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Call for Evidence questions on Subsidiarity, Proportionality, and Article 352 TFEU

Evidence submitted by Geert De Baere

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Scope

This paper examines some aspects of the principles of subsidiarity and proportionality as laid down in Article 5(3) and (4) TEU, as well as of the so-called 'flexibility clause' in Article 352 TFEU. It does so on the basis of the questions contained in the *Call for Evidence on the Government's Review of the Balance of Competences between the United Kingdom and the European Union*. [1]

Before assessing the operation of the principles of subsidiarity and proportionality, it is perhaps useful to remind ourselves that, as the Treaties currently stand, both principles are intended to decide whether the Union ought to exercise a certain competence that has been conferred on it, and not to decide whether certain competences ought to be conferred on it or should be reattributed to the Member States. Article 5(1) TEU is perfectly clear on that issue: 'The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality'.

Put differently, it is not because the Union has been attributed a certain competence by the Member States (conferral), that it should necessarily exercise it (subsidiarity), and it is not because the Union ought to exercise a certain competence that it should do so in the most far-reaching manner (proportionality). Nevertheless, as will be argued below, subsidiarity and proportionality in a wider sense (ie outside the scope of Article 5(3) and (4) TEU) can be used as 'pre-constitutional' principles to guide the reflection on the conferral of competences.

Are the principles of Subsidiarity and Proportionality effective ways to decide when the EU acts, and how it acts? You may wish to refer to particular examples in your evidence.

The starting point for assessing the effectiveness of the principles of subsidiarity and proportionality should be how they are defined in the EU Treaty.

Article 5(3), first subpara, TEU contains the following definition of the principle of subsidiarity: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the

* Assistant Professor of EU Law and International Law, Faculty of Law and Leuven Centre for Global Governance Studies, University of Leuven.

[1] Foreign and Commonwealth Office, *Call for Evidence on the Government's Review of the Balance of Competences between the United Kingdom and the European Union, Semester 4, Subsidiarity and Proportionality* (Opening date: 27 March 2014; Closing date: 30 June 2014).

Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'. [2] In turn, Article 5(4), first subpara, TEU defines proportionality as follows: 'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. [3]

Article 5(3), first subpara, TEU requires the Union to comply with the principle of subsidiarity only in 'areas which do not fall within its exclusive competence'. It is in that regard crucial to distinguish the subsidiarity reasoning from the determination of the nature (exclusive or not) of EU competence. In response to an argument put forward by Italy to the effect that enhanced cooperation for a unitary patent would not be possible as the establishment of such a patent could only be achieved at Union level and *hence* fell with exclusive EU competences, Advocate General Bot in his Opinion in the *Unitary Patent* case rightly noted that the fact that the objectives to be pursued cannot be achieved by the Member States is an argument for the *exercise* by the Union of its competence, but does not mean Union competence is ipso facto *exclusive*. [4]

The definition in Article 5(3), first subpara, TEU tests Union action against both a necessity criterion and an added value criterion: the former requires the EU institutions to assess whether the Member States have the necessary resources to attain the objectives at issue by themselves or whether Union action is necessary, while the latter requires that the institutions provide evidence that, even if Member States acting by themselves was a possible alternative, it is not a viable one, as Member State action would harm other interests and/or Union action would on balance have clear comparative advantages. [5] The reasoning can usefully be illustrated by looking at how Advocate General Poiares Maduro justified the need for EU (at the time Community) action in the *Vodafone case*. In his Opinion, the Advocate General noted that the prices for roaming charges are often set by mobile communications operators as part of a package including other services such as domestic communications, that roaming is a small part of those services, and that demand for roaming is less than demand for domestic communications. One could therefore expect that the focus of national regulators would be on the costs, and other aspects, of domestic communications and not on roaming charges. And the Advocate General concluded: [6]

> It is the Community, by virtue of the cross-border character of roaming, that has a special interest in protecting and promoting this economic activity. This is the precise type of situation where the democratic process within the Member States is likely to lead to a failure to protect cross-border activity. As such one can understand why the Community legislator intervened.

[2] The second subparagraph of Art 5(3) TEU continues as follows: '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'.

[3] The second subparagraph of Art 5(4) TEU continues as follows: 'The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality'.

[4] Opinion of Bot AG in Joined Cases C-274/11 and C-295/11 *Spain and Italy v Council* EU:C:2013:240, point 62.

[5] See to that effect P Van Nuffel, 'The Protection of Member States' Regions Through the Subsidiarity Principle' in C Panara and A De Becker (eds), *The Role of the Regions in EU Governance* (Berlin and Heidelberg: Springer-Verlag, 2011) 58-61.

[6] Opinion of Poiares Maduro AG in Case C-58/08 *Vodafone and Others* EU:C:2010:321, point 34.

Union action will conflict with the principle of subsidiarity where it can be shown that the objective sought can be achieved just as much in all Member States either by individual action or by cooperation between the Member States concerned. However, given that Union action is invariably tested against Union objectives, such as the achievement of uniform or coherent rules or the equal treatment of EU citizens, the burden of proof for the Union is easily discharged and the protection offered by subsidiarity often suboptimal and ineffective. [7] For example, once the Court of Justice has accepted that a certain measure is legitimately intended to improve the conditions for the establishment and functioning of the internal market and can therefore be adopted on the basis of Article 114 TFEU, the step to accepting that the objective can be better attained at Union level is small indeed. [8]

In its reasoned opinion on the Commission's proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, [9] the House of Commons took the view that the Commission's subsidiarity analysis did not

> consider whether the stated objectives are necessary, only that they can better be achieved at EU level, which makes them necessary: "[t]here is a need for the Union to act because the foreseen action has an intrinsic Union dimension" […]. By conflating the first and second limbs of the subsidiarity test, this statement is entirely self-serving. The analysis is not remedied simply by stating that the prosecution of offences by Member States "is not satisfactory". [10]

That objection appears in turn to conflate the question whether the objectives of a certain proposed EU action are legitimate with the question of whether the attainment of these objectives should be done at EU or at Member State level. As the text Article 5(3) TEU indicates, only the latter question is addressed by the principle of subsidiarity. Whether the objectives of the proposed action itself are legitimate appears to be rather more a question of conferral: can the Union pursue these objectives within the confines of its current competences? The objective or objectives that the Union wishes to attain with any particular action are shaped by the Member States during the process of negotiating or amending the Treaties and further developed by the Commission in proposals and again by the Member States through their representatives in the Council during the legislative process at Union level. As mentioned above, the subsidiarity principle then requires the EU institutions to assess whether the Member States have the necessary resources to attain the objectives at issue by themselves or whether Union action is necessary, and provide evidence that, even if Member States action by themselves was a possible alternative, it is not a viable one, as Member States action would harm other interests and/or Union action would on balance have clear comparative

[7] K Lenaerts and P Van Nuffel, *EU Law* (2nd edn, London: Sweet & Maxwell, 2011), paras 7-028 and 7-032.

[8] See eg Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* EU:C:2002:741, paras 180-183. See also the oral evidence by Professor Alan Dashwood in *HC European Scrutiny Committee Thirty-third Report: Subsidiarity, National Parliaments and the Lisbon Treaty* (HC Report (2007–2008) no 563) Ev 3, taking the view that if the conditions for the exercise of what is now Article 114 TFEU are fulfilled, 'the subsidiarity principle will automatically be satisfied because you can only remove restrictions on freedom of movement or distortions of competition by a measure adopted at the level of the Community'. See nevertheless the subsidiarity analysis in *Vodafone* (n 6), paras 72-79.

[9] COM(2013) 534 final.

[10] Reasoned Opinion of the House of Commons Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality concerning a Draft Regulation of the Council on the establishment of the European Public Prosecutor's Office (EPPO), para 11.

advantages. The two criteria are clearly closely interrelated and if a proposal meets the necessity criterion, it should logically also meet the added value criterion. [11] Nevertheless, the House of Commons rightly highlights that the logic appears to be less automatic in the other direction: it is not because the Union's action would provide added value, that it is automatically necessary, and the Commission ought to have given a clearer and fuller justification in that respect.

Furthermore, the question whether an objective can be better achieved at Union level or not can be analysed from a number of different angles. It may be that the optimal achievement of a specific aim requires the Union to lay down quite detailed measures at Union level, leaving only the application in particular instances to the Member States. However, it may equally likely be the case that the optimal achievement of a certain aim requires only a basic framework of rules to be adopted at EU level, leaving the Member States in charge of working out the details of the regulatory framework as well as the implementation measures and application to particular instances to the Member States. [12] In other words, deciding at what level action is required to attain an EU objective is closely connected to deciding on the intensity of EU action, which is governed by the principle of proportionality.

In contrast to the very limited case-law on the principle of subsidiarity, which will be further considered below, the case-law of the Court of Justice of the EU (the ECJ) on proportionality is extensive. The Court has consistently held that the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives. Furthermore, with regard to judicial review of compliance with those conditions, where interferences with fundamental rights are at issue, the extent of the EU legislature's discretion may prove to be limited, depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter of Fundamental Rights of the EU, the nature and seriousness of the interference and the object pursued by the interference. [13] As was demonstrated by the ECJ in declaring the Data Retention Directive [14] invalid in *Digital Rights Ireland*, the protection offered by the proportionality principle against overbearing EU action is not imaginary.

The importance of the principle of proportionality in adjudicating disputes over EU and Member State action is enhanced by Treaty articles requiring the Union to take account of particular objectives irrespective of the field in which it is acting. [15] Since such Treaty articles do not provide for

[11] See in that sense Van Nuffel (n 5) 61.
[12] P Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) *Journal of Common Market Studies* 75 and 82-83.
[13] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* EU:C:2014:238, paras 46-47 and the case-law cited there.
[14] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54).
[15] eg art 9 TFEU, which provides that in 'defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'.

any ranking order of the various Union objectives, the principle of proportionality is used to settle potential conflicts between them. [16]

Interpretation

What are your views on how the principles have been interpreted in practice by EU and Member State actors including: the EU courts, the other EU institutions, Member State governments, Member State parliaments, sub-national or regional bodies and civil society?

Former President of the Republic of Ireland and former United Nations High Commissioner for Human Rights Mary Robinson once described the chief advantage of the subsidiarity principle as 'its capacity to mean all things to all interested parties – simultaneously'. [17] While in assessing the interpretation and application of the subsidiarity principle, an appeal is often made to the intention of the Member States in introducing the principle in the Maastricht Treaty, that approach is problematic. Notably, it is regularly argued that the subsidiarity principle is inherently 'negatively-biased', that only 'the negative bias of the principle can account for Member States' support of it,' and that the Member States' fundamental objective when they decided to incorporate subsidiarity into the EC Treaty was to place another obstacle in the path of the transfer of sovereignty from the Member States to the Community. [18] This approach quite unjustifiably treats the Member States as one homogenous mass.

It is important to remember that only the *common* intent of the parties can be authoritative for the interpretation of a treaty provision, [19] and not the intent of a number of the parties. Such a common intent is nearly impossible to identify with respect to the subsidiarity principle.

For example, it is clear that placing obstacles on the way to further integration was not the intention of the Belgian government, as the Belgian permanent representative at the time has confirmed.[20] In fact, in a March 1990 memorandum to the other Member States, the Belgian Government noted that several arguments pleaded in favour of a new impulse for the European Communities towards a political union. It noted that the development of the Community, and in particular the establishment of the internal market and of an EMU clearly showed the democratic deficit of the institutional framework then in force. The Belgian Government concluded that this necessitated reform

> in the sense of a transfer of the political authority to the Community level and a better definition of the principle of subsidiarity. [21]

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[16] Lenaerts and Van Nuffel (n 7), para 7-034.

[17] M Robinsion, 'Constitutional Shifts in Europe and the United States' (1996) 32 *Stanford Journal of International Law* 10.

[18] A Estella, *The EU Principle of Subsidiarity and Its Critique* (Oxford: Oxford University Press, 2002) 2 and 82.

[19] See eg International Court of Justice, *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua), Judgment, ICJ Reports 2009*, p 213, 242, para 63.

[20] P de Schoutheete, 'Conclusions', in F Delpérée (ed.), *Le principe de subsidiarité*, Bibliothèque de la Faculté de droit de l'Université catholique de Louvain 37 (Brussels : Bruylant, 2002) 388-389.

[21] My translation. In French, this reads: '*dans le sens d'un transfert de pouvoir politique au niveau communautaire, et d'une meilleure définition du principe de subsidiarité*': Memorandum of the Belgian Government of March 1990, reproduced in Europe: Agence internationale d'information pour la presse,

Even if Germany may have been responsible for 'the markedly negative overtone of the wording' of the subsidiarity principle, [22] this does not mean that they had the same intention as, say, the United Kingdom for wanting this specific wording. [23] As sir Robert Jennings pointed out, there is a strong element of fiction in the attempt to discover the intention of the parties. His remark seems particularly relevant for the subsidiarity principle:[24]

> […] in many cases the dispute arises precisely because there was no common intention of the parties, either because the point was not thought of or because there were diverse intentions which were eventually comprehended not by a compromise but by a deliberate ambiguity or lacuna in the text.

Disagreements between Member States as to what the principle of subsidiarity requires in the abstract or in any particular situation are a continuation of that original disagreement. Such disagreements are manifested, for example, in the different responses of national parliaments to Commission proposals [25] or to diverging positions taken by different Member States before the ECJ as to the compliance by a certain EU measure with the principle of subsidiarity. [26] Of course, even within a single Member State, opinions on what subsidiarity requires have shifted following changes in government or policy preferences. [27]

The ECJ's review of the Union's compliance with the principle of subsidiarity is as a rule careful and circumspect. [28] The Court likely takes the view that the principle of subsidiarity requires consideration of a multitude of complex factors for which it often does not possess the necessary legal tools. The answer to the question at what level of government a certain policy should optimally be pursued is determined by a multifaceted set of considerations that are not easily converted into a legal formula that a court can apply. [29]

That said, it must be acknowledged that the number of serious cases brought on the basis of alleged non-compliance with the principle of subsidiarity is limited. [30] This may be explained by the fact that

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Europe Documents, 29 March 1990. See also the Benelux Memorandum for the Birmingham Summit of 16 October 1992 (Council Document 9213/92) 3, emphasizing that the implementation of the subsidiarity principle must not be used to dilute the acquis communautaire nor to upset the institutional balance.

[22] Estella (n 18) 87.

[23] Also in this sense: G Hirsch, 'Le principe de subsidiarité dans une perspective comparatiste', in F Delpérée (ed.), *Le principe de subsidiarité*, Bibliothèque de la Faculté de droit de l'Université catholique de Louvain 37 (Brussels : Bruylant, 2002) 56.

[24] RY Jennings, 'General Course of International Law', in *Académie de droit international. Recueil des cours*, vol. 121, II (Leiden : AW Sijthoff, 1967) 544.

[25] See, for example, the responses to the Commission's proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office COM(2013) 534 final, as outlined in the 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).

[26] cf in that sense Craig (n 12) 81.

[27] S Blockmans, J Hoevenaars, A Schout, and JM Wiersma, *From Subsidiarity to Better EU Governance: A Practical Reform Agenda for the EU* (Brussels: CEPS Essay No 10, 8 April 2014) 7.

[28] S Weatherill, 'Better competence monitoring' (2005) *European Law Review* 27-28 en 37. See the overview of the Court's substantive subsidiarity assessment in Van Nuffel (n 5) 62-66.

[29] G de Búrca, *Reappraising Subsidiarity's Significance after Amsterdam* (Cambridge, Massachusetts: Harvard Jean Monnet Working Paper 7/99, 1999) 10.

[30] With respect to actions brought by Member States, see eg Case C-84/94 *United Kingdom v Council ('Working Time Directive')* EU:C:1996:431; Case C-233/94 *Germany v Parliament and Council ('Deposit-Guarantee Schemes')* EU:C:1997:231; Case C-376/98 *Germany v Parliament and Council ('Tobacco Advertising I')*

Member States wishing to challenge a Union action on the basis of its infringement of the principle of subsidiarity must do so within the applicable time limits, which de facto implies that the action must be brought shortly after the adoption of the act. The Member State in question cannot be unaware of the fact that this means that at least a qualified majority of the representatives of the Member States in the Council, which act as the guardians of their Member States' interests and values, believed that action at Union level was indeed necessary. [31]

The possibilities for the Court of Justice to monitor the compliance by the institutions with the principle of subsidiarity have been enhanced by the fact that the Court now has jurisdiction, 'in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof'. [32] That possibility is not dependent on having issues a reasoned opinion. [33] The Committee of the Regions may also bring such actions against legislative acts for the adoption of which the TFEU provides that it be consulted. [34]

The possibility for Member States to bring actions on behalf of their national parliaments may, however, give rise to fairly awkward situations. A Member State may, for example, be asked to put forward its parliament's position regarding the infringement of the subsidiarity principle after having voted in favour of the adoption of the measure in the Council. This could be avoided by allowing national parliaments to put forward their own arguments before the Court of Justice, [35] which is possible from an EU procedural law point of view, [36] or indeed by providing for better monitoring mechanisms in national law allowing parliaments to take a view on a minister's position before it is put forward in the Council of Ministers, or even giving the responsible minister a specific (though preferably flexible) mandate. [37]

As mentioned above, the ECJ's case-law on the principle of proportionality is markedly more extensive than that on the principle of subsidiarity. While the Court of Justice has in the past not always been very strict in its proportionality review of Union measures, [38] the Court has recently given proof of a more robust approach notably, as mentioned above, in D*igital Rights Ireland*. [39]

EU:C:2000:544; Case C-377/98 *Netherlands v Parliament and Council ('Biotechnological Inventions Directive')* EU:C:2001:523; Case C-110/03 *Belgium v Commission ('State Aid for Employment ')* EU:C:2005:223; Case C-176/09 *Luxembourg v Parliament and Council ('Airport Charges Directive')* EU:C:2011:290.

[31] Craig (n 12) 80-81 and 83.

[32] Art 8 Protocol (No 2) on the application of the principles of subsidiarity and proportionality (OJ 2012 C 326, p. 206).

[33] As pointed out in *HC European Scrutiny Committee Sixteenth Report: Subsidiarity- monitoring by national parliaments: challenging a measure before the EU Court of Justice* (HC (2013–2014) no 671) 3.

[34] Art 8 Protocol (No 2) (n 32).

[35] P Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford: Oxford University Press, 2010) 186-187. See, however, the arrangements outlined in HC (2013–2014) no 671 (n 33) 4, 6-7.

[36] Art 19 of the Statute of the Court of Justice merely requires: 'The Member States and the institutions of the Union shall be represented before the Court of Justice by an agent appointed for each case; the agent may be assisted by an adviser or by a lawyer'. See, for example, art 88-6 of the French Constitution, which provides for such an arrangement. See further Van Nuffel (n 5) 75-77.

[37] See the discussion in the oral evidence given by Professor Simon Hix in HC report (2007–2008) no 563 (n 8), Ev 12-13. See also Blockmans, Hoevenaars, Schout, Wiersma (n 27) 7.

[38] Weatherill (n 28) 28.

[39] n 13.

After a detailed and thorough analysis on the basis of the principle of proportionality, the Court held that, by adopting Directive 2006/24, [40] the EU legislature had exceeded the limits imposed by compliance with the principle of proportionality and declared the directive invalid. [41]

Application

Do you have any observations on how the different actors play their roles? Could they do anything differently to ensure that action takes place at the right level?

Please refer to the section on 'Future options and challenges' below.

The EU Treaties treat Subsidiarity differently from Proportionality. National parliaments have a role in reviewing whether EU action is appropriate (Subsidiarity). The EU is not legally permitted to act where it is not proportionate (Proportionality). Does it make sense to separate out the two principles like this, and use different means to protect them?

The language of Article 5(3) TEU makes it quite clear that the subsidiarity principle as laid down there involves a proportionality analysis: the Union is to act not just 'only if' but also '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. It is therefore no surprise that, as a rule, it is very difficult indeed to judge whether a specific measure should be taken at Union level without at the same time asking with what intensity the Union should act. [42] The Court has on occasion amalgamated the subsidiarity and proportionality principles into one comprehensive subsidiarity analysis. It did so, for example, in *British American Tobacco*, where after holding that the objective at issue could not be sufficiently achieved by the Member States individually and called for action at Community level, as demonstrated by the multifarious development of national laws, the Court added that 'the intensity of the action undertaken by the Community in this instance was also in keeping with the requirements of the principle of subsidiarity in that […] it did not go beyond what was necessary to achieve the objective pursued'. [43]

There are nevertheless a number of important differences between subsidiarity and proportionality in their incarnations in Article 5(3) and (4) TEU. First, contrary to the principle of proportionality, the subsidiarity principle only applies in the areas of non-exclusive competence of the Union. That of course makes the principle dependent on how the concept of exclusive competences is defined, which was unclear at its introduction in Maastricht, and has only been partly clarified by the Lisbon Treaty. [44] However, given that the category of exclusive EU competences is small, [45] and that in the

[40] Directive 2006/24/EC (n 14).
[41] *Digital Rights Ireland* (n 13), paras 46-71.
[42] G de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) *Journal of Common Market Studies* 220.
[43] *British American Tobacco* (n 8), paras 180-185.
[44] Craig (n 12) 74.
[45] See art 3 TFEU.

absence of any indication to the contrary, Union competences must be regarded as non-exclusive, [46] the subsidiarity principle applies in most areas of EU competence.

A second contrast is indeed that only subsidiarity is subject to the yellow and orange card procedures involving national parliaments, described in the call for evidence. [47] The House of Lords suggested to the Convention for the Future of Europe to require the views of national parliaments on both subsidiarity and proportionality to be sought, [48] but the suggestion was not taken up. However, practice appears to demonstrate that arguments related to proportionality are routinely included in reasoned opinions, [49] and the House of Lords has reiterated its suggestion in its March 2014 report on the role of national parliaments in the EU. [50]

The fact that proportionality is excluded from review by national parliaments is regrettable, especially given the close connection between the respective analyses, and the system could certainly be improved by extending it to proportionality. Given that the subsidiarity principle as enshrined in Article 5(3) TEU also includes a proportionality test, national parliaments can arguably already legitimately do so under the current system. Nevertheless, in order to avoid arcane discussions about the distinction between the proportionality test as part of the principle of subsidiarity in Article 5(3) TEU on the one hand and the separate proportionality principle in Article 5(4) TEU, the latter should also be brought under the monitoring mechanism.

Future options and challenges

Where might alternative approaches or actions as regards the scope, interpretation and application of the principles of Subsidiarity and Proportionality be beneficial?

While many suggestions for alternative approaches with respect to the application of the principles of subsidiarity and proportionality are possible, this section focuses on the role of the ECJ before briefly touching upon the monitoring mechanism involving national parliaments.

A fruitful alternative avenue for the ECJ could be to focus its review further on the procedural aspects of subsidiarity and proportionality. [51] Such a procedural focus would be in line with the abolition of the more qualitative criteria that the Subsidiarity and Proportionality protocol entailed

[46] See, to that effect, Case C-370/12 *Pringle* EU:C:2012:756, paras 120 and 121.
[47] See also European Parliament, *State of Play on reasoned opinions and contributions submitted by national Parliaments under Protocol No 2 of the Lisbon Treaty* (Directorate-General for the Presidency, Directorate for Relations with National Parliaments, Legislative Dialogue Unit, Brussels, 9 April 2014) 2, which indicates that starting from the entry into force of the Treaty of Lisbon, in total 472 draft legislative acts have been submitted to national parliaments and the European Parliament received 1723 submissions, 282 of which were reasoned opinion and 1441 contributions.
[48] Report of the Select Committee on the European Union of the House of Lords presented by Lord Tomlinson and Lord Maclennan, 'Contribution to the work of the Convention' (CONV 598/03) 17, para 71.
[49] See, for example, the responses to the Commission's proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office COM(2013) 534 final, as outlined in COM(2013) 851 final (n 25) 5 and 10.
[50] *HL European Union Committee 9th Report: The Role of National Parliaments in the European Union* (HL Paper (2013–2014) no 151) 26-27, paras 75-79.
[51] In that sense also Craig (n 12) 78.

in its pre-Lisbon version. As Professor Alan Dashwood put it in his oral evidence to the House of Commons European Scrutiny Committee: 'The Court is at its strongest when the issue can be proceduralised in some way'. [52]

It could use the Impact Assessments to help guide its analysis in that regard. It did so, for example, in *Vodafone*, [53] a case in which for of the most important mobile phone operators in Europe, Vodafone, Telefónica O2, T-Mobile, and Orange challenged the validity of the Roaming Regulation [54] before the High Court of Justice of England and Wales. After having determined that the regulation indeed aimed to improve the conditions for the functioning of the internal market and that it could therefore be adopted on the basis of Article 95 EC (now Article 114 TFEU), the Court reviewed the validity of the regulation in the light of the principles of subsidiarity and proportionality. With respect to the principle of proportionality, the Court examined whether the regulation infringed that principle by reason of the fact that it did not confine itself to imposing ceilings for the wholesale charge, but also laid down ceilings for retail charges as well as an obligation to provide information about those charges to roaming customers. The Court recalled that before it drafted the proposal for the regulation, the Commission carried out an exhaustive study, the result of which is summarised in the impact assessment, to which the Court repeatedly referred in its judgment. [55] The Court took the view that the Union legislature could legitimately take the view that regulation of the wholesale market alone would not achieve the same result as the regulation at issue. The Court also drew the attention to the importance of the objective of consumer protection within the context of Article 95(3) EC, and concluded on that basis that intervention that is limited in time in a market that is subject to competition, which makes it possible, in the immediate future, to protect consumers against excessive prices, such as that at issue, even if it might have negative economic consequences for certain operators, is proportionate to the aim pursued. [56]

As regards the principle of subsidiarity, the Court pointed out that the Community legislature, wishing to maintain competition among mobile telephone network operators, had, in adopting the Roaming Regulation, introduced a common approach, in order in particular to contribute to the smooth functioning of the internal market, allowing those operators to act within a single coherent regulatory framework. The Court also referred to recital 14 in the preamble to the regulation, which made it clear that the interdependence of retail and wholesale charges for roaming services is considerable, so that any measure seeking to reduce retail charges alone without affecting the level of costs for the wholesale supply of Community-wide roaming services would have been liable to disrupt the smooth functioning of the Community-wide roaming market. For that reason, the Community legislature decided that any action would require a joint approach at the level of both wholesale charges and retail charges, in order to contribute to the smooth functioning of the internal market in those services. The Court concluded that such interdependence means that the Community legislature could legitimately take the view that it had to intervene at the level of retail

[52] HC report (2007–2008) no 563 (n 8), Ev 4, and see also Ev 5-6.
[53] n 6. See also the similar approach in *Airport Charges Directive* (n 30).
[54] 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 2007 L 171, p. 32).
[55] *Vodafone* (n 6), paras 5, 45, 55, 58, and 65.
[56] ibid, paras 51-71.

charges as well. Thus, by reason of the effects of the common approach laid down in the Roaming Regulation, the objective pursued by that regulation could best be achieved at Community level. [57]

While the subsidiarity review by the Court in *Vodafone* is careful and markedly less intense than the proportionality review, the Court's approach and in particular its reliance on the Impact Assessment can be regarded as a step in the direction of a more thorough and integrated subsidiarity and proportionality review. Such an impact assessment requires an explicit justification of Union action on the basis of proportionality and subsidiarity. [58] The Court could use Impact Assessment reports in combination with the duty to give reasons as laid down in Article 296, second paragraph TFEU to review the justification on the basis of subsidiarity and proportionality in a thorough and integrated manner. [59] It is true that the Court in the past has not always explored the full potential of the duty to state reasons in combination with the subsidiarity principle. Notably, in the *Working Time Directive Case*, in reply to the UK's argument that the preamble to the directive failed to explain the need for Community action, the Court simply referred to its analysis earlier on in the judgment and held that [60]

> the preamble to the directive shows that the Council considered it necessary, in order to ensure an improved level of health and safety protection of workers, to take action to harmonize the national legislation of the Member States on the organization of working time. […], the pursuit of such an objective, laid down in Article 118a itself, through harmonization by means of minimum requirements, necessarily presupposes Community-wide action.

In the *Deposit-Guarantee Schemes Case*, the Court also explicitly held that an express reference to the principle of subsidiarity was not required in the preamble of a measure. [61] It is unfortunate that the judgment is relied on by the Commission as authority for the position that 'the Court accepted an implicit and rather limited reasoning as sufficient to justify compliance with the principle of proportionality'. [62] This also points at a paradox in the subsidiarity obligations for the EU institutions, even post Lisbon: while draft legislative acts are to be clearly justified with regard to the principles of subsidiarity and proportionality, [63] there is no such explicit obligation with respect to the legislative act itself. [64] This is regrettable.

Be that as it may, the Court should move beyond a fairly formal examination of the sometimes rather laconic justifications on the basis of the subsidiarity principle in the preamble to EU measures, and scrutinize the arguments on the basis of which the Union thought it necessary to introduce certain measures by directly looking at the justification put forward in the Impact Assessment. [65]

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[57] ibid, paras 72-79.
[58] European Commission, *Impact Assessment Guidelines*, SEC(2009)92, paras 2.1, 2.3, 5.2 en 7.2.
[59] See in that sense P Craig, 'The ECJ and *ultra vires* Action: a Conceptual Analysis' (2011) *Common Market Law Review* 427; X Groussot and S Bogojevic, 'Subsidiarity as a Procedural Safeguard of Federalism' in L Azoulai (ed.), *The Question of Competence in the European Union* (Oxford: Oxford University Press, 2014) 240-241.
[60] *Working Time Directive* (n 30), para 91.
[61] *Deposit-Guarantee Schemes* (n 30), para 28.
[62] COM(2013) 851 final (n 25) 6.
[63] Art 5 Protocol (No 2) (n 32).
[64] cf Van Nuffel (n 5) 68.
[65] Craig (n 12) 78.

Advocate General Sharpston took such an approach in a case in which Spain challenged the new Community support system for cotton. [66] She took the view that the Community legislator had infringed the principle of proportionality, inter alia because no Impact Assessment was carried out. In particular, the Advocate General concluded that in the absence of an impact study, it was hard to see how the Council and the Commission could conclude that the new support system constituted the most appropriate measure to 'ensure economic conditions which, in regions which lend themselves to that crop, enable activity in the cotton sector to continue and prevent cotton from being driven out by other crops' as required by the contested Regulation. [67]

Nevertheless, useful though the Impact Assessment may be, the obligation in Article 5 of Protocol 2 that any draft legislative act 'should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality', plainly means that a subsidiarity and proportionality justification in the Impact Assessment only does not suffice. At least the explanatory memorandum of the proposal, and if adopted the preamble of the measure, should contain such a detailed justification. The Chairman of the House of Commons European Scrutiny Committee rightly argued in that sense in a letter to Commission Vice-President Maroš Šefčovič, [68] who in his response agreed that the explanatory memorandum 'is the appropriate place for the detailed statement as to how a proposal complies with the principle of subsidiarity'. [69] That is also of importance for the well functioning of the early warning mechanism involving national parliaments.

At the same time, national parliaments could help a great deal by basing the argumentation in their reasoned opinions much more clearly on the subsidiarity principle and, as the case may be, the proportionality principle. As is known, the Commission received its first yellow card with respect to the so-called Monti II proposal. [70] After 12 national parliaments representing a total of 19 votes submitted reasoned opinions, the Commission withdrew the proposal. However, it did so based on the consideration that its proposal was unlikely to garner the necessary political support within the European Parliament and the Council to stand a chance of passing, and explicitly denied that the

[66] Chapter 10a of Title IV of Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ 2003 L 270, p. 1), inserted by Article 1(20) of Council Regulation (EC) No 864/2004 of 29 April 2004 (OJ 2004 L 161, p. 48).

[67] Opinion of Sharpston AG in Case C-310/04 *Spain v Council* EU:C:2006:521, points 82-96. The Court too held that the proportionality principle had been infringed, but did not base that conclusion on the absence of an impact assessment.

[68] Letter of 26 June 2013 from William Cash MP, the Chairman of the European Scrutiny Committee to Maroš Šefčovič, Vice-President of the European Commission on the Commission's responses to the House of Commons' Reasoned Opinions received to date. See also the Reasoned Opinion of the House of Commons Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality concerning a Draft Regulation of the Council on the establishment of the European Public Prosecutor's Office (EPPO), para 8.

[69] Letter by Maroš Šefčovič, Vice-President of the European Commission to Mr. William Cash MP, Chairman of the European Scrutiny Committee (Ares(2013)BB/gvt 2752807, Brussels, 24 July 2013).

[70] COM(2012) 130.

proposal breached the principle of subsidiarity. [71] Clearer and more focused reasoned opinions should hopefully lead to clearer and more comprehensive Commission responses.

It is also worth noting that the limitation of the subsidiarity review to draft legislative measures can have as an effect that certain infringements of the subsidiarity principle by non-legislative measures go unnoticed. [72] That said, even though the monitoring mechanism may not apply to non-legislative acts, the Treaties contain no such limitation with respect to the principle of subsidiarity itself, contrary to what is the case regarding exclusive competences. Furthermore, the Treaties likewise do not limit the applicability of the subsidiarity principle to new measures, and the Union is required to respect the principle also when it amends or implements existing measures. [73]

Various practical improvements to the monitoring mechanism could further be considered, such as extending the deadline for national parliaments to respond, but are not further analysed here. [74]

Finally, in applying the principle of subsidiarity, it is crucial to take into account past experiences with leaving important aspects of a regulatory regime to Member States. In certain instances, such as notably as regards financial services and banks, that approach has led to clear inefficiencies if not outright failures of the regimes in questions. [75] The paradoxical consequence of such applications of the principle of subsidiarity, has been a process whereby the regulatory regime has been elaborated in greater detail and made stricter, and at the same time enforcement has been done at Union level. That appears to be the opposite of what the principles of subsidiarity and proportionality have intended.

Article 352 TFEU ('flexibility clause')

In your opinion, based on particular examples, is it useful to have a catch-all treaty base for EU action? How appropriately has Article 352 been used?

The tension between concern with imprecise delineation of competences on the one hand and potential need for flexibility that is at the centre of the debate on Article 352 TFEU was already addressed in the Laeken Declaration, which set in motion the process that would lead to the Constitution and, eventually, to the Lisbon Treaty: [76]

[71] See, for example, the letters of Commission Vice-President Maroš Šefčovič to the Rt. Hon. John Bercow, Speaker of the House of Commons, and to the Rt. Hon. Baroness D'Souza, Speaker of the House of Lords (Ares(2012)1058907, Brussels, 12 September 2012). See also the Letter of 26 June 2013 from William Cash MP (n 68), describing the Commission's response as 'both general and evasive'. For an overview and analysis of the national parliaments reasoned opinions and their identification of subsidiarity issues or their failure to do so, see F Fabbrini en K Granat, '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' (2013) *Common Market Law Review* 135-139.

[72] Craig (n 35) 185.

[73] See in that sense Van Nuffel (n 5) 57.

[74] See, for some suggestions, HL Paper (2013–2014) no 151 (n 50) 25-31; Blockmans, Hoevenaars, Schout, Wiersma (n 27) 8-9.

[75] Craig (n 12) 75-79.

[76] *Laeken Declaration on the future of the European Union*, Annex I to the Presidency Conclusions of the European Council Meeting in Laeken, 14 And 15 December 2001 (SN 300/1/01 REV 1) 22.

> Lastly, there is the question of how to ensure that a redefined division of competence does not lead to a creeping expansion of the competence of the Union or to encroachment upon the exclusive areas of competence of the Member States and, where there is provision for this, regions. How are we to ensure at the same time that the European dynamic does not come to a halt? In the future as well the Union must continue to be able to react to fresh challenges and developments and must be able to explore new policy areas. Should Articles 95 and 308 of the Treaty be reviewed for this purpose in the light of the "acquis jurisprudentiel"?

It is true that both ex Articles 95 and 308 TEC, which currently are Articles 114 and 352 TFEU, respectively, envisage broad competences with limits lacking in precision. Nevertheless, the balanced manner in which the passage of the Laeken Declaration quoted above was phrased inspired the subsequent debate and led to a rejection by a majority of the model proposed by some that would have involved an exhaustive and rigid list of tightly formulated EU competences and a list of competences that remained exclusively with the Member States. [77]

It is important to emphasise that this competence under Article 352 TFEU 'does not create an obligation, but confers on the Council an option, failure to exercise which cannot affect the validity of proceedings'. [78] Put differently, it is not true that if something can be done under Article 352 TFEU, it has to be done so instead of under Member State competences. The Council has a large discretion to determine whether action is necessary. [79] Nevertheless, this discretion is limited. First, recourse to Article 352 TFEU is justified only where no other provision of the Treaties either expressly or impliedly gives the Union institutions the necessary power to adopt the measure in question.[80] Second, any recourse to Article 352 TFEU should, in accordance with the principle of conferral, stay well within the scope of the Treaties. This was borne out by the Court's reasoning on Article 352 TFEU as a possible legal basis for accession of the then Community to the European Convention on Human Rights[81] in Opinion 2/94.[82] In accordance with its logic as an 'if-all-else-fails' legal basis, recourse to what is now Article 352 TFEU only became relevant once the Court had established that there were no express or implied powers in the Treaty that could constitute a legal basis for accession to the European Convention on Human Rights.[83] Article 352 TFEU is designed to fill the gap where no specific provisions of the Treaties confer on the Union institutions express or implied competences to act if such competences appear nonetheless to be necessary to enable the Union to carry out its functions to attain one of the objectives laid down by the Treaties.[84] However, in accordance with the principle of conferral, Article 352 TFEU 'cannot serve as a basis for widening the scope of [Union] powers beyond the general framework created by the provisions of the [Treaties] as a whole and, in particular, by those that define the tasks and the activities of the [Union]'. Nor can it 'be used as a basis for the adoption of provisions whose effect would, in

[77] Weatherill (n 28) 24-25 and 29-31.
[78] Case 22/70 *Commission v Council ('ERTA')* EU:C:1971:32, para 95.
[79] See eg Case 8/73 *Hauptzollamt Bremerhaven v Massey Ferguson* EU:C:1973:90, paras 3-6.
[80] Joined Cases C-51/89, C-90/89, and C-94/89 *United Kingdom, France and Germany v Council* EU:C:1991:241, para 6; Opinion 2/92 *Competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment* EU:C:1995:83, para 36.
[81] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, 213 UNTS 221.
[82] Opinion 2/94 *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms* EU:C:1996:140.
[83] ibid, para 28.
[84] ibid, para 29.

substance, be to amend the [Treaties] without following the procedure which it provides for that purpose'. [85] The Court thus took the view that accession to the European Convention on Human Rights would clearly go beyond the 'general framework created by the provisions of the Treaty', because a 'modification of the system for the protection of human rights in the [Union], with equally fundamental institutional implications for the [Union] and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article [352]. It could be brought about only by way of Treaty amendment.' [86]

Should the Union wish to act on the basis of Article 352 TFEU, the Council must act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament. [87] The Commission since the entry into force of the Lisbon Treaty has the obligation to draw national parliaments' attention to proposals based on Article 352 TFEU, [88] though perhaps surprisingly given their coupling in the Laeken Declaration, not of proposals based on Article 114 TFEU. [89]

If necessary, the Union can combine Article 352 TFEU with other provisions of the Treaty if they in themselves do not constitute a sufficient legal basis. [90] Where recourse is made to Article 352 TFEU in combination with other legal basis in the Treaty, the relevant procedural requirements are to be combined. Contrary to its *Titanium Dioxide* case law relating to the use of a dual legal basis, the Court thus allows for the unanimity requirement of Article 352 TFEU to be combined with other procedures, such as notably the ordinary legislative procedure, that would otherwise provide for qualified majority voting.[91] However, crucially, Article 352 may not be used to supplement a specific Treaty provision that limits Union competence by excluding coverage of certain policy areas or the use of certain instruments. Accordingly, measures based on Article 352 may not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation. [92]

Article 352 was, for example, used as a legal basis in the proposal for the adoption of the so-called Monti II Regulation referred to above. A number of Member States objected to the use of Article 352 TFEU as the legal basis and argued that the Commission was deliberately using Article 352 TFEU to circumvent the limits in Article 153(5) TFEU. For example, the UK House of Commons took the view that necessity for EU action has to be 'substantiated by evidence collated and assessed in an impact assessment, rather than by a perception of a need to act'. The House of Commons considered that the Commission's explanatory memorandum and impact assessment were 'largely based on perceptions of a need to act, which are necessarily subjective, in contrast to objective evidence of a

[85] ibid, para 30.
[86] ibid, para 35. As we know, the Member States obliged at Lisbon by providing for the Union to accede to the ECHR in art 6(2) TEU.
[87] Art 352(1) TFEU.
[88] Art 352(2) TFEU.
[89] See Weatherill (n 28) 36, arguing that the separation happened by accident and deploring this.
[90] See eg Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* EU:C:2008:461, paras 211-214.
[91] Case C-166/07 *Parliament v Council* ('*International Fund for Ireland*') EU:C:2009:499, para 69. For a critical analysis of this case-law, see G De Baere, 'From "Don't Mention the Titanium Dioxide Judgment" to "I Mentioned it Once, But I Think I Got Away with it All Right": Reflections on the Choice of Legal Basis in EU External Relations after the Legal Basis for Restrictive Measures Judgment' (2013) *Cambridge Yearbook of European Legal Studies* 537-562.
[92] Art 352(3) TFEU.

need to act'. [93] As noted above, the Yellow card procedure under the Subsidiarity Protocol was triggered and the Commission withdrew the proposal.

Which alternative approaches to the scope, interpretation and application of Article 352 might be beneficial?

Any assessment of the potential use of Article 352 TFEU must also take into account the national constitutional orders of Member States, both through national mechanisms designed to enhance parliamentary oversight of the use of Article 352 TFEU, such as Section 8 of the UK European Union Act 2011, and through what constitutional courts have had to say on the matter. Notably, the Bundesverfassungsgericht in its *Lisbon Urteil* took the view that Art 352 TFEU can be construed in such a way that the integration programme envisaged there can still be predicted and determined by the German legislative bodies. [94] However, the Bundesverfassungsgericht warned that the provision meets with constitutional objections

> with regard to the ban on transferring blanket empowerments or on transferring Kompetenz-Kompetenz, because the newly worded provision makes it possible substantially to amend treaty foundations of the European Union without the constitutive participation of legislative bodies in addition to the Member States' executive powers. [95]

The duty to inform national parliaments pursuant to Article 352(2) TFEU does not alter that assessment, because the Commission is only required to draw the national parliaments' attention to the relevant proposal. The Bundesverfassungsgericht therefore imposes an important procedural limit on the use of Article 352 TFEU: [96]

> Because of the indefinite nature of future application of the flexibility clause, its use constitutionally requires ratification by the German Bundestag and the Bundesrat on the basis of Article 23.1 second and third sentence of the Basic Law. The German representative in the Council may not express formal approval on behalf of the Federal Republic of Germany of a corresponding lawmaking proposal of the Commission as long as these constitutionally required preconditions are not met.

Much like Section 8 of the UK European Union Act 2011, that requirement poses a clear limitation on the potential for the use of the flexibility clause.

Could Article 352 TFEU, for example, be used to integrate the European Stability Mechanism (ESM) into the EU legal order? In *Pringle*, the ECJ studiously avoided committing itself to whether the ESM could have been set up on the basis of Article 352 TFEU: [97]

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[93] Reasoned Opinion of the House of Commons Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality Concerning a Draft 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, 5, para 17.

[94] BVerfG, 2 BvE 2/08 of 30 June 2009, para 322.

[95] ibid, para 328.

[96] ibid, paras 328 and 417.

[97] *Pringle* (n 46), para 67, referring to *ERTA* (n 78), para 95. See M Schwarz, 'A Memorandum of Misunderstanding – The Doomed Road of the European Stability Mechanism and a Possible Way Out: Enhanced Cooperation' (2014) *Common Market Law Review* 413, taking the view that art 143(2) TFEU combined with art 121 TFEU makes a strong case for a possible future implementation via art 352 TFEU to include granting loans by the Union to euro area members if compatible with art 125 TFEU as interpreted by the ECJ in *Pringle*.

> suffice it to say that the Union has not used its powers under that article and that, in any event, that provision does not impose on the Union any obligation to act.

In its blueprint for a deep and genuine EMU, published on 28 November 2012, the day after the *Pringle* judgment was rendered, the Commission argued that while it would not be excluded to integrate the ESM into the EU framework under the current Treaties, via a decision pursuant to Article 352 TFEU and an amendment to the EU's own resources decision,

> it appears that, given the political and financial importance of such a step and the legal adaptations required, that avenue would not necessarily be less cumbersome than operating an integration of the ESM through a change to the EU Treaties. The latter would also allow the establishment of tailor-made decision-making procedures [98]

That appears to be a sensible assessment.

Other

Are there any general points you wish to make on how well the current procedures and actors work to ensure that the EU only acts where it is appropriate to do so, and in a way which is limited to the EU's objectives, which are not captured above?

It is perhaps useful at this point to recall the primordial role of the Council of Ministers, which nuances the concerns over a possible 'competence creep' by the Union. It may be that the Commission sometimes wishes to interpret Union competences as widely as possible and thereby explores the limits of the principle of conferral, but it is only with the explicit consent of at least a qualified majority of the representatives of the Member States in the Council, and de facto often by consensus, that Commission proposals are transformed into binding EU law. [99] Apart from a lack of judicially applicable standards mentioned above, this is another reason why the Court should tread carefully when considering annulling a measure on the basis that it does not respect the autonomy of the Member States. The balancing required by the Court is hence not the crude 'EU versus Member State', but between the need to pursue a certain EU objective at EU level as interpreted by some Member States against that same need or the lack thereof as interpreted by other Member States or indeed of one other Member State who brought the action. As Professor Paul Craig put it: [100]

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[98] European Commission, *Communication from the Commission: A blueprint for a deep and genuine economic and monetary union. Launching a European Debate* (COM(2012) 777 final) 34. Compare European Parliament, *Report with recommendations to the Commission on the report of the Presidents of the European Council, the European Commission, the European Central Bank and the Eurogroup: "Towards a genuine Economic and Monetary Union"* (2012/2151(INI)) (A7-0339/2012) 7, recital CT, taking the view that the ESM could be integrated into the Union legal framework through art 352 TFEU in combination with art 136 TFEU; and B de Witte and T Beukers, 'The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*' (2013) *Common Market Law Review* 834, arguing that the incorporation of the ESM into the Union legal order could be achieved either through the ordinary ratification procedure or by using art 352 TFEU.

[99] Weatherill (n 28) 25.

[100] Craig (n 12) 83.

> The EU is premised on collective action in which Member States have to make compromises. Thus the mere fact that a Member State honestly believes that the legislation on which it was outvoted in the Council involves too great an intrusion on its values, does not *ipso facto* mean that this 'entitles' it to win the legal action, or that it should 'privilege' its vision of the balance between EU objectives and Member State values over those of other Member States.

At the same time, subsidiarity and proportionality implicitly underpin the Treaties as political principles that do not govern the exercise of powers that have been conferred, but guide the actual conferral of powers. Subsidiarity and proportionality-based reasoning can be used to reflect on whether competences should be granted to the Union for the exercise of a specific governmental function or not. An example thereof can again be found in the Laeken Declaration: [101]

> Citizens often hold expectations of the European Union that are not always fulfilled. And vice versa – they sometimes have the impression that the Union takes on too much in areas where its involvement is not always essential. Thus the important thing is to clarify, simplify and adjust the division of competence between the Union and the Member States in the light of the new challenges facing the Union. This can lead both to restoring tasks to the Member States and to assigning new missions to the Union, or to the extension of existing powers, while constantly bearing in mind the equality of the Member States and their mutual solidarity.

As pre-constitutional principles, subsidiarity and proportionality can guide the development of the EU legal order and are therefore incapable of being enforced by a court within that system, in contrast to the general principle of EU law concerning the exercise of competences conferred on the Union laid down in Article 5(3) and (4) TEU.[102] Nevertheless, that does not prevent Advocates General from referring to such broader considerations in their Opinion. [103]

However, in order for the principles of subsidiarity and proportionality as laid down in Article 5(3) and (4) TEU to have the desired effect, it is crucial that Member States reflect upon the pre-constitutional versions of these principles when considering conferring competences on the Union or retrieving them to the Member States.

GDB

Leuven, 30 June 2014.

[101] *Laeken Declaration* (n 76) 21.

[102] cf Lenaerts and Van Nuffel (n 7), para 7-027 (with respect to subsidiarity).

[103] See, for example, the Opinion of Sharpston AG in Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* EU:C:2008:178, point 118.