the wording of the principle and, moreover, the Amsterdam Protocol was replaced by a new protocol on subsidiarity. This alteration was made based on a proposal from Working Group I on the Principle of Subsidiarity in the Convention on the Future of Europe which was held in 2003 and where the Treaty Establishing a Constitution for Europe was prepared. The Constitutional Treaty was never ratified but the contents relating to the principle of subsidiarity were transferred to the Lisbon Treaty without alterations. In recent years, when Treaty amendments have been prepared through Conventions, the results from which have been published and the amendment process is therefore much more transparent, the CJEU has increased its use of preparatory work as a means to interpret EU law.\(^{40}\)

It is therefore relevant to look to the conclusions from the Convention and its working groups when discussing subsidiarity according to the Lisbon Treaty and Protocol. However, since these conclusions do primarily relate to the provisions in the new protocol and do not add to the knowledge on the contents of the principle of subsidiarity as such their contents will be treated in chapter four which relates to the rules of the new protocol.

The principle of subsidiarity applies in areas of EU law where the Union possesses competence that is not exclusive. In those areas the Union shall act only if and in so far as the objectives of a proposed action cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The contents and effects of this principle as it is stands in Article 5.3 TEU will be presented below and the analysis has been divided into different parts concerning various aspects which relate to the application of the principle.

\(^{39}\) Lenaerts and Van Nuffel, p 132.

\(^{40}\) See e.g. Case C-370/12, paragraph 135 and Opinion of Advocate General Kokott in Case C-583/11, paragraph 32.
3.2 Is EU Competent to Act?

The first thing which needs to be established when making an analysis according to the principle of subsidiarity is of course, as is always the case when it comes to EU law, if the Union is competent to act at all.\textsuperscript{41} The reason all studies of EU law need to start with this question is due to the fact that EU holds no sovereign powers of its own. Instead the Union derives all of its competence from its Member States, whom, through their accession to the Treaties, have freely chosen to limit their sovereign powers to the benefit of the Union.

In accordance with Article 4.1 and the second paragraph of Article 5 TEU the Union must therefore act within the limits of the competences conferred upon it by the Treaties while competences outside this limit remain with the Member States. Article 5.2 TEU furthermore states that even within its area of competence the Union may not use its powers as it wishes but may only act “to attain the objectives” which have been set out in the Treaties. The extent of the Union’s competence also varies from one area to another providing it with different means for action adapted to what is considered as appropriate for each specific area.\textsuperscript{42} When applying EU law it is therefore essential to always start by determining that EU is competent and that there is a correct legal basis for Union action.

Even though it is a fact that this method must be applied when conducting a thorough analysis of EU law one shall be clear on the fact that the principle of conferral in Article 5.2 TEU is a principle which stands on its own and is thus as such not a part of the subsidiarity principle as an isolated concept.\textsuperscript{43} Later we shall see that there have been some discussions on whether or not this analysis should likewise be of part an analysis of compliance with subsidiarity but, as this question coincides with other discussions of the contents of the notion of subsidiarity, this will be further discussed in chapters five and six.


\textsuperscript{42} Annex to SEC(92) 1990 final, p 10.

3.3 Does EU Have Exclusive Competence?

A question that may cause problems when applying the principle of subsidiarity is the limitation that the principle does only apply in areas where the Union does not possess exclusive competence. Prior to the Lisbon Treaty this question was the subject of a large debate due to the fact that the Treaties gave no lead on how the categorisation of different types of competence was to be made.44 With the Lisbon Treaty an attempt was made at clarifying this problem. Thus, in title one of the Treaty on the Functioning of the European Union (TFEU), Articles 2 to 5 now hold a categorisation where an attempt is made at placing different areas of Union competence in three main categories of competence; exclusive competence, shared competence and a third category where the Union is competent to take actions to support, coordinate or supplement Member State action.

Though it might seem that the Lisbon Treaty has now put an end to the debate on how to separate different categories of competence from each other one must still keep in mind that this categorisation is in no way the finite solution. There will still be borderline cases and situations which are by nature hard to determine solely by looking into the relevant Articles.45

Even though this problem partially remains and there are areas yet to be examined and categorised, this question will not be subject to further analyse in this essay.

3.4 Can the Objective be Sufficiently Achieved by the Member States or Perhaps Better Achieved By the Union?

The core prerequisite of the subsidiarity principle as it stands in the TEU is that Union action is justified only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can rather be better achieved at Union level. This part holds the very essence of the subsidiarity principle and this is also where the real difficulties lie in interpreting the provision and filling it with practical contents. The difficulties concerning the provision pertain mainly to the fact that it does not prescribe a well defined test based on clear legal concepts but rather induces what could be described as more speculative considerations of

44 Craig and De Búrca, p 94.
45 Foster, p 99.
suitability which easily tends to get political in nature. The principle has as such been described as a rule of reason or of “common sense” and a common invention against it is therefore that it is not, except for maybe as a procedural rule, set for legal evaluation and control.⁴⁶

When isolated Article 5.3 TEU provides for a subsidiarity test which can be divided into two parts. According to the first part of the sentence in 5.3 Union action is justified only when action by the individual Member States is not enough to achieve the objectives of the proposed action, and, according to the second part of the sentence, Union action must moreover by reason of the scale or effects be better achieved at Union level. The first part of this sentence will henceforth be called “the sufficient attainment test” and the second part will be referred to as “the better attainment test”.⁴⁷ Some commentators have suggested that the subsidiarity test consists of only one part⁴⁸ and others claim that an assessment in two parts⁴⁹ must be made to conclude whether an action complies with the principle or not. Though it is of course possible to reach the same result even if different methods are applied this essay strives to produce some clarity on what the different parts of the principle of subsidiarity can be said to encompass and how they relate to each other.

### 3.4.1 Subsidiarity in Theory

The Amsterdam Protocol and the Edinburgh Conclusions resolve that Article 5 TEU consists of three distinct legal concepts; the principle of conferral, the principle of subsidiarity and the principle of proportionality.⁵⁰ Regarding subsidiarity it is submitted that “both aspects” of the subsidiarity principle shall be met, referring to the sufficient attainment test and the better attainment test.⁵¹ Thereafter the documents refer to a set of guidelines which shall be used to determine “whether the abovementioned condition” is meet. Since the word condition in singular is used following a sentence which clearly states that the principle is built on two equally important aspects, the word “condition” could refer either to the last one of the two aspects of subsidiarity (the better attainment criteria), or to both of the aspects as being part of the same condition – the subsidiarity criterion as a whole. The most natural choice seems to be to assume

---

⁴⁶ Foster, p 99 and p 100 f, Shaw, p 227, Dashwood and Wyatt, p 117; Tridimas, p 183 ff and Horpsool and Humphreys, p 156. See also the report with conclusions of working group I on the principle of Subsidiairty, CONV 286/02 and COM (93) 545 final, p 1 f and COM (2011) 344 final, p 2.
⁴⁷ Horpsool and Humphreys uses this denomination, p 100 f.
⁴⁸ See eg. Nergelius, p 114 f.
⁴⁹ See eg. Chalmers, Davies and Monti, p 363 f and Lenaerts and Van Nuffel, p 134 f.
⁵⁰ Edinburgh Conclusions, annex 1 p 2.
⁵¹ Amsterdam Protocol Article 5 and Edinburgh Conclusions, annex 1 p 6.
that the guidelines do not solely pertain to the assessment of the better achievement test but define subsidiarity as a whole.

The guidelines consist of three points which need to be examined when compliance with subsidiarity is to be sustained. First, any transnational aspects which cannot be satisfactorily regulated by the Member States shall be taken into consideration. Second, it shall be examined whether action solely by the Member States would conflict with requirements of the Treaty or otherwise significantly damage Member States’ interests and third, they specify that action at Union level must produce clear benefits by reason of its scale or effects when compared with action at the level of the Member States.\footnote{Amsterdam Protocol Article 5 and Edinburgh Conclusions, annex 1 p 7.}

On a more general level the mentioned documents also state that Union action shall only be undertaken when necessary and that when possible, the reasons for concluding that Union action is required shall be substantiated by qualitative or quantitative indicators.\footnote{Amsterdam Protocol Article 4 and 6 and Edinburgh Conclusions, annex 1 p 7.} The conclusions also state that the evaluation of compliance with subsidiarity should be based on the substance of a proposal.\footnote{Edinburgh Conclusions, annex 1 p 11.}

The Edinburg conclusions originate from the Council and the Amsterdam protocol is part of the Treaties. A few remarks shall now be made on the Commissions view on subsidiarity. The Commission has occasionally used the notion of subsidiarity for the whole of what is now Article 5 TEU, thus encompassing not only subsidiarity in its strict form as in 5.3 but also the principles of conferral and proportionality in 5.2 and 5.4 TEU. This usage is lamentable both since it makes the further reading on this topic more ambiguous and because it to some extent seems to has infected other commentators of EU law resulting in what seems to be a vast variety of different definitions of the notion of subsidiarity.\footnote{Toth, p 38.}

However, in a communication from the Commission to the Council and the Parliament from October in 1992\footnote{SEC(92) 1990 final} (thus preceding both the Edinburgh meeting and the even latter introduced Amsterdam Protocol) the Commission has presented its view on subsidiarity. Even if the legal value of such an early and one-sided act may be questioned and though the Commission uses the notion of subsidiarity both in its broader and narrower sense, the communication still contains some interesting attempts at defining the concept of subsidiarity. In doing so it thereby

\footnote{Toth, p 38.}

\footnote{SEC(92) 1990 final}
introduces some interesting concepts that are still often used by commentators and does therefore deserve mentioning.

The view presented by the Commission in this communication largely coincides with the subsequent materials from the Edinburgh meeting and the Amsterdam Protocol but does in part go further in specifying the concept of subsidiarity. The Commission suggests that a test of comparative efficiency must be undertaken which would include the examination of factors such as the effect of the scale of the operation, trans frontier problems, the costs of inaction, the necessity to maintain coherence and limits on national action which may cause distortions of the end results and also the necessity to avoid distortion of competition within the internal market.  

Annexed to the communication is a “juridico-technical” document that, according to the Commission, on an internal basis was intended to contribute to the definition and application of the principle of subsidiarity. To ascertain whether there is a need for community action it is suggested in the annex that a test in two parts is applied. The first part involves checking whether the Member States would have at their disposal the means to the end of the proposed action. This part is defined as the abovementioned comparative efficiency test. Second one must assess the expected effectiveness of community action. This part is defined as the value added test and would include considerations of cross-border problems and consequences of failure to act. This more detailed description of the need for community action according to the annex does not completely coincide with the description used in the communication itself since there seems to be some confusion on what the notion of “comparative efficiency” actually encompasses. However, the Commission also acknowledges that the need for action cannot always be assessed in the same manner, thus seemingly leaving the field open for other methods to be applied while testing whether an action complies with subsidiarity or not. This view coincides well with the statement in the Edinburgh Conclusions and the Amsterdam Protocol that subsidiarity is a dynamic concept which shall be applied on a case by case basis.

In a report from 1993, just a month after the entering into force of the Maastricht Treaty, the Commission has again discussed the principle of subsidiarity and its application. In this report the Commission also uses the notion of subsidiarity in both a broader and a more narrow sense

---

57 SEC(92) 1990 final, p 2.
58 SEC(92) 1990 final, p 3.
60 Annex to SEC(92) 1990 final, p 10.
61 Annex to Edinburgh Conclusions, p 5 and Amsterdam Protocol, paragraph 3.
62 COM (93) 545 final.
but here the Commission expressly clarifies the fact that it is indeed a question of using the notion for two different purposes. In the second part of the report the Commission describes the method it applies when justifying proposals for legislation with regards to subsidiarity in its broad sense mentioning that the broader concept also encompasses the principle of proportionality. Latter it does however become clear that the stricter form of subsidiarity only encompasses some aspects of the broad notion of subsidiarity and that these aspects do not apply where the Union possesses exclusive competence.\(^{63}\) The definition of subsidiarity in strict form thus coincide with subsidiarity according to Article 5.3 TEU. In this report the Commission discusses the aim of the subsidiarity principle reminding of the fact that it is to see to it that decisions are to be taken as closely as possible to the citizens. It also suggests that a corollary aim is that the principle shall lead to the improvement of the quality of community action by requiring the community to demonstrate a legitimate need for action and thus limit action to the essentials.\(^ {64}\) The Commission puts forward three criteria in the form of questions for the assessment of the subsidiarity criteria. These questions are “What is the Community dimension of the problem?”, “What is the most effective solution?” and “What is the real added value of common action?”. These questions obviously relate to the criteria put forward in the Commission’s communication from 1992 and the comparative efficiency test and the value added test.

In recent years the Commission has introduced an Impact Assessment Board which has as its task to assess the effects of new legislation before the Commission gives of a proposal. The impact assessment review is mainly focused on potential economic, social and environmental consequences that proposals may entail but does also include a review of their compliance with subsidiarity.\(^{65}\) In 2009 the Commission published guidelines for the impact assessment which consists of a set of logical steps which help the Commission to perform the assessment. In these guidelines the Commission refers to the sufficient attainment test as the “necessity test” and to the better attainment test as the “EU value added test”. Thereafter it presents five questions to aid the review of the subsidiarity aspects of proposals. These five questions are the same ones as have been presented in earlier documents and does as such not produce anything new. However, here each of the first three questions, which relate to the sufficient attainment test, are accompanied by a concrete example of a situation which helps to explain in practice what the examination is to include.

\(^{63}\) COM (93) 545 final, p 3.
\(^{64}\) COM (93) 545 final, p 1.
\(^{65}\) http://ec.europa.eu/governance/impact/index_en.htm, as downloaded on 2013-02-01.
1. Does the issue being addressed have transnational aspects which cannot be dealt with satisfactorily by action by Member States? (e.g. reduction of CO2 emissions in the atmosphere)

2. Would actions by Member States alone, or the lack of Community action, conflict with the requirements of the Treaty? (e.g. discriminatory treatment of a stakeholder group)

3. Would actions by Member States alone, or the lack of Community action, significantly damage the interests of Member States? (e.g. action restricting the free circulation of goods)

In doctrine, the author Nergelius has suggested that there is a tendency in doctrine to exaggerate the difficulties relating to the subsidiarity test. Nergelius presents the idea that the wording of Article 5.3 TEU suggests that there is really only one test to be applied and that is the “better attainment test”. The other part of the test is according to Nergelius a corollary of the first part as it is causally connected to the first part through the usage of the word “therefore” which was used to connect the two parts of the sentence formulating the subsidiarity test in the Maastricht Treaty. Today however the word “therefore” has been replaced by the phrase “but can rather” in the English version of the Lisbon Treaty. In the French version the word “mais” (corresponding to “but” in English) is used, in the German version the words “sondern ... wegen” meaning “but, due to” are used and the Spanish version uses “sino que” which also translates to “but”. The Swedish version, however, does still, as in the English version of the Maastricht Treaty, use the word “därför” which translates to “therefore” and thus suggests, as implied by Nergelius that there is a closer connection between the two parts of the sentence than does the word “but”. If the meaning “therefore” is the correct one this would seem to imply that there cannot be a discrepancy resulting from the application of the two parts of the sentence. Hence if the sufficient attainment test would be positive the better attainment test would be negative since the second is a corollary of the former. Correspondingly, if the aim cannot be sufficiently achieved by the Member States, it can therefore automatically be better attained by the Union.

This discussion might tend to be a case of over-analysing of the wording of the treaty, forcing a strict legal and linguistic interpretation where really a more teleological approach would be preferable. Despite this there are some interesting aspects of this wording-question. Depending on the relation between the sufficient attainment test and the better attainment test the outcome of the subsidiarity test might be quite different.

As showed above Nergelius suggest that there is a connection between the sufficient attainment test and the better attainment test which leads to the conclusion that the two parts will always point in the same direction. If another view is applied and the parts are viewed as separate, as many of the basic documents on subsidiarity seem to imply when they prescribe that both aspects of the principle must be meet, then there is a possibility that the outcome of the two tests may indeed point in different directions. If this is the case then it needs to be affirmed how this problem is to be solved. Does one part have precedence over another or shall they be applied in a certain order?

It has been suggested that when determining the appropriate level for action the principle of subsidiarity is formulated to naturally prefer Member State action over Union action.67 Others have suggested that since subsidiarity is concerned with efficiency it would normally prefer Union action.68 These two aspects of subsidiarity, the democratic decentralising aspect and the efficiency aspect, which do undisputedly both form part of the principle, are by nature hard, if not impossible to unite and the principle has thus been described as a double-edged sword. It may both promote and restrict Union action and it is thus equally true that it can have both decentralising and integrating effects.69 However, if there had been no principle of subsidiarity there would have been nothing to suggest that the Union should in some cases refrain from using powers conferred upon it to the benefit of the Member States. Viewed from this perspective it could thus be accepted that in a general way the principle does actually, at least to a limited extent, have a decentralising effect. If statements such as the one in the preamble that “actions shall be taken as closely as possible to the citizens” are taken into account this aspect becomes even clearer. One shall also keep in mind that it is after all a fact that the principle has a negative formulation allowing community action “only if” action by Member States do not suffice and the aim is better attained by the Union. Even if the demands are set quite low and there is a large room for discretion it is the Union that bears the burden of proof and thus has to sustain that action at Union level is justified.70 I would therefore suggest that it is not wrong to say that the subsidiarity is actually a decentralising principle.

Bearing this inclination towards Member State action in mind, and returning to the question of how the two parts of the subsidiarity principle relates to one another, the following scheme could be a reasonable way to apply the principle in practice.

68 Cramér, p 541.
70 Melin and Schäder, p 55 f.
First the sufficient attainment test would be applied. Could the objective be sufficiently achieved by the Member States? If the answer is yes then Union action, in accordance with the aim to bring decisions as close as possible to the citizens, should be prohibited. If the answer is no, it can not be sufficiently achieved, then one should not be satisfied and conclude that Union action is legitimate but go on to assessing whether the objective of the action is actually better attained if the Union takes action.\(^{71}\) If action on Union level would not lead to better attainment of the objective (it could be that it is only just as good or bad as action by the Member States) then the subsidiarity test would still inhibit Union action. Only if Member States cannot sufficiently achieve the objective and if action at Union level would produce actual benefits in comparison with action at national level would Union action be justified. However, if any of the presumptions on which this line of reasoning is based would change or be proven to be incorrect so would probably this model of application.

One way to get an answer to the question of how to apply the principle is by examining the case law on subsidiarity. A presentation of the existing case law will therefore be presented below.

### 3.4.2 Subsidiarity in Practice

Even though the importance of the principle of subsidiarity has been stressed on several occasions and though it is by time rather gaining more recognition than less there is still not much case law relating to subsidiarity which can be used as a support in clarifying the meaning of the principle and how it is to be applied. There are only a handful of cases where the principle has even been actualised and a presentation of these and a short analysis of the Court’s judgements will follow here.

---

\(^{71}\) Hartley, p 122; Cramér, p 541.
In the so called Working Time Directive the United Kingdom sought annulment of a directive which lay down rules on the maximum weekly working time, minimum periods of rest and minimum paid leave form work. As grounds for its action the UK argued amongst other things that it had not been demonstrated that the aims of the directive could be better attained at community level than by action by the Member States. The CJEU firmly rejected this argument and concluded that there was a need for community action based on findings by the Council that it was “necessary to improve the existing level of protection … and to harmonize the conditions in this area” and that this ”necessarily presupposes Community-wide action”.\(^7\)

In this case the CJEU did not further examine the basis of the Council’s assertion that there actually was a need for community action but seems to be contented with the fact that there was a statement regarding this in the directive.

\section*{3.4.2.2 Case C-233/94, Deposit Guarantee Directive\(^7\)}

In this case Germany brought annulment proceedings against a directive on deposit-guarantee schemes on the grounds (amongst other things) that the directive did not sufficiently state the reasons on which it was based since it did not explain how it was compatible with the principle of subsidiarity. The CJEU started out by pointing to the fact that Germany had not claimed that the directive infringed the principle of subsidiarity, but only that “the grounds to substantiate the compability” with the principle had been left out. Thereafter the Court referred to three recitals in the preamble to the directive and concluded that though they did not explicitly refer to the principle of subsidiarity they did indeed give reasons on why community action was justified. For instance the recitals stated that “the guarantee scheme … has repercussions which are felt outside the boarders of each Member State” and that “it is indispensable to ensure a harmonized minimum level of deposit protection wherever deposits are located”. From this the Court concludes that from the “legislature’s view, the aim of its action could … be best achieved at Community level”.\(^7\) Another recital stated that “action taken by the Member States in response to the Commission’s [earlier] recommendation has not fully achieved the desired result”. From

\begin{itemize}
    \item \(^72\) ECR I-5755, [1996].
    \item \(^73\) Paragraph 54-55 and 47.
    \item \(^74\) ECR I-2405, [1997].
    \item \(^75\) Paragraph 26.
\end{itemize}
this the Court concluded that the community legislator must have found that the objective could not be sufficiently achieved by the Member States.\textsuperscript{76}

3.4.2.3 \textit{Case C-376/98, Tobacco Advertising Ban Directive}\textsuperscript{77}

In this case, which is also an annulment proceeding against a directive brought by Germany, one of seven pleas was that the directive breached the principles of subsidiarity and proportionality. This ground was however not at all examined by the Court since it found that the applicant’s plea could be approved based on Germany’s first plea that the directive did not have a correct legal basis.\textsuperscript{78}

In its argumentation concerning the question of legal basis the Court discusses how to decide whether the aim to prevent the emergence of obstacles to trade resulting from the multifarious development of national laws is fulfilled or not. The court states that this aim cannot be sustained by the mere finding of disparities and the abstract risk that this may lead to obstacles to the internal market or distortions of competition. Such obstacles and the risk that they pose must be likely to appear.\textsuperscript{79} This is interesting to note since the need for harmonisation, under which arguments concerning the need to protect the internal market can be subsumed, can be used as a mean to interpret the sufficient attainment test. This will be further discussed in chapters 5 and 6.

3.4.2.4 \textit{Case C-377/98, Biotechnology Directive}\textsuperscript{80}

The Netherlands brought action against the directive on the legal protection of biotechnical inventions claiming on six grounds that the directive should be annulled. The second plea was based on infringement of the subsidiarity principle, both as a substantive ground and as a procedural ground.\textsuperscript{81}

The Court concluded in just two short paragraphs that since the objective of the directive was to “ensure smooth operation on the internal market by preventing or eliminating differences between the legislation and practice of the various Member States” this could not be sufficiently

\textsuperscript{76} Paragraph 27.  
\textsuperscript{77} ECR I-8419, [2000].  
\textsuperscript{78} Paragraph 118.  
\textsuperscript{79} Paragraph 84-86.  
\textsuperscript{80} ECR I-7079, [2001].  
\textsuperscript{81} Paragraph 30.
achieved by the Member States alone. Moreover, since the directive had immediate effects on intra-Community trade the Court found that the objective could also be better attained by the Community.\textsuperscript{82}

Regarding the alternative plea that the directive did not state sufficient reasons with regards to subsidiarity the Court found from three recitals in the preamble to the directive that “the development of the laws and practices of the different Member States impedes the proper functioning of the internal market” and concluded that this was equal to stating sufficient reasons. The Court therefore dismissed the plea on subsidiarity.\textsuperscript{83}

\textbf{3.4.2.5 Case C-491/01, ex parte British American Tobacco\textsuperscript{84}}

In this case the CJEU did for the first time give some lead on the formal method to be applied when assessing compliance with subsidiarity. The Court begun by stating that to find whether the concerned directive was in keeping with the subsidiarity principle it was first to be considered whether the objective of the actions proposed by the directive could be \textit{better attained} at community level. Here the Court thus referred only to the better attainment test and did not mention the sufficient attainment test. The Court then went on by concluding that since the objective was to eliminate barriers raised by multifarious differences in the Member States’ laws the objective could not be \textit{sufficiently achieved} by the MS individually. From this the Court concluded that it followed that action was \textit{better attained} at Community level.\textsuperscript{85}

Here it seems as if the CJEU has adopted an approach to the method of applying the principle of subsidiarity which tends to assimilate the method proposed by Nergelius where he argues that the better attainment test is a natural corollary or just “another side of the coin” to the sufficient attainment test. It also deserves re-mentioning that at this time the English version as well as the Swedish one did actually use the word “therefore” to connect the two parts of the principle with each other. However, since the Court does not further expand on the topic and is quite brief in its examination the judgement cannot for sure be taken as an indication that this method is actually preferred by the Court.

\textsuperscript{82} Paragraph 32.  
\textsuperscript{83} Paragraph 33-34.  
\textsuperscript{84} ECR I-11453, [2002].  
\textsuperscript{85} Paragraphs 181-183.
This case is a preliminary ruling procedure in which the High Court of Justice of England and Wales asked the CJEU seven questions regarding a directive on food supplements, one of them regarding the directive’s relation to the principle of subsidiarity.

As in the previous case referred to, ex parte British American Tobacco, the Court begins by stating that to determine whether the directive infringes on subsidiarity it is necessary to consider if the pursued objective could be better achieved by community. The objective of the directive was to remove barriers resulting from differences in laws of the MS. Since leaving it to the MS to regulate the trade in this area would only, according to the CJEU, “perpetuate the uncoordinated development of national rules and, consequently, obstacles to trade” the Court concluded that the objective could not be satisfactorily achieved by the Member States alone and could consequently be best achieved at community level. Again the two parts of subsidiarity seems to have been treated in conjunction.

3.4.2.7 Case C-518/07, Protection of personal data

The Commission brought proceedings against Germany for failure to fulfil obligations under a directive on protection of personal data of individuals. In its defence Germany, amongst other things, invoked the principles of subsidiarity and proportionality in conjunction with paragraph 7 in the Amsterdam Protocol, according to which care should be taken to respect well established national arrangements and the national legal system. According to Germany it would be inconsistent with these principles to force them to give up a well established national system and replace it with a system “foreign to its legal order”. The CJEU shortly concluded that the directive did not go beyond what was necessary and that Germany’s objection could not be accepted.

86 ECR I-6451, [2005].
87 Paragraphs 104-107.
88 ECR I-1885, [2010].
3.4.2.8  **Case C-58/08, The roaming regulation**

In this preliminary ruling procedure the CJEU had to consider whether a regulation on roaming violated the principle of subsidiarity. The Court defined the objectives of the regulation as maintenance of competition and smooth functioning of the internal market. Thereafter the Court got into a rather detailed review on the interrelationship between retail and wholesale prices and concluded that it had been necessary to regulate both prices to not disrupt the functioning of the roaming market. Thereafter the Court, without further explanation, concludes that the objectives were thus better achieved at community level.

3.5  **Subsidiarity and Its Relation to Proportionality**

A question of great practical importance when discussing the principle of subsidiarity is its relation to the principle of proportionality. As mentioned earlier, there seems to be a broader usage of the term subsidiarity which encompasses the whole of Article 5 or at least the principle of proportionality, and one that is more narrow, including only the contents of Article 5.3. One example of this multifarious usage of the term subsidiarity can be found in the ex parte British American Tobacco-case which is presented above. In paragraph 184 the Court concluded that the intensity of an action was in conformity with the principle of subsidiarity since “it did not go beyond what was necessary to achieve the objective pursued”. The Court came to this conclusion by referring to a previous part of its judgement where it had concluded that the principle of proportionality was not infringed. Thus, while referring to subsidiarity, the Court uses arguments of proportionality.

Though it is indisputable that the three principles in Article 5 (conferral, subsidiarity and proportionality) are intimately intertwined in that they all concern the usage of EU powers they should still be regarded as three distinct legal concepts with different purposes, areas of application and effects. This view is supported by the presentation of the concepts in the Edinburgh Conclusions and the Amsterdam Protocol where the notions of subsidiarity and proportionality are treated more or less separately. The conclusions are more explicit on the fact that it concerns separate concepts since it treats the two concepts under different headings but in

---

89  ECR I-4999 [2010].
90  COM (93) 545, p 3.
91  Edinburgh Conclusions, annex 1 to part A, p 2; Toth, p 38.
the protocol the arguments pertaining to the different notions are likewise placed in different paragraphs (paragraph five and six respectively). Obvious signs that the principles are to be treated separately are also the fact that they are referred to as separate principles and are placed in separate paragraphs of Article 5. They also have separate histories and areas of application. The principle of proportionality has a much longer and more evolved history in EU law than the principle of subsidiarity. Proportionality is also applicable in all areas of EU law whereas subsidiarity is not applicable where EU has exclusive competence. Furthermore the three principles of Article 5 have different purposes. The principle of conferral answer the question “Can EU act?”, subsidiarity “Should EU act?” and proportionality the question of “How should EU act?”. Proportionality is concerned with issues of intensity and serves to make sure that the means of an action corresponds to the objectives of the action. Application of the principle of proportionality leads to the conclusion that, for instance, directives are to be preferred to regulations and that minimum rules, which leave as much room as possible for the Member States in implementing Union acts, are to be preferred to maximum or full harmonisation rules. There are points of convergence between the principles of subsidiarity and proportionality since they do both in some sense and to some extent put up restrictions to the use of Union powers. Nevertheless, subsidiarity is concerned with identifying the lowest possible level where an action can be performed effectively whereas proportionality administers the ways to perform the action once the appropriate level has been identified.

Despite the fact that it would thus seem that the principle of subsidiarity and proportionality do indeed have different aims, definitions and effects there are those who suggest that proportionality might be a part, not only of subsidiarity in its broader sense, but also of subsidiarity as it stands in 5.3 TEU. This view is presented by amongst others Hettne, Tridimas and, Lenaerts and Van Nuffel and concerns the wording “if and in so far as” in the sufficient attainment test. None of these authors have, however, defined the basis for this opinion in depth. Hettne refers to the formulation and states that it includes a test of necessity and one of proportionality. He argues that the subsidiarity test would be rather plain and vacuous if one would be satisfied by stating that there are reasons prompting Union action without entering into issues concerning the necessity and proportionality of such actions. He also underlines the fact that in both the Edinburgh Conclusions and the Amsterdam Protocol the two principles are

93 Melin and Nergelius, p 54; Bergström and Hettne, p 52 f.
95 Hettne, p 20-22; Tridimas, p 176 and Lenaerts and Van Nuffel, p 134 note 112.
treated jointly. As described above, though there is undoubtedly a close relationship between the concept of subsidiarity and proportionality and therefore good reasons why these would be treated in connection to each other, the documents referred to do indeed separate the concepts. Regarding the claim that subsidiarity would be vacuous without an addition of proportionality to the test one can only note that indeed there are difficulties in pinning down the concept of subsidiarity. Occasionally, as in e.g. clear cross boarder situations where there is an obvious need for harmonising actions on Union level, one might even question if the test really contributes at all since it is hard to think of reasons to object to the proposal not relating to proportionality. Nevertheless the fact that it is easy to slip into considerations of proportionality cannot be taken as an indication that proportionality is actually a part of the subsidiarity test it self.

3.6 Conclusions on the Contents of the Principle of Subsidiarity

As illustrated above there are many aspects of subsidiarity yet to be defined. Neither the Union institutions nor EU-commentators seem to agree on even such basic things as what the notion of subsidiarity actually encompasses. As a result there are multiple ways to interpret the principle and since case law is not very extensive nor can much help be found there. What may be concluded when it comes to justiciability is that the Court tends to leave a large margin of discretion to the institutions when it comes to assessing the substantive parts of the principle of subsidiarity. Normally the Court has settled with the mere statement in a preamble that Union action is necessary if the aim was to e.g. promote the smooth functioning of the internal market or to find solutions to problems with cross-border elements. In some cases the Court has also referred to statements where it was suggested that previous trials to leave it to the Member States to regulate an area have been unsuccessful and this must be perceived as a welcome element in the examination since it directly relates to the possibilities for Member States to achieve the objectives of the suggested action. It might be that the scantiness of the case law from the CJEU depends on the mere fact that the question of subsidiarity has not yet been put to the test in a case where it is the deciding factor and the resolution of the case depends on the definition of subsidiarity. Even so, as the case law stands today, it still implies an inclination towards inaction by the Court. This inclination to not make a very profound examination of the substantive parts of the principle leads to the conclusion that the principle will probably foremost be successfully

97 Bergström and Hettne, p 52 f.
invoked as a procedural ground. This conclusion also seems to be the overriding one amongst commentators in general.98

When it comes to the definition of subsidiarity I strongly advocate that the principle of subsidiarity in its strict sense should be separated from the related concepts of conferral and proportionality. One may of course ask whether in practice subsidiarity can, or even should, be separated from the questions of competence and proportionality. Especially since even the Court of Justice has occasionally treated subsidiarity as secondary to or subsumed under questions of competence and proportionality.99 It is however rather easy to distinguish between the concepts in theory. The prominent role that subsidiarity has been given in the Treaties and the way in which Article 5 has been formulated, combined with the fact that proportionality does not even come into action until after the appropriate level for the suggested action has been sustained are evident facts suggesting that the principles are to be separated. The fact that national Parliaments now have been given the right, through primary law, to review draft legislative acts on grounds of subsidiarity – and not proportionality – also implies that subsidiarity should be perceived as a principle independent of, though perhaps to some extent, influenced by, competence- and proportionality considerations. Whether these other principles should likewise be analysed when the national Parliaments perform their examination of compliance with subsidiarity according to the new Lisbon Protocol is another question which will be treated in chapters four and five.

As regards the method for applying the principle of subsidiarity it can be concluded that according to its present wording the principle of subsidiarity in most languages seems to consist of two separate parts which could lead to different, and therefore also occasionally opposed, results when applied. It shall of course be borne in mind that originally in the Maastricht Treaty the wording of the article did rather suggest that there were a connection between the two parts binding the better achievement test to the result of the sufficient attainment test so that the former was a corollary of the latter. Again, if this is the case then why was the wording altered through the Lisbon Treaty? And to what “aspects” do the Amsterdam Protocol refers when it states that “both shall be met”? Then again, since the principle is really a rule of reason according to which a judgement of suitability is to be made, is there really any point in trying to distinguish between these two aspects?

98 See amongst others Tridimas, p 185; Wyatt and Dashwood, p 117 f; Lenaerts and Van Nuffel, p 138 ff; Chalmers, Davies and Monti, p 363 ff;
99 Tridimas, p 188.
I would personally like to stress the importance of the second test, that to be justified the objectives must be *better* achieved by Union action. This is a sort of efficiency criterion which indicates that if both alternatives are *equally* good or effective then the Union shall, in accordance with the suggested decentralisation aim of the principle, refrain from taking action. This would lead to the conclusion that a two step-method which prefers Member State action should be used. This view is supported by, amongst others, Hartly and Dashwood and Wyatt which prescribes that “all other things being equal, the choice should fall on the Member States”. The decentralising effects of such a suggestion may be adjusted until an appropriate distribution of possibilities to act is reached by lowering the burden of proof placed on the Union. This method would coincide well with the political nature of the principle and is not contravened by the Court’s case law where the Court has occasionally even, without further motivation, accepted that an action does not infringe subsidiarity by the mere statement by the legislator that it does not.

When it comes to further specifying the contents of the subsidiarity principle aspects such as transnational effects, possible conflicts with requirements of the Treaty, damages to Member States’ interests and the scale or effects of actions shall be taken into account. It has also been suggested that the actual Union dimension of an action should be sustained and that consequences such as costs of inaction or failure to act shall be taken into account. The necessity to maintain coherence and to avoid distortions to the internal market and to competition shall also be considered. There is no distinction made on whether these criteria pertain to one or another of the two parts of subsidiarity. Nor do the two tests presented by the Commission of “comparative efficiency” and “value added “ clearly relate to a single one of these two parts though I would probably assign both of them to the better attainment test. This is due to the fact that they both refer to relative considerations whereas the sufficient attainment test does only refer to the actual possibility by the Member States to achieve an objective without comparing the result with the expected result at EU level. Furthermore, the statement in the former guidelines of the Amsterdam Protocol that it shall be considered whether Member State action would conflict with the treaties or otherwise damage Member State interests are according to me so obvious that they should not need to be examined separately. Naturally the Member States shall not take action if such action would infringe provisions of the treaties and if a Member State would find that its interests would be at risk if the Union did not take action this would of course influence the subsidiarity test.

100 Hartly, p 122; Dashwood and Wyatt et al., p 115.
4 Supervision by National Parliaments

4.1 Introduction

With the Lisbon Treaty a new Protocol on the Application of the Principles of Subsidiarity and Proportionality was introduced which replaced the repealed Amsterdam Protocol. The purpose of the new protocol is according to the preamble to ensure that decisions are taken as closely as possible to the citizens of the Union. The new protocol leaves out the guidelines on the application of the principles of subsidiarity and proportionality and focuses more on how to operationalize the principle through practical and procedural regulations.\(^\text{101}\) To secure the achievement of its purpose the protocol establishes a new system for monitoring ex ante, in advance, of the subsidiarity principle. The responsibility for monitoring compliance with subsidiarity is attributed to national Parliaments which may react to daft legislative acts presented by the Union institutions. As regards this new advance monitoring system the protocol only refers to subsidiarity and not to proportionality.

The basis of the draft proposal for the new Protocol was presented by the Convention on the Future of Europe. The proposals from the Convention was the basis for the Draft Treaty Establishing a Constitution for Europe. When this Treaty failed to get ratified the proposals concerning subsidiarity was transferred to the Lisbon Treaty without relevant alterations. Working Group I of the Convention had the responsibility to look into the question of subsidiarity. The group was to examine how the principle should be applied and how a mechanism for monitoring compliance with it could be designed. After concluding that there was a view that the principle of subsidiarity had failed to yield the expected results and that compliance with it had often been overridden it was concluded that the main focus of the Working Group’s examination would be to look at methods for monitoring of compliance.\(^\text{102}\) In its work the Group based its examination on three questions; how compliance could be

\(^{101}\) COM (2011) 344 final, p 2.
\(^{102}\) CONV 71/02, p 3 f.
monitored most effectively, whether a special mechanism or procedure for monitoring should be established and if so, whether this procedure should be of political or legal nature.\textsuperscript{103}

In its conclusions Working Group I pointed out the fact that the principle of subsidiarity has an essentially political nature and that implementation of it involved a considerable margin of discretion and that due to this, monitoring of the principle should be of a political nature and take place before acts came into force. A suggestion to create an ad hoc body was considered to be too cumbersome and the monitoring responsibility was instead attributed to national Parliaments which were to be strengthened in relation to their Governments when it came to EU questions.\textsuperscript{104} The proposal from the Working Group focused on three aspects of subsidiarity, it reinforced the rules for its application by the institutions in the preparatory phase of the legislative process, it introduced a “early warning system” of monitoring of compliance and it broadened the possibilities to refer questions of subsidiarity to the CJEU.\textsuperscript{105}

4.2 National Parliaments as Union Actors

Through the new system for monitoring the principle of subsidiarity the Lisbon Protocol contributes to the generally increased focus on national Parliaments as actors within the Union system. In addition to the second Protocol on the Application of the Principles of Subsidiarity and Proportionality the Lisbon Treaty also, as did its predecessors, contains a Protocol on the Role of National Parliaments in the European Union. In this protocol different aspects concerning national Parliaments as Union actors are mentioned, the most important one being this new possibility for the Parliaments to interact directly with the Union institutions in the legislative process. The purpose of accentuating and increasing the importance of national Parliaments in the Union in general and in the legislative process in particular is amongst other things to meet criticism concerning the democratic deficit and expanding competence of the Union and to counteract centralisation-tendencies which leads to an erosion of the national parliamentary powers.\textsuperscript{106}

\begin{itemize}
\item \textsuperscript{103} CONV 71/02, p 1.
\item \textsuperscript{104} CONV 286/02, p 2 f.
\item \textsuperscript{105} CONV 286/02, p 3 f, points a to c under heading II.
\item \textsuperscript{106} Barrett, p 595; Bergström och Hettne, p 81; Hallström 2011, p 9 and Jonsson, p 417 f.
\end{itemize}
In the discussions within the Convention on the Future of Europe this new possibility for national Parliaments was described as being of an “innovative and bold nature”. Steps in this direction had, however, already been taken by the Commission in 2006 when it introduced a system for political dialogue with the national Parliaments. As part of this political dialogue the Commission sends its new proposals and consultation papers to national Parliaments for general comments. Thereafter the Commission normally sends a reply to the emitting Parliament where it comments on the reflections made by the national Parliament. Due to the fact that the new subsidiarity procedure is applied alongside the political dialogue procedure the Commission has requested that the Parliaments separate their concerns on subsidiarity from other questions when issuing a reasoned opinion on subsidiarity.

4.3 Contents of the New Protocol

4.3.1 General Contents

The new Lisbon Protocol affirms the fact that all institutions must ensure constant respect for the principles of subsidiarity and proportionality. It also places an obligation on the Commission to consult widely before proposing legislative acts and to forward drafts not only to institutions and Governments but also to national Parliaments. Further it slightly sharpens the obligation to state the reasons on which a draft legislative act’s compliance with the principles can be justified. The new protocol states that all drafts “should contain a detailed statement making it possible to appraise compliance with the principles”. The demand that the given reasons shall be substantiated by qualitative or if possible quantitative indicators remains unaltered. Finally the protocol reaffirms the fact that the CJEU has jurisdiction over the application of the principle and adds a statement that action can be brought by Member States “or notified by them … on behalf of their national Parliament”. This last addition might prove to be of great significance in strengthening the role of national Parliaments in the Union since it might indicate a requirement

---

107 CONV 286/02, p 5.
and not just a possibility for national Governments to actually conform to a proposal from its Parliament to bring actions before the Court.\textsuperscript{110}

### 4.3.2 Provisions on the Monitoring Mechanism Attributed to national Parliaments

Article 6 and 7 of the new protocol deals with the new possibilities for national Parliaments to monitor in advance the creation of new legislation. This system has been referred to as an “early warning system”\textsuperscript{111} and in Article 6 the protocol provides that national Parliaments may, within eight weeks from the date of transmission of a draft legislative act, examine the act with regard to subsidiarity and give a reasoned opinion on its compliance with the principle to the Union institutions. It has been pointed out both by Working Group I of the Convention on the future of Europe and by the Commission, that the opinions should relate exclusively to questions of subsidiarity and not to the substance of the proposal.\textsuperscript{112} During the eight-week period the draft shall be resting awaiting response from the Member State’s Parliaments before it can be placed on the Council’s provisional agenda for adoption.\textsuperscript{113}

If a reasoned opinion is sent to the Union the institution from which the draft originates, normally the Commission, shall take account of the opinion. If only a few opinions are submitted the issuing institution does not have an obligation to review the draft but is only obliged to take notice of the opinion. In a letter from the president and vice-president of the Commission on 1 of December in 2009 to the national Parliaments the Commission does, however, assert that it intends to reply in some form or other to all reasoned opinions that it receives.\textsuperscript{114} The Member States can thus always expect some kind of reaction from the Commission on its opinions. If opinions are submitted from approximately one third of all Parliaments\textsuperscript{115} Article 7 in the protocol provides that the draft \textit{must} be reviewed. The review may, however, have little effect since it can result in either the withdrawal, amending or even maintaining of the original draft. Reasons for the decision resulting from the performed review must be given which will hopefully

\begin{footnotes}

\item[110] Hallström 2011, p 10; Hartley, p 125 and Tridimas, p 190.
\item[111] CONV 286/02.
\item[115] In reality a voting system has been introduced where all parliaments have two votes. If the country has a bicameral parliamentary system, each chamber has one vote. If opinions representing one third of all votes (approx. 18 of 54 votes) are submitted the draft must be reviewed.
\end{footnotes}
clarify in a better and more comprehensive way the relationship between the draft legislative act and the subsidiarity principle in cases when no alterations are made to the draft.

If opinions are submitted from Parliaments representing more than a simple majority of all parliamentary votes the draft must also be reviewed and the review may likewise result in the maintaining, amending or withdrawal of the proposal. In this case, however, a second mechanism applies if the proposing institution choses to maintain its proposal. In such a case the reasoned opinions from the national Parliaments together with the reasons for justifying the proposals compliance with the subsidiarity principle from the proposing institution shall be sent to the legislator. If then either 55 % of the members of the Council or a majority of the European Parliament considers that the draft legislative act does not comply with the principle of subsidiarity the proposal shall not be given further consideration and does therefore fall.

Hitherto the thresholds for review have only been reached on one occasion. This case concerned a proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services. Though the Commission was not convinced by the reasoning put forward by the national Parliaments on infringement of subsidiarity it still recognised that the proposal was not likely to gather the necessary political support needed for adaption and thus decided to withdraw its proposal.116

---

5 Supervision by the Swedish Parliament

The Swedish Parliament is one of the most active parliaments when it comes to using the possibilities to monitor compliance with subsidiarity and giving of reasoned opinions. Since the monitoring system was introduced in December 2009 the Swedish Parliament has, in total, submitted 33 reasoned opinions to the Union institutions. Twenty of these opinions were submitted in 2012, ten in 2011 and three in 2010. In 2011 only Luxembourg, Poland and Italy were close to being as active as Sweden when they submitted 7, 6 and 5 opinions respectively.\textsuperscript{117}

In this part of the essay I will analyse in more detail the reasoning in the twenty opinions from 2012. In all of these opinions the examining committee of the Parliament has requested and received an opinion from the Swedish Government on aspects of subsidiarity relating to the proposal. Half of the opinions have so far received an answer from the Commission and in one case the threshold requiring the Commission to review its draft was reached. This draft was mentioned earlier under 4.1.2 and though the Commission did not find that the draft infringed the principle of subsidiarity it has withdrawn its proposal since it found that it would be impossible to gather sufficient support for the adaption of the proposal.\textsuperscript{118}

5.1 Rules and Guidelines Applied by the Swedish Parliament

In Sweden monitoring of compliance with the principle of subsidiarity is carried through by the committee in the Parliament which handle the substantial questions that the draft legislative act concern. All drafts that are sent over to the Parliament from the Union are subject to a full review by a committee, no preliminary assessment is made to sort out for instance less controversial drafts.\textsuperscript{119} The committee that performs the subsidiarity test may request a statement from the Swedish Government and from the other committees in the Parliament regarding their view on a proposal’s conformity with the principle of subsidiarity. When the subsidiarity test is

\textsuperscript{117} COM(2012) 373 final, p 4 and annex p 11 ff.
\textsuperscript{119} The Traffic Committee applied for a short period a method for preliminary assessment but gave up this practice to conform with the method applied by other committees, see 2011/12:KU4 p 15, 2012/13:KU14, and 2012/13:TU1y.
performed committees are not restricted to viewing drafts as a whole but can also analyse a single provision of the draft separately.\textsuperscript{120} The Constitutional Committee has been attributed the task to monitor the over all application by the committees of the compliance controls performed in accordance with the new protocol. In doing this the Committee consider it as part of its task to view the proposed drafts in conjunction to see if drafts which separately have not been found to infringe subsidiarity might, if viewed together, have such effect or may in any other way affect the balance of competence between the Union and the Member States.\textsuperscript{121} Furthermore the Committee shall once a year submit a report on its observations regarding the monitoring of subsidiarity to the Parliament.\textsuperscript{122} The Constitutional Committee has up to date submitted three such reports which concerns all reasoned opinions from the Swedish Parliament until the end of 2011.

When making assessments on the compliance with the principle of subsidiarity the Swedish Parliament has been recommended to use a method in two steps.\textsuperscript{123} First the question is asked whether it is possible to achieve the objectives of the suggested act on national level? If the answer is no, action shall according to the instructions be performed at Union level. If the answer is yes the committees move on to the next step and asks whether the objectives can be better achieved by action on Union level? The committees have been recommended to find guidance in the guidelines presented in e.g. the Amsterdam Protocol and the Edinburgh Conclusions.\textsuperscript{124} The committees shall thus ask whether the proposal has relevant transnational aspects, if action solely by the Member States would conflict with requirements of the treaty or significantly damage Member States’ interests and if action at Union level produces clear benefits by reason of its scale or effects when compared with action at the level of the Member States.

\begin{center}
\textbf{Two step-method applied by the Swedish Parliament}
\end{center}

<table>
<thead>
<tr>
<th>Is it possible to achieve the objectives by action on Member State level?</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
</tr>
<tr>
<td>Yes</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Can the objectives be better achieved at Union level?</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
</tr>
<tr>
<td>Yes</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Union action is not justified.</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Union action is justified.</th>
</tr>
</thead>
</table>

\begin{itemize}
\item \textsuperscript{120} 2011/12:KU4, p 1.
\item \textsuperscript{121} 2012/13:KU8, p 1 and 32-52.
\item \textsuperscript{122} Riksdagsordningen (SFS 1974:153) chapter 10, paragraph 6; see also 2005/06:RS3 and annex to 2008/09:RS4.
\item \textsuperscript{124} Annex to 2008/09:RS4, p 52 and 2009/10:KU2, p 13.
\end{itemize}
The Constitutional Committee has also, while noting the fact that the new Lisbon Protocol does not explicitly prescribe that the national Parliaments shall monitor the principle of proportionality but only the principle of subsidiarity, suggested that the wording of the protocol does not mean that national Parliaments are prohibited from taking aspects of proportionality into account. The Committee has embraced the opinion presented in chapter 3.5 that considerations of proportionality lie implicit in the wording “if and in so far as” in Article 5.3. Accordingly, the Committee regards a certain amount of proportionality as being part of the principle of subsidiarity in its strict form and recommends the other committees to assume this view when making assessments of subsidiarity.

In a opinion from the Constitutional Committee requested by another committee when performing a subsidiarity test the Constitutional Committee declared that it does not consider questions of competence as part of the subsidiarity test. The Committee has also made clear that the subsidiarity test should not include substantial aspects as regards the appropriateness of the suggested rules in them selves but shall concern whether the suggested rules are most appropriately performed by the Union or by the Member States themselves.

5.1.1 Some Comments on the Guidelines Applied by the Swedish Parliament

The two-step model presented by the Swedish Parliament seems, contrary to the model suggested in chapter three in this essay, to have a built in inclination towards Union action. This could relate to the fact that in its two step-method the Swedish Parliament uses the Swedish word “möjligt” meaning “possible” in the first part of the analysis. This word does not correspond to the wording as expressed in the protocol where the words “i tillräcklig utsträckning” or “sufficiently achieved” are used. There is a considerable difference between these two wordings. If it is totally impossible to achieve the aims by action at Member State level then this is naturally not an option. According to the real wording, however, the question is not if it is possible or impossible for Member States to achieve the objective but if the objective can be sufficiently attained. This wording implies that, to at least some extent, the objective or objectives can be achieved by the Member States, however, the result may vary from very well to very poorly. This is one place where the tests political character and the fact that it concerns a test of suitability is revealed. “Sufficiently” implies that aims can be achieved and even if not all of the aims can be

125 2011/12:SoU18, p 9.
reached, a sufficient amount of the objectives can be reached. On the other hand a “No” on the sufficient attainment question does not necessarily mean that none of the aims can be attained at all. It only means that action by the Member States has not passed the sufficient-level. It may still be that some objectives can be achieved. Normally this would certainly imply that Union action is legitimate but likewise it need first be established that Union action is actually better at attaining the objectives. If it is not, Union action would be as pointless as a means to reach the objectives as action by the Member States. In such a case it might be preferable if no action at all was carried through since none of the alternatives can really lead to the sufficient achievement of the objectives. However, action at Union level in such a case would conflict not only with the aim to bring Union action as close as possible to the citizens but also with the efficiency criteria. Thus if action is to be undertaken at all the principle of subsidiarity prescribes that it should be undertaken at the level of the Member States. Due to the importance of the better attainment test and the efficiency-test it induces it would thus seem preferable if the two step-method applied by the Swedish Parliament should be altered on this aspect.

5.2 Notes on Formal and Substantive Aspects of the Reasoned Opinions Submitted by the Swedish Parliament in 2012

In the twenty reasoned opinions submitted by the Swedish Parliament to the European Union in 2012 a wide range of topics are covered and the opinions have therefore been produced by different committees in the Swedish Parliament, most being referred to the Financial Committee. The proposals have concerned a vide range of different topics such as protection of data, re-use of information from the public sector, public procurement, information to the public on medicinal products, exercise of the right to take collective action, aid to the most deprived, improving gender balance in boards of public companies and supervision of credit institutions, recovery and resolution of credit institutions and protection by means of criminal law of the Union’s financial interests. When analysing the reasoned opinions some interesting patterns on the use of this new capacity and the reasoning presented in the opinions have become evident and some notes on this will be presented below.
5.2.1  Opinions From the Government on Subsidiarity

One interesting thing, which has been quite striking when analysing the reasoned opinions, is that in all cases the Government’s opinion on the subsidiarity aspects of a proposal has been requested and received. In a majority of the opinions the author committee of the Parliament has more or less straight off followed the opinion expressed by the Government and used its arguments in the reasoned opinion. In only four cases does the Parliament and the Government reach different conclusions and present different arguments concerning the compliance with subsidiarity. It is only natural and also, of course, mostly of great use that the Parliaments get inspired by or assisted in their assessments by opinions from their respective Governments on aspects of subsidiarity since the Governments normally have greater knowledge of the drafts than do the Parliaments at this stage. However, if the Parliaments apply the reasoning submitted by the Government on routine this may cause the monitoring of the principle of subsidiarity to lose some of its purpose since the point is to hear the Parliaments opinion. The Governments are already directly involved in the EU legislative process both through the Commission and, above all, in the Council and their opinions are thus already represented in the legislative process.

Though in theory this can be considered as a problem, in practice one shall keep in mind both the fact that when representing Sweden in the EU the Government needs to consult the Parliament which is thus, at least to a limited extent, also involved in other aspects of the EU process. Moreover one must not forget the fact that in the Parliament the Governmental parties are normally in majority why it can be expected that the opinion of the majority in the committees of the Parliament coincide with the view of the Government. It is thus not surprising that the view of the Parliament coincides with the one of the Government. To ensure good quality of the submitted opinions it is however equally important that the committees actually do perform an evaluation of the compliance with subsidiarity on their own to ensure that no aspects are overlooked.

---

5.2.2 Aspects Included in the Opinions

When it comes to the method applied and the aspects included in the subsidiarity test it can be concluded that it is not obvious from viewing the reasoned opinions of 2012 that the two step-method as described and recommended by the Constitutional Committee has in fact been applied. The actual reasoning is much more free and concerns not only subsidiarity aspects. Though the Commission has explicitly requested that the Parliaments separate their concerns on subsidiarity from other questions when issuing a reasoned opinion, the Swedish Parliament, in many cases, treats other aspects than ones of subsidiarity in its opinions. Occasionally the discussion concerns questions of competence and legal basis but more often the discussion concerns substantial parts of the proposals. As mentioned above the Constitutional Committee has declared that it does not consider questions of competence as part of the subsidiarity test and it has also made clear that the subsidiarity test should not include substantial aspects.

On the competence question it shall be pointed out that though it is correct to assume that the principle of subsidiarity does not, at least not in its strict form, include considerations of competence it may still be questioned whether this question should likewise be part of the examination made by the committees when they perform their subsidiarity control. Obviously many of the committees are of the opinion that it is relevant to address questions of competence in their reasoned opinions and this view is also supported by some Swedish commentators.

Bergström has raised the question of how it would affect the future possibilities to make inventions before the CJEU against a proposed act on grounds of competence if the Parliament did not comment on this but only on subsidiarity in its opinion regarding the proposed action. Since considerations of subsidiarity are secondary to questions of competence a comment from the Parliament on a proposals compliance with subsidiarity which did not address the question of competence could be perceived as a silent consent to the fact that the proposal actually lies within the limits of Union competence. These kinds of considerations have to be weighed against the statements from the working group and the Commission that it is desirable that the reasoned opinions relate only to questions of subsidiarity. Though it is of course of great use if the Parliaments’ attention is brought to the fact that there might be a problem with the legal basis of

130 http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/letter_en.pdf, see page 4 of the letter.
131 2011/12:SoU18, p 9.
133 See eg. Bergström, p 426, Jonsson, p 427. See also SIEPS Yttrande över Riksdagsstyrelsens framställning Tillämpningen av Lissabonfördraget i Riksdagen, 14 September 2009 Stockholm, Dnr 83/2009.
134 Bergström, p 426 ff.
a proposed action through the examination performed under the subsidiarity procedure, it can be questioned whether it is suitable that such findings should be notified to the Union institutions under the heading “Reasoned opinion with regards to subsidiarity”. If this method is applied it need to be discussed whether opinions which solely relate to questions of legal basis and not subsidiarity should be taken into account when it is determined whether the threshold for review been reached under the system for monitoring compliance with subsidiarity. Perhaps such concerns are therefore better notified to the Commission as part of its political dialogue with the Parliaments. Then again, since the point of both of these procedures is to enable the Parliaments opinion to be heard in the political legislative procedure, perhaps it is best not to attach to much attention to formalities such as these but count on that, in practice, this would not cause problems.

Regarding the regular references made to substantive aspects of the proposals it can be sustained that though it have been requested, in the Convention on the Future of Europe and by the Commission, that the substantive aspects of a proposal are left out of the subsidiarity assessment, as it turns out, separating substantial aspects from pure aspects of subsidiarity is not always easy. If we go back in time and look at the Edinburgh conclusions and the interinstitutional agreement from 1993 it is stated that checks of compliance with the principle of subsidiarity shall be performed regularly as part of the institution’s internal procedures and that such checks “must form an integral part of the substantive examination”. In these documents the correlation between aspects of subsidiarity and substantial aspects is high lightened as it is suggested that considerations of subsidiarity must be performed at the same time as when the substantial parts of a proposal are drafted. Since it is not possible to perform a test of compliance with subsidiarity based only on the heading of a proposal or to say that al proposals concerning a certain area shall be treated the same way the examination must necessarily include some substantial aspects. However, this is not the same as commenting on e.g. the specific methods suggested for implementing the proposal. When such detailed parts of a proposal are discussed the examination has often turned from arguments on subsidiarity to arguments concerning proportionality.

Arguments concerning proportionality (and therefore also substantial parts of the proposals) are very commonly referred to in the reasoned opinions. References to proportionality has been made in at least half of the opinions, sometimes as part of subsidiarity and sometimes as a

135 Barrett, p 600.
separate aspect. Treating proportionality is however mostly a conscious decision of the committees since it is often expressed in the motivations to the opinions that the committee embraces the view proposed by the Constitutional Committee that, at least to a limited extent, proportionality is part of subsidiarity in its strict form. Though I object to this view the same line of argumentation applies here as is presented above on whether or not competence should be part of the examination performed by national Parliaments. And perhaps, due to the close relationship between the concepts it is not only appropriate but also necessary to treat these two aspects in conjunction.

5.2.3 Recurring Substantial Arguments

As regards the actual arguments presented by the committees on the compliance with subsidiarity a few of them appear more frequently than others. The first topic, which relates to the sufficient attainment test, is the one concerning the need for harmonisation of national laws. If such a need can be sustained action on Member State level would normally not suffice. In several cases the Commission has motivated its proposals by referring to the need for harmonisation on EU level. The reasons for concluding that such harmonisation is needed are normally sustained by either one of two arguments. The first argument concerns transnational problems, i.e. problems which by their nature have transnational aspects or effects, such as e.g. environmental issues or certain aspects relating to the economic system. The other argument relates to promoting and safeguarding free movement within the internal market. Thus, in the reasoned opinions one can find arguments presented by the committees where they attempt to rebut the need for harmonisation by proving that there is no such situation at hand. For instance, in a reasoned opinion concerning a proposal on processing of personal data for the purposes of investigation, detection or prosecution of criminal offences the Justice Committee found that the proposal infringed subsidiarity as far as it concerned the treatment of personal data in wholly internal situations but approved parts of the proposal which concerned the transmission of such data over national borders. In another opinion concerning statutory audits of annual and consolidated accounts the Civil Law Committee concluded that though the proposal did indeed concern transnational aspects it could be questioned whether the differences in national laws did actually pose such obstacle to the internal market that Union action was required.

138 See reasoned opinion in appendix 3 of 2011/12:JuU31.
139 See reasoned opinion in appendix 2 of 2011/12:CU21.
Another argument which was occasionally presented concerned national variations. Due to these variations it was sustained that action was better performed on national level than by Union action. Union action would inappropriately force Member States to conform well established and adequate systems into an unified system which would not be perfectly appropriate for either one of the Member States. Action on Member State level would also be better since in such case the methods could be adapted to fit important national variations in a more dynamic way than if a uniform rule was to be applied.\textsuperscript{140}

When proposals included regulation in more detail of administrative procedures, pure procedural aspects and administration of national authorities the committees did normally invoke that the proposal infringed subsidiarity with regards to these provisions.\textsuperscript{141} Often it was claimed that such considerations were both possible and better to regulate on national level but mostly the objections concerned aspects of proportionality, to regulate such basic things was to go further than was necessary with regards to the objective to be attained. Here the interconnection between proportionality and subsidiarity becomes evident since it is hard to separate the part relating to the one from the other but perhaps this is not necessary. If it can be sustained, in a case relating to administration or procedure, that the objectives of a proposal can be sufficiently achieved by the Member States it is probably also more effective and thus also better to leave the regulation of such matters to the Member States. This conclusion does however not in any way impede the fact that one may also, in addition to objections based on subsidiarity, impose objections based on the principle of proportionality. These two arguments do not counteract, but does in such a case rather enhance, the view that it is not appropriate for the Union to take such an action.


\textsuperscript{141} See e.g. reasoned opinions attached to 2012/13:NU5, 2011/12:JuU29, 2011/12:FiU50 and 2011/12:FiU36.
6 Conclusions

As mentioned initially the principle of subsidiarity relates to the difficult problem of balancing democracy and closeness to, and inclusion of, the peoples with necessary demands for efficiency. Due to this, application of the principle is bound to include considerations of suitability which tend to get political rather than legal. Even so, the definition of the principle cannot be left out from legal discussion and analyse. All law is to a varied extent based on political considerations and this does not in itself inhibit that concepts are defined by legal criteria. To meet the end to revive and increase the importance and respect of the principle of subsidiarity, and not render it an unpredictable and unimportant provision with only a limited influence on the distribution of Union powers, it is necessary to try to define a method for how it is to be applied and to put up procedural safeguards and rules for its enforcement.

For the Swedish Parliament’s monitoring of subsidiarity according to the new protocol I recommend that the two step-method, which is currently applied, is slightly altered and complemented with some further steps for the committees to consider when making their assessments. Though I recommend that an expanded analysis is performed as part of the examination I do not consider that all parts of the examination must necessarily be repeated in the motivated opinion to the Union institutions. These opinions shall according to the new Protocol, which is part of primary law, only include aspects of subsidiarity. Not even proportionality, which is treated in the same protocol, is mentioned in the Articles which relate to the new process and the reasoned opinions that national Parliaments may submit. If the Parliament still wishes to refer to other aspects than subsidiarity in the opinions, arguments such as the Commission’s wish to separate different aspects from each other should be taken into account. Other questions than those of subsidiarity should therefore to the extent possible be presented separately from each other and from the arguments of subsidiarity. This to make it easier to distinguish between them if needed for e.g. assessing whether the thresholds for review in the subsidiarity procedure have been reached.

The expanded method would start with the question of competence. Is EU competent to act and has reference been made to a correct legal basis in the Treaties? Thereafter it should be noted what kind of competence the Union possesses; exclusive, shared or complementary. If the

---

142 Article 51 TEU.
committees find the Union competent and the competence is not exclusive it shall try to establish what the purpose is of the proposed action. This purpose then forms the basis for the future analysis of subsidiarity. Depending on how well the objective of a draft is formulated it can affect the result of the subsidiarity test. If the purpose is poorly formulated, the committees should not, according to me, be satisfied with this purpose. Instead they should either get in contact with the institution, normally the Commission, responsible for the draft and ask for a clarification or it should it self try to reason, based on for instance the contents of the proposal, to see if another and perhaps more specific purpose can be induced when viewed in more detail.

In the actual subsidiarity analysis the first part to consider is the sufficient attainment test which answers the question whether the objectives can be sufficiently achieved by action on Member State level. The answer to this question does of course depend on the nature of the concerned proposal. To help assess whether this prerequisite is applicable or not it can be considered whether there is a need for harmonisation. Such a need has often been found to exist either if the proposal relates to a transnational problem which require joint action such as environmental issues or certain aspects of economic trade or if the objective of the proposal is to promote or safeguard free movement in the internal market. In this part of the test effects of action at Union level shall not be considered. This part relates only to the actual capacity of the Member States, their available means to reach the end and whether their efforts would be enough to achieve the objectives of an action.

After it has been sustained whether the objectives of an action can be sufficiently attained at Member State level or not the committees should always move on to analyse if the objectives can be better attained by Union action than if it is left for the Member States to regulate the area. This is where aspects of efficiency shall be considered. Here a comparison shall be made between possible effects of action on the different levels to see if Union action would actually add extra value to action by the Member States.

Though in practice, aspects relating to the two parts of the subsidiarity test may be hard to distinguish form each other, I would still like to underline the importance that both parts of the subsidiarity test are answered. If the committees would answer just one of the questions there is a risk that important aspects of subsidiarity are overlooked. It is possible that by doing this the result will be inconsistent and that the two parts will point in different directions. Therefore, in the end when making the final judgement on whether Union action is justified or not, the answers to both parts must be weighed together to see which level for action that would be most suitable. When doing this, aims such as the strive to legislate as close as possible to citizens and
perhaps also aspects of proportionality, could be allowed to influence the final decision. Other
than in such an occasion I advocate that aspects of proportionality should to such a large extent
as possible be clearly separated from aspects of subsidiarity. If the Parliament would like to
comment on proportionality this shall be made after and separate from the subsidiarity analysis.

The effects of these new rules for monitoring compliance with subsidiarity are important in
theory since it is for the very first time that national Parliaments are officially regarded as actors
whose rights and obligations are regulated in the Treaties. In practice, however, as can be seen
when statistics of reasoned opinions sent to the Union is consulted, it takes quite a lot of
interventions from the national Parliaments to reach the levels where the Union legislator must
take some kind of action and it is not likely that these levels will be reached very often. Even if
the thresholds are reached there is no guarantee that any changes will be made to the draft in
question. However, though one should not equate a large number of reasoned opinions with the
success of the new rules, their effects on EU level are likely to be of a more discrete – but
certainly positive – character, relating primarily to the quality of motivations of legislative acts. If
the Union does not want its suggestions to be criticised by the national Parliaments it needs to
give good and true motivations to its legislative acts and make sure that the principle of
subsidiarity, as well as other rules, are respected.

A corollary effect which might be just as important as any effect on EU level is the possible
effects that this new role for the Parliaments may have on the balance between the national
Governments and their Parliaments in EU related questions. In Sweden the membership in the
European Union have altered the balance between the Parliament and the Government since
questions which were earlier regulated by the Parliament have been transferred to the Union
where it is the Government that represents the State. Though there are rules obliging the
Government to consult the Parliament in EU questions it is still the Government that has the
final say. In Sweden the national Parliament have taken its new role in the Union legislative
process seriously and have, unlike the Swedish Courts, taken an active part in the EU dialogue.
Hopefully this active attitude from the Parliament will not abate in time but will instead
contribute to an increased awareness and interest within the national Parliament of EU questions.
Perhaps could this new attitude, in conjunction with the new possibilities for the Parliaments to
make their opinion heard directly in the Union legislative process, also further increase the
incitement for the Government to respect the view of its Parliament in EU questions.

143 Barrett, p 600.
144 Abrahamsson, p 434.
It is still hard to finally determine what effects the desire to revive and underline the importance of subsidiarity through the increased focus on procedure and enforcement will have and whether it will actually help to re-legitimise the European cooperation as intended. The main effect of the principle is probably, and hopefully, that it works as an incentive for the legislator to think twice before making use of its legislative powers and to motivate its opinions with more care. I suppose therefore that to some extent it is true as the Commission stated, that subsidiarity cannot be reduced to a set of procedural rules but is “primarily a state of mind”.\footnote{From COM(93) 545 final, p 2.}
7 References

European Union Materials

Commission documents

COM (93) 545 final, Commission report to the European Council on the adaption of Community legislation to the subsidiarity principle, Brussels, 24th of November 1993


COM (2010) 547 final, Report from the Commission on subsidiarity and proportionality, (17th report on Better Lawmaking covering the year 2009), Brussels, 8th of October 2010

COM (2011) 344 final, Report from the Commission on subsidiarity and proportionality, (18th report on Better Lawmaking covering the year 2010), Brussels, 10th of June 2011


Official Journal of the EU

Bull EC, Supplement 5/75

OJ 1993 C 329/136

OJ 2007 C 306/169

Cases


Case C-376/98, Tobacco Advertising Ban Directive, ECR I-8419, [2000]

Case C-377/98, Biotechnology Directive, ECR I-7079, [2001]

Case C-491/01, ex parte British American Tobacco, ECR I-11453, [2002]

Cases C-154 and 155/04, Alliance for Natural Health, ECR I-6451, [2005]

Case C-518/07, Protection of personal data, ECR I-1885, [2010]

Case C-58/08, The roaming regulation, ECR I-4999 [2010]

Case C-370/12, Pringle vs. Ireland, not yet published in ECR

Opinion of Advocate General Kokott in Case C-583/11, Inuit vs. Parliament and Council, not yet published in ECR
Other documents

European Council meeting in Edinburgh 11-12 December 1992, Conclusions of the Precidency with annexes
CONV 71/02, Mandate of the Working Group on the Principle of Subsidiarity, Brussels, 30 May 2002
CONV 286/02, Conclusions of Working Group I on the Principle of Subsidiarity, Brussels, 23 September 2002


Official Swedish Documents

Documents from the Swedish Government

_Swedish Government Official Reports_
SOU 1994:12, Suveränitet och demokrati
SOU 1995:123, Subsidiaritetsprincipen i EG

_Other Documents from the Swedish Government_
Ds 1997:64, Amsterdamfördraget, EU:s regeringskonferens 1996-1997

Documents from the Swedish Parliament

Reasoned opinions submitted in 2012
2011/12:FiU34, Subsidiaritetsprövning av förslag till förordning om ändring av förordning om kreditutvärderingsinstitut
2011/12:FiU33, Subsidiaritetsprövning avförslag till förordning om gemensamma bestämmelser för övervakning och bedömning av utkast till budgetplaner och säkerställande av korrigerings av alltför stor underskott i medlemsstater i euroområdet
2011/12:CU21, Subsidiaritetsprövning av kommissionens förslag om revisorer och revision
2011/12:NU17, Subsidiaritetsprövning av kommissionens förslag till förordning om program för företagens konkurrenskraft och små och medelstora företag
2011/12:FiU36, Subsidiaritetsprövning avförslag till direktiv om ändring av direktiv 2003/98/EG om vidareutnyttjande av information från den offentliga sektorn
2011/12:FiU50, Subsidiaritetsprövning av förslag till Europaparlamentets och rådets direktiv om offentlig upphandling
2011/12:FiU45, Subsidiaritetsprövning av förslag till Europaparlamentets och rådets direktiv om offentlig upphandling av vatten m.m.
2011/12:JuU29, Subsidiaritetsprövning av förslaget om inrättande av ett europeiskt gränsövervakningsystem (Eurosur)

2011/12:JuU31, Subsidiaritetsprövning av kommissionens förslag till direktiv om skydd av personuppgifter på det brottsbekämpande området

2011/12:SoU18, Subsidiaritetsprövning av kommissionens förslag om ändring av förordning vad gäller information till allmänheten om receptbelagda humanläkemedel

2011/12:KU25, EU-förslag om allmän uppgiftsskyddsförordning

2011/12:AU14, Subsidiaritetsprövning av förslag till Monti II-förordning

2011/12:FiU12, Subsidiaritetsprövning av direktinförslag om krishanteringsremverk (KOM(2012) 280)

2012/13:JuU8, Subsidiaritetsprövning av förslag till direktiv om skydd av EU:s finansiella intressen genom straffrättsliga bestämmelser

2012/13:TU3, Subsidiaritetsprövning av EU-kommissionens förslag till förordning om provning av motorfordon m.m.

2012/13:NU5, Subsidiaritetsprövning av kommissionens förslag till direktiv om kollektiv rättighetsförvaltning

2012/13:FiU18, Subsidiaritetsprövning av förslag till förordning om Europeiska centralbankens tillsyn över kreditinstitut (KOM(2012) 511 slutgiltig)

2012/13:SoU8, Subsidiaritetsprövning av kommissionens förslag om fonden för europeiskt bistånd till dem som har det sämst ställt

2012/13:MJu6, Tillträde till genetiska resurser m.m.

2012/13:CJU14, Subsidiaritetsprövning av direktivförslag om en jämnare könsfördelning bland icke verkställande styrelseledamöter i börsnoterade företag

Other documents

Betänkande 2010/11:KU18, Uppföljning av riksdagens tillämpning av subsidiaritetsprincipen

Betänkande 2011/12:KU4, Uppföljning av riksdagens tillämpning av subsidiaritetsprincipen

Betänkande 2012/13:KU8, Uppföljning av riksdagens tillämpning av subsidiaritetsprincipen

Framställning 2005/06:RS3, Riksdagen i en ny tid

Framställning 2008/09:RS4, Tillämpningen av Lissabonfördraget i riksdagen

Yttrande 2012/13:TU1y, Uppföljning av riksdagens tillämpning av subsidiaritetsprincipen

Literature

Abrahamsson, Olle, EU-medlemskapets inverkan på relationen riksdag-regering, ERT 2009/3 p 434


Bergström, Carl Fredrik, Subsidiaritetsprövningen: riksdagen bittar en ny roll I EU:s lagstiftningsprocess, ERT 2010/3 p 423
Bergström, Carl Fredrik and Hettne, Jörgen, *Lissabonfördraget, En grundlag för EU?*, Norstedts Juridik, 2010

Bernitz, Ulf, *Förhandsavgöranden av EU-domstolen – Svenska domstolars bältnings och praxis*, SIEPS 2010:2


Droege, Michael and Lysén, Göran, *Introduktion till EU och EG-rätten*, Iustus förlag, 1997


Hallström 2011, Pär, *Nationella parlaments roll i den Europeiska unionen*, ERT 2011/1 p 7-12


Hettne, Jörgen, *Subsidiaritetsprincipen: Politisk granskning eller juridisk kontroll?*, SIEPS 2003:4


Jonsson, Anna, *EU:s lagstiftningsprocess och subsidiaritetsprövningen: Nya möjligheter för nationellt inflytande?*, SvJT 2011 p 413


SIEPS, *Yttrande över Riksdagsstyrelsens framställning Tillämpningen av Lissabonfördraget i Riksdagen, 14 September 2009 Stockholm, Dnr 83/2009*


Online Sources

Oxford Dictionaries, as downloaded on 2013-02-04
   http://oxforddictionaries.com/definition/english/subsidiarity?q=subsidiarity

Letter from Commission to national Parliaments on 1 December 2009

Commission webpage on impact assessments, as downloaded on 2013-02-01
   http://ec.europa.eu/governance/impact/index_en.htm

Statistics concerning the judicial activity of the Court of Justice, Annual report of 2011