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SUBSIDIARITY, JUDICIAL REVIEW AND NATIONAL PARLIAMENTS AFTER LISBON: THEORY AND PRACTICE

Samuli Miettinen & Joonas Tervo*

1. INTRODUCTION

The principle of subsidiarity, as it is defined in Article 5(3) TEU, allows the Union to 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 reasons of the scale or effects of the proposed action, be better achieved at Union level'.

This definition has remained substantially similar since Maastricht, when the Member States introduced subsidiarity to the written text of the Treaties in the second indent of Article 3b EC.[1] The principle of subsidiarity was elaborated in more detail at the 1992 European Council in Edinburgh, thus became legally binding and subject to judicial review. In general terms, the principle of subsidiarity is often summarized as the idea that decisions should be taken 'at the level closest to those who are affected', or as a 'space' in which the diversity of

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[1] Estella, Antonio, The EU Principle of Subsidiarity and Its Critique (Oxford University Press 2002), pp. 82–89. For a broader context, Edward, David, "Subsidiarity as a Legal Concept" in Cardonel, Pascaln Rosas, Allan, and Wahl, Nils (eds.) *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart 2012), pp. 93–103 at 93–94.

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national values can flourish.[2] 'Subsidiarity' as a concept nevertheless remained ambiguous from the very beginning; Jacques Delors is said in 1992 to have facetiously offered a prize for its definition.[3] A central issue is whether subsidiarity is a political or legal principle.[4]

Subsidiarity is part of the Union's response to criticisms that EU law does not adequately address the appropriate balance between the Union and other levels of government[5] and the democratic deficit.[6] The Court has never annulled an EU measure on subsidiarity grounds.[7] Some say the concept is a tool to justify exercise of EU powers rather than to limit them.[8] If true, that finding vindicates widespread skepticism. The perceived ineffectiveness of subsidiarity-based judicial review also led to the introduction of a formal system of subsidiarity control by national parliaments, the so-called 'Early Warning System' (EWS) detailed in Protocol 2. This, too has been the subject of numerous proposals for reform.[9] Despite – or because of – pessimism about subsidiarity an effective limit to Union action both in the context of judicial review and the EWS process, subsidiarity continues to attract significant recent academic attention.[10] It

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2 Craig, Paul, "Subsidiarity: a political and legal analysis" *Journal of Common Market Studies*. 1/2012, 72–87 p. 73.

3 Toth A.G., "A Legal Analysis of Subsidiarity" in O'Keeffe David, Twomey, Patrick M. (eds.), *Legal Issues of the Maastricht Treaty* (Wiley Chancery Law 1994), p. 37.

4 Working Group I of the European Convention on the Principle of Subsidiarity, Brussels, 23 Sep. 2002, CONV 286/02, p. 2; Hettne, Jörgen, "Subsidiaritetsprincipen – juridisk granskning eller politisk kontroll?" SIEPS 2003:4; recently, Cooper, Ian, "Is the Subsidiarity Early Warning Mechanism a Legal or a Political Procedure? Three Questions and a Typology" *EUI Working Paper* RSCAS 18/2016.

5 Cass, Deborah Z., "The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community" *Common Market Law Review* 6/1992 pp. 1107–1136.

6 Rizzuto, Francesco, "National parliaments and the European Union: part of the problem or part of the solution to the democratic deficit in the European constitutional settlement?" *Journal of Legislative Studies* 3/2003, pp. 87–109.

7 Recently, Panara, Carlo, "The Enforceability of Subsidiarity in the EU and the Ethos of Cooperative Federalism: A Comparative Law Perspective" *European Public Law* 22/2016, pp. 305–351, p. 319. See however Case C-518/08 *Fundación Gala-Salvador Dalí and Visual Entidad de Gestión de Artistas Plásticos (VEGAP) v Société des auteurs dans les arts graphiques et plastiques (ADAGP) and Others* ECLI:EU:C:2010:191 p. I-3091 at para 33, concerning whether the Court would review French legislation which the Union legislature had already concluded it did not wish to harmonise on the basis of subsidiarity. The court declined, for that reason. Horsley, 2012, p. 273.

8 De Búrca, Gráinne, "The quest for legitimacy in the European Union" *Modern Law Review* 3/1996, pp. 349–376, p. 366.

9 Davor, Jančić, "The game of cards: National parliaments in the EU and the future of the early warning mechanism and the political dialogue" *Common Market Law Review* 4/2015, pp. 939–976.

10 Bartl, Marija, "The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit" *European Law Journal* 1/2015, pp. 23–43; Davies, Gareth, "Democracy and Legitimacy in the Shadow of Purposive Competence" *European Law Journal* 1/2015, pp. 2–22.

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is also of continued high-level interest to the institutions: subsidiarity was an element of the 'Competence' reviews at the 2016 FIDE congress.[11]

We examine subsidiarity control after the Lisbon Treaty from the perspective of these two control mechanisms. First, we recall the difficulty of defining and applying the subsidiarity principle. We then examine how key judgments of the Court of Justice treat subsidiarity claims from the entry into force of the Lisbon Treaty to the end of 2016. This is followed by an examination of the activity of national parliaments' using the Early Warning System during the same period. Detailed pre-legislative procedures and a variety of alternative mechanisms and concepts partly explains the rarity of successful subsidiarity challenges in either system. Current practice also confirms many widely held beliefs in so far as success is measured by annulment or withdrawal. Nevertheless, the level of detail in recent judicial review cases and, after a quiet period, the continuing interest of national parliaments in 2016 suggests subsidiarity remains a topical issue. Reports of its death are greatly exaggerated.

2. WHAT, AND WHERE, IS SUBSIDIARITY?

Definitions of subsidiarity have been contested since the 1992 Edinburgh guidelines.[12] One key question is whether subsidiarity in Article 5(3) TEU and proportionality in Article 5(4) TEU should overlap.[13] Shortly after the Maastricht Treaty came into force even the EU institutions were unsure.[14] After Lisbon, Article 5(3) TEU refers to the 'Protocol on the application of the principles of subsidiarity and proportionality'. However, neither the Protocol[15] nor Article 5(4) encourage national parliaments to review proportionality.[16] Interpretation matters in the context of the EWS, because it can affect how state-

[11] Ziller, Jacques, "General Report" pp. 115–117 and Iglesias, Maria, "Institutional Report" in Czuczai, Jeno, et. al. (eds.) *Division of Competences and Regulatory Powers between the EU and the Member States* (Wolters Kluwer 2016), pp. 186–190.

[12] Steiner, Josephine, "Subsidiarity under the Maastricht Treaty", pp. 49–64 and Emiliou, Nicholas, "Subsidiarity: Panacea or Fig Leaf?", pp. 65–86, in O'Keefe, David and Twomey, Patrick (eds.), *Legal Issues of the Maastricht Treaty* (Chancery Law Publishing, Chichester) p. 49; Davies, Gareth, "Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time" *Common Market Law Review* 1/2006, pp. 63–84; Estella, 2002, at 75, 98–99 and 101; Snyder, Francis, "Interinstitutional Agreements: Forms and Constitutional Limitations' EUI Working Paper in Law 95/4.

[13] Compare for example Toth, 1994 with Davies, Gareth, "The post-Laeken division of competences" *European Law Review* 5/2003, pp. 686–698.

[14] Toth, 1994, p. 38.

[15] Protocol 2, Article 6, first indent.

[16] Groussot, Xavier, Bogojević, Sanja, "Subsidiarity as a Procedural Safeguard to Federalism" in Azoulai, Loic (eds.) *The Question of Competence in the European Union* (Oxford University Press 2014) 234–252, at 236–237, argue 'in so far as' in Article 5(3) refer to a proportionality assessment.

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ments from national parliaments are received.[17] Diverging interpretations mean national parliaments with similar interests may take very different approaches to issuing reasoned opinions, as a comparison of Finnish[18] and Swedish[19] reasoned opinions reveals.[20] In judicial review, Article 263 provides a wide range of benchmarks and therefore this distinction is less important. A similar range of possibilities is also open in indirect challenges under Article 267 TFEU.

The question of proportionality is also linked to whether EU measures provide added value or, as Öberg puts it, correct a transnational 'market failure'.[21] In areas of exclusive competence now listed in Article 3 TFEU the principle does not apply; the EU is the only possible level of action.[22] But elsewhere, it is sometimes argued that elements of necessity and proportionality require demonstrations of EU added value. Schütze suggested that the Court should treat subsidiarity as a type of 'federal proportionality', and engage in a deeper review of whether the EU acts have '*unnecessarily* restricted national autonomy'.[23] In a similar fashion, Davies has asked the Court to consider 'whether the importance of the measure is sufficient to justify its effect on the Member States'.[24] Davies argued some case law should be read as the Court having accepted both the determination of the level of action *and determination of*

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[17] See Report from the Commission Annual Report 2012 on Subsidiarity and Proportionality Brussels, 30.7.2013 COM(2013) 566 final, p. 4; Conference of the Committees of the National Parliaments of the European Union Member States dealing with the European Union affairs as well as representatives of the European Parliament and the Eighteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, 27 September 2012.

[18] Raunio, Tapio "The Finnish Eduskunta and the European Union: The Strengths and Weaknesses of a Mandating System" In Claudia Hefftler, Christine Neuhold, Olivier Rozenberg & Julie Smith (eds.) *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave Macmillan Basingstoke 2015) p. 415–417; Miettinen, Samuli and Hyvärinen, Anna, "National Report Finland" in Czuczai, Jeno. et. al (eds.), *Division of Competences and Regulatory Powers Between the EU and the Member States Congress Proceedings Vol. 3* (Wolters Kluwer 2016), pp. 375–376.

[19] Jonsson Cornell, Anna "The Swedish Riksdag as scrutiniser of the principle of subsidiarity" *European Constitutional Law Review* 2/2016, pp. 294–317.

[20] Cooper, Ian "The Nordic Parliaments and the EU" in Gron, Caroline. et al. (eds.), *Still the other European Community? The Nordic Countries and the European Union* (Routledge 2015); Cooper, Ian "The Subsidiarity Early Warning Mechanism: Three Questions and a Typology" and Jonsson Cornell, Anna "Similar but Different: Comparing the Scrutiny of the Principle of Subsidiarity in Sweden, Denmark and Finland" in Jonsson Cornell, Anna and Goldoni, Marco (eds.), *National and Regional Parliaments in the EU-legislative Procedure post-Lisbon. The Impact of the Early Warning System* (Hart 2016).

[21] Öberg, Jacob "Subsidiarity as a Limit to the Exercise of EU Competences" *Yearbook of European Law* 2016, https://doi.org/10.1093/yel/yew027, p. 2.

[22] Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission* ECLI:EU:C:2012:821 para 79.

[23] Schütze, Robert, "Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?" *Cambridge Law Journal* 3/2009 pp. 525–36 at 533–5. Horsley, 2012, at 272; Davies, 2006, at 63–84.

[24] Davies, 2006, at 83.

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whether the act goes beyond what is necessary to achieve the objectives as part of the subsidiarity calculus.[25]

Early assessments of the Court's case law on subsidiarity are typically critical of the Court's ability to act as a counter-majoritarian institution.[26] This view has persisted in later studies,[27] which often support the view that 'the principle's core contribution to the integration process is a political principle in the pre-legislative arena'.[28] Regardless of which definitions are used, the internal market has been seen as a circular justification.[29] As Davies puts it, once the EU 'announces that it wishes to pursue an internal market objective, since these competences are defined in terms of creating uniformity, and Member States clearly cannot achieve this alone, subsidiarity no longer applies'.[30] Seen from this quite critical perspective, subsidiarity 'serves primarily as a masking principle, presenting a centralizing polity in a decentralizing light.'[31]

3. SUBSIDIARITY BEFORE THE COURT OF JUSTICE

The first of two principal subsidiarity review mechanisms involves judicial review before the Court of Justice of the European Union (CJEU). If subsidiarity is hard to define, conventional wisdom considers it at least equally hard to review. Toth's 1994 claim was remarkably prescient:

> 'all that the Court may be expected to do… is to examine whether in arriving at its decision the council has not committed a manifest error or a misuse of powers or has not patently exceeded the bounds of its discretion.'[32]

The intensity of judicial review remains a focal point in both literature and the case law from Luxembourg after November 2009. Few commentators on the

[25] Case C–491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* ECLI:EU:C:2002:741, p. I–11453 at 184 and 122–141. See also Davies, 2003, at 693, who notes: "[t]he obvious conclusion [to draw from the omission of proportionality] is that proportionality is an element of subsidiarity; thus national parliaments must be informed of the former to assess the latter".

[26] De Búrca, Gráinne, "The Principle of Subsidiarity and the Court of Justice as an Institutional Actor" *Journal of Common Market Studies* 36/1998, pp. 217–235; Estella, 2002, at 140–176.

[27] Cooper, Ian "The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU" *Journal of Common Market Studies* 2/2006, pp. 281–304.

[28] Horsley, Thomas, "Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?" *Journal of Common Market Studies* 2/2012, 267–283, at 267.

[29] Davies, 2006, pp. 63–84.

[30] Ibid, p. 75. Similarly, from a 'choice of legal basis' perspective, Weatherill, Stephen, "The Limits of Legislative Harmonization Ten Years after Tobacco Advertsing: How the Court's Case Law has become a "Drafting Guide" *German Law Journal* 3/2011, 827–864; Ten years prior, Emiliou, 1994, at 75. The argument remains central to Davies, 2015, Pages 2–22.

[31] Davies, 2006, pp. 77.

[32] Toth, A.G., "Is subsidiarity justiciable?" *European Law Review* 3/1994, pp. 268–285, p. 284.

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pre-Lisbon subsidiarity case law consider the principle an effective limit on EU action.[33] However, even pre-Lisbon cases incrementally add small elements to the Court's working methods when it evaluates subsidiarity claims. Thus, judicial review of subsidiarity should not be seen as stagnant even though no single case clearly annuls legislation based purely on subsidiarity concerns. This progress continues after Lisbon.

Pessimism about subsidiarity in judicial review has not delivered recent subsidiarity-linked litigation before the Court of Justice.[34] However, only a handful of judgments offer new insight into subsidiarity. This in itself suggests that the discussion on subsidiarity takes place primarily outside the context of judicial review. No judgment offers the ultimate prize in which subsidiarity leads to annulment. The Court nevertheless arguably develops the doctrine on subsidiarity review and perhaps even views some claims more sympathetically than

[33] Arnull, Anthony, et al. (eds.) *"Is the European Union an Organisation of Limited Powers?', A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood"* (Hart 2011), at 3 and Craig, Paul, Administrative Law (Oxford University Press 2012, 2nd edition), at 395.

[34] Cases involving references to subsidiarity 1.12.2009–31.12.2016 include: T-16/04 *Arcelor v Parliament and Council* ECLI:EU:T:2010:54 para 179; T-429/05 *Artegodan v Commission* ECLI:EU:T:2010:60 para 75; T-31/07 *Du Pont de Nemours (France) and Others v Commission* ECLI:EU:T:2013:167 para 205; T-336/07 *Telefónica and Telefónica de España v Commission* ECLI:EU:T:2012:172 paras 296–305; T-76/08 *EI du Pont de Nemours and Others v Commission* ECLI:EU:T:2012:46 paras 202–205; T-526/10 *Inuit Tapiriit Kanatami and Others v Commission* ECLI:EU:T:2013:215 paras 78–84; T-434/11 *Europäisch-Iranische Handelsbank v Council* ECLI:EU:T:2013:405 paras 172–184; T-295/12 *Germany v Commission* ECLI:EU:T:2014:675 paras 174–176; T-309/12 *Zweckverband Tierkörperbeseitigung v Commission* ECLI:EU:T:2014:676 paras 217–219; T-255/13 *Italy v Commission* ECLI:EU:T:2015:838 paras 177–179; T-257/13 *Poland v Commission* ECLI:EU:T:2015:111 paras 173–180; T-461/13 *Spain v Commission* ECLI:EU:T:2015:891 paras 180–182; T-614/13 *Romonta v Commission* ECLI:EU:T:2014:835 para 105; T-629/13 *Molda v Commission* ECLI:EU:T:2014:834 para 103; T-103/14 *Frucona Košice v Commission* ECLI:EU:T:2016:152 para 64; C-518/07 *Commission v Germany* ECLI:EU:C:2010:125 paras 52–53; C-58/08 *Vodafone and Others* ECLI:EU:C:2010:321 paras 72–75; C-343/08 *Commission v Czech Republic* ECLI:EU:C:2010:14 para 60; C-518/08 *Fundación Gala-Salvador Dalí and VEGAP* ECLI:EU:C:2010:191 para 32; C-176/09 *Luxembourg v Parliament and Council* ECLI:EU:C:2011:290 paras 76–79; C-504/09 P *Commission v Poland* ECLI:EU:C:2012:178 para 79; C-505/09 P *Commission v Estonia* ECLI:EU:C:2012:179 para 81; C-521/09 P*DEP – Elf Aquitaine v Commission* ECLI:EU:C:2013:644 para 78; C-539/09 *Commission v Germany* ECLI:EU:C:2011:733 paras 40–48; C-221/10 P *Artegodan v Commission* ECLI:EU:C:2012:216 para 75; C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission* ECLI:EU:C:2012:821 para 79; C-373/11 *Panellinios Syndesmos Viomichanion Metapoiisis Kapnou* ECLI:EU:C:2013:567 para 24; C-422/11 P *Prezes Urzędu Komunikacji Elektronicznej and Republic of Poland v Commission* ECLI:EU:C:2012:553 paras 38–40; C-295/12 P *Telefónica and Telefónica de España v Commission* ECLI:EU:C:2014:2062 paras 134–135; C-525/12 *Commission v Germany* ECLI:EU:C:2014:2202 para 36; C-410/13 *Baltlanta* ECLI:EU:C:2014:2134 para 43; C-508/13 *Estonia v Parliament and Council* ECLI:EU:C:2015:403 paras 44–45; C-276/14 *Gmina Wrocław* ECLI:EU:C:2015:635 para 41; C-358/14 *Poland v Parliament and Council* ECLI:EU:C:2016:323 paras 111–127; C-477/14 *Pillbox 38* ECLI:EU:C:2016:324 paras 142–151; C-547/14 *Philip Morris Brands and Others* ECLI:EU:C:2016:325 paras 213–227. We have used as proxy the Commission's reports from 2010–2015 but also consider the case law of the Court of Justice from 2016 with explicit subsidiarity references.

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early commentators might expect. Subsidiarity is recognized as a matter for judicial review, and in some cases examined in light of additional evidence beyond the institutions' own preparatory works. Even ardent critics of the Court's standards should recognize that they are evolving.

In *Vodafone*, the first high-profile subsidiarity case to be judged by the Court of Justice after the Lisbon Treaty entered into force, the Court's review recognizes the importance of reasoning in pre-legislative documents. The Court considers the discretion of the legislature to harmonize telecoms charges.[35] A key test is whether the legislature has exceeded the limits of its discretion.[36] Reactions to the judgment were muted, if not surprised.[37] As Advocate General Maduro suggested in his opinion, 'the Court is not substituting its judgment for that of the Community legislator but simply compelling it to take subsidiarity seriously.'[38] *Vodafone* is notable because of the Court's acknowledgement that impact assessments provide evidence relevant to judicial review.[39] The evidence becomes something of an essential procedural requirement despite having no explicit basis in the Treaties themselves.[40] Nevertheless, that judgment did not provide much encouragement that judicial review would question impact assessments.

The 2011 judgment in *Luxembourg vs Parliament and Council* confirms both perspectives: Impact assessments are relevant,[41] but also unlikely to offer evidence in favour of annulment. The case concerned Directive 2009/12 which imposed rules applicable on airports with at least a certain number of passengers. If no such airport was in a Member State, the rules applied to the airport in

[35] Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC OJ L 171, 29.6.2007; *Vodafone*, paras 51–71.

[36] Ibid, paras 68–70.

[37] The Court, unlike AG Maduro, does not itself review arguments for why a common approach is required but accepts this is the case. Brenncke, Martin, "Case C-58/08, Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform, Judgment of the Court of Justice (Grand Chamber) of 8 June 2010" *Common Market Law Review* 6/2010, pp. 1793–1814, at 1813.

[38] AG Maduro at point 30 of the Opinion to *Vodafone*. Hettne, Jörgen and Langdal, Fredrik, "Does Subsidiarity Ask the Right Question?" Think Global – Act European (TGAE) 2011, p. 354.

[39] Case *Vodafone*, paras 5, 45, 55, 58 and 65; Wimmer Micheal "The Dinghy's Rudder: General Principles of European Union Law through the Lens of Proportionality" *European Public Law* 2/2014, pp. 331–353, p. 351.

[40] Keyaerts, David, "Ex ante evaluation of EU legislation intertwined with judicial review? Comment on Vodafone Ltd v Secretary of State for Business, Enterprise and Regulatory Reform (C-58/08)" (Case Comment) *European Law Review* 6/2010, pp. 869–884 at p. 877.

[41] Alemanno, Alberto and Meuwese, Anne, "Impact Assessment of EU Non Legislative Rule-making: The Missing Link in 'New Comitology" *European Law Journal* 1/2013, pp. 76–92, p. 79; Curtin Deirdre, Hofmann Herwig and Mendes Joana, "Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda" *European Law Journal* 1/2013, pp. 1–21, p. 15.

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each Member State which had the highest passenger numbers. This, according to Luxembourg was contrary to the principles of proportionality and subsidiarity because its capital airport was subject to the rule regardless of the numbers of passengers whereas other, larger member states had many airports not subject to similar requirements. The Court dismissed the claim that national rules could be sufficient because this was not pleaded by Luxembourg to sufficient detail.[42] This signaled the Court was open in principle to such evidence but not required to obtain it on its own.

Several years after *Luxembourg v Parliament and Council* are characterized by minor developments before the General Court. In 2012, the Court confirmed State Aid as an area of exclusive competence not subject to subsidiarity in *Mitteldeutsche Flughafen.*[43] In the *Artedogan* judgment it dismissed subsidiarity as a principle giving rise to individual rights and thus non-contractual liability of the Union.[44] In 2013, the General Court delivered two notable judgments on the principle. In Case T-31/07, *Du Pont de Nemours and Others v Commission*, the General Court confirmed its earlier case law that where an instrument of EU law confers Union bodies exclusive competences, their exercise is not subject to the subsidiarity principle.[45] Directive 91/414/EC conferred exclusive competence on EU authorities to assess active substances that may be used in plant protection products and to place restrictions on their acceptance. A measure adopted in the exercise of that competence was held not to be covered by the principle of subsidiarity. In *Inuit Tapiriit Kanatami and Others v Commission*,[46] a Commission Regulation laying down detailed rules on trade in seal products[47] was claimed to breach the principle of subsidiarity. The General Court noted the objective of the basic regulation was to improve the functioning of the internal market, rather than the animal welfare objectives suggested by the applicants.[48] As the GC put it, 'the improvement of the conditions of functioning of the internal market, taking into account the protection of animal welfare.'[49] This cannot be satisfactorily achieved by action undertaken only in the Member States and requires action at Union level.[50] The 'market failure'

[42] Case *Luxembourg v Parliament and Council*, para 80.
[43] Case *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission*.
[44] Case *Artegodan v Commission, Artegodan*, para 82.
[45] Case T-31/07 *Du Pont de Nemours (France) and Others v Commission* ECLI:EU:T:2013:167 Para 203, 205 and T-334/07 Cases T-420/05 R *Vischim v Commission* ECLI:EU:T:2009:391, para 223, *Denka International v Commission* ECLI:EU:T:2009:453, para 200.
[46] Case *Inuit Tapiriit Kanatami and Others v Commission*.
[47] Regulation (EC) No 1007/2009 of 16 September 2009 on trade in seal products OJ L 286, 31.10.2009.
[48] Case *Inuit Tapiriit Kanatami*, para 35.
[49] Paras 83 and 64.
[50] Para 85.

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caused by divergent national law demonstrated a need to harmonize national provisions which regulate placing seal products on the market.[51]

The next judgment of note, *Estonia v Parliament and Council*,[52] involves concerns related to accounting rules in Directive 2013/34/EU.[53] This judgment dismisses a number of arguments that would, if successful, have confirmed a more intense subsidiarity review. Estonia argued that a specific provision in the directive failed to comply with the principle of subsidiarity.[54] This approach was rejected: Subsidiarity review involves concerns the instrument as a whole and not each of its provisions individually.[55] Nor need the legislator consider the position of specific member states individually when reviewing subsidiarity pleas: the legislature must only ensure that the action 'can, by reason of its scale or effects, be better achieved at Union level'.[56] The technical choices in the instrument did not require specific individual statements of reasons.[57] Worse still for advocates of strict judicial review, a state could not claim a failure to state reasons when it was a participant in the legislative procedure leading to the adoption of the instrument.[58]

Despite a poor outlook in 2014–2015, three judgments delivered on 4 May 2016 suggest judicial subsidiarity review remains viable. In a fitting continuation of a classic theme, tobacco regulation, Poland supported by Romania challenged Directive 2014/40/EU. This sought to further regulate mentholated tobacco products in the Union.[59] Two other judgments were references brought in national proceedings involving the same instrument; one criticizing standardized (plain) packaging, and the other focused on new regulation for electronic cigarettes.[60]

In *Poland v Parliament and Council*, Poland argued in essence that local conditions required local solutions.[61] Poland also pleaded that the recital's reference

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51 See case *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission* paras 38 and 39. See also case *Spain v Commission*, paras 181–182.

52 Case C-508/13 *Estonia v Parliament and Council* ECLI:EU:C:2015:403; Report from the Commission 21014 Annual Report 2014 on Subsidiarity and Proportionality 2.7.2015 COM(2015) 315 final, p. 8, noting an absence of significant judgments.

53 Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC and repealing Council Directives 78/660/EEC and 83/349/EEC OJ L 182, 29.6.2013.

54 Case *Estonia v Parliament and Council*, para 41.

55 Ibid, at 51. The court considered this a question of the duty to state reasons, but this plea also failed because the applicant was party to the legislative process. See also *Poland v Parliament and Council* at 119.

56 Case *Estonia v Parliament and Council* para 53.

57 Para 60.

58 Para 61.

59 Case *Poland v Parliament and Council*, paras 111–127.

60 Cases *Pillbox 38* and *Philip Morris Brands*.

61 Case *Poland v Parliament and Council*, Polish pleas at 106.

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to subsidiarity was 'a standard formula' with no real significance in light of the principle of subsidiarity and thus a failure to state reasons in respect of subsidiarity.[62] The institutions and interveners argued that subsidiarity was adequately considered in the impact assessment, and that in any event other recitals which did not expressly mention subsidiarity nevertheless satisfied the duty to state reasons.[63] The Court starts out strong: it 'must verify both compliance with the substantive conditions set out in Article 5(3) TEU and compliance with the procedural safeguards provided for by that Protocol.'[64] The standard remains whether 'whether the EU legislature was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at EU level.'[65] Harmonization, remains, however, its own justification. Even if one of the objectives of the instrument

> 'might be better attained at the level of Member States… the fact remains that pursuing it at that level would be liable to entrench, if not create, situations in which some Member States permitted the placing on the market of tobacco products containing certain characterising flavours, whilst others prohibit it, thus running completely counter to the first objective of Directive 2014/40, namely the improvement of the functioning of the internal market for tobacco and related products.'[66]

Thus, the interdependence of internal market and health-promoting objectives in the directive allowed the EU legislature to

> '…legitimately take the view that it had to establish a set of rules for the placing on the EU market of tobacco products with characterising flavours and that, because of that interdependence, those two objectives could best be achieved at EU level.[67]

In what might be considered a subtle, but quite significant development in the intensity of review, the Court admitted new evidence brought by the claimant to contradict subsidiarity claims in the preparatory work.[68] The applicant had brought evidence to support claims that the consumption of mentholated tobacco products is in essence limited in Poland, Slovakia and Finland and that

[62] That recital reads: "(60) Since the objectives of this Directive, namely to approximate the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products, cannot be sufficiently achieved by the Member States, but can rather, by reason of their scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives."

[63] See recitals 4, 7, 15 and 16.

[64] Para 113.

[65] Para 114.

[66] Para 117.

[67] Section at 118, referring to *Vodafone and Others*, paragraph 78, and *Estonia v Parliament and Council*, paragraph 48.

[68] Para 120.

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therefore the secondary objective of protecting human health in the internal market context could have been better achieved at the national level. Thus, the judgment could be read as a confirmation that evidence contradicting subsidiarity claims made in preparatory documents is not only admissible but seriously considered by the Court of Justice. As the Court notes, the directive and its impact assessment include 'sufficient information showing clearly and unequivocally the advantages of taking action at EU level'.[69] This could be read as a further signal indicating the willingness of the Court to consider contrary evidence. It could, after all, have developed the rule that as a participant in the legislative proceedings Poland was precluded from challenging the statement of reasons regarding the choice of measures.[70] The judgment also clarifies the legal standard for subsidiarity statements of reasons. According to the Court, the legislation and its preparatory material

> 'established to the requisite legal standard that that information enabled both the EU legislature and national Parliaments to determine whether the proposal complied with the principle of subsidiarity, whilst also enabling individuals to understand the grounds relating to that principle and the Court to exercise its power of review.'[71]

In the second subsidiarity-related judgment, *Pillbox 38*,[72] the UK High Court referred a question concerning the validity of Article 20 of the Directive. The contested provision imposed regulatory requirements for electronic cigarettes and refill containers, including an advertising ban. The Court dismisses reasoned opinions as evidence of a breach of subsidiarity. Reasoned opinions 'are part of the mechanism in connection with the political monitoring of compliance with that principle established by that protocol… the Court must review only compliance with the procedural safeguards provided for by that protocol.'[73] As to the substantive subsidiarity revision? in Article 5(3) TFEU, 'the Court must examine whether the EU legislature was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at EU level.'[74] The Court reviewed new evidence purporting to challenge claims that national differences existed, but found that there were indeed such differences (and thus a reason to harmonize legislation).[75]

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[69] Para 123.

[70] Case *Estonia v Parliament and Council*, paragraph 62 and *Poland v Parliament and Council* paragraph 125.

[71] *Poland v Parliament and Council*, para 124.

[72] Case *Pillbox 38*, especially paras 142–151.

[73] Para 147.

[74] Para 148.

[75] Paras 57, 112 and 150.

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The Third judgment, *Philip Morris Brands*,[76] includes a subsidiarity challenge against the prohibition on menthol as a characterizing flavor for tobacco products.[77] The Court addressed only part of the subsidiarity pleas because the reference itself only explained the referring Court's subsidiarity concerns as regards a single article of the directive.[78] Was the legislature 'entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at EU level'?[79] Here, too, the conflation of public health goals into an overall internal market objective[80] helps demonstrate subsidiarity of EU level action.[81] The interdependence of the two objectives meant that they could, read in tandem, be best achieved at EU level.[82] Sufficient reasons were given: 'the Commission's proposal for a directive and its impact assessment include sufficient information showing clearly and unequivocally the advantages of taking action at EU level rather than at Member State level.'[83] It is interesting to hypothesize how an answer to the question might be framed if the statement of reasons did not *clearly and unequivocally* show such advantages.

What is the standard for evaluating reasoning in legislative proposals? Early comments on these cases perceive the triplet of judgments as 'a deferential approach to the policy choices underpinning the Directive' and note the importance of international conventions as inspiration for also the Union's policy choices.[84] They also note, however, that the Court deals with the issues in a detailed manner and continue to engage with the arguments, examine the effectiveness of alternative policy choices, and support conclusions with a robust selection of sources.[85] Even if AG Kokott's approach – whether the Union's political institutions have kept within the limits of their discretion – is viewed as weak,[86] the limits of that discretion are increasingly viewed in a rather evidence-based way.

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76 Case *Philip Morris Brands and Others*, paras 213–227.

77 Question 7 referred to the Court of Justice reads: "Is [Directive 2014/40] and in particular Articles 7, 8(3), 9(3), 10(l)(g), 13 and 14 invalid for failure to comply with the principle of subsidiarity?"

78 Paragraphs 51–52, declaring the remainder of question 7 inadmissible in other respects and 213–214 for the same as regards subsidiarity.

79 Para 218.

80 As the Court states in paras 143 and 220, "…Directive 2014/40 has two objectives in that it seeks to facilitate the smooth functioning of the internal market for tobacco and related products, while ensuring a high level of protection of human health, especially for young people."

81 Para 221; compare the similar *Poland v Parliament and Council* paragraph 117, above.

82 Para 222; see also *Vodafone and Others*, para 78, and *Estonia v Parliament and Council*, para 48.

83 Para 226.

84 See "Reviewing harmonization: the Tobacco Products Directive judgments" (Editorial) *European Law Review* 3/2016, p. 306.

85 Ibid.

86 Bartlett, Oliver "The EU's competence gap in public health and non-communicable disease policy" *Cambridge Journal of International and Comparative Law* 1/2016, pp. 50–81, p. 69.

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The review of post-Lisbon case law shows subsidiarity is in principle justiciable,[87] but in practice difficult to challenge before the Court. The problems in judicial review were clearly evident to commentators at the time of its introduction.[88] Whilst many of the decisions represent further limits to subsidiarity review, the 2016 *Poland v Parliament and Council* judgment may, in its review of the external evidence, represent progress towards more detailed review. It at the very least shows Court is willing to entertain external evidence which might refute the claims of the legislature.

Why are there no successful annulment actions? It is regularly suggested that this is a function of the limited number of cases and because there are often good grounds for EU-level action in the cases that have been brought.[89] Some suggest it is only because 'a viable methodology and testing standards have not yet been thrashed out.[90] Nothing in the case law to date suggests subsidiarity review is impossible. Quite the contrary, we agree a change may arise a case where the case for legislation is not adequately made and where as a consequence a measure may be annulled. It may even happen with reference to external evidence produced by parties to an annulment case. Litigation does not suffer from the myopic approach to subsidiarity found in the context of the Early Warning System. Applicants are perfectly at liberty to argue all factors that contribute to the allocation and exercise of competence. The same annulment action, or the same preliminary reference can raise questions of legal basis, subsidiarity and proportionality without difficulty, again evident in the triplet of tobacco regulation judgments from May 2016. They may even plead national constitutional identity. However, the criticism levelled at the intensity of subsidiarity review are equally applicable to review focusing on proportionality or legal bases. Member States have arguably been equally unsuccessful on all direct fronts of assault. Literature nevertheless suggests the intensity of subsidiarity review varies across eras.[91] If that is so, arguably review based on

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[87] After Lisbon, e.g. *Vodafone* paras 72–78.

[88] Robinson, William, "The Court of Justice after Maastricht" in O'Keeffe and Twomey, 1994, 179–192 at p. 189; Bermann, George, "The Lisbon Treaty: The Irish "No". National Parliaments and Subsidiarity: An Outsider's View" *European Constitutional Review* 3/2008, pp. 453–459 at 458; Weatherill, 2013, at 853, Bogojevic and Groussout, in Azoulai, 2014, 241; Biondi, 2012 at 213; Barbier de la Serre and Sibony, "Expert Evidence before the EC Courts" *Common Market Law Review* 4/2008, pp. 941–985.

[89] Van Nuffel, Piet, "The Protection of Member States' Regions Through the Subsidiarity Principle" in Panara, Carlo and De Becker, Alexander (eds.) *The Role of the Regions in EU Governance* (Springer 2011), at 65–66, and Craig, 2012, at 50, 72, 80; Panara, 2016, at. 319.

[90] Davor, 2015, at 942, 974 and 944.

[91] Bradley, Kieran St. C., "Legislating in the European Union" in Barnard, Catherine, Peers, Steven (eds.) *European Union Law* (Oxford University Press 2014) at 115 cites case C-142/84 – *BAT and Reynolds v Commission* ECLI:EU:C:1987:490 at 180 as the turning point, where the Court accepts there is subsidiarity review; but compare *Vodafone* at 78 also cited by Bradley as contra; Harlow, Carol, Rawlings, Richard, "Process and Procedure in EU Administration"

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impact assessments and carefully scrutinizing legislative proposals represents a modern era of more intense review.[92]

Subsidiarity might also be redefined in a way more open to judicial review than is currently the case in the context of Article 5(3) TFEU or Protocol 2. The Amsterdam Protocol included more detail, and referred to 'transnational aspects which cannot be satisfactorily regulated by action by Member States' and situations where 'actions by Member States alone… would conflict with the requirements of the Treaty (such as the need… to avoid disguised restrictions on trade …)'.[93] Reintroducing such a text could improve and develop judicial tests. Nevertheless, many of these are also issues in determining competence, for example in the context of the internal market legal basis, and thus already open to judicial review. The cure- strict judicial review- may also be worse than the disease. Panara notes that in Germany, where subsidiarity remains of some interest,[94] improved definitions defined and a change in the *Bundesverfassungsgericht* doctrine led to successful subsidiarity challenges.[95] The ultimate outcome, however, was a constitutional amendment which made the test less strict and thus watered down strict judicial review.

4. SUBSIDIARITY AND THE EARLY WARNING SYSTEM

After the Lisbon Treaty entered into force, national parliaments are invited to consider the subsidiarity of legislative proposals under the so-called 'early warning system' (EWS), detailed in Protocol 2 to the Treaties. This was linked to a broader aim of involving national parliaments.[96] Where they consider that a draft proposal infringes the principle of subsidiarity, they may submit a Reasoned Opinion (RO) to the Commission. Each national parliament has two votes which, depending on the bicameral nature of the parliament, may be issued independently by each chamber. Two mechanisms are set out in Article 7 of the Protocol. The so called 'yellow card' requires either one third or, in the area of freedom, security and justice (AFSJ) one fourth of allocated votes. The 'orange card' requires a simple majority in the ordinary legislative procedure. Triggering either procedure requires the Commission to review the legislation and consider amending or withdrawing the proposal. The 'orange card' allows

(Hart 2014), p. 44, citing *Commission v Poland* and *Commission v Poland and Estonia*, cited as "perhaps the closest the CJEU has come to invoking subsidiarity".

[92] E.g. Vandenbruwaene, Werner, "Multitiered Political Questions: The ECJ's Mandate in Enforcing Subsidiarity" *Legisprudence* 3/2012, pp. 321–345, suggesting this *de lege ferenda*.

[93] Protocol (No 30) on the application of the principles of subsidiarity and proportionality, Article 5.

[94] FIDE General Report on Competence for 2016, p. 115. In 2016 there were no UK or Austrian reports, in the UK case clearly not because there were no subsidiarity concerns.

[95] Panara, 2016, at 313–314.

[96] See also Protocol 1 on National Parliaments.

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the Council or EP to stop the legislative procedure. Three yellow cards have been issued by the end of 2016. No orange cards have been issued. Whilst one proposal was withdrawn for other reasons, no yellow card resulted in the withdrawal of a proposal *for the reason that the Commission considers it breaches the principle of subsidiarity*. After a period involving very few ROs in 2014 and 2015, national parliaments have issued a large number in 2016.

What 'subsidiarity' means in the context of the EWS remains debatable. The confusion can be traced in part to the working group's structure of the convention: there was a subsidiarity, but not a proportionality, working group in the Convention on the Future of Europe.[97] The final report of the working group on subsidiarity suggested the principle should be best understood as a political concept, as 'too vague to lend itself to objective interpretations… so the best way to avoid disgruntlement is to bring all levels of political representation within the process, and attempt to ensure their concerns are taken account of.'[98] The Commission's impact assessment guidelines reflect the distinction between subsidiarity and proportionality: Under guidelines first issued in 2005,[99] three tests included proportionality elements,[100] under newer guidelines published in 2009,[101] the third test was deleted because it was linked to proportionality rather than subsidiarity.[102] Some writers on national parliaments have maintained that the subsidiarity concept should, for the purposes of the Early Warning System, be interpreted more broadly than the Commission's practice acknowledges.[103] The Commission has treated the issuing of a Reasoned Opinion as a matter for national parliaments ROs which appear to address issues other than subsidiarity in the strict sense, treats them as a RO.[104]

Are reasoned opinions effective? Even in cases where the threshold is not reached yellow cards signal a diminished likelihood that the proposal will be passed. The Commission's annual reviews of the application of the principles of subsidiarity and proportionality illustrate a progressive deepening of national

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97 Stephen Weatherill's evidence to the HL select committee, 7 December 2004, cited in Konstantinides, 2009, at 119.

98 Davies, 2003, at p. 694, citing Final Report of the Working Group on Subsidiarity, CONV 286/02 at 2, point 5.

99 Impact Assessment Guidelines SEC 2005 791 final.

100 Necessity, added value, that EU action is limited to what Member States cannot achieve satisfactorily and to what the Union can do better.

101 SEC 2009 92, Impact Assessment Guidelines.

102 Bogojevic and Groussout in Azoulai, 2014, at 242–243.

103 Kiiver, Philipp, The Early Warning System for the Principle of Subsidiarity: Constitutional theory and empirical reality (Routledge 2012), pp. 69–91, analyzing both the definitions and the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) practice in selected cases.

104 Letter from President Barroso and Vice-president Wallström of 1 December 2009, Annex p. 4, http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/letter_en.pdf (Accessed 4.1.2017).

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parliaments' subsidiarity review.[105] Before the first 'yellow card' in 2012, very few proposals attracted sufficient reasoned opinions to warrant a mention. The annual reports regularly observe that Reasoned Opinions remain a small percentage of all of the contributions received from national parliaments in the context of political dialogue.[106] A revised definition of subsidiarity, mooted above as a solution to concerns about judicial review, might also improve some national parliaments' position. The improvement would be marginal if such concerns are equally effective when they receive a political dialogue response, and more so if those national parliaments have chosen to disengage for domestic or resource reasons. This invites further research.

Summarizing the year 2009, when the procedure is first available, the Commission noted that 'where compliance is questioned, the actors involved in discussions hold a broad variety of views. This is the case not only between the different institutions, but also within these institutions, and sometimes between the different actors of the same Member State."[107] By the end of 2010, 82 draft legislative proposals falling within the scope of the Protocol had received 211 documents issued as ROs but according to the Commission, only 34 raised subsidiarity concerns.[108] Only five legislative proposals received more than one reasoned opinion.[109] The most controversial, on seasonal workers, received only nine critical Reasoned Opinions but an equal number of opinions supporting the proposal.[110]

In 2011, 64 reasoned opinions were received on a total of 28 Commission proposals. No proposal exceeded the threshold for a yellow card, but the Common Consolidated Corporate Tax Base[111] received nine ROs worth 13 votes, the

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105 We rely on the Commission's annual reviews for statistics for 2010–2015 but develop our own for 2016 based on the IPEX database as of 4.1.2017.

106 Report from the Commission 2012, p. 3–4; Report from the Commission Annual Report 2013 on Subsidiarity and Proportionality Brussels, 5.8.2014 COM(2014) 506 final, p. 4.

107 Report from the Commission on Subsidiarity and Proportionality (17th report on Better Lawmaking covering the year 2009) 8.10.2010 COM/2010/0547 final, p. 11.

108 Report from the Commission on Subsidiarity and Proportionality Brussels (18th report on Better Lawmaking covering the year 2010), 10.6.2011 COM(2011) 344 final, p. 4.

109 Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010) 379 final; Proposal for a Directive … /…/ EU of the European Parliament and of the Council on Deposit Guarantee Schemes [recast], COM(2010) 368 final; Proposal for a Regulation of the European Parliament and of the Council amending Council Regulations (EC) No 1290/2005 and (EC) No 1234/2007, as regards distribution of food products to the most deprived persons in the Union, COM(2010) 486 final; Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), COM(2010) 537 final; Direct Support Scheme for Farmers, COM(2010) 539, and the Investor Compensation Scheme, COM(2010) 371 final.

110 Seasonal Workers Directive, COM(2010) 379 final.

111 Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) COM(2011) 121 final.

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proposal on the temporary reintroduction of border controls at internal borders in exceptional circumstances[112] six ROs, and both the Common European Sales Law[113] and the Single Common Market Organization Regulation[114] five ROs.[115] As of 1.1.2017, none of these have been passed. A relatively high number of votes clearly indicates difficulties in passing a proposal because it also serves as a proxy for the position of national governments.[116]

In 2012, the Commission received 70 ROs.[117] The first yellow card was issued in 2012 concerning the proposal for a 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.[118] This was the only proposal to come close to reaching the threshold, with 12 ROs representing 19 votes. The next most controversial proposal received only five reasoned opinions.[119] Only the later has been passed.

The proposal on collective action sought to restate the relationship between the labour rights and the exercise of freedom of establishment and to provide services enshrined in the Treaty, according to the Commission,[120] considered in the *Viking*[121] and *Laval*[122] judgments. The Commission, as well as some academics,[123] saw the ROs as raising a range of issues beyond the narrow Protocol 2 definition of subsidiarity. These included its legal basis,[124] the added value of the proposal as opposed to the status quo, and the necessity for the proposal EU alternative dispute settlement mechanism.[125] In its responses to national parliaments, the Commission suggested the proposal complied with subsidiarity but concluded that the widespread concerns were a proxy for Council votes and

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112 Regulation amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances COM(2011) 560 final.

113 Proposal for a Regulation on a Common European Sales Law Brussels, COM(2011)635 final.

114 Regulation establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products ('Single CMO Regulation'), COM(2010) 799 final.

115 Report from the Commission 2011, p. 4.

116 This confirms predictions made by i.a. Raunio, Tapio, "Destined for Irrelevance Subsidiarity Control by National Parliaments (WP)" ARENA Paper 36/2010, p. 13.

117 Report from the Commission 2012, p. 3.

118 Ibid, p. 7.

119 Proposal for a Regulation on the Fund for European Aid to the Most Deprived, COM(2012) 617 final.

120 Report from the Commission 2012, p. 7.

121 Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* European Community Court ECLI:EU:C:2007:772.

122 Case C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* ECLI:EU:C:2007:809.

123 See Fabbrini, Federico, Granat, Katarzyna ""Yellow card, but no foul": The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike" *Common Market Law Review* 1/2013, pp. 115–143.

124 TFEU article 352, considering article 153 excludes the right to strike from Union harmonisation.

125 Report from the Commission 2012, p. 7.

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therefore the proposal was politically unworkable. As a result, the proposal was withdrawn for reasons presented as political expediency rather than subsidiarity concerns.[126]

In 2013, 88 reasoned opinions were received by the Commission.[127] A second yellow card was issued, this time on the proposal for the establishment of the European Public Prosecutor's Office (EPPO). National Parliaments issued 13 reasoned opinions on the proposal representing 18 votes.[128] A further seven chambers engaged in political dialogue over issues other than subsidiarity.[129] This proposal also remains pending in 2017.

The Commission's response[130] again sought to distinguish between strict subsidiarity concerns and those which it considered outside the scope of subsidiarity: arguments relating to proportionality, to policy choices, or to other policy or legal issues. It considered the statement of reasons on subsidiarity sufficient and maintained the proposal. The case of EPPO is curious because Article 86 TFEU already provides for unanimity, therefore enabling any Member State in Council to veto the proposal. Subsidiarity is, in effect, strongly politically protected in this context unlike where the ordinary legislative procedure is used. As of 4.1.2017, this proposal also remains under discussion.[131]

2014 marks the beginning of a sharp decline in the number of ROs.[132] The Commission received only 21 reasoned opinions from national Parliaments regarding the principle of subsidiarity on a total of 15 proposals.[133] The drop in ROs was unmatched by a correspondingly large decline in political dialogue but the decline has been explained by the end of the 2010–2014 Commission's term of office.[134] Only three reasoned opinions were given on the most controversial proposals, a Directive on the Union legal framework for customs infringements and sanctions[135] and the proposal for a review of waste policy and legislation.[136] The former remains pending whilst the proposal on waste policy

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126 Official Journal of the European Union, C 109, 16 April 2013, p. 9.

127 Report from the Commission 2013 final, p. 4.

128 In this case 14 votes were needed to trigger a yellow card procedure in this case.

129 Report from the Commission 2013, p. 8.

130 Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2, COM(2013) 851 final.

131 Procedure 2013/0255/APP, procedure available here: http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:52013PC0534 (Accessed 4.1.2017).

132 Report from the Commission 2014.

133 The Commission received 21 reasoned opinions, some of them relating to more than one document.

134 Report from the Commission 2014, p. 4 and p. 12.

135 Proposal for a Directive on the Union legal framework for customs infringements and sanctions, COM(2013) 884 final.

136 Proposal for a Directive amending Directives 2008/98/EC on waste, 94/62/EC on packaging and packaging waste, 1999/31/EC on the landfill of waste, 2000/53/EC on end-of-life vehi-

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review was withdrawn.[137] During 2014 three national parliaments proposed improvements to the scrutiny process[138] These suggested extending the concept of subsidiarity to cover proportionality and legal basis issues and extending the scrutiny deadline from the present eight weeks, and making the withdrawal of a proposal compulsory where the present thresholds for a 'yellow card' are met.[139]

The trend for very few ROs continued in 2015, with only eight reasoned opinions on subsidiarity.[140] This is matched by a significant drop also in the number of contributions in political dialogue as compared with 2013 and 2014. Five, thus more than half of all reasoned opinions and representing 7 votes, related to one single proposal concerning a solidarity mechanism for the relocation of the Union's 'Dublin' system refugees.[141] The new Juncker Commission's work program focused on a limited number of new initiatives and withdrawing a substantial number of pending proposals.[142] The trend may also be linked to the Commission's new 'Better Regulation' package in May 2015, and new consultation and feedback mechanisms intended to produce a more inclusive pre-legislative process.[143] These are expected to refocus scrutiny from post-proposal examination to the pre-legislative stage.[144]

In 2016, the national parliaments dispelled any premature ideas about the death of the EWS that might arise from the low number of contributions in 2014 and 2015.[145] IPEX records 56 separate reasoned opinions, comprising 83 votes, on 21 different legislative proposals with scrutiny dates clearly ending during 2016. An additional, somewhat anomalous proposal, the EP proposal for a Council decision to amend the EU voting rules, received a further eight

cles, 2006/66/EC on batteries and accumulators and waste batteries and accumulators, and 2012/19/EU on waste electrical and electronic equipment, COM(2014) 397 final.

137 OJ C/2015/80/20.

138 DK Folketing "*Twenty-three recommendations to strengthen the role of national Parliaments in the European decision-making process*", UK House of Lords "*The role of National Parliaments in the European Union*' and NL *Tweede Kamer* '*Ahead in Europe*'.

139 Report from the Commission 2014, p. 5. In detail see Jančić, 2015, 52, pp. 939–975.

140 Report from the Commission Annual Report 2015 on Subsidiarity and Proportionality Brussels, 15.7.2016 COM(2016) 469 final, p. 7.

141 Proposal for a Regulation establishing a crisis relocation mechanism and amending Regulation (EU) 604/2013, COM(2015) 450 final.

142 A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change – Political Guidelines for the next European Commission: http://ec.europa.eu/priorities/docs/pg_en.pdf (Accessed 4.1.2017).

143 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Better regulation for better results – An EU agenda Strasbourg, 19.5.2015 COM(2015) 215 final. For analysis, Dawson, Mark, "Better Regulation and the Future of EU Regulatory Law and Politics" *Common Market Law Review* 5/2016, pp. 1209–1236.

144 Report from the Commission 2015, p. 2.

145 The data used for this year are compiled form IPEX as of 4.1.2017.

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votes in six ROs[146] straddling 2015 and 2016.[147] The proposed Directive on the posting of workers[148] received enough votes to become the third proposal to date to receive a 'yellow card' with 14 ROs totaling 22 votes.[149] The proposal for recasting the Dublin regulation received 10 votes from 8 ROs.[150] Sweden did not issue a RO for either of these, although it remained the most active national parliament with 9 ROs worth 18 votes.

Other proposals attracting ROs were significantly less controversial. The closest contenders each receiving between four and six votes. A proposed decision on an information exchange mechanism on instruments in the energy sector[151] received six votes from four chambers[152] as did a proposal on cooperation between national consumer authorities.[153] A proposal on tax disclosure for undertakings[154] gathered four votes.[155] So did a proposal on entry and residence rules for third country national skilled workers,[156] and a proposal concerning

[146] European Parliament resolution PE/2015/2035 of 11 November 2015 on the reform of the electoral law of the European Union.

[147] As the Swedish RO 2016/16:KU27 notes, the EP had not informed national parliaments of the proposal or the scrutiny date.

[148] Directive amending Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 505 final.

[149] ROs were received from Bulgaria (National Assembly), Croatia (Croatian Parliament), Czech Republic (Czech Senate, Czech Chamber of Deputies), Denmark (Danish Parliament), Estonia (Estonian Parliament), Hungary (Hungarian National Assembly), Latvia (Saeima Parliament of Latvia), Lithuania (Seimas of the Republic of Lithuania), Poland (Polish Senate, Polish Sejm), Romania (Romanian Senate, Romanian Chamber of Deputies), and Slovakia (National Council of the Slovak Republic).

[150] Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsibility or examining an application for international protection lodged in one of the Member

States by a third-country national or a stateless person (recast), COM(2016) 270 final.

[151] Proposal for a Decision establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, COM(2016) 53 final.

[152] Austria (only Austrian Federal Council), France (Only French Senate), Malta (Maltese House of Representatives), Portugal (Assembleia da Republica).

[153] Proposal for a Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws, COM(2016) 283 final: Austria (only Austrian Federal Council), Bulgaria (Bulgarian National Assembly), Czech Republic (Czech Chamber of Deputies), Sweden (Swedish Riksdag).

[154] Proposal for a Directive amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, COM(2016) 198 final.

[155] Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, COM(2016) 198 final: Ireland (Irish Houses of Oireachtas), Sweden (Swedish Riksdag).

[156] Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM(2016) 378 final, with ROs from Bulgaria (Bulgarian National Assembly), and the Czech Republic (Czech Senate and Czech Chamber of Deputies).

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tax avoidance in the internal market.[157] A proposal on civil aviation regulation gathered three votes from two parliaments,[158] as did a proposal on the security of the gas supply[159] and one on establishing a European body of regulators for electronic communications.[160] The majority of proposals which received any attention at all from national parliaments received only one or two Reasoned Opinions.[161]

The Commission's response to the 'yellow card' on the revised posted workers rules continues its 'legal rule-following'[162] policy of responding in detail only to arguments that fall within the strict definition of subsidiarity.[163] The communication rebuts claims that the existing rules are sufficient and adequate, that the Union is not the adequate level of the action, that the proposal fails to explicitly recognize Member States' competences on remuneration and conditions of employment and that the justification contained in the proposal with regard to the subsidiarity principle is too succinct. Thus, a third consecutive 'yellow card' is dismissed as not raising valid subsidiarity concerns. The curious case of the EU elections proposal also raises questions about the nature of subsidiarity control when unusual legislative procedures are invoked in areas which are not obviously exclusive Union competences listed in Article 3 TFEU.

Is the EWS ineffective? This is hard to justify given the correlation between ROs and stalled or withdrawn proposals. From 2009 to the beginning of 2017, the dialogue between national parliaments and the Commission also suggests that how subsidiarity is defined is not decisive. It has nevertheless been argued that subsidiarity should also formally be deemphasized in favor of explicitly more detailed reviews of conferral and the substance of the legislation.[164] Whenever the Commission responds to claims which it does not accept are strict

[157] Proposal for a Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, COM(2016) 26 final, from Malta (Maltese House of Representatives) and the Swedish Riksdag.
[158] Proposal for a Regulation on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and repealing Regulation (EC) No 216/2008, COM(2015) 613 final, with ROs from Italy (only Italian Senate), Malta (Maltese House of Representatives).
[159] Proposal for a Regulation concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010: Bulgarian National Assembly and Austrian Federal Council, COM(2016) 52 final.
[160] Proposal for a Regulation establishing the Body of European Regulators for Electronic Communications COM(2016) 591 final; Italian Senate and Maltese House of Representatives.
[161] COM(2016) 113 final; COM(2016) 26 final; COM(2015) 750 final; COM(2016) 551 final; COM(2016) 52 final; COM(2016) 491 final; COM(2016) 25 final; COM(2015) 613 final; COM(2016) 289 final; COM(2015) 595 final; COM(2016) 590 final; COM(2016) 591 final; COM(2016) 589 final; COM(2015) 634; COM(2015) 635 final; COM(2016) 465 final.
[162] Cooper, 2016, p. 23.
[163] Communication from the Commission on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, COM(2016) 505 final, p. 5.
[164] Davor, 2015, pp. 939–976, at 942 and 974.

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subsidiarity claims, as it has undertaken to do, this is already taking place. If this process is maintained the EWS will be a success in engaging national parliaments to debate broader questions about the proper balance between EU level action and national and sub-national action even if the direct consequences of 'yellow cards' are hard to observe. Although we have not conducted full review of correlations between reasoned opinions and legislative outcomes for 2015 and 2016, proposals that were Reasoned Opinions appear to struggle already during the early stages of the process. Kiiver argued before the Lisbon treaty that even weak tools like the yellow card system could therefore be a catalyst for real and effective parliamentary action.[165]

Nevertheless, it remains the case that subsidiarity review by the national parliaments does not, directly, lead to withdrawal of proposals for reasons of subsidiarity. The Monti II proposal was withdrawn, according to the Commission,[166] not for subsidiarity concerns but because the objections amounted to a blocking vote in the Council,[167] whereas the European Public Prosecutor's Office[168] and the revisions to the Posted Workers Directive continued despite the objections because the Commission considered the concerns unwarranted.[169] The Commissions responses to the EPPO yellow card then also addressed concerns which it did not consider subsidiarity concerns. In the third set of responses to the 2016 yellow card involving the directive on posted workers, the Commission also maintained its approach was consistent with a strict reading of the subsidiarity principle and undertook to respond to non-subsidiarity concerns through the political dialogue system.[170] Thus, the evidence from 2016 rebuts any claim that the EWS is in desuetude, and suggests instead that ROs correlate well with the failure of a proposal. It also confirms earlier doubts about the direct impact of ROs: a new yellow card does not directly lead to the withdrawal of the offending proposal on subsidiarity grounds.

5. EXPLAINING WEAK SUBSIDIARITY REVIEW

Both the case law and the practice of national parliaments cast doubts on the efficacy of subsidiarity as a legal principle. Some of the evidence could be

[165] Kiiver, Philip, "Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity" *Maastricht Journal of European and Comparative Law* 15/2008, 77–83, pp. 83.

[166] See the letter of 12 September 2012 from Barroso, then President of the Commission, to the EP Speaker Martin Schulz here: http://europa.eu/rapid/press-release_MEMO-12-661_en.htm (Accessed 4.1.2017).

[167] Some academics agree: Fabbrini and Granat, 2013, pp. 115–143.

[168] Commission Communication on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity COM(2013) 851 final.

[169] Commission Communication on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity COM(2016) 505 final, pp. 5–6.

[170] Communication on the Workers directive subsidiarity review, p. 9.

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explained by practical developments. Ex ante review in the EU institutions takes a fairly broad approach to elements that might be described as relating to the correct level of governance. Early interinstitutional agreements[171] have since evolved into a much more detailed better regulation agenda,[172] in which duties to state reasons exist regardless of whether the issue at hand is formally one of subsidiarity or proportionality and even if the instrument is not technically a legislative one.[173] Existing legislation is also reviewable in the context of the Regulatory Fitness and Performance program (REFIT).[174] In 2015 the Commission adopted a 'better regulation' package. Under the terms of this package, subsidiarity and proportionality are addressed when the Commission publishes a roadmap towards a legislative package, again in a full impact assessment, and finally in the context of explanatory memoranda to published legislative proposals.[175] The better regulation toolbox, introduced in 2015, requires the Commission to also assess the subsidiarity of both legislative and non-legislative initiatives.[176] A March 2016 Interinstitutional agreement further recalls the importance of i.a. subsidiarity throughout the pre-legislative and legislative processes.[177]

The Commission's own meta-analysis shows that the subsidiarity of proposals is regularly improved prior to the publication of legislative proposals. This suggests pre-proposal stage review may account for a better quality of instruments. Better and more detailed pre-legislative material also improves both national parliaments' reviews and the quality of judicial review.[178] Proposals are harder to challenge on subsidiarity grounds because those concerns have been flagged and corrected before the publication of the proposal.[179] A significant proportion of draft proposals has been amended before they began the formal

[171] Interinstitutional Agreement of 25 October 1993 on the procedures for implementing the principle of subsidiarity, OJ C 329, 6.12.1993.

[172] Report from the Commission 2015, p. 2 and Commission Staff Working Document Better Regulation Guidelines SWD(2015) 111 Strasbourg 19.5.2015. See the 'smart regulation toolbox' at http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf (Accessed 4.1.2017)

[173] Report from the Commission 2015, pp. 2–3.

[174] The Regulatory Fitness and Performance (REFIT) website is at: http://ec.europa.eu/smart-regulation/refit/refit-platform/index_en.htm (Accessed 4.1.2017).

[175] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Better regulation for better results – An EU agenda, Strasbourg, 19.5.2015 COM(2015) 215 final, p. 5.

[176] European Commission, "Better Regulation 'Toolbox'" p. 22, available here: http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf (Accessed 4.1.2017).

[177] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making OJ L 123, 12.5.2016, p. 1–14), Recitals 3 and 4, and articles 2, 12 and 15.

[178] Wetter, Anna, "Subsidiaritetskontroll i nationella parlament och EU-domstolens ansvar för att kontrollen fungerar" SIEPS EPA 8/2014.

[179] For some examples, see the Report from the Commission 2013, p. 3.

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legislative process.[180] This trend continued throughout the survey period, and in 2010–2015 a third or more of proposals receive subsidiarity or proportionality review comments from the Impact Assessment Board before being formally published.[181] Overall the proportion of subsidiarity-related revisions at pre-legislative stage, remains fairly stable. In 2009 the Impact Assessment Board (IAB) made recommendations on subsidiarity and proportionality in 27 out of 79 impact assessments (34 %).[182] For 2010 the figure is one half.[183] In 2011, a third of impact assessment board opinions raised subsidiarity issues. Several specific examples of their effects on redrafting proposals prior to their presentation are given in the Commission's review for that year.[184] In 2012, the 97 impact assessments led to 144 opinions of the IAB; Comments on issues of subsidiarity were included in 33 % of its opinions.[185] The proposed Directive on Collective Copyright Management led the IAB to receive a stronger assessment on the need for, the timing and added value of EU action under the proposed single market and cultural diversity legal basis.[186] In a similar scenario involving the proposal for a regulation on a European Voluntary Humanitarian Aid Corps,[187] the IAB requested and received clearer statements on the necessity and added value of EU action.[188] 2013 continued much as 2012: the IAB issued 142 opinions based on 97 impact assessments. Subsidiarity and proportionality issues were reviewed in more than a third (34 %) of the cases it examined.[189] For 2014, 25 impact assessments led to 8 improvements as regards subsidiarity or proportionality, or both.[190] In the final year for data, 2015, seven of 30 impact assessments were amended on subsidiarity or proportionality grounds.[191]

In addition to better processes, subsidiarity review may be deflected by alternatives not formally recognized as subsidiarity review. Subsidiarity is only one method of determining the correct level at which to act in the EU context. In the context of Article 5 TEU alone, subsidiarity complemented by two related tests: the question of whether competence has been conferred, EU law the issue of *legal basis*, and the proportionality of action under Article 5(4) TEU. This is

[180] See the Report from the Commission 2009, p. 4.
[181] The Commission's meta-analysis does not in this respect distinguish between the two.
[182] See the Commission's 2009 report, p. 4.
[183] See the Commission's 2010 report, p. 3.
[184] Proposal for a Directive of 26 February 2014 on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, COM(2012) 372 final.
[185] See the Commission's 2012 report, p. 3.
[186] Proposal for a Directive 2014/26/EU of 26 February 2014 on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, COM(2012) 372 final.
[187] Report from the Commission 2011, p. 3.
[188] Ibid, p. 3.
[189] Report from the Commission 2013, p. 2.
[190] Report from the Commission 2014, p. 3.
[191] Report from the Commission 2015, p. 5.

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also the cases in many of the leading cases on subsidiarity, where the claims are linked to the choice of a public health or an internal market legal basis.[192] There are also other competing functions that have come to replace national vetoes. At one point, the national constitutional identity provision in Article 4(2) TEU was heralded as an exception to primacy[193] before skepticism prevailed in commentaries of the national identity case law.[194] We might see the threat of the 'emergency brake' mechanism in certain areas of the AFSJ and social security as another, perhaps more effective way of ensuring that matters remain regulated at the national rather than EU level[195] even if unanimity requirements do not directly guarantee states a veto in the context of the enhanced cooperation procedure.[196] However, the response to the EPPO proposal shows parliaments are interested in subsidiarity even where the Member State has a veto. National identity was not often invoked by the Court of Justice until the entry into force of the Lisbon Treaty consolidated it in the new 4(2) TEU.[197] Shortly thereafter such arguments were regularly addressed before the Court of Justice.[198] The choice of EU measures for legislative acts can also be framed in terms of subsidiarity – does the Union seek unification through regulations or a less strict form of approximation through directives.[199] Prohibitions of harmonization in the context of supporting competences could also be seen as an application of subsidiarity.[200] Even Article 1 TEU, with its references to 'ever closer union', speaks of the need to take decisions 'as openly as possible and as closely as

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192 See recently e.g. *Poland v Parliament and Council* at 105–108.

193 von Bogdandy, Armin, Schill, Stephan, "Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty" *Common Market Law Review* 5/2011, pp. 1417–1453, pp. 1417–1453. Recently in depth, Cloots, Eike, National Identity in EU Law (Oxford University Press 2015).

194 deBoer, Nik, "Addressing rights divergences under the Charter: Melloni" *Common Market Law Review* 4/2013, pp. 1097–1100, citing C-399/11 *Melloni* ECLI:EU:C:2013:107, C-208/09 *Sayn-Wittgenstein* ECLI:EU:C:2010:806 and C-213/07 *Michaniki* ECLI:EU:C:2008:731.

195 Emergency brake articles: 83(3) TFEU, 81(3) TFEU, Article 48 TFEU.

196 Judgment in Joined Cases C-274/11 and C–295/11 *Spain and Italy v Council* ECLI:EU:C:2013:240.

197 Besselink, L.F.M., "National and Constitutional Identity before and after Lisbon" *Utrecht Law Review*. 3/2010, 36–49 at 41; van der Schyffl, Gerhard, "The constitutional relationship between the European Union and its member States: the role of national identity in article 4(2) TEU" *European Law Review* 5/2012, 563–583 at 565; Gustavero, Barbara, "Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause" *Yearbook of European Law* 1/2012, 263–318.

198 E.g. Joined Cases Joined cases C-58/13 and C-59/13 *Angelo Alberto Torresi and Pierfrancesco Torresi v Consiglio dell'Ordine degli Avvocati di Macerata* ECLI:EU:C:2014:2088 at 54–59; Case C–202/11 *Anton Las v PSA Antwerp NV* ECLI:EU:C:2013:239 at 26–27; Case C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* ECLI:EU:C:2011:291 at 86–87.

199 Article 6, Protocol on subsidiarity and proportionality annexed to the Amsterdam Treaty.

200 Geiger, Rudolf, et al, (eds.) *European Union Treaties* (Hart, 2015), p. 37.

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possible to the citizen'.[201] Subsidiarity is everywhere in principle, but perhaps nowhere in practice.

6. CONCLUSIONS

We set out to consider how subsidiarity has been invoked since the entry into force of the Treaty of Lisbon in cases brought to the Court of Justice of the European Union and in the context of the Early Warning System used by national parliaments. At the end of 2016 it remains the case no judgment annuls EU legislation expressly because it breaches the principle. The EWS has also failed to produce a clear withdrawal of a proposal for subsidiarity reasons. Nevertheless, both types of subsidiarity review seem to be developing into more robust processes. In judicial review, recent case law admits extrinsic evidence and arguably considers the merits of subsidiarity claims in detail. This would surprise some early commentators and marks a departure from the main trend. Generally, the Court dismisses various types of subsidiarity claims either in context or more categorically as arguments that will never be entertained. This is not necessarily an indictment of subsidiarity itself, but should perhaps be seen in the context of annulment actions generally brought against legislative acts. Member States are as a rule unsuccessful regardless of the nature or quality of their pleas, and subsidiarity is no exception. The trend towards reviewing more, and better, evidence is also palpable. As pre-legislative processes produce more information and the Court signals a willingness to review contradictory but extrinsic evidence, even a process-based review will generate judgments with more intensity regardless of how subsidiarity is defined. In cases brought to the Court of Justice, there is no compelling reason to conflate issues of subsidiarity in the strict sense with proportionality, legal basis, or other issues related to the distribution of legislative powers. These are all capable of being raised in their own right before the Court of Justice. We are therefore cautiously optimistic about the outlook, if not the present achievements, of subsidiarity review before the Court of Justice. As for the Early Warning System, after a quiet few years in 2014 and 2015, 2016 marks a return to a high number of reasoned opinions and involves a third 'yellow card'. Here, subsidiarity is defined strictly by the Commission. This also impacts on the policies of national parliaments in how they engage with the process. If all national parliaments were as active as Sweden, the procedure and perhaps its outcome might look very different. The effectiveness of the early warning system might be criticized because the yellow cards to date have not resulted in the withdrawal of proposals *due to subsidiarity concerns*. However, the evidence shows that proposals with relatively large

[201] TEU art. 1.

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numbers of reasoned opinions either die on the operating table that is the EU legislative process or, in exceptional cases, are later revived as shadows of their former selves. The Protocol 2 system is on balance a success for national parliaments because despite the strict definition of proportionality, they are able to raise their concerns and, arguably, the correlation between ROs and failed or stalled proposals suggests this is effective. In an era where lawyers increasingly recognize the value of soft power, it would be interesting to trace the effects of these arguments through the legislative process. A detailed examination may suggest ROs with non-subsidiarity claims translate into particular outcomes not only for entire legislative proposals but for the parts which national parliaments considered especially controversial.

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