

Managing the Deficit: Subsidiarity and Democratic Legitimacy in the EU



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University of Stavanger

Sander Malmin

Student number: 237978

Supervisor: Solveig Grønnestad

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Abstract

This thesis explores if, and to which degree, the democratic legitimacy of the European Union has improved since implementing the principle of subsidiarity in the 1992 Maastricht Treaty. It explains why democratic legitimacy can be thought of as a combination of input, output, and throughput legitimacy, discusses how subsidiarity could in principle affect each, and evaluates if legitimacy in these areas have improved to the present date. The thesis finds that there are some improvements to output legitimacy on a local level, but that while EU subsidiarity may have had an impact, competing explanations of the development also exist. In addition to the positive output development, it finds positive developments to input and throughput legitimacy. On a national level the improvements to output legitimacy are insignificant. Nevertheless, input and throughput legitimacy both see positive developments. Still, there is more room for improvement, as it seems that Member States either lack the capability or willingness to use the new tools afforded to them. The EU Commission seems to have adhered decently to the changes, but has taken the technical interpretation of subsidiarity, which undermines the purpose of the principle. The European Court of Justice has had virtually no effect on the development of democratic legitimacy in terms of subsidiarity.

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1 Introduction

The advent of globalization and its acceleration through digitalization has brought to the forefront questions on how to structure large organizations in effective and normatively legitimate ways. Before the 1992 Maastricht Treaty, Member States were increasingly concerned about the creeping EU competences (Öberg, 2017). The EU competences kept increasing because of the implicit insistence on the neutrality of economic goals (Bartl, 2015). Economic growth often comes at the expense of other normative concerns, which in turn creates the desire for Community restriction and deeper political deliberation. As the European Union continued to grow in the decades after its inception, the desire for decentralization and political legitimacy increased among Member States.

The principle of subsidiarity is a principle for structuring organizational responsibilities. The principle itself has ancient roots and grew in popularity sometime after the Reformation (Follesdal, 2014). There are multiple ways to conceptualize subsidiarity, and some interpretations give opposing conclusions. This is also the case within the EU: terms such as competence subsidiarity, proportional subsidiarity and substantive subsidiarity regularly appear in the literature. With that in mind, the selected – albeit disputed – definition of EU subsidiarity in this thesis is as follows: “In areas of non-exclusive competence, the Community should act if and only if the objectives of the proposed action can only be achieved by Community wide action: in such circumstances the objectives in question cannot be sufficiently achieved by the Member States, and can be better achieved by the Community” (Wyatt, 2006, p. 7). The key idea in this definition lies in the phrase ‘can only be achieved by Community wide action.’ Here it is only acceptable to intervene if the lower level is incapable of managing the issue on its own; it is not enough that the Community is more competent or that Community action may be more effective.

Democratic legitimacy consists of three constitutive parts: social legitimacy, legal legitimacy, and normative legitimacy. Social legitimacy regards the degree to which subjects abide by laws and authorities. The legal legitimacy of laws and authorities is high when they are enacted and exercised within the constitutional boundaries and using appropriate procedures. Legal legitimacy is a necessary, but not sufficient condition of normative legitimacy. Normative legitimacy is to which degree authorities can impose a moral duty on citizens to comply to its

laws, and is often considered to be fundamental (Follesdal, 1998). Normative legitimacy can be taken to be interchangeable with democratic legitimacy in this text.

Previous research in this topic may be divided into three general areas. First is the discussion of democratic legitimacy (Bartl, 2015; Dobson, 2004; Follesdal, 1998, 2003; Lijphart, 2012; Majone, 1998; Pogge, 1992; Puchala, 1999). Discussions here include but are not limited to: whether majority rule is always just; international liberalism vs realism in intergovernmental contexts; whether the EU is a federation, a confederation, or something in between; and how much of a democratic deficit is present in the EU. Second is the theoretical discussion of subsidiarity in a more abstract sense (Davies, 2006; De Búrca, 1998; Follesdal, 2013, 2014; Swaine, 2000). Key subjects here are about the origin and purpose of subsidiarity, and if the principle can work when there is heterogeneity of values among groups. Third and finally is the practical application of the principle within institutions and organizations (Horsley, 2012; Lenaerts, 1993; Öberg, 2017; Raunio, 2010; Sander, 2005; Wyatt, 2006). This final discussion spans a wide range of subject, among them the allocation of power *viz-á-viz* Community and Member State, whether subsidiarity should be interpreted as technical or normative principle, and when shared or exclusive competencies are more appropriate.

The aim of this thesis is to answer the following question: How has the democratic legitimacy of the EU developed since the implementation of subsidiarity with the Maastricht Treaty? The EU is ethnically and culturally diverse, in addition to being the size of a continent. This leads to a plethora of difficulties both in questions about who gets to decide, and how to do so effectively. One major goal of the EU project is the fostering of dual loyalty among citizens – both to the Union and their national government. To achieve this loyalty they need trust: citizens must be sure of the future regularity of the conduct between Union and State (Follesdal, 2006). In simpler terms, the citizens of the EU must be confident that the Union won't collapse, divorce, or turn into something unrecognizable; and given the broader history of European conflict, stability ought not be taken for granted.

The theory on democratic legitimacy is solid and it is what I will be mainly building upon. The two most – in my view – important ways in which subsidiarity in the EU operates are: restricting Community action and creating public deliberation on the role of each entity in the Union. The theories of input, output, and throughput legitimacy will be the main method of operationalizing my research question. Most important among them will be input and

throughput; why the present writer views output legitimacy as less important will be discussed later. Most the material used will be cases already discussed in the literature, the contribution of this thesis is primarily the bridging of discussions. In addition, the articles of the TEU (Treaty on European Union) pertaining to subsidiarity and the Protocol describing the practical application of subsidiarity will be used as direct sources.

This thesis will be split into two main parts: theory and discussion. Within the theory part, there will be three sections. The first section explains the conflicting interpretations of subsidiarity, and which political leanings tend to be sympathetic to the differing interpretations. The second section will elaborate further on what is meant by democratic legitimacy and explain how it can be operationalized by 'black box' theory. The third section will consider how to think of subsidiarity as it relates to federations and confederations, as this opens the possibility of comparison of the EU to federations such as the US. In the discussion part there will be a brief introduction to the background of the Maastricht treaty. Then there will follow four sections. The first will look at the legal development of the principle of subsidiarity since 1992. The second will consider if the principle has increased the democratic legitimacy of the EU on a local level. The third will turn to the national level and consider especially the Lisbon Treaty. Finally, the fourth section will discuss what kind of impacts the principle of subsidiarity has had on EU institutions, and what challenges are still head.

2 Theory

2.1 Subsidiarity

Subsidiarity may be a good procedural tool to secure democratic legitimacy in governments ruling ethnically and culturally diverse populations. Depending on the interpretation, it is a normative principle which favors the lower level of Government, often this means the national government, but it can 'go all the way down' to the local government. The main idea is that lower levels of governance are better able to create laws that all citizens can accept. This is because the composition of people will be more homogenous, which in turn means that conflicts of interests will then be expected occur less often and be of less substantial significance. And so, by restricting the scope of what higher levels are allowed to do, a higher degree of trust may be achieved. It is, however, not agreed upon among scholars if subsidiarity

– as it is implemented in the EU – does this in practice (for a critique of subsidiarity in pluralist societies, see Davies, 2006).

The principle of subsidiarity in the EU has two main interpretations – which are usually in conflict: one as a normative principle and the other as a technical principle. The technical interpretation uses the principle purely as a principle of efficiency, the level that is best able to competently perform a task should be given it, making it a competition in the spirit of New Public Management – which was just reaching its peak in western countries (Christensen, 2006). Competence subsidiarity as an interpretation is of little relevance to the question of democratic legitimacy in the normative sense in which we are using the term in the present text. Still, it is important to note that this interpretation does exist among scholars, and it affects the authority of the normative interpretation of the principle. This is so because the technical interpretation is apathetic to democratic legitimacy. This thesis will be operating primarily on the normative interpretation of the principle.

As a normative principle there also a conflict of interpretation on an ideological level. Of the two – among quite a few – interpretations discussed here; a common feature is that it is highly regarded in the center-right political tradition. The first interpretation is the one popularized by Johannes Althusius in the 1500s. He based the principle on something he called covenants. A covenant was a political unit with the goal of supporting the needs towards holy lives of individuals. Such a covenant would have absolute veto power over the higher levels of government. This view of subsidiarity as it relates to a higher level was based on a negative view of freedom. The common good was decided by every subunit; if subunits disagreed, the common good was not to be determined (Follesdal, 2013). This view has many familiarities with the confederal view of subsidiarity. One could say that both these views have a freedom-oriented, libertarian angle.

The second interpretation was popularized by the Catholic Church in the late 1800s. It is rooted in the following statement: ‘The human good is to develop and realize one’s potential.’ This form of subsidiarity is, then, not an absolute principle, but rather something nested in a larger good. Subsidiarity should regulate both the allocation of legal authority and its exercise; but the state and other political bodies must intervene to further individuals’ autonomy (Follesdal, 2013). This conception does not grant immunity to the lower levels. The main goal is not a subsuming of power from higher to lower, but rather that the higher-level support the lower.

One could say that this view has a conservative, justice-oriented angle. This interpretation of the principle is communitarian, though the statement on which it is rooted often leads people to believe that it is liberal (Baldersheim, 2002).

2.2 Democratic legitimacy

Borrowing from Vivien A. Schmidt (2013), the analogy to Abraham Lincoln's famous statement – government of the people, by the people, for the people – makes clear the important measures of democratic legitimacy: output legitimacy is for the people, input legitimacy is by the people, and throughput legitimacy is with the people. The 'black box' theory of democratic legitimacy is about the process in which politics becomes policy. A fitting analogy is to look at the 'black box' as printer. A good printer will support many different types of paper and ink, it will correctly reproduce the digital – ephemeral – content into solid – concrete – matter. A good printer is flexible, if it is lacking input from one type of ink it will compensate and approximate the best result it can obtain with what it has.

Output legitimacy boils down to the degree government decisions resonate with citizens' values and identity. As mediators of the collective will of the people, politicians should strive to match the policy to the politics; meaning that passed legislation should be both *tolerable* and relevant to citizen wishes. The reason for writing tolerable rather than popular, is because some matters may be of significantly greater qualitative importance to certain subsets of the population (Follesdal, 2006). For example, if the EU proposed legislation on whether to have a universal energy price, this could produce a marginally better price per kwh for Germans, while significantly increasing the price in Sweden; because – among other factors but most importantly – the German population is so large compared to the Swedish population. If every voter voted in their own interest, the proposal would be popular, but substantively much more negative to the Swedish interests than positive to German interests.

When operationalizing democratic legitimacy through output legitimacy one must not take for granted that the officials representing the people necessarily share their values and identity. Therefore, when attempting to measure output legitimacy, it is not sufficient to measure, for example, how satisfied politicians are with outcomes: it needs to be connected to citizen views. This is not to say that a low output legitimacy necessarily is the fault of politicians – or, for that matter, actors on the administrative side government. Low input, and throughput legitimacy

could be potential causes for low output legitimacy; they are necessary but not sufficient factors.

Input legitimacy is about citizen expression. For input legitimacy to be high the citizen expression needs both institutional and deliberative representation through politics (Schmidt, 2013, p. 7). This does not mean that the citizen must have direct input; it is sufficient if the organization of interest through various groups is present. However, input legitimacy requires an active population, the possibility of input is not sufficient for democratic legitimacy, there needs to be *actual* participation in a meaningful way. High input legitimacy does not guarantee that most groups will be satisfied with the outcome; but when people are taken seriously in the deliberation, they are more likely to respect the outcome, even if it is undesired. Input legitimacy is today mostly talked about in terms of inclusivity and openness.

Throughput legitimacy is concerned with the procedural mechanisms that happen in the ‘black box’ between input and output. The quality of the processes themselves contribute to a different kind of normative legitimacy. Performance legitimacy and participation legitimacy are useful distinctions for understanding how the ‘black box’ is at its best (Schmidt, 2013). Performance legitimacy is about the efficiency of the system. If transparency and public deliberation in the form of scrutiny is the goal, it needs to be as easy as possible to use these legitimate channels. If the channels come with seemingly unnecessary procedures and have a long waiting time, it has low performance legitimacy. Participation legitimacy can be seen as the size of the ‘black box.’ If the box is very efficient, but only a few actors are allowed or able to give input to it, the throughput legitimacy is still low.

2.3 The EU context of subsidiarity

The general connotations of *federalism* are quite different in Europe compared to the US. In Europe one might get the impression that federalism in an EU context would mean an amassing of power for the Union at the expense of Member States. In the US, federalism is associated with states’ rights and is typically held in high esteem among advocates of small government (Swaine, 2000). In this way federalism is quite similar to subsidiarity when comparing the levels State and Union. Now it is understandable, and perhaps even correct that federalism brings negative connotations among EU sceptics: federalism would implicitly admit that the

EU is a federation, and this is very much up for debate. Nevertheless, the links between the terms federalism and subsidiarity are quite clear.

The reason for connecting federalism to subsidiarity in the present text is to make clear that thinking about the EU as if it is a federation can allow us to use the insights of some studies of democracies. The EU can then be viewed as an incongruent – or asymmetrical – federation. Congruent federations have territorial units with social and cultural characters which reflect that of other units and of the federation as a whole. On the other hand, incongruent federations have units which do not reflect the other units or the federation as a whole (Lijphart, 2012, p. 183). In other words, incongruent federations contain what we might alternatively call permanent minorities. Permanent minorities poses challenges for creating systems of governance that are democratically legitimate, especially in matters that are of great qualitative importance to the minority group (Follesdal, 1998).

In some ways the Constitution Treaty (which did not pass but is essentially the same as the Lisbon Treaty) makes the EU more like a federation (Follesdal, 2006). However, this does not indicate that the EU has become more centralized. The federal features are to coexist with confederal elements. For example, the Treaty also confirms the states' rights to withdraw, which is a confederal element. If by contrast a State in the US was to withdraw from the federation, it would be called a secession – and last time this happened it led to civil war.

3 Methods

As was briefly noted in the introduction, the goal of this thesis is to examine the general development of democratic legitimacy since the Maastricht Treaty; it is not to measure cause and effect either the Maastricht Treaty or Lisbon Treaty directly. The development examined is almost exclusively based on examples that give qualitative indications, rather than quantitative measurements; though it would be possible to measure these developments in a quantitative way, given more resources.

Input legitimacy is not only about the input from different levels of government. Activist organizations and businesses also need to be heard for input legitimacy to be high. This thesis, while recognizing that such input is important, does not discuss or explore these forms of input. It should be noted that on the discussion of the European Court of Justice the cases relating to

subsidiarity that the present writer is aware of, are almost exclusively complaints originating from private organizations, which suggests that there is either a lack of input from local commerce in the process of policymaking or there is a lack of post-policy challenges from Member States.

The throughput legitimacy of the EU is here discussed in terms of improvement of transparency and scrutiny. However, another important part of a legitimate ‘black box’ is that it doesn’t have life of its own. Without suggesting that this is the case in the EU, what is meant can be described with AI as an example. Self-learning AI creates very sophisticated systems that work well, but the system-authors have no idea *how* the AI does it. The neural network has a life of its own. So, while the AI does a good job of converting input to output, how it does it remains a mystery. The EU system is understandable by its own authors, which is where the analogy breaks down. But it is still mysterious to citizens how these processes work; they are often too complicated. This thesis does not discuss this problem further (except a short mention in the discussion on EU institutions), because though relevant to subsidiarity, only in a tangential way.

Output legitimacy may seem like to most important measure, as it is results based and therefore a solid indicator that the input and throughput legitimacy is in good order. Still, when talking about subsidiarity in this context, it is actually the least important measure. This hypothetical should illustrate the point: If an absolute monarch ruled in such a way that was in concord with the will of the average citizen, the democratic output legitimacy would have to be regarded as high. But if the monarchy dissolved, and was replaced by a republic or a democracy, and the output legitimacy remained – or even decreased slightly, – the increase in input and throughput legitimacy would still increase the democratic legitimacy overall. In the EU context subsidiarity was not meant to be a reforming principle, but a safeguard against further centralization, if the output legitimacy stays the same but the processes it used to reach it change, the goal has been met.

The conclusions made in this thesis are not based a systematic framework of interpretation. The reader may conclude something entirely different based on the same information. When there are three levels – central, national, local/regional – and three modes of democratic legitimacy, the conclusion of development EU legitimacy as a whole depends much on how one weighs each of these qualitative categories.

4 Discussion

In the EU, subsidiarity was introduced precisely to reduce fears of centralization (Follesdal, 2006). This fear was understandable, as the safeguards that one would expect against centralization, were absent at the time. In the years prior to the Maastricht Treaty there was concern among some Member States – most important among them Britain and France – that the EU was becoming too powerful as an institution. The Maastricht Treaty should be viewed as a response from Member States to the undesired development of the Union. Some would argue that it was discomfort with the future prospect of a centralized European power tightly knit to Germany that was the main motivator. However considering that the main advocates for subsidiarity in the Maastricht treaty was the United Kingdom, Spain, France, Italy, and – to the point – Germany (Wyatt, 2006), it is not so clear that this view is correct; neither does it seem to be a conflict between Conservative and Liberal clusters, even though – normatively – the principle is conservative (using here the definitions of Esping-Andersen, 2006).

While it is questionable to say that the fears were of a too-powerful Germany, there was clearly concern about unchecked growth of institutional power. When the Union was initially established the Communities were divided into ‘economic’ and ‘democratic,’ perceiving the two categories as a different level of governance with different fields of action. The intention was to let the institutions handle the issues that ‘everyone’ agrees on to free up room for public deliberation of contested issues. In practice this divide turned out to be less sharp as in theory. The key mechanism for EU expansion of power has been through diagonal conflicts: In cases where competence is shared between Community and Member State, the ‘economic’ institutions have to reinterpret social problems in line with its own functional objectives. This frames the issues as matters of efficiency, which creates many presuppositions that ought to be politically challenged (Bartl, 2015). In other words, the depth of political debate has shrunk due to this framing, reducing the democratic legitimacy of the Union.

4.1 The legal basis for subsidiarity in the EU

The principle of subsidiarity has both been an action of development for the Union and the subject of development by the Union. When it was first introduced in 1992 it read as follows:

“In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.” (European Union, 1992, art. 3b).

When compared to the definition given in the introduction, the reason for there being multiple legitimate interpretations of the principle becomes clear. The exclusively normative definition given by Wyatt ascertains that Community action is only permissible when a Member State is incapable of doing the action sufficiently. On the other hand, the definition given in 1992 is less clear because it says ‘therefore,’ implying that if the Community can do it better, the Member State capability is insufficient. Notice that in this stage of the Union the article granting legal basis for subsidiarity makes no mention of local or regional governments.

The current 2016 TEU, which is virtually the same as the 2009 Lisbon Treaty, but went through a substantive change on subsidiarity in the 1997 Amsterdam Treaty has this definition:

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, 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.” (European Union, 2016, art. 5(3)).

The change minor change in expression with the Lisbon treaty, from ‘therefore ... be better achieved’ to ‘rather ... be better achieved’ is perhaps not discussed enough. The former implies a competition of competence, where the most competent actor – Community or Member State – gets to decide; the latter implies an objective standard, that both – or none – of the actors can reach, and if both can reach it, the authority should remain in the Member State. This subtle change of wording suggests a significant development that gives more credence to the normative interpretation of subsidiarity, while still allowing room for the technical interpretation. Among the competing normative interpretations, it still seems to be firmly within the justice – rather than freedom – school of thought.

The changes of formulation to the articles regarding subsidiarity does not resolve disagreements of interpretation, there is still no clear allocation of authority. This opacity undermines the implementation of the principle itself. However, public deliberation could perhaps lead to agreement over time (Follesdal, 2006). It seems, at this stage, unlikely that this will be addressed through amendments to the TEU, so other avenues of public deliberation must be used.

4.2 EU subsidiarity and local governance

Whether subsidiarity should go ‘all the way down’ is up for debate when practically applied in cases such as the EU. However, article 10(3) of the TEU states that “Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.” (European Union, 2016). While the article does not directly refer to the principle of subsidiarity, it is still very much in the spirit of subsidiarity. Combined with the express mention of central, regional, and local levels in article 5(3), there is a convincing case for those that proposit that subsidiarity should go ‘all the way down’ in the EU. Still, deciding which of these levels is most appropriate, seems to be left to the Member state. It is tempting to conclude that the reformulation may be understood as an attempt to gently encourage Member States to integrate subsidiarity in their own system of governance.

The literature on local – meaning municipal – subsidiarity in the EU is quite limited. Harald Baldersheim (2002) is one of the few scholars who have explicitly discussed subsidiarity as it relates to local government. One interesting claim he makes, is that the introduction of the principle of subsidiarity principle in the Maastricht treaty has played a valuable role in explaining why there exists no EU institutions outside Brussels or Strasbourg. It is not inconceivable that it would be in the EUs interest to use local institutions. For example, just like Norway has county governors (*statsforvaltere*) that maintains the states interests on a local level, it could potentially be useful for the EU to have something equivalent to maintain EU interests on a local level. The non-existence of such institutions may be interpreted as a positive development – or maintenance – for output legitimacy. Do note that this is assuming without data that the average citizen prefers decentralized and light-handed EU institutions, without having looked at empirical data.

In terms of input, and throughput legitimacy there also seems to be some positive development for local interests. Even though the principle primarily meant, and still means today, to mediate the relationship between central and national levels, the local governments often became required to formulate their own policies and enact them themselves (Baldersheim, 2002). When policy is formed locally this is a direct increase of input legitimacy. This is so because local institutions deal with the interests of a more homogenous population; it is much less likely that you find permanent minorities in local community – usually a permanent minority *is* a local community within a larger whole. Throughput legitimacy has increased many – especially in developing countries – places in Europe after the Maastricht Treaty: the local policy making institutions did not exist before, but now does. After¹ the Maastricht Treaty sub-national institutions were created, creating a formal part of the ‘black box’ that was previously non-existent.

4.3 Subsidiarity efforts on a national level

In 2006, when Andreas Follesdal commented on the democratic deficit of the EU, he pointed out that there was, at the time, limited ways for member states to appeal to any other parts than the executive branch. A paraphrase of what he said: In instances where much is at stake for the member state, it seems reasonable to assume that someone other than the Commission is better suited for judgment (Follesdal, 2006). This should be counted as a negative in the development of throughput legitimacy for lack of real scrutiny. This critique shows that the implementation of the Maastricht Treaty still missed important channels for public deliberation of legislation. When the Lisbon Treaty was enacted, it came with a ‘orange card’ mechanism which was supposed to alleviate this democratic deficit. This was an addition to the ‘yellow card’ mechanism of the Constitutional Treaty (which failed to ratify). Both mechanisms were put in force by the Lisbon Treaty. Following will be a description of how both mechanisms work.

The ‘yellow card’ proposal of the Constitutional Treaty is a mechanism designed to get more national involvement in the EU legislative process. The term is an analogy to soccer, if the Member states give the ‘yellow card,’ the legislative draft gets placed on the metaphorical bench. The goal was that national parliaments (shortened: NPs) would monitor the application of subsidiarity. This was affirmed by Article I-11(3), which held that “National parliaments are

¹ It might have been a direct response to the treaty, but it is not so clear because there was a general sentiment in Europe towards more bottom-up governance, making the claim to a cause-and-effect relationship spurious.

under duty to ensure compliance to the principle of subsidiarity...” (Wyatt, 2006, p. 13). They do this through reasoned opinions on draft legislation which are then voted on by all NPs: If 1/3rd vote in accordance with the opinion, the draft will have to be reviewed by competent institutions.

Much like the ‘yellow card,’ the mechanism of the ‘orange card’ works through NPs monitoring and writing opinions on legislative drafts. The two main differences lie in the power of the mechanism, and how many votes were needed to pass. On the one hand the ‘orange card’ now requires the Commission, if they choose to keep the draft as is, to write a reasoned opinion for why the draft does comply with subsidiarity. This opinion is then sent, together with the opinion of the NPs, to the Council and to the European Parliament (shortened: EP): If one or both chambers agree with the NPs by a 55% vote, the draft will be thrown out (Cooper, 2012, p. 8).

The card mechanisms are aimed at affecting both input and throughput legitimacy directly. Let us first discuss the input legitimacy. By giving the NPs not only the option, but the duty, to monitor the EU legislative branch, the expected input from the national level should be expected to increase. It is important to note that this mechanism has not been activated many times. As of today, the ‘yellow card’ has only been used three times, the last of which was in 2016, the ‘orange card’ has never been used (European Parliament, 2023). This begs the question: Does low frequency of use indicate failure to reduce democratic deficit? Depending on how you view the Early Warning System,² this may be a problem. If the view used it that this system is in place to increase general, direct input, then it has failed. If, however, the view is that this mechanism is in place primarily to increase passive participation (NPs being aware of what draft legislation says), it does not necessarily follow that there needs to a high frequency of flags.

At least in principle, the throughput legitimacy of the EU system has increased. There is now a formalized path which creates public documents that deliberate proposed drafts. This is an increase in transparency. The more difficult element of throughput legitimacy – increased scrutiny – has at the very least become possible through public channels. In order for a mechanism of scrutiny to be both practical and legitimate, it needs to be at least close to being the path of least resistance. If the reason for low usage can be attributed to it being viewed as

² The system which created the legal basis for the two ‘cards.’

a burden for the NPs, then it does not properly fulfill its role. On the other hand, this is not necessarily the case. It may very well be that the reason for low usage is a lack of resource allocation from the Member States, in which case the EU system is not at fault.

The output legitimacy increase is both questionable and difficult to measure. Indirectly, the will of the average citizen may well be in better concord with EU legislation now as opposed to before the Maastricht Treaty. But, granted that this is true, seeing that both these factors have a myriad of other plausible explanations, it would be impossible to exclusively attribute it to the implementation of subsidiarity. It is too large a task for this thesis to measure if there is a quantitative difference in outcomes after the implementation of subsidiarity. It might, however, be worthwhile to reflect upon whether a 55% majority vote is appropriate for the ‘orange card.’ First, because it never being triggered in over ten years of its inception should raise some concerns to the pragmatic value of the mechanism. And second, because NPs in the EU might be of too diverse interests to reach 55% majority on subsidiarity complaints. As short aside, if the principle of subsidiarity is to be thought about as a constitutional principle, a robust judicial procedural path of scrutiny such as the one Öberg (2017) advocates for may be more appropriate.

4.4 Democratic legitimacy in EU institutions

When discussing EU institutions what is meant in this text is primarily the Commission and the European Court of Justice. The Commission creates proposals for laws, which are then voted on later by democratically elected bodies. In contrast to countries such as Norway, the President of the Commission – currently Ursula von der Leyen – is elected by the parliament as a whole and oversees all the ministries led by Commissioners elected in a similar fashion to how judges are typically elected. The country of comparison has a democratically elected official on each ministry. The former approach has pros and cons. In theory this should increase the potential competence of the Commissioner – because political activity is no longer a prerequisite for the role. On the other hand, this creates an additional layer between the people who are democratically elected, and the people who are writing the legislation. This means that political checks on the Commission become less straight forward and could, especially in times of increased populism, cause someone to suspect a democratic deficit. When considering democratic legitimacy, the institution must not only be democratically legitimate in fact; it must also be *perceived* as democratically legitimate by the typical citizen.

The protocol for application of subsidiarity states that: “The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators” (European Union, 2008, art. 5). This article is significant because it demands written, formalized, reasons for a task being done by the central level, increasing transparency – which is a consequence of higher throughput legitimacy. It also opens opportunity for public deliberation, as these reasons can be challenged by other actors. These actors may be Member States, through the Early Warning system, but it could also be private actors through the judicial system. The fact that the protocol article requires both quantitative and, if possible, qualitative indicators means that there arises opportunity to challenge the Commission on factual accuracy.

Opinion on how the Commission has responded to this development is split. More optimistic EU scholars such as Andreas Follesdal (2006), hold that the Commission seems to have taken subsidiarity to heart: It now undertakes to justify each of its new proposals in light of the principle. It also uses Green and White Papers more regularly, promoting public debate. Scholars on the pessimistic side, such as Gráinne de Burca (1999) holds that there is reason to believe that the Commission rejects that the principle of subsidiarity has anything to do with reducing the democratic deficit, though do keep in mind that we are now talking about literature from before the Lisbon Treaty. In more recent literature from the pessimistic side there has been complaints that the Commission merely mentions subsidiarity as a way to check a box, as something to be worked around (Öberg, 2017).

When considering the implementation of subsidiarity in the EU from the perspective of normative framing, there are still major democratic deficits to be found. According to Marija Bartl (2015), EU institutions take for granted the goals and uses subsidiarity merely as a constraint as to which entity is best suited for the implementation. This completely discards the conflict of interest which may lie between member state and Community as to the goal in itself, which is why she advocates for a framework for the scrutiny of goals. To conclude the discussion on the national level, real improvements have been made, but issues can be found both in capability to challenge from the Member State, and there is still lacking in public deliberation of goals, respectively these are then areas on improvement on throughput legitimacy (the need for a less resource demanding channel of challenge) and input legitimacy (the framing has made it so that the Member State cant input a challenge the goal itself).

Furthermore, she claims that the Commission needs to be explicitly politicized to decrease the democratic deficit. The EU Commission, when it is seen as an unbiased guardian of 'EU interests,' covers up the de-politicizing tendency of the EU. It creates epistemic problems, as there is hesitancy to problematize the objectives put forth by the Commission. This may lead to policy that reflects the politics poorly. The Commission, as it currently stands, effectively determines the needs of the internal market. This is not only a critique of the Commission, but of all technocratic institutions (Bartl, 2015).

The European Court of Justice (ECJ) is the final instance of complaint similar to the Supreme Court of the United States (SCOTUS). In principle the court can strike down legislation that does not abide by the principle of subsidiarity, which is a positive development in throughput legitimacy because it is a form of scrutiny – that even has teeth in this instance. In practice, though, the ECJ has never struck down a measure on the basis of subsidiarity. According to Jacob Öberg (2017) this is because the court has to make such judgments based on a review of the material the Commission gives, and simply does not have the resources to do this. Furthermore, if the court was given the resources to do this, it would challenge the democratic legitimacy in its own right, as it would affect the balance of power between judicial, executive and legislative. His proposed solution to this problem is interesting, but outside the scope of this thesis.

The input legitimacy there seems to be a lack in the ECJ, at least if the activity of the US is seen as a positive. It is quite common in the US for both States and Federal government – especially the administration – to sue the other after it passes laws it deems to conflict with the Constitution. In the EU, public deliberation between Member State and Community through the courts is less common. This comparison does imply that the TEU is a comparable document to a constitution, which may be problematic. The activity level of the ECJ in *State v. Community* cases compared to the US should be taken as a minor indicator, as the contexts are quite different.

Instances of institutional discontent are quite rare in the EU. This could be because the EU institutions do a solid job and are democratically legitimate. But it could also mean that there is a sense of powerlessness to change the institutional framework of the Union. In 2011 the Austrian parliament suggested that efforts should be made to promote confidence-building at the EU level, to negate real obstacles to cross-border transactions (Bartl, 2015). The Austrian

politicians, it seems, believe that the trust in EU institutions insufficient for the economic purposes of the Union. Though this is an isolated example and not at all generalizable to the whole of the EU, this may lead us to believe that the trust in technocratic entities do not reach down to the typical citizen.

5 Conclusion

Has the democratic deficit been affected through subsidiarity since the 1992 Maastricht Treaty? On a local level it seems quite clear that there have been improvements on input and throughput legitimacy. The fact that sub-national policy-making institutions have appeared in developing EU countries seems to be an increase in input legitimacy, though it is not certain that this is the result of the Union development or if it is a separate development. Considering that the original thrust of the implementation of subsidiarity was to prevent further centralization, the non-existence EU institutions on a local level should be counted as a positive for output legitimacy.

On a national level the development is a mixed bag. There are more formal channels for Member states to use to have transparency in the process. The ‘orange’ card gives both the Council and Europa Parliament increased possibility to strike down – on subsidiarity grounds – proposed legislation before it goes to a vote. The ‘yellow’ card can be a useful way of strengthening a potential legal case before the European Court of Justice (Wyatt, 2006), creating new dynamics between the National Parliaments and the Commission. The input legitimacy does not seem to have had any significant increase. While these tools should in theory increase legitimacy, they don’t seem to be used a whole lot. The ‘yellow’ card has been used 3 times, and the ‘orange’ card has never been used. If the tools need to be strengthened by lowering the vote thresholds or if this is simply a lack resources from Member States to monitor is not clear.

The EU institutions have the greatest opportunity for improvement. The Commission seem at first glance to have responded quite well to the instructions of various treaties and protocols. In legislation where it is relevant, they now justify why Community action has clear benefits over leaving the task to the Member States. However, it also has its sympathies with the technical interpretation of the subsidiarity principle, leaving it still at odds with the original intended goal of the Member States concerned about EU power creep. The European Court of Justice does not currently have a significant impact on subsidiarity. It has never annulled a

measure because on the basis of subsidiarity, and in rulings where it potentially could (for instance, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, 2002), it has avoided the issue. There are, however, genuine reasons for the Court not intervening. The court has a relative institutional disadvantage: lawmaking competences simply have much more horsepower to gather data, making the current approach to judicial review unrealistic.

Further research on the relationship between the value differences between politicians and citizens may help shine a light on democratic legitimacy in the EU. While it appears that subsidiarity has made, if not a substantial, at least a meaningful procedural difference to the relationship between legislative Community institutions and Member states, this does not mean that the will of the people has been better achieved. It is known that in general politicians are more moderate than their constituents. But in recent years the gap between the opinions of politicians and the citizens they represent seems to have increased. Will the EU be able to keep the democratic deficit from reaching unmanageable levels in such fragmenting times?

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