

Subsidiarity and EU added value: the difficulty of evaluating a legal principle in a pragmatic way

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Subsidiarity is part of the legal foundation of the EU and all EU institutions have an obligation to ensure that this principle is applied, with the Court of Justice of the European Union as the final arbiter. European Added Value (EAV) has become an essential – if not the main – element of this legal principle, the subsidiarity principle. However, how can a principle that is legal in form and political in nature be applied and measured in an objective manner? Gracia Vara is a senior consultant on EU law and multilevel governance, who worked for almost two decades as an expert at the European institute of Public Administration. She zooms in on the legal aspects related to EAV, but also the difficulties encountered by the Commission in quantifying EAV as part of its Better Regulation initiative.

Legal principles and their operationalisation

The principle of subsidiarity, a long standing concept in political theory, became part of European Law when it was included in the wording of the Treaty of the European Union (the Maastricht Treaty) adopted in December 1991. Since then, it has been one of the most ambiguous and disputed notions in EU Law.

Respect for the principle of subsidiarity by the EU means that in areas that fall outside its exclusive competence, the Union must act in accordance with the principle: it needs to justify whether it is more appropriate that Member States act at the right national regional or local level, or whether the EU should act. However, allocation of competences is essentially a

political discussion, so the enforcement of this legal principle by the Court of Justice of the EU has been timid, to say the least. The introduction of an ex-ante review by national parliaments, since the Lisbon Treaty, brought new actors onto the stage – this time political ones – to protect Member States’ competences. But the principle’s full potential is still in the making, and there is still no uniform understanding of it.

The European Commission has been working to operationalise the principle in its [Better Regulation](#) (BR) guidelines, seeking to satisfy both the legal (the Court) and political (the national parliaments) control mechanisms. Two aspects will determine if the EU should act, according to the 2017 version of the Better Regulation Guidelines and the [Subsidiarity task force](#) established by the Commission in 2017: the necessity test and the EU added value (EAV) test. However, three years after the publication by the Commission of those Better Regulation Guidelines and toolbox, we still have no clear answer to one very important question: how do we define the EU added value (EAV) of a given legislative proposal, and how should the European Institutions measure it.

Below I will address the evolution of the subsidiarity principle and its relation with the concept and evaluation of EAV from a legal perspective.

The evolution of the principle of subsidiarity

The concept was popularised by the Roman Catholic Church in the 1931 encyclical, *Quadragesimo Anno*, which pronounced that it was a fundamental principle of social philosophy, fixed and unchangeable, that one should not withdraw from individuals and commit to the community what they can accomplish by their own enterprise and/or industry. Generally, the idea is that in a federal structure, if effective, issues should be managed at the most decentralised level. The principle has been referred to as a golden rule for allocating functions between various tiers of government in European countries.

The *Treaty establishing the European Coal and Steel Community* was in a way the first legal text to adopt the principle, by establishing in Article 5 that ‘the Community shall carry out its task in accordance with this Treaty, with a limited measure of intervention’. However, the majority claim that the term subsidiarity entered the European dialogue in 1989 as part of a new ‘Eurolanguage,’ when the political leaders intended to push through economic and monetary Union.

The concept formally became EU law when it entered the *Maastricht Treaty*. The wording in the Preamble noted that the signatories wanted to create ‘an ever closer union among the peoples of Europe, and decisions are taken as closely as possible to the citizens in accordance with the principle of subsidiarity’.

But to observers it became immediately obvious that the Maastricht Treaty was somewhat inconsistent in relation to the use of the term subsidiarity, lending it both a negative and a positive connotation, depending on the perspective adopted. In the Preamble, decentralisation is emphasised: ‘...as closely as possible to the citizen’. Whereas in Article 5 the focus is on the right and necessity of responsible central intervention if the lower entity cannot function effectively. The article reads: ‘...the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central

level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’

As a result, the need to clarify the principle made its way into the *Treaty of Amsterdam*, and its Protocols on the application of subsidiarity and proportionality. The Protocols fixed three criteria for an analysis of the principle:

- there should be transnational aspects that would need European level action;
- verify that the absence of EU action would conflict with the Treaties or damage a Member State’s interest; and
- finally, that EU action should bring clear benefits compared to Member State action (EAV).

The *Lisbon Treaty* maintained the same text in the Treaty, only adding an explicit reference to the regional and local level. However, in the Protocols, instead of digging into the three criteria to make the principle operational, they introduced an early warning system, by which the national and regional parliaments would have the possibility to object to a legislative proposal based on non-compliance with subsidiarity. Consequently, the Lisbon Treaty formally introduced the right for all national parliaments to get involved in the EU legislative process, by allowing them to object to a Commission legislative proposal within an eight-week period, if they considered it infringed the subsidiarity principle.

This has had a double effect. On the one side, in practice the Commission goes on using the three Amsterdam criteria as a tool to help operationalise the principle. On the other hand, a new actor has entered the stage, a political actor: national parliaments have the possibility to have a say at an early stage and block legislative proposals. So far, this has had a minor impact in terms of laws blocked – only one, the [Monti II Regulation](#)). However, it has an important side-effect, mobilising the parliaments and the Commission to better justify respect for and compliance with the subsidiarity principle.

Better regulation in the European Commission and EU added value

Under the Juncker Commission, the creation of a task force on ‘Subsidiarity, Proportionality and “Doing Less More Efficiently”’ gave further impetus to the adoption of better regulation principles across the EU institutions. Judging by the Better Regulation Guidelines, the Commission is strongly committed to a consistent and robust analysis of the principle of subsidiarity when making its legislative proposals across all policy areas. And the methodological requirements posed by the Toolbox and the Regulatory Scrutiny Board are quite demanding.

Complying with the Better Regulation Guidelines has proven to be a difficult task in practice and, although progress has been made at the Commission and the European Parliament, it does not avert criticism. In fact, in 2016-2017 the Commission organised training courses for officials of the different EU institutions to help them work with the principle of subsidiarity and to be able to quantify whenever possible the EU added value of any given intervention, also building on the Better Regulation Guidelines (see **Figure 1**).

In the last Better Regulation version, published in 2017, the analysis of compliance with the principle is described as an iterative process that needs to be revisited throughout the whole policy cycle. According to the Commission, and to its interpretation of the text of Article 5, it entails a double test: the first to examine why the objectives of the proposal cannot be adequately achieved by Member States, and therefore EU action is justified; the second to examine why action at EU level, by reason of its scale or effects, would produce clear benefits as opposed to action at Member State level, also known as the effectiveness test or EU added value test.

Furthermore, next to the interpretation of Article 5 *stricto sensu*, the Commission describes guiding questions in the context of the above two-tier test:

- the cross-border test: if the problem to be solved entails cross-border aspects;
- the heterogeneity test: if the problem has the same or diverse causes throughout the Member States;
- the cost benefit test: would national action or the absence of EU action damage other Member States; and
- an analysis of the proportionality principle, i.e. the content and scope of EU action may not go beyond what is necessary to achieve the objectives of the Treaties.

Working with EU added value testing

In fact, the criteria for quantification of EU added value, when one compares the versions of the Better Regulation Tool Box published in 2015 and the last one published in 2017, has been evolving. In 2015, it was accepted that, due to the difficulties of finding a counterfactual, the analysis would often be only qualitative. The new version of 2017 claims that possibilities to apply methods such as the counterfactual one are now easier since data collection is easier. So the Commission services should first try to quantify, and move to qualitative analysis only as a second option.

In the same vein, the European Parliament EAV Unit analyses the potential benefit of future action by the European Union through Cost of Non-Europe Reports (see also page XX), and through EAV Assessments to underpin legislative initiative reports put forward by parliamentary committees. Here, too, quantification by creating counterfactuals has proven to be difficult.

European experts have been advising Commission services on the different evaluation methods available to analyse added value. First, one would need to answer:

- what are the policy priorities and for whom?
- who should support it – EU/Member State/regional/local?
- in what way should it be done if at EU level, from the point of view of effectiveness of spending?

As already stated, based on the EAV principles, EU action is only justified if there is a clear additional benefit from collective efforts, compared with action by Member States. Moreover, the benefits should exceed those that would have been achieved in the absence of public expenditure.

Measuring this implies that, basically, one needs to be able to create the *counterfactual*: the evaluator must seek to understand the difference the programme or intervention makes. Behind all evaluations is the counterfactual question: what would have happened in the absence of the programme or intervention? Of course, this question can never be answered with certainty, because we cannot construct a parallel reality.

However, there are various methods to estimate the counterfactual, using quantitative or qualitative data. The problem is that, in the EU context, creating the counterfactual will often be difficult and costly, to say the least. The choice between such methods must ultimately depend on what we are searching for. The pressure to prove in numbers the added value of any Commission initiative may force the services involved to look for quantitative measures where only qualitative descriptions will work.

Taking up the subsidiarity/EAV challenge

The Union needs to prioritise activities and to use available resources more efficiently, and, in order to do so, a common understanding of the principle of subsidiarity is required. When assessing subsidiarity, the different actors involved are trying to quantify to the extent possible the value added by the EU intervention.

To conceptualise and understand EAV, knowledge of what drives EU initiatives and their objectives on the one hand, must be set against outputs and impacts on the other (see also **Figure 2**). In addition, one needs to measure the additional benefit of the EU intervention compared to Member States' actions. This is forcing the evaluators to look for quantitative measures, where data are not always available. The evaluation team needs to calibrate, with the available time and resources and using appropriate evaluation tools, whether quantification is at all possible. In those cases, there is a need to blur the quantitative-qualitative distinction, and ensure that, when using the appropriate evaluation tools, the researchers will be able to provide credible answers to the questions asked. And by doing so, be in a position to provide solid and infringement-proof justifications for compliance with subsidiarity, which can be quite a challenging task.

Treaties do not give the European institutions a blank cheque

During the last 20 years European Commission services have been working on better regulation, including establishing rules and procedures which facilitate analysis of compliance with the principles of subsidiarity and proportionality.

However, the chairman of the Commission's task force on "Subsidiarity, Proportionality and "Doing Less More Efficiently,"" Frans Timmermans, rightly stated in 2018: 'The treaties do not give the EU institutions a blank cheque to do what they want. Subsidiarity and proportionality are the practical tools to ensure that the Union does not do what the MS or regional and local authorities can better do themselves, and to focus the Union's actions on where it can really add value.'

Today, this may be more necessary than ever.

