

Principle of Subsidiarity and the EU Environmental Policy

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Abstract

The principle of subsidiarity is a fundamental principle of the European Union. It has first been introduced in the field of environmental policy by the Single European Act in 1987 and extended to all fields of shared competencies by the Maastricht treaty in 1992. Since then much has been done to operationalize the principle, and subsidiarity has received increasing attention by the Union's institutions and Member States. The following contribution provides a brief appraisal of the role of the principle and of how it has influenced environmental legislation, so far.

Keywords

Subsidiarity principle, shared competencies, environmental law, enforcement, judicial review

1. Applying the Principle to Environmental Measures

Since environmental policy is not vested exclusively in the EU, the principle of subsidiarity applies.¹ In a nutshell, the aim of this principle is not to allocate powers, but rather to regulate the use of powers. In particular, the focus is on whether the EU is the most appropriate decision-maker. The EU 'action' must

¹ Case C-114/01 *AvestaPolarit Chrome* [2003] ECR I-8725, para. 56. It ought to be remembered that the principle of subsidiarity was at the outset enshrined in Article 130r(4) EEC and was thus restricted to the environmental policy. However, the Court of justice never ruled on that requirement.

satisfy two tests. First, the EU lawmaker has to demonstrate that the objectives of the proposed action cannot be sufficiently achieved by the Member States 'either at central level or at regional and local level'. Second, they should also demonstrate that the proposed action by reason of its scale or its effects 'can be better achieved at Union level'. In other words, the lawmaker is required to demonstrate that the proposed action has an added value in terms of effectiveness. As regard environmental protection, what is 'better' is embroiled with controversies. Does it mean more effective, more democratic, more consistent with the internal market obligations, more consistent with international obligations, etc.? At first glance, no easy answer can be given to these questions.²

In sharp contrast to the harmonisation of the internal market, where Member States are unable to achieve the economic goals pursued by harmonisation, environment policy entails constantly cooperation between all institutional players. In fact, the allocation of competence between the EU and the Member States tends to be not so much a separation but rather an intermingling of powers.³ Their relationship is more dynamic than static. Accordingly, subsidiarity comes much more to the fore in the environmental field than in other policies such as the internal market.

That being said, there are a number of good reasons supporting the view that EU environmental measures easily pass the hurdles of subsidiarity. Several arguments can be mustered.

- First and foremost, there is no doubt as to the Member States inability to solve environmental issues having a transboundary nature, such as ozone depletion, climate change, biodiversity, air and water pollution, etc. As a result, regulating these issues should be a matter for the EU and not chiefly for the Member States.
- Second, subsidiarity does not preclude the EU lawmaker to regulate issues that don't have cross-frontier elements, such as urban noise, household waste or contaminated land remediation. Given the significant discrepancies among the Member States regarding the stringency of their environmental policies, EU harmonisation ensures that a common

²) L. Krämer, *EC Environmental Law*, 6th ed. (London, Sweet & Maxwell, 2007) 19.

³) L. Brinkhorst, 'Subsidiarity and European Community Environmental Policy. A Pandora's Box' (1991) *EELR* 20.

approach will apply in all Member States in a way ensuring a high level of environmental protection. In the absence of such a common approach, the efforts made by the most zealous Member States would easily be frustrated by the passivity of the others.

- A third observation must be made. It is likely that unilateral measures would exacerbate the distortion of competition and create new barriers to free trade.

2. Judicial Review and Political Control of the Principle

Needless to say that it is doubtful that the principle could become a serious ground for review in the environmental regulatory realm. The Court is likely to reject the claim that existing environmental directives violate the principle. It is sufficient to observe that with respect to measures regarding safety at work, public health and food safety, claims according to which these measures could have been better achieved at national level have been rebutted.⁴ This prompts the question as to whether subsidiarity is no more than a mere pre-legislative requirement.

With the entry into force of the Lisbon Treaty, the “ineffective” *ex-post* judicial review has been supplemented with an *ex-ante* political control that is likely to increase the accountability of the EU’s law-making bodies.⁵ Brief mention should be made of the fact that pursuant to Article 5(3) TEU and the Protocol No 1 on the Role of National Parliaments in the EU, national parliaments may consider all legislative proposals for compatibility with subsidiarity. Needless to say that these parliaments have a strong interest in ensuring that the EU abides by the principle. What is more, Article 8 of the Protocol confers on the Court of justice jurisdiction to hear actions for the annulment of EU acts based on the principle of subsidiarity brought by Member States on behalf of their national parliaments or a chamber thereof. Whether this review mechanism would lead to a closer national check of the exercise of EU competence as regard the protection of the environment remains to be seen.

⁴ Case C-84/94 *UK v. Council (working time directive)* [1996] ECR I-5755; Case C-491/01 *British American Tobacco* [2001] ECR I-11453; Case C-154/04 *Alliance for Natural Health* [2005] ECR I-6541.

⁵ M. Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, not Hearts’ (2008) 45 *CMLRev* 659.

3. Impact of the Principle on Decentralising the EU Environmental Policy

As a matter of practice, the intent to repatriate in the name of subsidiarity by some legislations regarding water protection has not been successful.⁶ Not a single piece of major environmental legislation has been repealed so far. Instead, the subsidiarity-led thinking has rather been, on one hand, an exercise of simplification of the existing environmental legislation. Moreover, in addition to the vertical dimension (who is the appropriate decision-maker?), the principle has also an horizontal dimension (what is the appropriate instrument).⁷ Though the Title of the TFEU is silent as to the choice of the regulatory instruments, directives have always been preferred to regulations, and framework directives to detailed directives. What is more, over these last years, subsidiarity signals a shift away from detailed harmonization and towards a more flexible regulatory style characterized by vague objectives leaving ample room for manoeuvre. In addition, the focus has been placed on negotiated rule-making through soft-law instruments.

Last, the ways in which the EU environmental policy is being fleshed out is testament to the significance of the principle of subsidiarity. First, the policy is highly decentralised since the control over its implementation is left, by virtue of Article 192(4) TFEU, to the Member States. The implementation and the enforcement of the EU harmonised measures is entirely left to the Member States.⁸ Accordingly, it is appropriate that the Member States establish control and oversight regimes in order to apply the policing measures associated with the conservation of environmental protection⁹ and in order to punish infringements.¹⁰ This means that decisions as to whether to grant a license for operating a plant, to conduct an EIA, to regulate waste are matters for national, regional and even to local authorities not for the Commission. Given that the

⁶ A. Weale and al., *Environmental Governance in Europe* (Oxford, OUP, 2000) 359 and 461.

⁷ B.E. Olsen, 'The subsidiarity principles and its impact on regulation' in B.E. Olsen and K.E. Sorensen (eds), *Regulation in the EU* (Copenhagen, Thomson-Sweet & Maxwell, 2006) 57.

⁸ Given the absence of genuine liability rules and legal remedies, private enforcement still is far less prominent.

⁹ European Parliament and Council Recommendation 2001/331/EC providing for minimum criteria for environmental inspections in the Member States [2001] OJ L118/41.

¹⁰ See European Parliament and Council Directive 2008/99/EC on the protection of the environment through criminal law [2008] OJ L328/28, replacing the Council Framework Decision 2003/80/JAI on the protection of the environment by criminal law. The Framework Decision was nullified in 2005 in Case C-176/03 *Commission v. Council* [2005] ECR I-7879.

mechanics of enforcement are likely to diverge significantly among Member States, the adequacy of enforcement still remains a major issue. As the Guardian of the Treaties, the European Commission only exercises a relatively marginal control over the proper implementation of EU secondary law.¹¹

Second, the financing of measures taken pursuant to EU law obligations is, by virtue of Article 192(4) TFEU, also a matter for the Member States. Remarkably enough, although the social and economic pillars of sustainable development dispose of funds made available for these purposes,¹² the title dedicated to the environment does not make any provision for structural financing. Launched in 1992, the LIFE Programme is one of the spearheads of EU environmental funding and has financed 3115 projects contributing in 2.2 billion to the protection of the environment.¹³ Other programmes of importance to the protection of the natural environment depend also on the willingness of the Member States to provide the matching funds. Though the contribution to the agri-environmental schemes provided under Regulation (EC) 1698/2005 on rural development may be as low as 15 pc—unlike the first pillar of the CAP, these schemes are subject to cofinancing—this appears to be a sufficient deterrent for State financial intervention.¹⁴

4. Impact of the Principle on Shared Competences

The principle of subsidiarity is one aspect of a much broader political debate as to the allocation of powers.

The EU has no exclusive competence for protecting the environment. Pursuant to Article 4(2)(e) TFUE, the environment has been classified among the eleven shared competences alongside the internal market, consumers protection, transports, . . . Accordingly, in virtue of Article 2(2) TFUE, the EU has

¹¹ R. Williams, 'The European Commission and the Enforcement of Environmental Law: an Invidious Position' (1994) *14 Yb Eur L* 351; P. Weneraas, *The Enforcement of EC Environmental Law* (Oxford, OUP, 2007) 251–308; ; I. Krämer, 'The Environmental Complaint in EU Law' (2009) *6:1 JEEPL* 13–35; P. Frassoni, 'Is the Commission still the guardian of the treaties?' (2009–10) *1 RAE-LEA* 45–57.

¹² Council Regulation (EC) No. 2012/2002 establishing the European Union Solidarity Fund [2002] OJ L311/3.

¹³ The latest Financial Instrument for the Environment (LIFE+) was adopted through Regulation (EC) No 614/2007. See Communication from the Commission, Mid-term review of the LIFE + Regulation, COM(2010) 516 final.

¹⁴ B. Jack, *Agriculture and EU Environmental Law* (Farnham, Ashgate, 2009).

the power to legislate and to adopt legally binding acts in the environmental area. On an international level, Article 191(4) TFEU emphasises the shared nature of competence, as the EU and the Member States each intervene ‘*within their respective spheres of competence*’. This shared competence has its implications for the nature of the agreements concluded by the EU.¹⁵

What does sharing of competence mean?

As a starting point for analysis of the question what does sharing of competence mean, one should focus on Article 2(2) TFEU that reads as follows: ‘When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.’

It is important to make several observations within this context.

First, both the EU and Member States may act in order to protect the environment. Member States’ intervention could be envisioned first, when the EU has not yet activate its powers, second, when the EU decides to repeal existing legislation without replacing it by new legislation,¹⁶ or when the legislation has been annulled by an EU court.¹⁷ As a result, insofar as the EU has not taken action, the Member States maintain their competences, provided that they respect the obligations contained in treaty law. In other words, Member States exercise their competence inasmuch as the EU has not exercised its own competence. With respect to the free movement of goods, as long as the EU lawmaker has not pre-empted the field, Member States may justify their restrictive measures in invoking either one of the reasons written in Article 36 TFEU, or a mandatory requirement. Conversely, Member States may no longer rely upon these exceptions if secondary law has fully harmonised a field.

Second, where the subject matter has been harmonised under secondary law, EU law does not allow the Member States to pursue an environmental policy as they understand it. In such case, the Member States must simply

¹⁵ Opinion 2/00, ECR I-9713, para. 47; Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635, para. 92.

¹⁶ It must be noted however that whenever the EU has been acquiring new competences regarding the protection of the environment, it has never been giving them up.

¹⁷ R. van Ooik, ‘The European Court of Justice and the Division of Competence in the EU’ in D. Obradovic and N. Lavranos (eds.), *Interface between EU Law and National Law* (Groningen, Europa Law Pub., 2007) 24.

implement secondary law. If they do not do so, infringement proceedings may be commenced against them before the Court of justice for failure to fulfil their EU obligations. However, the state of EU secondary law is much more complex. Unless the subject matter has been completely harmonised, the Member States remain free to intervene provided that their regulatory measures are consistent with the economic principles of the TFEU. In this context, account must also be made of the fact that EU legislations are often incomplete. It follows that where a criterion necessary for the implementation of a directive adopted on the basis of Article 192 TFEU has not been defined in the directive, such a definition falls within the competence of the Member States and they have a broad discretion, in compliance with the Treaty rules, when laying down national rules developing or giving concrete expression to the EU obligation.¹⁸

Third, though the EU lawmaker pre-empts the field, the Member States still retain a residual competence. Indeed, following the adoption of EU measures, they have the right by virtue of Article 173 TFEU to retain or to introduce more stringent protection requirements.¹⁹ Accordingly, minimum harmonization has been recognized as the *modus operandi* of the environmental policy. As a result, minimum harmonised standards allow pursuant to that provision diverging national standards.²⁰ Minimum harmonization expresses a preference for regulatory differentiation that mirrors subsidiarity.²¹

Fourth, though a field may be subject to harmonization, Member States still retain much leeway. Indeed, most legislation ‘predicated upon broadly drawn principles and objectives’²² follows the principle of subsidiarity by setting largely general targets for protection. These highly permissive legislations charge the national authorities with the programming of implementing measures. Against this background, they are endowed with much leeway in framing their policy. Consider, for sake of illustration, the review of the decisions

¹⁸) See, to that effect, Case C-254/08 *Futura Immobiliare and Others* [2009] ECR I-0000, paras. 48, 52 and 55 ; Case C-378/08, *Augusta* [2010], para. 55.

¹⁹) Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753.

²⁰) D. Freestone and H. Somsen, ‘The Impact of Subsidiarity’ in J. Holder (ed.), *The Impact of EC Environmental Law in the UK* (John Wiley & Sons, Chichester, 1997) 87.

²¹) F. De Cecco, ‘Room to Move? Minimum Harmonization and Fundamental Rights’ (2006) 43 *CMLRev* 10.

²²) J. Scott, ‘International Trade and Environmental Governance: Relating Rules and Standards in the EU and the WTO’ (2004) 15:2 *EJIL* 309.

adopted by the Commission regarding the validity of the national allocation plans for greenhouse gas emission allowances in virtue of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community.²³ The General Court held that according to the principle of subsidiarity, ‘in a field, such as that of the environment governed by [Articles 191 to 193 TFUE], where the [EU] and the Member States share competence, the [EU]...has the burden of proving the extent to which the powers of the Member State and, therefore, its freedom of action, are limited’ with respect to the obligation to implement through proper regulatory instruments the obligations laid down in Directive 2003/87/EC.²⁴

Last but not least, they can also depart from EU harmonised standards on the account that EU environmental law is rife with specific escape and safeguard clauses.

²³) OJ 2003 L 275/32.

²⁴) Case T-374/04 *Germany v. Commission* [2007] II-4431, para. 79; and Case T-263/07 *Estonia v. Commission* [2009], para. 53.