Subsidiarity *vs.* Autonomy in the EU

By Carlo Panara*

The principle of subsidiarity as construed by the Court of Justice and the Advocates General is not an autonomy clause. Article 5(3) TEU aims to promote the efficiency of governance rather than the autonomy of the Member States and of the subnational governments. Although a number of scholars emphasise the potential role of federal proportionality for the protection of the autonomy, the effectiveness of this principle is limited in practice due to the Court's judicial self-restraint. In the EU the autonomy of national and subnational governments is protected primarily by the legal bases in the Treaty. The reasoning of the Court to delimit these legal bases largely overlaps with and absorbs considerations of subsidiarity that acquire a merely ancillary role.

Scope and purpose of this study

The typical question arising in relation to the principle of subsidiarity concerns its justiciability. Since the principle has never led to the annulment of an act of the EU by the Court of Justice, scholars often conclude that subsidiarity must be a political or philosophical principle rather than a legal and judicially enforceable one.[1] This conclusion is too hurried, however. Not only the Court of Justice does carry out a sufficiently rigorous scrutiny of the EU legal acts against subsidiarity, which alone would rebut the non-justiciability argument, but also, and especially, the same or very similar principles have led to the annulment of laws in at least two EU member states (MSs) – Germany and Italy. The real issue concerning subsidiarity is therefore not so much, or only, around its justiciability, but around its suitability to protect the autonomy of the MSs and of the subnational authorities (SNAs).[2]

In an earlier publication I argued that the principle of subsidiarity is enforceable both judicially and through political mechanisms.[3] Here, I would like to address another, albeit related, problem concerning why subsidiarity is difficult to enforce judicially *in favour* of the MSs and of the SNAs. The argument I intend to develop is that subsidiarity is not primarily a tool to protect the autonomy of the MSs or the SNAs. It is rather an instrument to promote the efficiency of governance. So, it is not surprising that the judicial application of subsidiarity might often work in favour of the EU (or of the central government in the MSs) rather than in favour of the MSs or the SNAs. This feature of the principle of subsidiarity is not probably what the MSs and especially the SNAs (in particular the German *Länder* and the Belgian Regions and Communities) wished or expected when they pushed for its introduction in the Treaty of Maastricht. And yet, the notion of subsidiarity has prioritised the efficiency of governance (or at least a certain notion of efficiency of governance) rather than the autonomy of the MSs and the SNAs.

This feature is not unique to subsidiarity as a legal principle. It is intrinsic also in the notion of subsidiarity in the social teaching of the Catholic Church as *subsidium*, meaning 'assistance',

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[1] N.W. Barber, 'The Limited Modesty of Subsidiarity', 11 *European Law Journal* (2005), p. 308-325; A.G. Toth, 'Is Subsidiarity Justiciable?' 19 *European Law Review* (1994), p. 282-285). Jakob Öberg argues that subsidiarity could become justiciable only if the Court developed more stringent criteria. See J. Öberg, 'Subsidiarity as a Limit to the Exercise of EU Competences', 36 *Yearbook of European Law* (2017), p. 391-420. On the political nature of the principle of subsidiarity, see also Working Group I of the European Convention on the Principle of Subsidiarity, Brussels, 23 September 2002, CONV 286/02, p. 2.

[2] R. Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?', 68 *Cambridge Law Journal* (2009), p. 525-536; G. Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time', 43 *Common Market Law Review* (2006), p. 63-84.

[3] C. Panara, 'The Enforceability of Subsidiarity and the Ethos of Cooperative Federalism: A Comparative Law Perspective', 22 *European Public Law* (2016), p. 305-332.

'support'. According to this vision, each echelon of society shall support the others – the family the individual, the state the family and, by analogy, the central government the SNAs and the EU the MSs. Each higher 'level' shall intervene, if appropriate, in support of another, lower, level in order to facilitate the achievement of important objectives which would otherwise be beyond reach.[4] This reasoning certainly values the role of smaller societies, such as the family and the locality, in that in theory it protects them from unnecessary interferences from bigger communities, but at the same time it justifies these interferences if they are required to respond to demands that cannot be accommodated, *or as efficiently*, for example without undesirable externalities, by smaller communities. Subsidiarity, therefore, protects the autonomy if and to the extent this is compatible with efficiency, and always giving way to efficiency in case of a conflict between the two.

A true autonomy clause, by contrast, should prioritise autonomy above efficiency and should assume that the competence of the lower tiers of government constitutes the rule in relation to local affairs. As a result, an autonomy clause should favour these tiers of government even where, hypothetically, the retention of a responsibility at that level may deliver a less efficient outcome than its allocation to a higher echelon of government. Autonomy clauses, therefore, limit the interventions of the superior levels of government in the affairs of the lower ones, both in relation to the right of a bigger society to intervene in the affairs of a smaller one, and to the pervasiveness of the intervention, which should leave as much discretion as possible to the lower level of government.

The case-law of the Court of Justice on the principle of subsidiarity is not huge. Since 1993 there have been 44 cases that dealt with the principle. Compared to 2002, when Antonio Estella published his seminal book entitled *The EU Principle of Subsidiarity and Its Critique*, where he identified 13 cases on subsidiarity,[5] or compared to 2012, when Paul Craig published his article entitled *Subsidiarity: A Political and Legal Analysis*,[6] in which he counted 10 real subsidiarity challenges, the case-law on the principle appears now richer, more complicated and multifaceted than before and it is possible to identify three principal streams within it: (a) subsidiarity cases concerning EU legal rules and decisions; (b) subsidiarity cases concerning national or regional rules; and (c) cases concerning the duty to state reasons.

Through a thorough analysis of the relevant case-law of the Court of Justice (CJEU), this study shall demonstrate that, despite its prima facie appearance, the principle of subsidiarity as construed by the CJEU, is not a genuine autonomy clause and that, in the EU, Article 5(3) of the Treaty on the European Union (TEU) pursues efficiency of governance rather than the autonomy of the MSs or of the SNAs.[7] The analysis of the cases will be enriched through the Advocates General's (AGs) Opinions which are rarely examined in the legal commentaries on subsidiarity.

Subsidiarity cases concerning EU legal rules and decisions

(a) The realisation that subsidiarity is not an autonomy clause

[4] See Communication of the Commission to the Council and the European Parliament, *The Principle of Subsidiarity*, SEC(92) 1990 final, 27 October 1992, p. 1. The concept of subsidiarity is usually traced back to the encyclical *Quadragesimo Anno: Encyclical of Pope Pius XI on Reconstruction of the Social Order* (1931), §§79-81. This document uses the expression 'principle of subsidiary function' [*subsidiarii officii principio*] (§80). See J.-P. Trnka, 'Subsidiarity: Competence Control or Political Masquerade?' in N. Neuwahl and S. Haack (eds.), *Unsolved Issues of the Constitution for Europe. Rethinking the Crisis* (Thémis, 2007), p. 242–243.

[5] A. Estella, *The EU Principle of Subsidiarity and Its Critique* (Oxford University Press, 2002), p. 140.

[6] P. Craig, 'Subsidiarity: A Political and Legal Analysis' 50 *Journal of Common Market Studies* 2012, p. 80.

[7] Article 5(3) TEU: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar 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." (Emphasis added).

The first case where the Court of Justice dealt with the alleged breach of the principle of subsidiarity by EU legal rules is the *Working Time Directive Case* (C-84/94). The UK invoked the principle to protect the autonomy of the MSs. It argued that the Community legislature had failed to "fully consider" and "adequately demonstrate" whether there were transnational aspects which could not be satisfactorily regulated by national measures; whether such measures would conflict with the requirements of the EC Treaty or significantly damage the interests of other MSs; or, finally, whether action at Community level would provide clear benefits compared with action at national level.[8]

The UK seemed to understand subsidiarity as requiring evidence that the legislative intervention of the Community has to be necessary in light of the transnational dimension of the matter to regulate or of the requirements of the EC Treaty, or, simply, it has to be more efficient than national measures (see in particular the reference to the evidence of the "clear benefits" that Community action would have to deliver compared with national interventions). The comparative efficiency argument used by the UK should not necessarily be understood as a reference to the economic efficiency of the Community intervention compared to the MSs', although it is well-known that historically UK governments have seen the Community primarily, if not only, as a common market providing opportunities for business rather than as a process of political integration. It is important to stress that the UK put forward the argument that it should be the Community legislature to "adequately demonstrate" the four previously mentioned elements, which means that the UK saw the burden of proof as falling upon the Community.

In addressing the UK's subsidiarity plea, the Court appeared to accept the point of view of the Council without an accurate analysis of subsidiarity. Since the Council had found that it was necessary "to improve the existing level of protection as regards the health and safety of workers and to harmonize the conditions in this area", then, "achievement of that objective ... necessarily presupposes Community-wide action".[9] It would therefore appear that the subsidiarity reasoning of the Court abided by a political logic and that it is up to the Community legislature to decide if and when to take action. Certainly, autonomy does not seem to be at the forefront of the reasoning of the Court. Quite the opposite, at the forefront there is efficiency. The statement of the Court reveals that the subsidiarity test compares the efficiency of Community action *vis-à-vis* action at national level. It also rules out that the MSs, individually, could achieve that objective. The intrinsic rationality of the comparison (whether it is really true and why that the Community is the only level of government able to secure that result), though, is not reviewed and it is ultimately left to the Council to decide whether and when to intervene, to the point that the Court appears to be abdicating its role as a 'constitutional court'. However, if one looks at the Opinion of AG Léger in relation to this case, the solution adopted by the Court appears less arbitrary than it might seem at first glance.

The seemingly 'light touch' approach by the Court mirrors the way AG Léger approached subsidiarity in the Opinion. He did not investigate *whether* a legislative intervention by the Council would be appropriate, that is, whether a legislative intervention by the Community in this field through a directive was really necessary or invasive of the autonomy of the MSs. He appears to assume that that decision is purely political. So, if the Council chooses to 'harmonise' the conditions concerning the health and safety of workers, then the problem is not whether it should or should not do so, but solely if and in so far as the objective(s) of the proposed action (harmonisation) cannot be achieved by the MSs alone and can therefore be better achieved by the Community. Logically, the AG argues, harmonisation can be devised only by the Community legislature and "in so far as harmonization is an objective, it is difficult to criticize the measures adopted by the Council to achieve it on the ground that they are in breach of the principle of subsidiarity. It would be illusory to expect the Member States alone to achieve the harmonization envisaged, since it necessarily involves supranational action."[10] "Thus, in view of the fact that the objective provided for in Article 118a [EC Treaty] is harmonization, there is

[8] Case C-84/94 *UK v Council*, EU:C:1996:431, para. 46.
[9] Case C-84/94 *UK v Council*, para. 47.
[10] Opinion of AG Léger in Case C-84/94 *UK v Council*, EU:C:1996:93, para. 129.

no doubt that the aim of the contested directive can be better achieved by action at Community level than by action at national level."[11]

So, from the reasoning of the AG, and later of the Court, it emerges that they have conducted an efficiency comparison between the Community and the MSs (although not specifically an economic efficiency comparison, unlike Portuese argues in relation to this case, involving the factoring in and the balancing of the anticipated gains and losses of an action[12]) and concluded that the objective of the proposed action (harmonisation) would be defeated by the MSs acting individually. However, neither the AG nor, later, the Court have actually queried whether harmonisation is needed in the first place. The mere fact that this objective is written as a legal basis in the EC Treaty is enough, in their view, for taking its lawfulness for granted, or at least for presuming it. In cases involving harmonisation of market rules, the AG and the Court seem therefore to place the burden of proof on the MSs. These have to demonstrate the infringement of subsidiarity, rather than the Community legislature having to "adequately demonstrate" compliance with the same principle as argued by the UK in its plea.

In the Case *Netherlands v European Parliament and Council* (C-377/98), concerning Directive 94/44/EC,[13] the Court held that harmonisation of legislation and practice of the various MSs in the area of protection of biotechnological inventions could not be achieved by action taken by the MSs alone. Moreover, "As the scope of that protection has immediate effects on ... intra-Community trade, it is clear that, given the scale and effects of the proposed action, the objective in question could be better achieved by the Community".[14] Like in the *Working Time Directive* Case, rather than asking the question 'is harmonisation in the field of biotechnological inventions actually needed?', once the objective has been agreed by the institutions and a legal basis identified, the only aspect the Court scrutinises is whether that objective (harmonisation), which the institutions deem necessary, can be better achieved by the EU or the MSs. This comparative efficiency evaluation is not immediately per se an economic efficiency argument, although an economic assessment sits in the background as a result of the objective pursued by the Community of ensuring the smooth functioning of the internal market.[15] Economic efficiency, however, is not an intrinsic quality of subsidiarity. The economic dimension of subsidiarity rather emerges from the context. Since in the EU single market economic aspects are at the forefront, economic concerns linked to the internal market are likely to arise in relation to subsidiarity pleas rather than being an intrinsic feature of subsidiarity.

The same internal market argument that justifies intervention by the Community emerges also from the Opinion of AG Jacobs concerning this case. After flagging up that "the approximation of national rules concerning the establishment and functioning of the internal market" might be an area of exclusive responsibility of the Community which, as such, would not be subject to subsidiarity,[16] AG Jacobs completes a typical comparative efficiency reasoning whereby he argues that harmonisation in the field of legal protection of biotechnological inventions requires Community action,[17] although he fails to engage with the preliminary question of whether harmonisation in this field is necessary in the first place.

The same comparative efficiency argument arises also in the Case *British American Tobacco* (C-491/01), concerning the Tobacco Products Directive.[18] The Court held that "the Directive's objective to eliminate the barriers raised by the differences which still exist between the Member States' laws ... on the manufacture, presentation and sale of tobacco products" could not

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[11] Opinion of AG Léger in Case C-84/94 *UK v Council*, para. 130.

[12] A. Portuese, 'The Principle of Subsidiarity as a Principle of Economic Efficiency' 17 *Columbia Journal of European Law* (2011), p. 251-52.

[13] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, [1998] OJ 1998 L 213/13.

[14] Case C-377/98 *Netherlands v EP and Council*, EU:C:2001:523, para. 32.

[15] Case C-377/98 *Netherlands v EP and Council*, para. 32.

[16] Opinion of AG Jacobs in Case C-377/98 *Netherlands v EP and Council*, EU:C:2001:329, para. 81.

[17] Opinion of AG Jacobs in Case C-377/98 *Netherlands v EP and Council*, para. 81-82.

[18] Directive 2001/37/EC of the EP and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the MSs concerning the manufacture, presentation and sale of tobacco products, [2004] OJ 2001 L 194/26.

be sufficiently achieved by the MSs individually and called for Community action. "It follows", according to the Court, "that the objective of the proposed action could be better achieved at Community level."[19] The Court did not enquire, however, whether eliminating the barriers was actually necessary. The decision to eliminate the barriers stems directly from the legal basis (Article 95 EC Treaty).

This demonstrates that the reasoning of the Court cannot be reduced to economic efficiency. If the principle of subsidiarity was understood by the Court as promoting economic efficiency, then it should trigger a test of the economic rationality of the Community's decision to intervene in order to harmonise the rules on tobacco products. This test, however, is outside of the subsidiarity equation and the decision of the Community is entirely political, with its economic efficiency or rationality taken for granted as these appear to stem directly from the legal basis provided for by the Treaty. Whilst the review of the legal basis is thorough, the subsidiarity test does not constitute an additional filter on top of the legal basis. This is not construed as a filter to scrutinise the necessity of the proposed action, but rather as an efficiency test concerning in essence 'which level of government is better at achieving the objective'. Ultimately the Court appears to perform a rigorous review of the legal basis for the action of the Community and an efficiency test which is overshadowed by, or subsumed altogether, into the assessment of the legal basis.

The overall impression of a weakening of the principle of subsidiarity and of a limitation of its autonomy appears corroborated by the Opinion of AG Geelhoed relating to this case. After explaining that "the principle of subsidiarity is a dynamic concept which leaves the necessary scope to the appraisal of the European legislature", AG Geelhoed subsumes the appraisal of subsidiarity into the assessment of the legal basis where he argues that "As I have concluded in this case that action by the Community legislature under Article 95 EC was *necessary*, no further significance attaches to the principle of subsidiarity" (emphasis added) and that for this reason the issue of subsidiarity can be "easily disposed of". By using the word "necessary" the AG seems to reveal the underlying thinking that: (a) action by the Community must be "necessary" and that this is required to comply with the principle of subsidiarity; (b) the evaluation of the necessity of the action may be reviewed by the Court; (c) the appraisal of the necessity of an action in accordance with the principle of subsidiarity is exhausted in the assessment of the legal basis; and that (d) compliance with the legal basis legitimises the action and addresses possible contestations concerning subsidiarity.[20]

However, whilst he deconstructs subsidiarity by defining it a "dynamic concept" which is within the remit of the Community legislature, AG Geelhoed also cross-refers to his thorough analysis of the legal basis where he had concluded that the measure finds its basis in the single market argument that barriers to trade may emerge as a result of the differences between the MSs' legislations, and in the comparative efficiency argument according to which "a national ban on production would be neither effective nor conceivable".[21] If considered in its entirety (including both the assessment of the legal basis and that of subsidiarity), the analysis of the AG is not superficial, even though it does not entail an independent evaluation of subsidiarity. Within this approach, however, the principle seems to lose its dignity and autonomy and, as a result, its separate meaning from the legal basis and its potential. Each EU action finds therefore its justification in the single market impetus of the EU and in the chosen legal basis. In this case the AG includes the comparative efficiency appraisal, which is the essence of subsidiarity, in the evaluation of the legal basis.

A further example of comparative efficiency reasoning by the Court can be found in the Joined Cases C-154/04 and C-155/04 *ANH v SoS for Health* concerning Directive 2002/46 on food supplements, where the Court concludes that "To leave Member States the task of regulating

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[19] Case C-491/01 *The Queen v SoS for Health (ex parte British American Tobacco Ltd and Imperial Tobacco Ltd)*, EU:C:2002:741, para. 181-183.

[20] Opinion of AG Geelhoed in Case C-491/01 *The Queen v SoS for Health (ex parte British American Tobacco Ltd and Imperial Tobacco Ltd)*, EU:C:2002:476, para. 285.

[21] Opinion of AG Geelhoed in Case C-491/01 *The Queen v SoS for Health (ex parte British American Tobacco Ltd and Imperial Tobacco Ltd)*, para. 285.

trade in food supplements which do not comply with Directive 2002/46 would perpetuate the uncoordinated development of national rules and, consequently, obstacles to trade between Member States and distortions of competition so far as those products are concerned".[22] AG Geelhoed addresses the issue briefly in the Opinion concerning this case, where he observes that the objective of the Directive to eliminate the barriers to intra-Community trade in food supplements "cannot be sufficiently achieved by the Member States individually and calls for action at Community level".[23] The single market imperative to remove the "obstacles to trade" legitimises the legislative intervention of the Community and underpins its 'necessity'. Like in *British American Tobacco*, the subsidiarity test is largely absorbed by the appraisal of the plea concerning the legal basis, which is where the Court analyses the situation that led to an action by the Community and, by identifying its legal basis, also explains why that action was necessary. The subsidiarity test appears therefore ancillary, if not entirely included, in the part of the judgment concerning the legal basis.

(b) Towards a more sophisticated comparative efficiency reasoning

In the Case *Vodafone* (C-58/08), concerning EC Regulation No. 717/2007 on the 'Eurotariff' for roaming services, the Court used the Amsterdam Subsidiarity Protocol as a guidance for its assessment and highlighted the importance of the Protocol for the protection of the autonomy of the MSs. The protection of the autonomy, however, is subordinated to a comparative efficiency reasoning in that the protection arising from subsidiarity can be afforded only if this is "consistent … with securing the aim of the measure and observing the requirements of the Treaty".[24] As a result, the Court accepted the view of the Community legislature (outlined in the Preamble to the Regulation) that the interdependence between wholesale and retail roaming charges requires the imposition of a ceiling to the retail charges as well, if the objective of the Community legislature (competition among network operators within one single coherent regulatory framework) is not to be frustrated.[25] Therefore, the comparative efficiency reasoning, which is the real essence of subsidiarity, justifies the imposition of a ceiling also on the retail charges.
The Opinion of the AG Poiares Maduro concerning this case is exemplary of the comparative efficiency reasoning (at some point the AG even uses the notion of "legislative efficiency"[26]). He explains, first, that action at Community level in relation to wholesale prices is plainly justified in light of a comparative efficiency evaluation based on the principle of subsidiarity. He notes that the national regulator from the customer's own MS will be unable to take action against providers in the MS visited by the customer in case these providers charge excessive rates to the customer's home network. He also notes that national regulators have no incentive to control the wholesale rates which will be charged to foreign providers and, as a result, to their customers. The reasoning of the AG is not concerned with the autonomy of the MSs and focuses on the explanation of why action at Community level is more efficient than action at MS level if a particular objective (setting Community-wide maximum prices for roaming) is to be achieved.[27]

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[22] Joined Cases C-154/04 *The Queen, on the application of ANH and Nutri-Link Ltd v SoS for Health* and C-155/04 *The Queen, on the application of Natural Association of Health Stores and Health Food Manufacturers Ltd v SoS for Health and NA for Wales*, EU:C:2005:449, para. 106.
[23] Opinion of AG Geelhoed in Joined Cases C-154/04 *The Queen, on the application of ANH and Nutri-Link Ltd v SoS for Health* and C-155/04 *The Queen, on the application of Natural Association of Health Stores and Health Food Manufacturers Ltd v SoS for Health and NA for Wales*, EU:C:2005:199, para. 95.
[24] Case C-58/08 *The Queen v SoS for Business (ex parte Vodafone)*, EU:C:2010:131, para. 73.
[25] Case C-58/08 *The Queen v SoS for Business (ex parte Vodafone)*, para. 76-78.
[26] Opinion of AG Poiares Maduro in Case C-58/08 *The Queen v SoS for Business (ex parte Vodafone)*, EU:C:2009:596, para. 32.
[27] Opinion of AG Poiares Maduro in Case C-58/08 *The Queen v SoS for Business (ex parte Vodafone)*, para. 27.

AG Poiares Maduro applies a typical comparative efficiency reasoning also to the regulation of retail rates, where he and the Court address the question of why the Community chose to set a Community-wide maximum retail rate rather than empowering the national regulators to set maximum retail prices for roaming services. Compliance with subsidiarity requires, as AG Poiares Maduro explains, that it "will have to be established that the Community legislator was in a better position than the national legislator to regulate the retail rates of roaming prices".[28] The AG splits the subsidiarity test into two sequenced sub-questions. The first concerns the need for action from the Community and the second the reasonable justification of that action. As already evidenced in relation to other cases, the problem of *if* legislative intervention by the Community is actually *necessary* in the first place, is usually treated as a political question that neither the Court nor the AGs scrutinise beyond verifying that there is a suitable legal basis in the Treaty. So, normally, the necessity of an intervention by the Community stems directly from the Treaty and the subsidiarity check does not add anything significant to the scrutiny. Here, however, the AG seems to argue that the existence of a Community competence, alone, does not justify a legislative intervention by the Community and, a fortiori, that the existence of a legal basis for the Community legislature may not necessarily justify the actual decision by the Community to legislate. If one looks more closely at the reasoning of the AG, though, it becomes clear that he envisages a comparative efficiency scrutiny that involves whether the Community or the MSs are better equipped to deliver a particular objective.

The second sub-question identified by Poiares Maduro concerns the reasonable justification. Compliance with the principle of subsidiarity, he says, "requires that there be a reasonable justification for the proposition that there is a need for Community action".[29] By "reasonable justification" the AG does not mean that the scrutinised Community act should be expressly motivated in relation to subsidiarity, but rather that the Community decision to act should not only be "needed", but also "reasonable". In a strong reassertion of the comparative efficiency test, AG Poiares Maduro explains that comparative efficiency is not limited to identifying the added value of Community action but also concerns "a determination of the possible problems or costs involved in leaving the matter to be addressed by the Member States".[30] In light of the outlined criteria the AG argues that it is the cross-border nature of roaming that renders the Community legislature more apt than national authorities to regulate it both at the level of wholesale and at the level of retail charges. This is because the 27 different national regulators may need too long to introduce effective control of retail prices, which would frustrate the imposition of a ceiling on wholesale charges. Additionally, these regulators may not place the same emphasis on addressing roaming costs as on domestic communications costs, and the Roaming Regulation facilitates "cross-border activity" and ultimately helps in the functioning of the internal market by ensuring adequate facilitation and protection of Community law free movement rights.[31] All of these are clearly comparative efficiency arguments with the final one establishing a link between free movements and the legislative intervention by the Community which is the usual argument used in cases involving subsidiarity to legitimise Community action.

Poiares Maduro's approach seems quite different to AG Geelhoed's in *British American Tobacco*. If Geelhoed had emasculated the principle and reduced it to an efficiency test confined to the appraisal of the legal basis, Poiares Maduro seems to relaunch the self-sufficiency of

[28] Opinion of AG Poiares Maduro in Case C-58/08 *The Queen v SoS for Business (ex parte Vodafone)*, para. 28.

[29] Opinion of AG Poiares Maduro in Case C-58/08 *The Queen v SoS for Business (ex parte Vodafone)*, para. 30.

[30] Opinion of AG Poiares Maduro in Case C-58/08 *The Queen v SoS for Business (ex parte Vodafone)*, para. 30. Paraphrasing the famous book by Ronald Dworkin, AG Poiares Maduro stresses that in scrutinising the need for Community action and the requirement of a reasonable justification for that action, "the Court is not substituting its judgment for that of the Community legislator but simply compelling it to take subsidiarity seriously" (ibid.).

[31] Opinion of AG Poiares Maduro in Case C-58/08 *The Queen v SoS for Business (ex parte Vodafone)*, para. 34-35.

subsidiarity by acknowledging that a suitable legal basis does not automatically guarantee compliance with the principle.

In *Luxembourg v EP and Council* (C-176/09) the subsidiarity plea advanced by Luxembourg merely restates by different words a previous plea in the same case concerning the rationality and internal coherence of the decision by the EU legislature to create a common framework for airports with more than 5 million passenger movements per year and those with fewer than 5 million passenger movements per year, provided that these are the main airport of their MS (this is the case of Luxembourg-Findel, the main Luxembourg hub with 1.7 million passengers per year). The Court rejected the plea and held that the exclusion from the scope of the Airport Charges Directive (2009/12) of some airports with annual traffic of below 5 million passengers per year is acceptable if they are not the main airport of a MS.[32] The comparative efficiency reasoning, which is not at the forefront of the Court's response in this particular case, emerges however from AG Mengozzi's Opinion, who observes that air traffic is a largely international matter and, as such, it is ill-suited for regulation at national level. He argues that leaving the determination of airport charges to the MSs may give rise to inconsistent national regulations and that "Such divergence could, in the long term, lead to *inefficiency*, and in the immediate present also make it easier for airports to adopt abusive conduct to the detriment of the airlines." (Emphasis added.)[33]

In *Estonia v EP and Council* (C-508/13) concerning the EU Accounting Directive,[34] the Court decided to proceed without an Opinion from the AG. The Court, however, engaged thoroughly with the subsidiarity plea from Estonia and carried out a comparative efficiency evaluation ("it must be considered whether the objective of the proposed action could be better achieved at EU level"[35]). The Court identified two objectives of the Directive, the first being harmonising the financial information of EU undertakings; the second being a special scheme taking into account the particular situation of small undertakings, on which the application of accounting requirements laid down for larger undertakings would be an excessive administrative burden. Estonia claimed that the second objective could have been achieved more effectively by the MSs. The Court, however, with a reasoning similar to the one in *Vodafone*, held that these two objectives are interdependent, and that, even if, as claimed by Estonia, the second of those two objectives were better achievable through action at MS level, the pursuit of that objective by the MSs and the resulting divergent standards set by the MSs could run counter the first objective of the Directive.[36] If one pays careful attention to the wording used by the Court ("that twofold objective could be best achieved at EU level"), it emerges clearly that the Court applies a comparative efficiency test, whereby the review shall not be about determining whether the twofold objective of the proposed action could have been *sufficiently* achieved by the MSs, but whether the twofold objective of the Directive could be achieved *better* ("best") by the EU or the MSs.[37]

The Case *Poland v EP and Council* (C-358/14) concerns the Tobacco Products Directive and relies on an Opinion by AG Kokott which she delivered on the same day and along the same lines as those in *Pillbox* (C-477/14) and *Philip Morris* (C-547/14). The reasoning follows the usual comparative efficiency template whereby "the Court must determine whether the EU legislature was entitled to consider, on the basis of a detailed statement, that the objective of

[32] Case C-176/09 *Luxembourg v EP and Council*, EU:C:2011:290, para. 80-82.

[33] Opinion of AG Mengozzi in Case C-176/09 *Luxembourg v EP and Council*, EU:C:2010:776, para. 109.

[34] Directive 2013/34/EU of the EP and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, [2013] OJ 2013 L 182/19.

[35] Case C-508/13 *Estonia v EP and Council*, EU:C:2015:403, para. 45.

[36] Case C-508/13 *Estonia v EP and Council*, para. 48. See also Case C-58/08 *The Queen v SoS for Business (ex parte Vodafone)*, para. 78.

[37] Case C-508/13 *Estonia v EP and Council*, para. 48. See also Case C-58/08 *The Queen v SoS for Business (ex parte Vodafone)*, para. 78.

the proposed action could be better achieved at EU level".[38] Like in *Estonia v EP and Council*, the Court argues that the interdependence of the two objectives of the Directive (facilitating the smooth functioning of the internal market for tobacco and related products while ensuring a high level of human health, especially for young people) means that, even if the protection of human health could hypothetically be better attained by the MSs, pursuing it at that level would run counter the achievement of the first objective (improvement of the functioning of the internal market for tobacco and related products).[39] Accordingly, the Court concludes, "the EU legislature could legitimately take the view that it had to establish a set of rules for the placing on the European market of tobacco products with characterising flavours and that, because of that interdependence, those two objectives could best be achieved at EU level".[40]

In the Opinion AG Kokott devises a two-stage test, whereby (a) "the EU institutions must satisfy themselves that they are acting only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States" (negative component of the test) and (b) "action by the Union is permissible only if and in so far as the objectives of the proposed action can, by reason of the scale or effects of the proposed action, be better achieved at Union level" (positive component of the test).[41] The negative component is an evaluation of the ability of the MSs to achieve sufficiently the proposed objectives. This is not, on its own, a comparative efficiency test, in that the evaluation does not include a comparison between the capabilities of the EU and of the MSs. The positive component, quite the opposite, entails an evaluation of whether the EU can achieve the proposed objectives 'better' than the MSs. This is indeed a comparative efficiency test as it involves a comparison between the efficiency of the EU and the MSs. The negative component requires an evaluation of the ability by the MSs to achieve certain goals, whilst the positive component implies a comparative evaluation of the EU and of the MSs. The AG acknowledges that the subsidiarity test ultimately addresses the same question from two different angles, namely "whether action should be taken at Union level or at national level in order to achieve the envisaged objectives".[42] It is therefore the achievability of these objectives that determines the result of the assessment, whereas the protection of the autonomy of the MSs remains in the background and ultimately fades away. A boost to the autonomy can be a desirable side effect of the application of the comparative efficiency test, but this does not, per se, push necessarily into one direction (downward to the MSs) rather than the other (upward to the EU), once again highlighting the limitations of subsidiarity as an autonomy clause.

The AG calls for the first time the subsidiarity test "comparative efficiency test",[43] although by this she means the two-stage test rather than the positive component of the test only.[44] She describes the negative component of the subsidiarity test (action which cannot be sufficiently achieved at national level) as an evaluation which embraces three aspects:

(a) the technical and financial capabilities of the MSs ("If some Member States are not actually capable of taking the necessary action to resolve a problem, that is an indication that the negative component of the subsidiarity test is satisfied"[45]);

(b) whether national, regional or local features are central to the issue ("If so, this tends to suggest that intervention should be at the level of the Member States and that *the matter*

[38] Case C-358/14 *Poland v EP and Council*, EU:C:2016:323, para. 114.
[39] Case C-358/14 *Poland v EP and Council*, para. 117.
[40] Case C-358/14 *Poland v EP and Council*, para. 118.
[41] AG Kokott Opinion re Case C-358/14 *Poland v EP and Council*, ECLI:EU:C:2015:848, para. 142. See also AG Kokott Opinion re Case Opinion re Case C-477/14 *Pillbox 38 (UK) Limited v SoS for Health*, ECLI:EU:C:2015:834, para. 165, and AG Kokott Opinion re Case C-547/14 *Philip Morris v SoS for Health*, ECLI:EU:C:2015:853, para. 275.
[42] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, EU:C:2015:848, para. 165. See also Opinion of AG Kokott in Case Opinion C-477/14 *Pillbox 38 (UK) Limited v SoS for Health*, EU:C:2015:834, para. 165, and Opinion of AG Kokott in Case C-547/14 *Philip Morris v SoS for Health*, EU:C:2015:853, para. 275.
[43] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 141.
[44] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 142.
[45] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 151.

should be addressed by the authorities which have greater proximity and expertise in respect of the action to be taken"[46], emphasis added), and
(c) whether the problem has cross-border dimensions ("it must be examined whether the problem to be resolved has a purely local or regional dimension or whether, on the contrary, it has cross-border dimensions which, by their nature, cannot be effectively addressed at national, regional or local level"[47]).
It is not immediately clear from the Opinion of the AG whether these three aspects should all be present and therefore if the Court should go over all the various steps to decide that only if all of them are met, then action should be taken at one level or another, or whether only one of these aspects would suffice in order justify action at a certain level. There are two observations that can be made in this respect. The first is that these three elements are largely if not entirely overlapping, in that if one condition is met, the others appear to follow. The second is that, looking at it more closely, AG Kokott is actually right in presenting the subsidiarity test, overall, as a "comparative efficiency test", in that also the negative component is ultimately about judging whether an objective cannot be achieved *sufficiently* at MS level and therefore, logically, should be achieved, not only better but necessarily, by the EU. In other terms, also the negative component of the test entails an efficiency comparison between the MSs and the EU exactly like the second, positive, component. However, it is striking that, in the context of the negative component, AG Kokott emphasises the "national, regional or local features", the "greater proximity" and the "purely local or regional dimension" of a problem as symptoms of a national responsibility. It could be that the AG, whilst proclaiming that the subsidiarity test is a comparative efficiency test, may have felt uncomfortable with a notion of subsidiarity which is entirely about comparing the efficiency of the MSs and the EU rather than about protecting the autonomy of the MSs and the SNAs.
In her analysis of the merit of the subsidiarity plea, instead of addressing each separate aspect of the negative component of the test, the AG concentrates on the key objective of the action (removal of obstacles to cross-border trade of tobacco products while ensuring a high level of health protection) and observes that "The removal of obstacles to cross-border trade in the European internal market, which is the focus of interest in Article 114 TFEU (Treaty on the Functioning of the EU), is a prime example of action which cannot, as a rule, be sufficiently realised at national level."[48] Since the removal of obstacles to trade and the protection of health are "interdependent objectives" in the context of the Directive,[49] the EU legislature cannot be accused of having committed a "manifest error of assessment" if it takes the view that there is a problem that has a cross-border dimension which cannot be resolved by action of the MSs alone and requires action at EU level.[50] The emphasis on the cross-border aspect and, therefore, on the negative component of the subsidiarity test rather than on the 'greater proximity' and the 'local/regional features' evidences a prominence in the reasoning of the AG of the comparative efficiency nature of the notion of subsidiarity as opposed to the protection of the autonomy. At the same time, the notion of "manifest error of assessment" denotes a possible light touch approach to subsidiarity in that not *any* error of assessment by the EU legislature shall lead to the annulment of an act, but only a "manifest error", that is, a particularly serious and significant error. AG Kokott appears therefore to be setting a high threshold for subsidiarity.
As to the positive component of the subsidiarity test (action which can, by reason of its scale and effects, be better achieved at Union level), AG Kokott notes that this considers whether

[46] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 152.
[47] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 153. See also the 'Overall approach to the application by the Council of the subsidiarity principle', adopted by the European Council at its meeting in Edinburgh on 11-12 December 1992 (see the Conclusions of the Presidency, Part A, Annex 1, Section II, point ii, published in Bull. EC No 12-1992), which refers to 'transnational aspects'.
[48] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 154.
[49] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 157.
[50] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 160.

action by the EU institutions offers an "added value", in the sense that the general interests of the EU can be better served by action at that level than by action taken at national level.[51] The AG explains that there is a "strong presumption" of added value for action at Union level "where the EU measure in question has the aim of resolving problems with a cross-border dimension", in particular eliminating obstacles to trade and thus improving the functioning of the European internal market. However, the AG also notes that the existence of a legal basis relating to the internal market, alone, cannot deprive the principle of subsidiarity of its role and effectiveness ("an internal market dimension cannot automatically lead to the conclusion that the positive component of the subsidiarity test must be considered and satisfied. Otherwise the principle of subsidiarity in internal market matters would be deprived of much of its practical effectiveness"[52]). Accordingly, AG Kokott 'demotes' the internal market argument from 'nail in the coffin' of subsidiarity pleas to mere 'strong presumption' of the added value of the Union action. This added value "is all the more evident the more Union citizens or market operators are affected and the larger the relevant trade volumes in question", while "the economic, social and political importance of the subject to be regulated must be assessed in the light of the Union's objectives as laid down in Article 3 TEU and taking into account the fundamental values on which the Union is founded under Article 2 TEU".[53] The decisive factor, therefore, according to the AG, to determine whether an EU action is compliant with subsidiarity, is that the action ought to be grounded in the Union's objectives in Article 3 TEU and in the fundamental values of the EU in Article 2 TEU. The comparative evaluation concerning subsidiarity may also involve a balancing of the general interest of the EU and the particular situation of a MS "where the action envisaged by the EU institutions affects the national identity of a Member State (Article 4(2) TEU) or its fundamental interests".[54] And, as in relation to the negative component of the subsidiarity test, AG Kokott stresses that a measure can be annulled for a breach of subsidiarity only if the Court concludes that the EU legislature has committed a "manifest error of assessment".[55]

(c) Cases concerning subsidiarity in which a proportionality reasoning arises

Article 5 TEU allows for Union action not only "if" the conditions of subsidiarity are met, but also "in so far as" they are met. This phrase alludes to the requirement of proportionality, according to which Union action should not go beyond what is necessary to achieve the proposed objectives. The proportionality test requires an examination of whether the same objectives could have been equally achieved with less burdensome measures and it may also be invoked by MSs and SNAs

[51] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 162.
[52] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 164.
[53] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 165.
[54] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 166.
[55] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 168. In the same Opinion at para. 169 the AG also makes reference to the existence of an international obligation for the EU arising from the WHO Framework Convention on Tobacco Control which the Union was required, within the scope of its competences, to contribute to implement and concludes that "Such an international obligation must be borne in mind in connection with the question whether and in what manner the EU institutions exercise the competences conferred on them."
The Tobacco Products Directive is the subject of subsidiarity pleas also in the Case C-477/14 *Pillbox 38 (UK) Limited, trading as Totally Wicked v Secretary of State for Health*, EU:C:2016:324; of the Case C-547/14 *Philip Morris v SoS for Health*, EU:C:2016:325; and of the Case C-151/17 *Swedish Match AB v SoS for Health*, EU:C:2018:938. These cases do not add anything new to the earlier case-law and reiterate the two-stage test launched by AG Kokott in *Poland v EP and Council* (*Pillbox* and *Philip Morris*) and the reasoning based on the interdependence between the objectives (*Swedish Match* and *Philip Morris*).
The Case *Swedish Match* in particular is another example of comparative efficiency reasoning whereby, without even looking at whether the objective of an action could be achieved by the MSs alone, the Court immediately addressed the comparative efficiency of the action (para. 66).

to preserve their freedom of action against too intrusive Union action.[56] This explains why the Amsterdam Subsidiarity Protocol required Union institutions to leave as much scope for national decision as possible, for example, by preferring directives to regulations and framework directives to detailed measures and by minimising the burden of Union measures for, inter alia, national governments and local authorities.[57]

The challenge of the MSs to a proposed Union measure on the basis that such measure is not "necessary" often also relies on an alleged infringement of the principle of proportionality. That principle can be distinguished from subsidiarity in that it presupposes the legitimacy of the Union action in question and only scrutinises its concrete intensity and scope.[58] There are, however, cases in which subsidiarity and proportionality arguments are advanced together,[59] or where the distinction between the two appears blurred in that the Court or the AG assess proportionality as part or in the context of subsidiarity.[60] The latter situation is exemplified in the Case *Arcor v Germany*, where the Court identified the principle of subsidiarity with the idea that "the Member States retain the possibility to establish specific rules on the field in question".[61]

Another example is AG Kokott's Opinion in *Poland v EP and Council*, where she argues that "even where a common European interest and certain international obligations exist, not all aspects of the manufacture, presentation and sale of tobacco or related products necessarily require regulation in EU law at the present time. For example, the implementation of the adopted rules, the monitoring of compliance with those rules on the ground and the imposition of any penalties are matters which the Union can, as a rule, consider to be resolved better by the national authorities in the light of specific national, regional and local features. Accordingly, the contested directive leaves such duties as far as possible to the Member States."[62] Through this reference to a more detailed regulation left to the MSs, the AG is de facto suggesting that subsidiarity leads to the obligation for the EU to leave the implementation and monitoring, as well as the imposition of any penalties, to the MSs (and/or their SNAs). This suggestion clearly resembles the proportionality requirement of not exceeding what is necessary to achieve the objectives of the Treaties. What appears unclear, though, is whether this is an achievement of subsidiarity (or proportionality) or is it linked to the nature of the directives as an instrument of legislation, which should be limited to general principles and guidelines.

Subsidiarity cases concerning national or regional rules that may jeopardise the functioning of the internal market

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[56] Cf. 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* (Springer, 2011), p. 58); K. Lenaerts and P. Van Nuffel, *European Union Law* (3rd edition, Sweet & Maxwell, 2011), p. 144-145; R. Schütze, *European Constitutional Law* (Cambridge University Press, 2012), p. 181-184; D. Harvey, 'Federal Proportionality Review in EU Law: Whose Rights Are They Anyway?', 89 *Nordic Journal of International Law* (2020), p. 309.

[57] Amsterdam Subsidiarity Protocol, points 6 and 7.

[58] Cf. P. Van Nuffel, in C. Panara and A. De Becker (eds.), *The Role of the Regions in EU Governance*, p. 58; Opinion of AG Léger in Case C-84/94 *UK v Council*, para. 124-26; Opinion of AG Trstenjak in Case C-539/09 *Commission v Germany*, EU:C:2011:345, para. 87-92.

[59] See, for example, the Case C-84/94 *UK v Council*.

[60] The distinction between subsidiarity and proportionality appears somewhat blurred in the Case C-491/01 *The Queen v SoS for Health (ex parte British American Tobacco Ltd and Imperial Tobacco Ltd)*, para. 184. See also Opinion of AG Poiares Maduro in Case C-58/08 *The Queen v SoS for Business (ex parte Vodafone)*, para. 36: "Finally, as the Council notes, the setting of a price ceiling allows for national variations to be taken into account in the determination of prices below this level. As such the Community regulation still leaves some margin for the intervention of the Member States. In light of all of the aforementioned considerations, the Community regulation cannot be said to violate the principle of subsidiarity."

[61] Case C-55/06 *Arcor v Germany*, EU:C:2008:244, para. 144.

[62] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, EU:C:2015:848, para. 170. It has to be pointed out, though, that the case in question deals with subsidiarity and proportionality pleas separately.

Subsidiarity is usually invoked in cases that concern challenges of EU rules by the MSs. There are, however, examples of cases in which subsidiarity is invoked by the MSs to defend their own rules or rules of the SNAs that allegedly undermine the integrity of the single market.
In *Bosman* (C-415/93) the principle of subsidiarity was invoked for the first time by a MS before the Court of Justice, where, "referring to the freedom of association and autonomy enjoyed by sporting federations under national law", Germany submitted that "by virtue of the principle of subsidiarity, taken as a general principle, intervention by public, and particularly Community, authorities in this area must be confined to what is strictly necessary."[63] It transpires from this argumentation that Germany sees the sporting sector as enjoying a considerable degree of autonomy under national law and that this shall lead to an intervention by public authorities, including the Community, *only where absolutely necessary*. It seems to me that Germany is emphasising the autonomy protection aspect of the principle of subsidiarity and, in effect, it is referring to a 'horizontal' notion of subsidiarity, whereby the state ("the public authorities") shall abstain from legislative interventions unless these are necessary as an aid to the economy or to particular segments of the society (family, groups, associations).[64] This interpretation of the principle of subsidiarity reflects the original and most genuine meaning of the principle in the social teaching of the Catholic Church, according to which a society should abstain from intervening in matters that can be handled by a smaller society. Germany is indeed pointing out that no public authority should intervene in this area. An alternative explanation of Germany's submission could be that, although it invokes subsidiarity, it is in fact using a proportionality argument ("intervention by public authorities in this area must be confined to what is strictly necessary"[65]).
The Court's response to Germany's argument is that the principle of subsidiarity "cannot lead to a situation in which the freedom of private associations to adopt sporting rules restricts the exercise of rights conferred on individuals by the Treaty".[66] This is not an economic efficiency argumentation, at least directly. One may argue, however, that *indirectly*, somewhat in the background, the Court might be implying that the Community's intervention could be justified by the creation and maintenance of the economic efficiency of the internal market, which in turn requires compliance with the four fundamental freedoms pursuant to a decision crystallised in the Treaty, rather than on the basis of an ad hoc assessment concerning this particular case.[67] The approach followed in this case reflects, therefore, the usual pattern that sees the CJEU prioritising the market freedoms above the prerogatives of the SNAs whenever their regulations restrict these freedoms.[68]
On a later occasion Germany used the principle of subsidiarity as a defence against an alleged breach of the PPE Directive[69] by some *Länder* (the territorial units that constitute the Federal

[63] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, EU:C:1995:463, para. 72.
[64] See, for example, Article 118(4) of the Italian Constitution.
[65] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, para. 72.
[66] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, para. 81.
[67] The Court, though, did not adopt the view of AG Lenz that the fundamental freedoms are part of the Community's exclusive competence. See Opinion of AG Lenz in Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, EU:C:1995:293, para. 130.
[68] Cf. E. Cloots, 'The European Court of Justice and Member State Federalism: Balancing or Categorisation?', in E. Cloots, G. De Baere and S. Sottiaux (eds.), *Federalism in the European Union* (Hart, 2012), p. 322-361; C. Panara, 'The 'Europe *with* the Regions' Before the Court of Justice' 26 *Maastricht Journal of European and Comparative Law* (2019), p. 271-93.
[69] Council Directive 89/686/EEC of 21 December 1989 on the approximation of the laws of the Member States relating to personal protective equipment, [1989] OJ 1989 L 399/18.

Republic) in the Case *Commission v Germany* (C-103/01).[70] The *Länder* had made personal protective equipment for firefighters subject to requirements additional to those laid out by the Directive. According to the Court, however, different rules in this field may constitute "a barrier to trade with direct consequences for the creation and operation of the common market. The harmonisation of such divergent provisions may, by reason of its scope and effects, be undertaken only by the Community legislature".[71] The reasoning of the Court entails both an argument acknowledging the primacy of the market freedoms vis-à-vis the prerogatives of the *Länder* based on German constitutional law, in that divergent rules may become barriers to trade, and a comparative efficiency argument establishing that only the Community (not the MSs nor the SNAs) can harmonise the diverging provisions in this field by eliminating the barriers to trade.

A reasoning prioritising comparative efficiency rather than the protection of autonomy emerges in this area as well, although, probably due to the fact that the analysed cases are rather old, in a less sophisticated and accomplished manner than in the cases analysed previously. As we have seen, the necessity of a legislative intervention of the EU arises directly from the Treaty. Accordingly, subsidiarity does not afford much protection to MSs and SNAs beyond the interpretation and delimitation of the legal basis. Additionally, there is no presumption of competence in favour of the MSs that emerges from the reasoning of the CJEU.

Cases concerning the duty to state reasons

The Amsterdam Subsidiarity Protocol of 1997 laid out procedural requirements to ensure that the principle of subsidiarity received due consideration by the Union legislator. The Protocol established that "For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators."[72] This obligation contained an additional duty for the Commission, that had to "justify the relevance of its proposals with regard to the principle of subsidiarity", as well as in relation to the Parliament and the Council, that had to "consider their consistency with Article 3b of the Treaty".[73] Similar obligations are put forward in the new Subsidiarity Protocol attached to the Treaty of Lisbon, where it stipulates that "Draft legislative acts shall be justified with regard to the principle of subsidiarity and proportionality" through "a detailed statement making it possible to appraise compliance with the principles".[74]

A number of subsidiarity cases concern the duty to state reasons or, better, the alleged failure by the EU lawmakers to explain why an act complies with the principle or to disclose sufficient details about compliance with the principle. One important thing to note is that the duty to state reasons could be seen as something indicating the existence of a presumption of competence in favour of the MSs, which could suggest that subsidiarity is in fact an autonomy clause. That the EU institutions have to explain the reasons for the decision to legislate seems indeed to underpin the conclusion that, as a rule, the EU should refrain from legislating unless its intervention is necessary. The CJEU, however, appears to have mitigated the duty to state reasons and the reasoning the EU institutions use to justify their intervention is in essence a comparative efficiency reasoning rather than the typical reasoning one would expect in relation to an autonomy clause.

As to the mitigations of the duty to state reasons, in a number of cases the Court pointed out that there is no duty to refer expressly to the principle of subsidiarity in the act. For example,

[70] Case C-103/01 *Commission v Germany*, EU:C:2003:301, para. 19.
[71] Case C-103/01 *Commission v Germany*, para. 47. Subsidiarity does not justify a practice of a MS which is contrary to the obligations of a Directive according to Case C-503/17 *Commission v UK*, EU:C:2018:831, para. 55.
[72] Point 4 of the Protocol.
[73] Point 9 and Point 11 of the Protocol respectively.
[74] Article 5 of the new Subsidiarity Protocol.

in *Germany v Parliament and Council* (C-233/94), the applicant claimed that the Community legislature had failed to explain why the act is compliant with subsidiarity. The Court stressed that, provided that subsidiarity has been duly considered by the institutions, there is no obligation to refer to it expressly in the act.[75] Along the same lines, in *Netherlands v Parliament and Council* (C-377/98) the Court dismissed the claim that the Directive on the legal protection of biotechnological inventions[76] did not state sufficient reasons. The Court found that the duty to state reasons was met, as "Compliance with the principle of subsidiarity is necessarily *implicit* in the fifth, sixth and seventh recitals of the preamble to the Directive, which state that, in the absence of action at Community level, the development of the laws and practices of the different Member States impedes the proper functioning of the internal market. It thus appears that the Directive states sufficient reasons on that point." (Emphasis added).[77]

Another mitigation concerns the absence of a duty for the EU institutions to state reasons in relation to each and every provision of an act. In *Estonia v Parliament and Council* (C-508/13), concerning the EU Accounting Directive,[78] the Court held that there is no duty to state reasons in relation to each individual provision of an act ("the Republic of Estonia cannot successfully argue that the determination of compliance with the subsidiarity principle should have been made not for the Directive as a whole, but for each of its provisions individually") and that it is presumed that a MS knows about the fundamental reasons of an act also as a result of its participation in the Council.[79]

A further mitigation concerns the lack of detail of the reasons the EU lawmakers have to give in order to substantiate compliance with subsidiarity. The Court accepted that a mere reference to the principle would be sufficient, if there is evidence that subsidiarity was taken into account in the legislative process. In *Philip Morris* (C-547/14), for example, the Court held that the Commission's proposal for a directive and its impact assessment included sufficient information to enable both the Union legislature and national parliaments to determine whether the proposal complied with the principle of subsidiarity. These documents, according to the Court, were "showing clearly and unequivocally the advantages of taking action at EU level rather than at Member State level", while also enabling individuals to understand the reasons relating to the principle and the Court to exercise its judicial review.[80]

The Court's approach to the duty to state reasons appears prima facie as light touch. It has to be noted that in her Opinions in *Poland v Parliament and Council* (C-358/14) and *Philip Morris* (C-547/14), AG Kokott urged the EU legislature to provide more detailed explanations in the future of why a legislative act is compliant with subsidiarity.[81] In these Opinions there is also an important reference to the fact that a number of statements in the Directive address the requirements governing its legal basis which can also be applied to the principle of subsidiarity, given that, in the words of the AG, "there is considerable overlap between the reasoning which the Union legislature is required to follow in the context of Article 114 TFEU [the legal basis]

[75] C-233/94 *Germany v Parliament and Council*, EU:C:1997:231, para. 25-29.

[76] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, [1998] OJ 1998 L 213/13.

[77] Case C-377/98 *Netherlands v Parliament and Council*, EU:C:2001:523, para. 33. See also Opinion of AG Jacobs in Case C-377/98 *Netherlands v Parliament and Council*, EU:C:2001:329, para. 82.

[78] Directive 2013/34/EU of the EP and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, [2013] OJ 2013 L 182/19.

[79] Case C-508/13 *Estonia v Parliament and Council*, EU:C:2015:43, para. 51 and 62 respectively. See also Case C-358/14 *Poland v Parliament and Council*, EU:C:2016:323, para. 125.

[80] Case C-547/14 *Philip Morris v SoS for Health*, para. 226-27.

[81] See Opinion of AG Kokott in Case C-358/14 *Poland v Parliament and Council*, para. 177 and 188; see also Opinion of AG Kokott in Case C-547/14 *Philip Morris v SoS for Health*, para. 290. E. Ruiz Cairó, 'Different Arguments Lead to the Same Result: The Tobacco Products Directive Is Declared Valid by the Court of Justice, 1 *European Papers*, (2016), p. 748.

and of Article 5(3) TEU".[82] This sentence may create the impression that the principle of subsidiarity operates like an autonomy clause, because, in addition or as an alternative to the duty to explain the reasons, there must be a rigorous analysis of the conditions for legislative intervention already during the decision-making process, alongside a justification of the measure through a reasoning that follows intellectual processes similar to the identification of the legal basis. The suggested similarity between the substantiation of subsidiarity and of the legal basis may be mistakenly seen as indicating that the rule, in subsidiarity cases, is that there exists a presumption of competence in favour of the MSs unless a legal basis can be identified. The reality is that AG Kokott does not depart from and actually envisages a typical comparative efficiency reasoning, whereby what matters is the added value of Union action ("the benefits of adopting an internal market harmonisation measure") or the shortcomings of action at national level ("the disadvantages of disparate national rules").[83]
The approach of the Court to the duty to state reasons is not lighter touch in relation to subsidiarity than to the statement of reasons required by the second paragraph of Article 296(2) TFEU, applicable in general to the legal acts of the Union. There is a clear trend in the CJEU's case law that shows that it takes a relaxed approach to the application of Article 296(2), or at least it shows that it is not interpreting Article 296(2) strictly. The case law shows that, provided that the relevant institution has offered some background as to why the measure was taken and the objectives of the measure in question have been stated within it, then the institution in question has satisfied the requirements of Article 296(2).[84]

Concluding remarks

The principle of subsidiarity, in theory, protects the autonomy of the MSs and of the SNAs. As stated at the outset of the article, however, an autonomy clause shall prioritise the political autonomy of the MSs and of the SNAs and value this autonomy even where considerations of efficiency would push towards centralisation. An autonomy clause typically assumes that the competence of the lower levels of government constitutes the rule in relation to local affairs. Autonomy clauses, furthermore, limit the interventions of the superior levels of government in the affairs of the lower ones, both in relation to the right of a bigger society to intervene in the affairs of a smaller one, and for what concerns the pervasiveness of that intervention, which should leave as much discretion as possible to the lower level of government.[85]
The first thing to point out is that subsidiarity concerns the exercise of powers and therefore comes into play after the preliminary question concerning the existence and scope of a legal basis has been settled. In *Poland v EP and Council*, AG Kokott indicates that whilst the legal basis decides whether the Union actually has a competence to adopt certain measures, the

[82] See Opinion of AG Kokott in Case C-358/14 *Poland v Parliament and Council*, para. 180, and Opinion of AG Kokott in Case C-547/14 *Philip Morris v SoS for Health*, para. 293. In both Opinions AG Kokott says that "there is considerable overlap between the reasoning which the Union legislature is required to follow in the context of Article 114 TFEU [the legal basis of the act] and of Article 5(3) TEU."
[83] See Opinion of AG Kokott in Case C-358/14 *Poland v Parliament and Council*, para. 180 and 182, and Opinion of AG Kokott in Case C-547/14 *Philip Morris v SoS for Health*, para. 293 and 295.
[84] See, in particular, Case 250/84 *Eridania v Cassa conguaglio zucchero*, EU:C:1986:22, para. 37-40; Case C-478/93 *Netherlands v Commission*, ECLI:EU:C:1995:324, para. 48-49; Case C-466/93 *Atlanta Fruchthandelsgesellschaft and Others (II) v Budesamt für Ernährung und Forstwirtschaft*, EU:C:1995:370, para. 16; Case C-168/98 *Luxembourg v Parliament and Council*, EU:C:2000:598, para. 62-65; C-5/01 *Belgium v Commission*, EU:C:2002:754, para. 68; Case C-361/01 P, *Kik v OHIM*, EU:C:2003:434, para. 102; Case C-501/00 *Spain v Commission*, EU:C:2004:438, para. 73; Case C-221/09 *AJD Tuna*, EU:C:2011:153, para. 58; Case C-62/14 *Gauweiler and Others*, EU:C:2015:400, para. 70.
[85] On subsidiarity as implying a presumption in favour of the lower units of government see, inter alia, T. Latimer, 'Against Subsidiarity', 26 *The Journal of Political Philosophy* (2018), p. 282; A.G. Toth, 'The principle of subsidiarity in the Maastricht Treaty', 29 *Common Market Law Review* (1992), p. 1100; and N. Emiliou, 'Subsidiarity: an effective barrier against "the enterprises of ambition"?', 17 *European Law Review* (1992), p. 385.

principle of subsidiarity determines whether and in what manner the EU shall exercise that competence in a particular case.[86] Subsidiarity appears therefore ancillary to the assessment of the legal basis of an act.[87] Questions of subsidiarity come logically after the question around the correct legal basis has been settled. The interpretation of the legal basis de facto absorbs large part of the legal reasoning concerning subsidiarity.[88]

The analysis of the cases demonstrates that in the interpretation of subsidiarity by the Court there is a coexistence of autonomy and efficiency considerations. The duty to state reasons, albeit mitigated in various ways, indicates that the Union has the burden of proof in relation to the legitimacy and rationale for its legislative interventions which points to the existence of an underlying presumption of competence of the MSs. The proportionality element of subsidiarity, that is, the requirement to not go beyond what is necessary for the regulation of a particular matter, again, suggests that the autonomy of the MSs is inherent to this principle. Additionally, subsidiarity has been used in one case to justify the inaction of the EU,[89] which demonstrates the possible role of subsidiarity for legitimising a lack of intervention by the EU legislator. Last but not least, the principle of subsidiarity has been used to limit EU action also in areas other than legislation,[90] which, again, appears to confirm the overarching role of this principle for the protection of the autonomy of MSs and SNAs.

Considerations of comparative efficiency, however, are largely prevalent over considerations concerning the autonomy of the MSs (or of the SNAs) in the reasoning of the Court and of the AGs. This is quite different to the autonomy clauses, in which the devolution of authority to the lower level, albeit counterbalanced by considerations of good governance, feasibility and efficiency, constitute the core feature of as well as the rationale for the clause. The sphere of own responsibility of local authorities, for example, is typically defined by a general clause featuring a 'local interest' (or 'local affair') criterion. In principle, this criterion grants the local authorities a right to regulate and manage all matters which concern the local community, provided that they can be effectively handled at local level. Accordingly, in some states the local authorities in principle have the right to manage all local affairs, even in the absence of a specific legal basis (see, for example, Belgium, Articles 41(1) and 162(1) No. 2 of the Constitution; Germany, Art. 28(2) of the Fundamental Law (*Grundgesetz*); Greece, where Article 102(1) Const. lays out a presumption of competence in favour of the local authorities;[91] The Netherlands,

[86] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 144.

[87] See also A. Portuese, 17 *Columbia Journal of European Law* (2011), p. 252; Opinion of AG Kokott in C-358/14 *Poland v EP and Council*, para. 180; Opinion of AG Kokott in Case C-547/14 *Philip Morris v SoS for Health*, para. 293.

[88] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 180, and Opinion of AG Kokott in Case C-547/14 *Philip Morris v SoS for Health*, para. 293.

[89] The Case C-264/18 *P.M. and Others*, EU:C:2019:472, concerns the exclusion by a directive of certain legal services from the application of the procedures for the award of public contracts. The referring court asked whether this self-restraint by the EU legislator infringed the principle of subsidiarity. The Court answered that the EU left it ultimately to the national legislatures to decide whether, in relation to certain legal services, the rules on the award of public contracts should be applicable. The Court has not used subsidiarity, here, as a tool to require the EU to take action. On this occasion, therefore, the principle of subsidiarity appears to have operated as an autonomy clause to the advantage of the MSs.

[90] Case C-539/09 *Commission v Germany*, EU:C:2011:733. Even here, however, the CJEU carried out a comparative efficiency reasoning. The Court dealt with Germany's objections to the audit by the Court of Auditors of the collection of the VAT by the MSs. At para. 84 the Court observes that "Since such an audit is intended to ensure that cooperation involving the authorities of all the Member States is functioning properly, proper functioning on which depends partly the ability of each authority to combat tax evasion and tax avoidance effectively in its own territory, *that audit will necessarily be better carried out centrally at Community level by the Court of Auditors since, in particular, the scope of the Court of Auditors' power, unlike that of the national courts of auditors, extends to all of the Member States*." (Emphasis added). See also the Opinion of AG Trstenjak in relation to the same case (especially para. 81 and 85).

[91] The presumption of competence implies that in the rare cases in which an issue is not regulated by law, a local authority may act on a matter of local interest.

Art. 124(1) of the Constitution; Poland, Art. 163 of the Constitution; England, Section 1 Localism Act 2011).[92]

There is only one Opinion by AG Kokott in which she suggests that in relation to subsidiarity pleas "it must be ascertained whether national, regional or local features are central to the issue. If so, this tends to suggest that intervention should be at the level of the Member States and that the matter should be addressed by the authorities which have greater proximity and expertise in respect of the action to be taken."[93] However, in the same Opinion the AG points out that the judicial review of subsidiarity is limited in that the Court shall annul an act only where the EU legislator committed a "manifest error of assessment".[94] There is therefore no real presumption of competence in favour of the MSs arising from subsidiarity. In *Poland v EP and Council*, AG Kokott even mentions a strong presumption of added value of Union action, in this way creating the impression that the presumption of competence, if there is one, may work in favour of the EU rather than of the MSs.[95]

The principle of proportionality, epitomised by the fact that "the Union shall act only … *insofar as* the objectives of the proposed action cannot be sufficiently achieved by the Member States" (emphasis added), aims to contain the legislative interventions of the EU to what is necessary to the achievement of a particular objective. According to some scholars, the most important part of the principle of subsidiarity resides in this notion of federal proportionality.[96] This article corroborates the idea that, since the autonomy of the MSs and of the SNAs is not sufficiently protected through subsidiarity ("the Union shall act only *if*"), then subsidiarity as proportionality (federal proportionality) may need to play a bigger role in the reasoning of the Court to protect the prerogatives of the MSs and of the SNAs.

There is some limited evidence that federal proportionality could promote the self-restraint of the Union legislator and protect the autonomy of the MSs and of the SNAs. For example, AG Trstenjak uses extensively proportionality in *Commission v Germany*,[97] and AG Poiares Maduro uses a proportionality argument in *Vodafone*, where he notes that the setting of a price ceiling allows for national variations to be taken into account in the determination of prices below this level. Therefore, he concludes, the Community regulation still leaves some margin for the intervention of the Member States.[98] Another clear example of federal proportionality can be seen in the reasoning of AG Kokott in *Poland v EP and Council*, where she notes that the contested directive leaves the implementation of the adopted rules, the monitoring of compliance with those rules and the imposition of any penalties to national authorities in the light of specific national, regional and local features.[99] However, as AG Kokott puts it in the same Opinion, an infringement of the proportionality principle by the Union legislature can be taken to exist only where the EU measure concerned is "manifestly disproportionate", that is to say, "where it is manifestly inappropriate for attaining the legitimate objectives pursued, goes manifestly beyond what is necessary to achieve those objectives or entails disadvantages which

[92] C. Panara, 'The contribution of local self-government to constitutionalism in the member states and in the EU multilayered system of governance', in C. Panara and M. Varney (eds.), *Local government in Europe. The 'fourth level' in the EU multilayered system of governance* (Routledge, 2013), p. 378–83.
[93] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 152.
[94] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 146 and 168.
[95] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 164.
[96] R. Schütze, 68 *Cambridge Law Journal* (2009), p. 525-536; D. Harvey, 89 *Nordic Journal of International Law* (2020), p. 303-326. More sceptical about the potential of federal proportionality are C. Panara, 22 *European Public Law* (2016), p. 322-25; and more recently N. Petersen and K. Chatziathanasiou, 'Balancing Competences? Proportionality as an Instrument to Regulate the Exercise of Competences after the PSPP Judgment of the Bundesverfassungsgericht', 17 *European Constitutional Law Review* (2021), p. 313-334.
[97] Opinion of AG Trstenjak in Case C-539/09 *Commission v Germany*, para. 122-40.
[98] Opinion of AG Poiares Maduro in Case C-58/08 *The Queen v SoS for Business (ex parte Vodafone)*, para. 36.
[99] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 170.

are manifestly disproportionate to its objectives."[100] This means that federal proportionality, like subsidiarity, is subject to only limited judicial review.[101]

Subsidiarity may entail limitations to the powers of the EU, but it typically prioritises efficiency above autonomy in the exercise of the legislative responsibilities. As well as through federal proportionality, in the EU the autonomy of the MSs and of the SNAs is protected primarily via the legal bases in the Treaty and the legislative procedures, including the early warning system, that safeguard the rights of the MSs.[102] As AG Kokott says in *Poland v EP and Council*, "Scrutiny of these measures is exercised primarily at political level, with the participation of the national parliaments, and for that reason the Treaty of Lisbon introduced a dedicated procedure in Protocol No 2."[103]

In light of the fact that subsidiarity is about efficiency rather than autonomy, further research seems required in particular in relation to federal proportionality and the interpretation techniques used by the Union legislator and the Court of Justice for the delimitation of the legal bases.

[100] Opinion of AG Kokott in C-358/14 *Poland v EP and Council*, para. 89. The AG invokes as supporting authorities the Judgment in *Gauweiler and Others* (C-62/14, EU:C:2015:400, para. 74, 81 and 91); as well as the Judgments in *Vodafone and Others* (C-58/08, para. 52); *S.P.C.M. and Others* (C-558/07, EU:C:2009:430, para. 42), and *Afton Chemical* (C-343/09, EU:C:2010:419, para. 46).

[101] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 146. Cf. C. Panara, 22 *European Public Law* (2016), p. 322-325.

[102] A. Engel, *The Choice of Legal Basis for Acts of the European Union* (Springer, 2018), p. 1-2.

[103] Opinion of AG Kokott in Case C-358/14 *Poland v EP and Council*, para. 146. Cf. C. Panara, 22 *European Public Law* (2016), p. 325-30.