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**Article**

## Subsidiarity and the debate on the future of Europe

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*Suggested Citation:* Grevi, Giovanni (2002) : Subsidiarity and the debate on the future of Europe, CESifo Forum, ISSN 2190-717X, ifo Institut für Wirtschaftsforschung an der Universität München, München, Vol. 03, Iss. 4, pp. 12-18

This Version is available at:

<https://hdl.handle.net/10419/166137>

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## SUBSIDIARITY AND THE DEBATE ON THE FUTURE OF EUROPE

GIOVANNI GREVI\*

### The background of the current debate

With the establishment of the Convention on the Future of Europe on 28 February 2002, the debate on the principle of subsidiarity for the functioning of the European Union, and on its application, entered a new phase.

The Laeken Declaration of December 2001<sup>1</sup> marked the beginning of a transition insofar as it reflected concerns expressed by political leaders over the previous months and set out the basic guidelines of the debate on the future of Europe. In this context, three priorities were indicated for further reflection:

- How to make the division of competences more transparent.
- How to determine whether there needs to be any reorganisation of competences.
- How to allow for flexibility in the distribution of competences.

Interestingly, the need to “ensure that a redefined division of competences does not lead to a creeping expansion of the competence of the Union or to encroachment upon the exclusive areas of competence of the Member States” was stressed in the Declaration. This is a clear reflection of the warning signals sent by a number of leaders, particularly from the German regional establishment, in the run-up to Laeken. At the same time, the fundamental linkage between the question as to ‘who does what’ and “the

*nature of the Union’s action and what instruments it should use”* was established.

Prior to the Laeken Declaration, in December 2000, the Declaration on the Future of the Union adopted at Nice<sup>2</sup> put the question of “*how to establish and monitor a more precise delimitation of competencies between the European Union and the Member States, reflecting the principle of subsidiarity.*”

### Subsidiarity in context

In order to appreciate the main features of the ongoing debate and the distinctiveness of the political and institutional context of the Union, some preliminary remarks seem useful. To begin with, a short definition of subsidiarity is necessary to frame the guidelines of the discussion.

In short, subsidiarity is the principle whereby action should be taken as close as possible to the citizens, and left to private actors when the involvement of public structures is not required to achieve expected results. Higher levels of governments should intervene only when they can provide tangible added value in delivering policy outcomes. The essential trade-off at the core of the subsidiarity debate is between efficiency and freedom.

This definition needs, however, to be completed with two further observations. On the one hand, the principle of subsidiarity should be regarded not only as the criterion for the delimitation of competences between different public (or private) actors but also, and perhaps most importantly, as a dynamic principle governing the shift of these competences and guaranteeing the flexibility of the system. On the other hand, given the definition outlined above, it should be stressed that subsidiarity works both ways: from the top down, but also from the bottom up. This is particularly relevant when looking at the current debate at the European level, where the emphasis is

The subsidiarity principle: Action should be taken as close as possible to the citizens

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<sup>1</sup> Presidency Conclusions, European Council Meeting in Laeken, 14–15 December 2001, SN 300/1/01.

<sup>2</sup> Official Journal of the European Communities C80, 10.3.2001, Declaration 23.

clearly put on the former dimension, and much less on the latter.

The principle of subsidiarity plays a fundamental role in establishing a workable relationship between different levels of government in any multi-level framework. While, however, the principle normally applies to decision-making in federal states, this is of course not the case when looking at the European multi-level framework.

The components of the European Union – Member States – are far more heterogeneous than the components of any other federation in the world, with the possible exception of India. Their number is rapidly growing with successive waves of enlargement, and the diversity of interests to be included in decision-making at EU level is expanding exponentially.

Most of these component units are, in turn, divided into a number of sub-units – regions, Länder, comunidades autonomas etc. – with very different degrees of autonomy. In fact, some of these ‘sub-national’ entities are endowed with law-making powers and have elected governments. The so-called ‘constitutional regions’ are effectively fully-fledged state-like systems.

Most notably, political or administrative subdivisions in the Member States of the European Union correspond to deep-rooted distinctive historical traditions, such as in the case of Germany, or to national differences *tout court*, as in the case of Belgium, Spain and the United Kingdom. In fact, a considerable number of the calls for more powers being allocated at the national level actually originates from the concern of regional entities to preserve their own competences in areas such as education or health. These policy areas reflect the distinctive character of a socio-economic model, and sub-national entities are reluctant to entrust Member States’ governments with legislation at EU level in the Council of Ministers.

In stark contrast to most federal constitutional systems, the power to allocate competences to the European level of government – or *Kompetenz-Kompetenz* – firmly belongs to Member States. This is reflected in the so-called principle of attribution of powers, enshrined in Article 5 TEC. It implies that all EU powers are not sovereign but derived. Also, the role reserved to the Union in those areas where nor-

mally federal competence is exclusive, is actually quite limited. This is the case as far as internal and external security policies are concerned, but also for foreign policy more widely. Of course, monetary policy is managed at the federal level for those countries belonging to the euro zone.

This leads to a further important consideration, namely that one very distinctive expression of the principle of subsidiarity in the context of the European Union is differentiated integration. Arguably, the mechanism whereby a group of EU Member States can undertake ‘enhanced cooperation’ in a given policy area, such as, for example, armament procurement, reflects the need to allocate the exercise of competences in this field to a different level of government, better equipped to act effectively. From this standpoint, therefore, moves towards differentiated integration in the Union (whether by way of ‘variable geometry’ or by shaping a ‘two speed’ Europe) basically result in allocating competences to intermediate levels of government between the Member States and the fully-fledged EU level.

### **Subsidiarity in the Treaties**

Turning to the primary law of the European Community and of the European Union, the principle of subsidiarity cannot be considered in isolation from at least three other important principles informing the functioning of the EU: transparency, proportionality and Union loyalty.

According to Article 1 TEU, decisions in the Union “*are taken as openly as possible and as closely as possible to the citizen.*” Two points deserve particular attention in this respect.

Firstly, transparency and subsidiarity are indicated as the two sides of the same coin. This is relevant because one of the most pressing demands in the current debate is that responsibilities are clearly allocated so that citizens can understand ‘who is responsible for what’. However, some confusion seems to occur between the very legitimate call for transparent decision-making, and the instrumental use of subsidiarity to justify a rigid delimitation of competences.

Secondly, a direct reference is made to the citizens: this seems to pave the way for an application of subsidiarity in the functioning of the Union that

Besides subsidiarity there are three other important principles: transparency, proportionality and union loyalty

goes beyond the two-level game involving the EU and Member States, and extends to sub-national entities. So far, there has been considerable resistance to opening the discussion on the delimitation of competences to the sub-national level, but interesting developments are taking place in the current debate at the Convention as to the monitoring of subsidiarity, as reported below.

Article 5 TEC states that: *“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 insofar 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.”*

This provision reflects a more legalistic approach to the application of the principle of subsidiarity. Notably, its application is limited to areas that do not fall within the remit of the exclusive competence of the Union, and parameters for action are set down. Interestingly, the reference to ‘exclusive’ competences, whether of the Union or of Member States, is increasingly challenged as a reliable, and workable, criterion for delimitation.

The procedural steps to be taken for ensuring that the subsidiarity dimension is fully acknowledged in the decision-making process are specified in detail in the Protocol on the Application of the Principle of Subsidiarity and Proportionality, attached to the Treaty of Amsterdam. From this standpoint, the main innovation in the Convention is the consensus on the involvement of national parliaments in the monitoring of the application of subsidiarity.

As to the principle of proportionality whereby, according to Article 5 TEC, *“Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty”*, this is arguably the real target of much questioning of EU intervention. It is somewhat misleading to challenge the competence of the Union to legislate in a given policy field, when the actual problem is the degree of detail of legislation. This is a key point in the debate, and is central to the question of ‘Complementary competences’, recently the subject of a report of one of the Working Groups of the Convention.

Article 10 TEC expresses the principle of Union loyalty or solidarity, by establishing that *“Member*

*States shall take all appropriate measures...to ensure the fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of Community’s tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.”*

It should be noted that the inclusion of a clause of reciprocity, whereby the Union shall respect the responsibilities and identities of Member States, is likely to be the outcome of the ongoing debate in the Convention on this particular subject. This would go beyond the present wording of Article 6.3 TEU, whereby *“The Union shall respect the national identities of its Member States.”*<sup>3</sup>

### Three highways in the Convention

The debate on the principle of subsidiarity and its implications taking shape in the Convention is essentially threefold, focusing in particular on: the question of the delimitation of competences; the link between competences and instruments; and how to effectively monitor the respect of subsidiarity.

#### *The delimitation of competences*

This important issue is central to the ongoing political controversy on the distribution of power between the Union and Member States, but it should be made clear that delimitation does not necessarily result from a correct application of the principle of subsidiarity. Contrary to what might appear, the two questions are separate. As indicat-

<sup>3</sup> The Final Report of the Working Group ‘Complementary Competences’, CONV 375/02, 31 October 2002, recommends that *“TEU Article 6(3) should be made more transparent by clarifying that the essential elements of national identity include fundamental structures and essential functions of the Member States notably their political and constitutional structure, including regional and self-government; their choices regarding language; national citizenship; territory; legal status of churches and religious societies; national defence and organisation of armed forces.”* The full text of the report is available at <http://register.consilium.eu.int/pdf/en/02/cv00/00375-r1en2.pdf>. Most interestingly, the very recent ‘Feasibility Study’ published by the Commission on 4 December and consisting of a fully fledged constitutional text for the Union, already includes a clause of reciprocity in Article 4 of Part I – Principles: *“In compliance with the subsidiarity principle, the Union shall act in good faith in relation to the Member States and shall preserve their identity and their national and regional diversity. It shall respect the constitutional organisation of the Member States, including in its relations with territorial units. The Union shall be mindful of the specific features of Member States as regards their internal and external security and their public services.”* The text of this Working Document of the Commission is published at [http://europa.eu.int/futurum/documents/offtext/const051202\\_en.pdf](http://europa.eu.int/futurum/documents/offtext/const051202_en.pdf).

Subsidiarity does not imply a rigid delimitation of competences

ed above, subsidiarity does not imply a rigid delimitation of competences: it simply establishes that the most appropriate level of government shall take action, with a view to reconciling autonomy and efficiency. From a procedural standpoint, in the presence of appropriate mechanisms for ensuring the participation of all interested parties in decision-making, no division of competences would be required at all. If this is an extreme solution in the direction of flexibility, it should be stressed that establishing watertight catalogues of competences would go too far the other way.

The divergence between these two extreme solutions and their supporters is essentially a difference of *Weltanschauung* as to what the Union is about. If one believes in a progress towards an “*ever closer Union*”, then a ‘functional’ approach to the allocation of competences would seem the most appropriate. The Union would be given objectives, and would be able to adopt necessary measures to fulfil them, while respecting subsidiarity.<sup>4</sup> On the other hand, if one sees clear limits to EU integration, then competences and instruments should be very clearly identified, and the Union should be able to take action only where a precise legal basis exists.<sup>5</sup> *As usual, in medio stat virtus.*

Given the growing heterogeneity of the Union and the consequent increasing need to ensure consistency, it is arguable that an excessive delimitation of competences would be inappropriate. The vast majority of competences are in fact shared, and this is true both for those primarily exercised by the Union, and for those where Member States are mainly responsible.

This was the position taken by most members of the Convention at the plenary sessions in April and May<sup>6</sup> However, recent developments seem to indicate the political will to establish a clear demarcation between different categories of competences,

namely defining three levels: exclusive EU competences, shared and complementary competences. The elaboration of the last category was the subject of extensive reflection in the Convention Working Group chaired by Henning Christophersen.<sup>7</sup> The recommendations of this WG, presented at the plenary session on 8 November, triggered a very lively debate and met more opposition than support.

Aside from the general criticism of the idea of delimitation of competences as such, two main problems arose in this context:

- The proposed change of name, from ‘complementary competences’ to ‘supporting measures’, marks the shift from a sphere of action to a type of instrument. A large majority of the members of the Convention felt that this was inappropriate and confusing. It was also argued that, from a legal standpoint, what distinguishes complementary competences from shared ones is simply that the exercise of the former does not pre-empt the right of Member States to legislate in future.
- The exclusion of EU legislation from the policy areas listed in this context – namely employment, education and vocational training, culture, public health, trans-European networks, industry, research and development – led to much disappointment. It was argued that the real issue is the ‘intensity’ of EU intervention – therefore a matter of proportionality and not of subsidiarity. Some suggested that sufficient protection of Member States’ competences would be guaranteed by excluding harmonisation of national provisions by EU law.

The Preliminary Draft Constitutional Treaty issued by the Praesidium of the Convention on 28 October 2002 envisages a delimitation of competences in three different categories (Article 9 to 12, Part One), and includes the exclusion of EU legislation in “*the areas in which the Union supports and coordinates action by the Member States.*”<sup>8</sup>

The ‘Feasibility Study’ published by the Commission on 4 December<sup>9</sup> – a fully-fledged constitution-

There are three levels of competences: exclusive EU, shared, and complementary

<sup>4</sup> For a position closely reflecting this approach, see the contribution submitted by the Belgian members of the Convention, CONV/53/O2, 1” May 2002: “*The Union’s powers, which are functional in nature, are simply means whereby it carries out its missions and achieves its objectives ... powers will be defined on the basis of missions and objectives.*”

<sup>5</sup> This alternative model is clearly outlined in the Bundesrat Resolution on the division of competences 1081/01, 20 December 2001, whereby “*the principle of limited specific authorisation to act must be reinforced*” and “*differentiated indication of the admissible legal instruments and the ways in which the Community may pursue its objectives should be given if specific authorisations to act are granted.*”

<sup>6</sup> The summaries of all the plenary sessions of the Convention are available at <http://european-convention.eu.int/sessplen.asp?lang=EN>

<sup>7</sup> The full set of Working Documents produced by this Working Group can be found at <http://european-convention.eu.int/dynadoc.asp?lang=EN&Content=WGV>. For the text of the Final Report, see above n. 3.

<sup>8</sup> The text of the Preliminary Draft Constitutional Treaty is available at <http://european-convention.eu.int/docs/sessPlen/00369.en2.PDF>.

<sup>9</sup> See n. 3 above.



al text for the Union – outlines an alternative model whereby policies are divided in the first part of the text into principal policies of the Union, flanking policies and complementary action. This is a sort of political statement, helpful for citizens to understand the remit of the European Union and of Member States in clear and simple terms. Part Three of the document, dedicated to the description of individual policy areas, sets out a more detailed break-down of the powers of the Union and of the instruments available to it, reflecting the notion of different degrees of ‘intensity’ of EU action. It should also be noted that the rules envisaged for the amendment of the detailed provisions of Part Three – Policies – are less demanding than the procedures established for the revision of part One – Principles.

#### *The link between competences and instruments*

Instruments are needed to implement the competences

The attempt at linking competences to instruments is a very relevant aspect of the debate. As stated in one of the notes prepared by the Secretariat of the Convention as a basis for debate, *“The subject of legal instruments follows on logically from that of competences: once it has been decided to implement a competence, it is necessary to decide who can do it, how, and with what effects.”*<sup>10</sup>

A shift in focus away from the actor responsible for taking a decision to the most appropriate instrument for implementing that decision – that is, from subsidiarity to proportionality – should be welcomed. Addressing the two questions simultaneously shows the close linkage between the two principles. On the other hand, it is arguable that a rigid link between a certain type of competence and a specific instrument would excessively narrow the margins of EU action.

The concept of ‘intensity’ is pivotal here. A number of contributions have been submitted listing the various ‘modes’ of EU intervention. The German Bundesrat, for example, indicated five categories in its contribution to the Convention: harmonisation, mutual recognition, financial support, supplementary measures and coordination.<sup>11</sup> As a result of the key intervention by Paolo Ponzano of the European Commission<sup>12</sup>, the WG on Complement-

ary Competences came out in favour of a more elaborated scale of EU intervention, with a distinction between legislative and non-legislative action and related examples, in its final report. Whether such *“hierarchy of intensity”* is to be enshrined in the future EU constitution or not is a matter for discussion. However, it is surely the intellectual backdrop of the hierarchy of instruments recommended in the final report of the WG on Simplification chaired by Giuliano Amato.<sup>13</sup>

The debate in this WG was inspired primarily by the need for simplification. It was felt that simplification was a prerequisite for enhancing the democratic legitimacy of the Union. At the same time, however, the definition of a limited number of instruments (and procedures) and the clear identification of their effects meets the expectations of those who denounce the obscure character of the system, and the scope for prevarication that it entails. Three levels are identified for the adoption of acts by the Union: legislation, delegation and implementation. Legislative acts include laws, framework laws and decisions. Delegated acts are a new type of instrument whose scope is determined by the legislative act. They *“supplement or develop the detail of a legislative act or adapt certain elements of the actual legislative act, always under the powers defined by the act”* and they are adopted in the form of delegated regulations. Finally, implementing acts, which fall in principle within the responsibility of Member States, are to be adopted by the Commission through the system of comitology. They consist of implementing regulations or implementing decisions.

A smaller number of instruments and a new, simpler language should ensure that citizens are in a position to better understand what is being decided at the European level, all the more so given the parallel simplification of decision-making procedures and the widely expected opening to the public of the legislative proceedings in the Council of Ministers. Arguably, there will be fewer complaints against the ‘Brussels machinery’ and more pressure on national governments and national parliaments.

<sup>10</sup> CONV 162/02, 13 June 2002, available at <http://register.consilium.eu.int/pdf/en/02/cv00/00162en2.pdf>

<sup>11</sup> See n. 5 above.

<sup>12</sup> Among the many key contributions by the Commission to this WG, see ‘Delimitation of powers: a matter of scale of intervention’, WD 4, 10 July 2002, available at <http://european-convention.eu.int/docs/wd5/1722.pdf>

<sup>13</sup> The Final Report, CONV 424/02, 29 November 2002, can be found at <http://register.consilium.eu.int/pdf/en/02/cv00/00424en2.pdf>

As noted above, a different matter is whether a clearer definition of the instruments should lead to a detailed association of types of instruments with the different competences of the Union. According to the German Bundesrat, “*differentiated indication of the admissible legal instruments and the ways in which the Community may pursue its objectives should be given if specific authorisations to act are granted.*” Others believe that the most appropriate instruments should be decided on a case-by-case basis.

The former approach might lead to an extremely complex, and probably very rigid system. That would not be in line with some of the priorities emerging in the Convention debate as to the features of the new institutional framework. For example, if one takes a look at defence policy, currently discussed in one of the Convention WGs, it would not make much sense to define one – presumably non-legislative – instrument of EU intervention. On the contrary, at least three areas of action could be considered: purely military matters (intergovernmental instruments and procedures); crisis management (mixed instruments and procedures); armament procurement and R&D (legislative instruments and community method).

A potential compromise might consist in indicating in the legal bases of the future constitution, not the instruments but the ‘modes’ of action, or in excluding some of them, such as harmonisation.

### *Monitoring subsidiarity*

Before discussing how best to monitor the application of subsidiarity, one first needs to determine whether subsidiarity is a principle of political or legal nature. While it seems hard to draw a clear distinction between these two aspects, some members of the Convention feel that judicial scrutiny of subsidiarity would be more appropriate to avoid political controversy. Decisions by the European Court of Justice (ECJ) would be clear and motivated, and its legal authority would not be challenged.<sup>14</sup> Others, however, take the view that the ECJ would run the risk of undue ‘politicisation’, were it to be involved in reviewing an essentially political choice. This was the line taken by some of

the experts who contributed to the proceedings of the WG dedicated to the monitoring of subsidiarity, chaired by Inigo Mendez de Vigo.<sup>15</sup>

According to the conclusions produced by the WG, subsidiarity is a principle of “*essentially political nature*” and “*monitoring of compliance with that principle should be of an essentially political nature and take place before the entry into force of the act in question.*” On the basis of that assumption, the WG sought to avoid complicating decision-making and shaped a mechanism for preliminary political control on the part of national parliaments, failing which the option would be open for recourse to the Court.

The approach includes three steps:

- Firstly, national parliaments must be more closely associated throughout the whole of the legislative process. In particular, the Commission should address its legislative proposals to each national parliament at the same time as to the Council and the European Parliament. The same is envisaged for the ‘common position’ to be discussed by the Conciliation Committee in the context of the co-decision procedure.
- Secondly, an *ex ante* political mechanism or “early warning system” should be established for identifying infringements of the subsidiarity principle. Within six weeks from the date on which a proposal is sent, each national parliament would have the right to issue a “*reasoned opinion*” concerning compliance with the principle of subsidiarity. Depending on the number of opinions submitted, the Commission could be obliged to re-examine its proposal.
- Thirdly, national parliaments should have access to an *ex post* judicial review by the ECJ. With a view to limiting the scope of this access, the decision was taken to link the right of appeal to the Court to the presentation of a reasoned opinion *ex ante*. However, this could result in an artificial incentive to submit opinions in advance with the sole purpose of preserving the right of recourse to the Court. Finally, it should be stressed that indi-

Since subsidiarity is a political principle, monitoring should also be of a political nature

<sup>15</sup> The Working Documents produced by this WG are available at <http://europeanconvention.eu.int/dynadoc.asp?lang=EN&Content=WGI>. The text of the Final Report, CONV 286/02, is available at <http://register.consilium.eu.int/pdf/en/02/cv00/00286en2.pdf>. As to the debate above, see more specifically the contribution by Jean-Claude Piris, Director general of the Legal Service of the Council of Ministers, WD 4, at <http://european-convention.eu.int/docs/wd1/1347.pdf>, and the oral contribution by Francis Jacobs, Advocate General at the ECJ, to the meeting of the WG on 25 June 2002.

<sup>14</sup> See in this sense the contribution ‘Subsidiarity must be controlled by a judicial body’, CONV 213/02, 24 July 2002, by Elmar Brok MEP and Jacques Santer MEP among others.

vidual chambers of bicameral assemblies are entitled to appeal to the Court. That might lead to interesting developments under domestic politics in those federal systems where the 'second chamber' of the regions (such as the Bundesrat) is often of a different political colour from the national government.

The idea has also been advanced that the Committee of the Regions should be allowed to appeal to the Court in relation to "*proposals which have been submitted to the Committee of the Regions for an opinion and about which, in that opinion, it had expressed objections as regards compliance with subsidiarity.*" This is an important development towards opening policy-making at the European level to sub-national actors and to the interests of regions, albeit through the filter of a consultative body of the Union.

The final report of the WG includes significant references to the question of better distribution of competences and to the simplification of the legislative instruments available to the Union, and the clarification of their effects. These two strands of reform, considered above, are considered prerequisites for the proper application and monitoring of the principle of subsidiarity.

### Conclusion

Following this short overview of the debate on the principle of subsidiarity and its implications for the functioning of the enlarged Union after 2004, some political guidelines can be drawn for further reflection.

Broadly speaking, it would be a mistake to insist on a rigid delimitation of competences between different levels of government within the Union. European integration is a necessary condition for achieving high standards of security and prosperity for European citizens. Following enlargement, it is arguable that the principle of solidarity will be at least as relevant to EU strategic decisions as the principles of subsidiarity and proportionality. Moreover, European integration is not an end in itself, but a step towards a better model of global governance. All things considered, any move towards stifling EU decision-making by imposing severe constraints would be a step backwards. More and not less flexibility will be required from now on.

The argument whereby European citizens want a clear allocation of competences to be able to hold to account those responsible for important decisions is a valid one. However, this is only a partial solution to a wider problem, namely the obscurity and complexity of European decision-making. Opening up the proceedings of the Council of Ministers when it legislates, as well as simplifying instruments and procedures, represents a key step forward in enabling citizens to understand and judge decisions taken at the European level. With this in mind, the idea of a somewhat artificial, detailed distinction between different levels of powers is neither necessary nor desirable.

The principle of proportionality, whereby the 'intensity' of European intervention should not go beyond what is necessary to achieve expected results is now firmly anchored in EU decision-making. As a consequence, framework legislation is to be preferred wherever possible. That leaves more room for Member States' discretion in implementation, as the Union does not have the resources to supervise the crucial phase of implementation.

The implementation of subsidiarity should be looked at in this context, and not simply as the question of who legislates. Decisions are shaped *ex ante* though extensive consultation (this is the direction taken by the European Commission with its White Paper on European Governance), and require *ex post* a joint effort involving various actors at different levels to ensure proper implementation. This does not imply that clear limits should not be set to the undue expansion of Union intervention in the area of Member States' competences. However, the effective cooperation between all the relevant actors is a much more faithful application of the principle of subsidiarity than a regressive, and outdated, separation of competences.

Implications of subsidiarity for an enlarged Union: No rigid delimitation of competences