

Discussing Subsidiarity in Terms of Justification: Some Practical Issues of the EU Legislative Process

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Abstract

This article attempts to study the inter-institutional dimension of the practical implementation of the subsidiarity principle in the EU legislative process. The main research question is whether the subsidiarity principle could be a real communicative tool in the EU's multi-level regulation policy used to seek consensus between EU institutions and national parliaments on the justification of an appropriate level for EU actions (subsidiarity justification). The short answer is 'yes'. Through the content analysis of the published documents and with the help of the theory of deliberation, the author argues for a subsidiarity justification procedure occurring at the beginning of each instance of the EU legislative process to provide an inter-institutional setting to move away from confirming (one-way) to deliberative (two-way) reasoning over the issue of potential subsidiarity violation in the EU legislative process.

Keywords

Consensus; Deliberation; EU Legislative Process; 'Green Card' Procedure; Inter-institutional Dialogue; Subsidiarity Control Mechanism; 'Yellow Card' Procedure

Introduction

The subsidiarity principle has been widely adopted in various sectors of public policy including economics, environment, education, and social policy. However, the main lines of research related to this principle are traditionally connected to the legal (Davies 2006; Fabbrini and Granat 2013; Fabbrini 2017) and political (Craig 2012; Cooper 2006; Cooper 2017; Schütze 2009) facets of subsidiarity. This article explores the subsidiarity principle as a communicative tool that ensures better justification of regulations proposed by the EU (subsidiarity justification) through promoting earlier interactions among decision-makers in search of a consensus on what should be perceived as the better argument justifying the proposed action. There are not many publications on this subject (the few that exist include Schout and Sleifer 2014; Bickerton, Hodson and Puetter 2015) but there is a practical need for a procedure to provide an inter-institutional setting to improve consensus-seeking between European and national institutions looking for a single answer to a question on the appropriate level of regulation in order to achieve goals set out by the EU.

On the EU legislative arena, decision makers are influenced by diverse views when judging which actor is best placed to achieve an EU objective. That is why a decision on the subsidiarity application always involves inter-institutional interactions to balance inter-institutional stances (Pimenova 2016), and this article studies how the EU institutions respond to subsidiarity concerns expressed by national institutions in the legislative process of the EU as a unique jurisdiction whose system of multi-level governance furnishes rich illustrative material for furthering my research interest in consensual decision-making.

What does a ‘good decision’ in multi-level regulation mean? As Lindblom (1959, 84) points out, an agreement on regulation policy is the test of “best policy” even if there is no agreement on values underpinning a contestable policy. This is particularly the case for decisions that involve cross-border issues and affect the identity and culture of different nations. Decision-makers in a multi-level system need to deliver a proper justification for their decisions supported not just with appropriate reasons confirming what they need in a time but mainly with a consensus about these reasons. A promising feature of consensus-seeking activity is the possibility to avoid the pitfalls and challenges of multi-level decision-making through implementing early deliberations. As the building blocks of a democratic decision-making process, early deliberations enable policymakers to reveal all feasible policy options, to reconcile them through debating any contradicting particularities of these options, and then lend validity to ‘the one that survives the widest range of criticisms’ (Fischer 2007, 228).

As a form of communication, deliberation relies on an ‘exchange of arguments’ (Landemore 1976, 90) ‘for and against a given preposition’ (Fearon 1998; Manin 2005; Thompson 2008) between actors who mutually recognize the provisional nature of their own arguments and are prepared to challenge them (Gutmann and Thompson 2003) on the grounds of a better argument (Risse 2000, 7). Deliberations provide actors with ‘a technology for mind writing’ (Norman 2016, 697), as deliberators potentially can rewrite their minds as their preferences are not stable and are subject to constant revision through mutual learning (Kanra 2012). Dealing with competing preferences, deliberators move back and forth in their reasoning for and against a debating option (deliberative reasoning) until all objections are addressed through either changing preferences (arguments) or bringing new evidence to keep them stable. Recognizing the epistemic properties of deliberation, I argue that by means of earlier argument exchanges, European and national decision-makers can be involved in a ‘more open process of deliberation about the reasons’ (Weatherill 2005, 147) and necessity of actions proposed by the EU ‘with the expected systemic advantage of making each part responsive to the arguments and concerns of the others’ (Terrinha 2017, 3).

The key research question behind this study is whether subsidiarity justification could be a real communicative tool in the EU’s multi-level regulation policy used to seek consensus between EU institutions and national parliaments on appropriate EU actions at earlier stages of the EU legislative process. This question will be addressed through the assessment of the practical applicability of the subsidiarity principle in inter-institutional deliberations and through the review of opportunities for strengthening the role of the national parliaments and the Court of Justice of the European Union in delivering subsidiarity justifications.

Key topics include the subsidiarity control mechanism and the potential role and current position of the Court of Justice of the European Union in working out a consensus on subsidiarity observance in the EU regulation. The main methodological focus is on content analysis of published documents and especially on the written texts exchanged by the Commission and the national parliaments in the process of the application of the subsidiarity control mechanism. The main observation is the Commission’s response pattern in the subsidiarity concerns of national parliaments; this response pattern manifests a lack of the most important attribute of inter-institutional deliberations – responsiveness to opposing arguments/evidence from national parliaments on the issue of potential subsidiarity violation in the EU legislative process.

Background

As laid down in the consolidated version of the Treaty on European Union, the subsidiarity principle sets out that the EU should only act if the objectives of the proposed action cannot be sufficiently met by the Member States (so called necessity test), and therefore, by reason of its scale or effects, can be better achieved by the EU (so called added value test). According to some scholars, the subsidiarity principle codifies a preference for regulation ‘at the lowest level of governance’ (Estella 2002, 81) in order to prevent excessive use by supranational powers and to maintain a space for national autonomy. From this standpoint, the subsidiarity principle has been criticized for ‘thwarting the project of European integration and weakening supranational authority’ (Toth 1992, 1081). According to other researchers, the subsidiarity principle gives a preference to supranational regulation on the basis of the supposed transnational dimension of most policy issues, the related ideas of a ‘collective action problem’ (Kumm 2006, 520), and ‘the beneficial effects of a common supranational intervention’ (Cooter 2002, 111). In this view, the subsidiarity principle has been brought into question for being ill-designed to meaningfully protect national regulatory autonomy, and it was once even labelled as ‘the wrong idea, in the wrong place, at the wrong time’ (Davies 2006, 71). Despite these disagreements, there is a general consensus that the subsidiarity principle should be pursued as a ‘Janus-faced concept’ (Schütze 2009, 243) or a ‘double-edged sword’ (Golub 1996, 703) reconciling both the need for national autonomy and the need for supranational regulation in areas of shared competence between the EU and its member states.

By recognizing the reality of concurrent competence—in which neither the EU nor its member states have sole legislative powers and actions depend on the given context, leaving significant room for discretion—subsidiarity, as a dynamic concept, works in both ways: either extending or limiting the EU’s powers. Subsidiarity does not give clear answers about the ‘right’ level of exercise of legislative powers, but leaves the actual conditions of its application open, meaning that the conditions may vary depending on the circumstances of time and place.

At the same time, the practical application of the subsidiarity principle implies a balance between respect for freedom, the diversity of small entities, and the need for unity and public coherence (Brouillet 2011, 608). As an ideal theoretical target, a balance is hard to establish and there is no absolute criterion for what should be done to achieve it in practice. Striking the right balance between self-rule and shared-rule is a challenging task in any multi-level system and, in this regard, the subsidiarity principle must be understood *as a perpetual*

process of evolution and adaptation, rather than a static system governed by immutable rules. This is key for understanding the practical aspects of an inter-institutional implementation of the subsidiarity principle in a multi-level decision-making system.

What is fascinating about subsidiarity is that it doesn't try by any means to mask itself as a purely legal principle strictly regulated at all stages of its application. Although it has been recognized since the Maastricht Treaty, the precise scope and limits of the principle of subsidiarity in EU law remain undetermined. In the EU decision-making system, the subsidiarity principle operates 'as an ambiguous norm, primarily offering a standard of behavior for legitimate legislative action' (Kersbergen and Verbeek 2007, 224). It vests in decision-makers a large margin of discretion when they look for a 'better' solution, which is critical for multi-level systems in which decision-makers driven by polar political aspirations are often incapable of achieving common ground. However, in order for better multi-level decisions to be delivered, the discretion of one decision-maker should be restricted by the discretion of another, and both of them *should owe one another justifications for mutually binding decisions.*

The value of justification (reasoning)

As a dynamic and evolving concept, the subsidiarity principle does not offer ready-to-use recipes for all problems, but provides decision-makers with a tool to reach a valuable consensus about a possible solution; its blended and Janus-featured nature is perfect for securing consensual decisions with the inclusion of all potentially affected parties with different preferences and interests. Consensus is important for gaining the legitimacy of decisions (Manin 1987, 359) through its proper justification, especially in a multi-level context in which actors are driven by different perceptions of justice when looking for trade-off solutions.

Generally, justice is an elusive, contestable and changeable concept. No theory offers one clear-cut explanation of justice and no single notion of justice exists; it comes down to a question of individual preferences congruent with values and contingent upon the subjective interpretations of the context in which actors find themselves interacting with each other. In different contexts, actors behave differently, revealing adherence to different values. Due to preference instability, it is hard to predict which values will be at play in a subjective interpretation of justice perceived by an actor at a particular time in a certain context. Dryzek (2015, 379) points to actors' interactions which produce justice. More precisely, to be found and clarified, justice requires reciprocity in interactions between actors who give each other mutually acceptable reasons (Gutmann and Thompson 2003, 35). These

reasons are arguments justifying or challenging certain preferences, and reciprocity in their consideration (accepting and rejecting) entails that the deliberation on justice is a continuous process of value/preference clarification consisting of the pondering of pros and cons related to a suggested decision by the bringing up of arguments and evidence which both support and reject the debated option. In this process of continuous reciprocation in reason-giving, consensus on the most convincing argument which ‘survives the widest range of criticisms’ (Fischer 2007, 228) is required to make a decision, and *only deliberative discourse endorsing two-way reasoning (for and against a decision) with a chance to reject the less convincing argument can lead to decision justification with a higher degree of legitimacy and unity in finding common justice.*

Justification and its deliberative discourse are especially important in multi-level decision-making processes in which thick decisions are at stake, affecting policy actors of all levels and requiring their collaborative efforts to be approved. Through justification (reasoning), actors forge a common ground that makes multi-level communication possible in which the language of narrow functional inevitability is not suitable as it does not contribute to the coherent implementation of a decision in the context featured by diversity in values and justice perceptions. Decision-makers at different levels of governance and with different views about common justice should be included in a deliberative discourse of mutual reasoning over the pros and cons of a proposed action – the discourse governed by the ‘logic of arguing’ (Cooper 2006, 302) ‘with the expected systemic advantage of making each part responsive to the arguments and concerns of the others’ (Terrinha 2017, 3). In EU multi-level governance, such deliberative discourse of justification should be a core feature of the subsidiarity justificatory procedure, allowing multi-level actors to benefit from the dynamic and vague nature of the subsidiarity principle coming up with EU legislative decisions without unresolved (still dividing) controversy over the reasons behind them.

Point where the spade turns

Exercising legislative powers in matters that fall within concurrent competences, the EU is forced to provide grounds for its decision-making and demonstrate that proposed measures are consistent with the principle of subsidiarity. The need to justify EU interference means that every draft legislative act must be accompanied by a detailed statement outlining compliance with the subsidiarity principle (Lisbon Protocol 2 on the application of the principles of subsidiarity and proportionality, Article 5). Statements are elaborated by the relevant EU proposing institutions, and the subsidiarity justification is supposed to help EU institutions facilitate consensus in the European legislative process to gain legitimacy for its decisions. However, this is not always the case.

As European subsidiarity ‘assumes the primacy of the central goal [EU goal]’ (Davies 2006, 83) and does not protect the right of member states to set their own goals in areas of shared competence, *subsidiarity justification contained in EU legislative proposals does not use the language of political choices equally arguing for and against the necessity of the given EU action*. In practice, while justifying legislative proposals, EU institutions employ the language of inevitability (‘this must be done to achieve this concrete goal’), basing their position on the EU’s perceptions of ‘justice’. This is the point where the spade turns: in the EU legislative process, subsidiarity justification serves not to build a consensus between a relevant EU legislative proponent and the most vigilant ‘subsidiarity watchdogs’ (Cooper 2006, 304) (i.e. national parliaments of the member states), but to push what is necessary at the time. As a result, there is no dialogical communication between European and national decision-makers.

Although the Commission, as a leading proponent of the EU legislation, has been doing its best to internalise the subsidiarity principle at different stages of the decision-making cycle (impact assessment reports, roadmaps, rigorous systems of evaluations and consultations with experts and affected stakeholders), it has stayed very much reluctant *to conduct a dialogue on subsidiarity justification* of proposed legislation with other participants of the EU legislative process. While there is some kind of interaction between the Commission, the Council, and the European Parliament on how they can use the Commission’s subsidiarity justification (contained in impact assessments) in relation to the Council’s and the European Parliament’s substantial amendments to the Commission’s proposal (Interinstitutional Agreement of 13 April 2016), *there is no profound dialogue between the Commission and national parliaments on how to deliver impact assessments*. National parliaments can only challenge the Commission’s subsidiarity justifications in the framework of the subsidiarity control mechanism (the Mechanism) or by means of judicial review.

According to the Mechanism, national parliaments raise subsidiarity concerns and submit their reasoned opinions directly to the proposing institutions of the EU (Lisbon protocol 1 on the role of national parliaments in the European Union). The Mechanism should serve as a collective warning of difficulties to be addressed by the EU institutions and as a forum where national parliaments can state their positions on a proposal without undermining the EU legislative process. Some expected outcomes brought about by the Mechanism include a greater flow of information between national parliaments and the European institutions, as well as a ‘more open process of deliberation about the reasons and techniques of EU rulemaking’ (Weatherill 2005, 147).

Since its introduction, the Mechanism has been triggered three times (the so-called yellow cards) with the main argument raised by national parliaments being the insufficient character of subsidiarity justification provided by the Commission to validate the EU-level actions. The first ‘yellow card’ was issued in relation to the Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (the Monti II proposal). In this instance, the UK House of Commons concluded that the explanatory memorandum and impact assessment provided by the Commission were ‘largely based on [the Commission’s] perceptions of a need to act, which are necessarily subjective, in contrast to objective evidence of a need to act’ (UK Government 2014, 80). Some chambers questioned the added value of the Monti II proposal claiming that the draft act under consideration would not lead to a greater legal certainty (European Commission 2013, 7). The second ‘yellow card’ was triggered in relation to the Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office. In that case, a number of national parliaments stated that that the Commission ‘had not sufficiently explained how the proposal complied with the principle of subsidiarity’ (European Commission 2014, 9) and had not successfully manifested a clear need for an EU-wide intervention. In the case of the third ‘yellow card’, subsidiarity concerns were expressed in relation to the Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. Assumptions voiced by national parliaments were mostly the same: the insufficient character of the Commission’s subsidiarity justification and the lack of clear evidence that the intended action would be best pursued at the EU level.

Within the framework of the Mechanism, the Commission is under a duty to justify its legislative proposals, in terms of the subsidiarity principle, to national parliaments. It is not national parliaments that have to prove beyond doubt that challenged legislative proposals contain subsidiarity violations, but the Commission is responsible for providing a clear explanation of why it believes that proposals comply with the requirements of subsidiarity (Pimenova 2019, 292). In the absence of a comprehensive explanation, national parliaments may conclude that it has not been proven that a proposal complies with the subsidiarity principle, as happened in all three yellow card cases. The main argument raised by national parliaments in their reasoned opinions was an insufficient subsidiarity justification of the challenged proposals. However, the common response of the Commission was to dismiss this argument (against the necessity of EU actions) on the formal

basis that it was not directly connected to the strict definition of the subsidiarity principle as laid out in Article 5 of TEU which contains no clarifications on why it is not necessary to take action at the EU level (European Commission 2013). In all three ‘yellow card’ cases, the Commission operated in a defensive mode and disregarded subsidiarity concerns voiced by national parliaments; subsidiarity justification was reaffirmed by the Commission as sufficient to allow both the EU legislature and national parliaments to determine whether the subsidiarity principle is respected in a draft act under consideration (European Commission 2016).

To some extent, this one-way, for the necessity of the EU’s actions, subsidiarity justification by the Commission may be regarded as ‘rightful’ since the Mechanism is ‘half-baked’: the Mechanism invites the Commission to review a proposal even though this proposal has been already declared consistent with subsidiarity in the Commission’s impact assessment. On the other hand, subsidiarity justifications given by the Commission are truly not deliberative as the Commission delivering them mostly acts on its own and assumes no substantive contributions from the actors – national parliaments – mostly concerned with subsidiarity observance in the EU legislative process. Being consistent in rebutting the arguments of national parliaments opposing EU draft legislation, the Commission makes no effort to embrace the ‘logic of arguing’ and incorporate two-way (for and against) reasoning over the necessity of EU actions into its subsidiarity justificatory procedure, generally undermining subsidiarity as a principle of a ‘better EU regulation policy’ (Pimenova 2016).

Regulatory watchdog

In multi-level governance systems based on the rule of law, all decision-makers should be committed to providing a justification of their actions that adequately integrates all positions in the decision-making process. The ideal of a deliberative government system ‘is a loosely coupled group of institutions and practices that together perform the three functions [...] [of] seeking truth, establishing mutual respect, and generating inclusive, egalitarian decision making’ (Mansbridge et al. 2012, 22). Following a systematic deliberative approach to the multilevel decision-making process, a subsidiarity justificatory procedure should be taken seriously in all EU institutions, and especially in a courtroom while the Court of Justice of the European Union (CJEU) itself is well placed in the EU institutional system to adopt the role of a defender of the consensual nature of the EU legislative process. However, this is also not the case.

In case C-233/94 *Federal Republic of Germany v European Parliament and Council of the European Union*, the CJEU accepted that a very simple and concise reasoning may be enough

to justify an action with regard to subsidiarity. ‘In assessing the need for the measure [...] the Community legislature [...] needed to [...] choose between the general prevention of a risk and the establishment of a system of specific protection’ (paragraph 28). Therefore, it has been established that legislative institutions just need to state in a recital of a proposed act *their preference* for a certain kind of action to conform with the principle of subsidiarity. In 2010, the CJEU moved one step further and indicated that impact assessments undertaken by the Commission should be regarded as a tool for the justification of a common measure at the EU level (Case C-58/8 *Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd v. Secretary of State for Business, Enterprise and Regulatory Reform about EC Regulation*). In 2016, the CJEU concluded that compliance with the requirement to provide relevant subsidiarity arguments along with legislation ‘must be evaluated not only by reference to the wording of the contested act, but also by reference to its context and the circumstances of the individual case (Case C-547/14 *Philip Morris Brands SARL and Others v Secretary of State for Health*). Hence, the CJEU has assumed that subsidiarity is a dynamic political principle, but it has remained silent on the necessity of reaching a consensus between a proposing EU legislative institution and concerned national parliaments when they have disagreement over subsidiarity justifications in relation to challenged EU legislative acts.

When the CJEU abstains from the substantive assessment of subsidiarity justifications, it tries ‘to preserve its own legitimacy, which derives in large part from the fact that its functions are perceived as being essentially jurisdictional rather than political’ (Brouillet 2011, 612). Of course, a strict legal position on the ‘right’ level for the exercise of the EU’s legislative powers would put the CJEU ‘against the will of the qualified majority of the member states in Council and the majority of the representatives of the European citizens in Parliament’ (Fabbrini 2016, 18). As Federico Fabbrini (2014, 31) states, ‘the ECJ [CJEU] should not overrule the results of the democratic debate [in representative and political institutions]’. However, with the ‘declining public support for representative institutions’ (Brack and Costa 2018, 10), a creeping exclusion of representative institutions from decision-making (on some issues), and an increasing preference for intergovernmental policy coordination (Bickerton et al., 2015), the EU’s multi-level governance system currently faces the need for the CJEU to accommodate in its decisions the interests of *all players in the EU legislative process*. In the same way as national parliaments act as ‘subsidiarity watchdogs’ (Cooper 2006, 304), maintaining a balance between national and European legislative interests, the CJEU may take on the role of a ‘regulatory watchdog’ (Popelier 2011, 567) and

ensure respect towards all decision-makers engaged in the process of working out a consensus on subsidiarity justification for regulating at the EU level.

Take care early

Endowed with deliberative and law-making powers, national parliaments are capable of adding value to the inter-institutional dialogue within the EU multi-level legislative process, and of enhancing the deliberative legitimacy of EU actions. National parliaments hold a strong potential to act as inclusive deliberative agents: they are, as a rule, directly elected representative institutions with unique democratic legitimacy and naturally suited to be closely involved in the assessment of subsidiarity compliance of EU draft legislation before it is made public.

National parliaments can enjoy a wider recognition of their subsidiarity concerns by developing a deliberative dialogue with relevant EU proposing institutions. As Ian Cooper (2012, 461) suggests, ‘the Mechanism [subsidiarity control mechanism] is “hard core” within a much broader, non-binding deliberative exchange among NPs [national parliaments] and EU institutions’. Using the Mechanism for political ends, national parliaments are also expected to develop meaningful interactions with EU institutions, particularly with the Commission as the main EU legislative proponent if they want to strengthen their role in the EU legislative process. Yet, the dialogue should take place at the ‘right’ time – that is, *before* a legislative proposal is issued. At this stage, it is still possible to give consideration to subsidiarity justification and to push amendments forward on subsidiarity grounds whilst not undermining the political influence of the proposal initiator.

Some scholars recognize that one of the tools to help national parliaments acquire greater ‘subsidiarity weight’ early in the EU law-making process is the so-called ‘green card’ procedure (Fasone and Fromage 2016). This instrument partly rectifies the existing reasoned opinions’ procedure, which, as mentioned above, requires the Commission to provide a revised subsidiarity justification for a proposal even though this proposal has already been verified as fully subsidiarity-compliant. The ‘green card’ procedure encourages the Commission and concerned national parliaments to engage in deliberations before subsidiarity justifications are officially released by the Commission. As a result, it potentially can lead to a reduced number of national parliaments’ subsidiarity concerns expressed through the Mechanism and at the CJEU. Early deliberations on subsidiarity justification not only transform national parliaments from ‘subsidiarity watchdogs’ (Cooper 2006, 304) into partners collaborating with the Commission from the outset of a drafting process, but also shift the Commission’s focus from seeking the consent of national parliaments on tabled

proposals (under the Mechanism) towards seeking their consent on proposals that have not yet been tabled.

Eventually, early deliberations assume that the subsidiarity justificatory procedure takes the form of deliberative reasoning (for and against a proposed action) instead of one-way reasoning (for a proposed action) in which policy actors do not challenge arguments put forward by a proposing body, but try to verify the acceptability of these arguments. The deliberative nature of the subsidiarity justificatory procedure can secure the meaningful accommodation of national parliaments' concerns. Engaged in dialogue from the outset, national parliaments and the Commission are more likely to reach valuable consensus about the necessity of EU actions.

Conclusion

Decision-makers at different levels of European governance have their own views about subsidiarity and follow their own procedures while participating in the supranational decision-making process. There are all sorts of institutions (including the Commission, the CJEU and national parliaments) that appeal to the assessment of the 'necessity' of proposed EU legislation. This is reflected in the growing interest in exploring the inter-institutional facet of the practical application of the subsidiarity principle in the EU legislative process (European Union 2018, 4).

Although EU institutions have made strong efforts to internalise the subsidiarity principle in the EU's regulation policy, and, particularly, the Commission has established and followed a number of procedures to ensure its draft legislation is compatible with subsidiarity, subsidiarity justification in the EU legislative process has not yet grown into a communicative tool for seeking inter-institutional consensus on proposed EU-level actions. These days, subsidiarity operates much more as a principle for structuring institutional differences and institutional disagreement on political discourse (Constantin 2008, 171) in the EU legislative arena rather than as a consensus-builder among actors with decision-making power located at different levels of EU governance. The proponents of EU actions try to justify these interferences through giving reasons which would be appropriate, from their institutional positions, to take actions at the EU level without looking for and embracing alternatives to suggested options as well as without arguing both for and against given options with other institutional actors who will be affected by it. Here lies the main problem with the application of the subsidiarity principle in the EU's multi-level decision-making where actors lack reciprocity in reasoning over subsidiarity violations in mutually-binding decisions; *a lack of reciprocity in subsidiarity justification by EU institutions reveals a more profound*

problem underlying the application of the subsidiarity principle in the EU – a lack of inter-institutional deliberations in reasoning over the necessity of EU actions.

The Janus-faced nature of the subsidiarity principle makes a perfect fit with securing two-way, for and against, deliberative reasoning over the necessity of EU actions between institutional actors involved in the production and implementation of EU legislation. Unfortunately, the dynamic nature of the subsidiarity principle is currently burdened with the justificatory procedure which, instead of embracing and promoting the dyadic nature of the subsidiarity principle, violates it, thus limiting institutional actors' capacity to reason just in one direction – for the necessity of proposed actions to be taken at the EU level. The evidence observed in all three cases of triggered 'yellow cards' assessed in this article demonstrates the flawed nature of the subsidiarity justification procedure according to which the Commission is capable of producing and reproducing (in response to the subsidiarity concerns of national parliaments) *the same set of stable arguments confirming the necessity of EU actions*. In all three 'yellow card' cases, the Commission was not engaged in two-way reasoning with opposing national parliaments over the controversial EU legislation, and it did not reciprocate the national parliaments' arguments – as a result, the Commission neither changed its own reasons nor brought new evidence to confirm them. *Keeping with what it initially stated, the Commission steadily demonstrated a lack of reciprocity in its vicious cycle of subsidiarity reasoning.*

Concluding, I want to cite a prominent saying of the Commission: 'subsidiarity cannot be reduced to a set of procedural rules but it [subsidiarity] is primarily a state of mind' (Commission of the European Communities 1993, 2). This is true: formality does not lend substantiality in observance of the multifaceted subsidiarity principle. The most appealing application of the subsidiarity principle lies in overcoming inter-institutional barriers and reaching a dialogical communication on the necessity of EU actions – that depends much more on external deliberations of supranational and national decision-makers and on the quality of their political dialogue among themselves rather than upon their rigorousness in following their own formal procedures. *Decision-makers should be committed to a deliberative discourse on subsidiarity justification based on reciprocal reason-giving for and against a given proposition at the earliest stages of the EU decision-making process.* Reciprocity in decision-making encourages actors to switch from pushing their own arguments to reconsidering them on the base of new evidence and accepting a better argument for a final decision (Gutmann and Thompson 2003). Such a shift in inter-institutional communication will drive better justified decisions and secure a more consensual environment in the EU decision-making process through

which ‘everyone agrees that all objections to a proposal have been met or at least overridden by more important considerations’ (Anderson 2006, 16). Under the reciprocal respect for opposing arguments/evidence, subsidiarity justification procedure can provide an inter-institutional setting to move away from confirming (one-way) to deliberative (two-way) reasoning over the issue of potential subsidiarity violation in the EU legislative process.

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