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Is there truly a competence 'competition' in shared matters? Towards a reform of the EU competences system

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SUMMARY: 1. Introduction. - 2. The principle of subsidiarity and common policies. – 3. The principle of subsidiarity and the harmonisation of legislations. - 4. The role of the subsidiarity principle in environmental and energy matters. - 5. Other shared competences: economic and territorial cohesion, health. - 6. Protocol (No 2) on the application of the principles of subsidiarity and proportionality. - 7. Conclusions.

1. Introduction

The present article aims to address the following questions: if it becomes necessary to establish legal acts in a subject matter falling within shared competence (EU and MS), is the determination of the most suitable level still governed by the principle of subsidiarity? Or has the exercise of competence now been relegated to a mechanism that, in certain cases, entirely bypasses a choice, deferring instead to a scheme that has been consolidated and which represents the logical and natural endpoint of subsidiarity?

The questions arise from a careful examination of the relevant conventional provisions, as well as from an analysis of practice. Indeed, discipline regarding matters covered by Article 4 of the TFEU, as dictated by the provisions contained in Part III (Internal Policies and Actions of the Union), establishes objectives that, by their nature and scope, can only be pursued at the EU level, thereby pre-emptively excluding any (even merely sufficient)

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action by the Member States and, therefore, the role that the principle of subsidiarity should fulfil. In other words, there is no perfect alignment between the concurrent nature of the competences referred to in Article 4 TFEU and the specific content of the relevant policies.

Practice further demonstrates that, in sectors requiring a comparative assessment of the most suitable level (EU or national) to undertake a particular action, the principle of subsidiarity has nonetheless validated a mechanism aimed at ensuring a "coordinated" exercise of competences between national authorities and EU institutions.[1]

This mechanism does not involve any choice regarding the most suitable level to exercise either competence but rather manages such exercise according to a predetermined sequence. In these areas, an interweaving of competences has been woven in the name of the principle of subsidiarity, whereby the Union first acts (always) to define a purpose (in implementation of what is provided for in the conventional provision), often with very specific and detailed interventions; and, subsequently, the Member States adopt the necessary measures to achieve the predetermined goal, sometimes of marginal significance.[2]

Hence, even with a preliminary review, the structure of shared competences seems to consist of subjects where the Union's authority is self-evident, considering their transnational character and market impact, placing them squarely within the EU's domain.[3] This is particularly evident in areas such as agriculture and fisheries (excluding the preservation of biological resources, which falls under exclusive competencies); transportation and trans-European networks; environmental issues, and specific aspects of energy policy. These matters are characterised by objectives that automatically justify competence lying within the Union.

In other sectors, the principle of subsidiarity persists in directing the selection of the most suitable level, subjecting it to the early warning system delineated in Protocol No. 2. However, even in these sectors, the evaluation proposed by the principle of subsidiarity does not primarily concern whether the set objectives necessitate action by EU institutions, but rather revolves around the spectrum of decisions and actions aimed at formulating and executing them. In these domains, the potentially disruptive effect of subsidiarity has not been as pronounced as anticipated: over a brief period, it has been assimilated or, more accurately, standardized within a tangible operational framework, advocating for enhanced collaboration between national authorities and EU institutions -

[1] See the Annual Report 2022 of the Commission on the application of the principles of subsidiarity and proportionality and on relations with national Parliaments.

[2] Instead, in the sense that the principle of subsidiarity, in some cases, has prevented both EU institutions and Member States from intervening, see A.G. TOTH, "Is Subsidiarity Justiciable?" (1994) 19 *E. L. Rev.* 278.

[3] Cf. J. OBERG, "Subsidiarity as a Limit to the Exercise of EU Competences" (2017) *Yearbook of European Law* 395. For an examination of the European Community's power of action in various substantive policies, predating the incorporation of the principle of subsidiarity into the Treaty, see A. TIZZANO, "Lo sviluppo delle competenze materiali delle Comunità Europee" (1981) *Rivista di diritto europeo* 146-149. For more general and in-depth considerations on the principle of subsidiarity, may we refer to P. DE PASQUALE, *Il principio di sussidiarietà nella Comunità Europea* (Napoli: Editoriale Scientifica, 2000).

albeit with nuanced refinements. This has resulted in a marked enhancement of the legislative process, presently distinguished by heightened clarity and transparency, and most importantly, the active engagement of diverse stakeholders and societal factions, in line with a collaborative ethos of "time-honoured" provenance.[4]

In certain sectors, Member States have persistently relied on the principle of subsidiarity to protect their areas of competence. Notably, in fields such as asylum and immigration, as well as health protection, the Commission's tendency to expand its sphere of power has consistently been moderated by the European Parliament and the Council through political compromise. However, this moderation has often been influenced by short-term perspectives that have endorsed national self-interest and the resurgence of nationalist sentiments.

Moreover, it is worth noting that the delineation of competences outlined in Title I of the TFEU ("Categories and Areas of Union Competence") appears to have been effectively surpassed, particularly in the aftermath of the Covid-19 pandemic and the conflicts arising from Russia's aggression against Ukraine and Hamas' attack on Israel. Emergency situations in both instances have underscored the limitations of this delineation and compelled institutions to swiftly find effective solutions, even when, according to the Lisbon Treaty, their intervention was intended to complement that of national governments.

Most importantly, these challenges have highlighted the imperative to expedite the revision of the distribution of competences - a task that institutions have embraced, notably in response to the outcomes of the Conference on the Future of Europe.

2. The principle of subsidiarity and common policies

Beyond any further detailed analysis, it is immediately apparent that in certain domains, if the aim is to establish a unified policy, it is illogical to question which entity is best positioned to exercise a particular competence, as only the Union, rather than individual Member States, can effectively pursue such objectives. This holds true, for instance, in the realms of agriculture, fisheries, and transport policy. Concerning the former two, the Communication of the Commission on the principle of subsidiarity in 1992 explicitly listed agriculture, the conservation of fishery resources, and the common organization of fisheries markets as exclusive competences. Additionally, it emphasized that this classification should be interpreted judiciously and that the Community's obligation to

[4] Reference is made to the good faith and, therefore, to the principle of loyal cooperation that has informed the relations among the Member States and between them and the EU institutions since the outset: on this principle, see V. CONSTANTINESCO, "L'article 5 CEE, de la bonne foi à la loyauté Communautaire", in F. CAPOTORTI, C.D. EHLERMANN, J. FROWEIN, F. JACOBS, R. JOLIET, T. KOOPMANS AND R. KOVAR (sous la direction de), *Du droit international au droit de l'intégration: liber amicorum Pierre Pescatore* (Baden-Baden: Nomos Verlagsgesellschaft, 1987), p.97; M. KLAMERT, *The Principle of Loyalty in EU Law* (Oxford: OUP Oxford, 2014).

act did not imply an intention to deprive Member States of their right to intervene in certain respects.[5]

Subsequently, the process of constructing common rules has experienced (and continues to experience) moments of particular significance. Firstly, due to the broadening scope of agricultural policy, now encompassing not only fisheries but also food law, environmental law, and increasingly regulations concerning animal welfare as sentient beings; secondly, because of the sensitivity of the issues addressed, which express historical peculiarities and identities on not only a national but also regional and global scale. These peculiarities translate into a declared search for identity and dialogue among institutions and Member States (and local authorities), in a process of constructing EU law as common law. On the other hand, the objectives set out in the Treaty (Article 38 TFEU) exhibit both economic and social characteristics that have remained unchanged since the Treaty of Rome, as their formulation has proven to be highly flexible and capable of encompassing the numerous reforms undergone since the 1980s. Indeed, in the early decades of the European integration process, secondary law referring - broadly - to agricultural law constituted over half of Community law, in not coincidental correspondence with the circumstance that, in the community budget, expenditure on agriculture absorbed well over half of the resources. In recent years, however, increasing emphasis has been placed on the transition towards specifically regulatory law rather than merely incentivizing law.

Therefore, the allocation of competences between EU institutions and Member States avoids a pre-determined determination of "who" should regulate, instead focusing solely on "how" to regulate, and sometimes allowing a degree of subsidiarity to each Member States.[6] The agricultural and fisheries policy is therefore embedded in a system that automatically assigns to the Union the function of setting objectives and to national authorities the task of pursuing them. In this regard, for example, the reform of the Common Agricultural Policy (CAP),[7] which came into effect on January 1, 2023, explicitly states that "the Union should set the basic policy objectives, types of intervention and basic Union requirements while greater responsibility and accountability for meeting those objectives should be borne by the Member States. […] Accordingly, under the new CAP delivery model, Member States should be responsible for tailoring

[5] Commission of the European Communities, "The principle of subsidiarity" SEC (92)1990 final, 27 October 1992. It should be noted that, in the Communication, the Commission also emphasized that, in the broad range of sectors where powers are shared, the need for Community action could not always be assessed in the same way. Thus, it advised the adoption of legislative measures to ensure the smooth functioning of the internal market and community policies (agriculture, transport, fisheries).

[6] See Recital 18 of Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing [2009] OJ L 303/1.

[7] Regulation (EU) 2021/2116 of the European Parliament and of the Council of 2 December 2021 on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013 [2021] OJ L 435/187, on which see L. FERRARIS, "The 2021-2027 EU Rural Development Policy: a New Paradigm of Shared Management?" (2019) 44 *E. L. Rev*. 855.

their CAP interventions in line with their specific needs and basic Union requirements in order to maximise their contribution to Union's CAP objectives".[8]

From this standpoint, the justification advanced to validate EU intervention aptly articulates how such policy naturally falls within the scope of its sphere of influence: "Since the objectives of this Regulation cannot be sufficiently achieved by the Member States given the links between this Regulation and the other instruments of the CAP and the limits on the financial resources of the Member States, but can rather, by reason of the multiannual guarantee of Union finance and by concentrating on the Union's priorities, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives".[9]

In this case, the Regulation clarifies that the EU action is justified also on financial grounds, which, as is well known, is a significant factor in determining the most appropriate level to dictate regulation.

Similarly, the transport policy also aims to establish a common policy, given that the sector serves as a fundamental aspect of European integration, crucial for facilitating the movement of individuals, goods, and services. Specifically, the transport sector is characterized by the tension between the imperative of liberalization and the necessity to uphold public service obligations. Consequently, it requires governmental interventions aimed at facilitating and regulating to advance common interests.[10] While initially the principle of subsidiarity appeared to be a viable mechanism for preserving substantial competences within the Member States, the establishment of a European transportation network inherently required the formulation of European regulations. This is particularly evident in matters such as network interoperability and the adoption of standardized technical protocols.

Indeed, practical experience demonstrates a significant influence of EU legislation not only in shaping organizational frameworks but also in regulating the transportation and infrastructure sector more broadly. This interference occurs through modalities and criteria that profoundly impact areas that, upon closer scrutiny, would seem to fall within the purview of Member States' competences. In this context, the true efficacy of the principle of subsidiarity has been questioned, or at least its capacity to fully harness its potential to enable Member States to adopt the most suitable regime for their specific circumstances.

However, the inherent linkage between transport policy and overarching concerns, such as the integration of European transport markets, sectoral liberalization,[11] climate change mitigation, passenger rights, and the adoption of clean fuels, inherently justifies the

[8] Recital 3 of Regulation (EU) 2021/2116.
[9] Recital 111 of Regulation (EU) 2021/2116.
[10] On this point, see S. M. CARBONE, "Principio di sussidiarietà e disciplina comunitaria di porti, aeroporti ed infrastrutture del trasporto" (2002) *Il diritto dell'Unione europea* 425.
[11] E.g., *Italian Republic v Commission of the European Communities* (Italian traffic distribution rules for the airport system of Milan) (C-361/98) EU:C:2001:29.

exercise of competence by EU institutions. They are better positioned than single Member States to deliver efficient, safe, and environmentally sustainable mobility solutions. This approach fosters an environment conducive to a competitive industrial sector capable of fostering economic growth and employment opportunities.

Over the years, the European Union has undertaken substantial planning endeavours to address challenges in the global market while simultaneously committing to environmental protection through initiatives promoting investments in sustainable technological innovations for various modes of transport, including high-speed rail and low-emission vehicles. Moreover, the transition toward safe, accessible, inclusive, intelligent, resilient, and zero-emission mobility has broadened the scope of transport policy within the Union, necessitating the identification of suitable tools to develop an integrated transport system for both passengers and goods.

This objective has been pursued based on two guiding principles. The first, primarily of economic nature, has led to the adoption of measures aimed at enhancing the efficiency of the European single market through the design of intermodal systems and infrastructure renewal. The second principle, with a socio-cultural dimension, has directed efforts toward strengthening social and territorial cohesion within the European Union and with third countries.[12]

Even within the transport sector, EU competence appears to be primary rather than subsidiary, justifying the intervention of EU institutions, especially considering the significant disparities among various national legal systems that may impact the effective implementation of EU policies. Consequently, the principle of subsidiarity does not govern the choice of the most suitable authority to exercise competence, which is naturally vested at the Union level, as articulated in Article 91 of the TFEU. Instead, it focuses on identifying the actions that Member States may undertake to achieve the established objectives. Therefore, no comparative assessment between the EU and national levels is necessary, as it is indisputable that the exercise of competence primarily falls within the purview of European institutions.

Similarly, the Treaty addresses another closely related sector, namely trans-European networks. Article 170(1) of the TFEU specifies that, with the aim of ensuring economic, social, and territorial cohesion, the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications, and energy infrastructures, within the framework of open and competitive markets. To this end, the latter establishes guidelines covering the objectives, priorities, and broad lines of measures envisaged in the sphere of trans-European networks and implements any necessary measures to ensure the interoperability of the networks, particularly in the field of technical standardization (Article 171, para. 1, TFEU).

[12] On the peculiar distribution of powers on the external sphere in this matter, see, especially, R. BARATTA, "La ripartizione tra Comunità e Stati membri delle competenze esterne in materia di servizi di trasporto marittimo" (2002) *Il diritto dell'Unione europea* 17.

The very name of this specific field implies functions that presuppose allocation to EU institutions, given the trans-European nature of the networks involved.[13] In this regard, for instance, following opinions issued on the proposal to revise the Regulation on the trans-European transport network, seeking clarification on adherence to the principle of subsidiarity, the Commission asserted that national planning must align with the Union's transport policy and the ambitious goals of a genuinely European transport network.

Conversely, the deficiencies observed in asylum, subsidiary protection, and temporary protection policies are well-documented. The principle of subsidiarity, as previously underscored, has been invoked to tether every competence to national exigencies (and self-interest), thereby impeding genuine efforts to achieve collective solutions. As highlighted in Article 78(1) TFEU, this policy is aimed at "offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement". The Common European Asylum System (CEAS), established to facilitate a fairer and more solidary management of asylum requests, has encountered obstacles and stagnation due to disparities among Member States regarding the equitable distribution of asylum seekers. These conflicts are echoed in the "New Pact on Migration and Asylum", nearly adopted following seven years of negotiations, albeit amidst myriad controversies. [14]

There is no doubt, and some indications have already been observed, that the New Pact is poised to reignite debate. It presents itself as a disappointing patchwork of disjointed measures resulting from numerous compromises aimed at striking a balance between various national perspectives, many of which are characterized by excessive nationalism.[15] The Pact mandates the transition, through the utilization of regulations replacing previous directives, from a system grounded in partial and incomplete approximation of national legislations to nearly complete harmonization of asylum and return procedures, crisis management tools, and solidarity mechanisms. However, this harmonization tends towards a diminished level of protection of migrants' rights both substantively and procedurally. Furthermore, even the Presidency of the Council of the European Union, in its statement, acknowledged that "This reform is a crucial piece of the puzzle. But the EU also remains committed to tackling the root causes of migration,

[13] European Commission, "Proposal for a Regulation of the European Parliament and of the Council on Union guidelines for the development of the trans-European transport network, amending Regulation (EU) 2021/1153 and Regulation (EU) No 913/2010 and repealing Regulation (EU) 1315/2013" COM/2021/812 final.

[14] See European Commission, Statement "Commission welcomes the major progress achieved by Parliament and Council on the New Pact on Migration and Asylum", 20 December 2023. Among the first reactions to the newly reached agreement, see A. Martelli, "New Pact on Migration and Asylum, Historical Agreement or Broken Deal?", *https://iep.unibocconi.eu/new-pact-migration-and-asylum-historical-agreement-or-broken-deal*, 2 January 2024.

[15] D. VITIELLO, "L'ultimo atto: il nuovo Patto sulla migrazione e l'asilo è (quasi) legge", *https://www.adimblog.com/2023/12/31/lultimo-atto-il-nuovo-patto-sulla-migrazione-e-lasilo-e-quasi-legge/*, 31 December 2023.

working together with countries of origin and transit and addressing the scourge of migrant smuggling".[16]

The New Pact raises concerns regarding coherence with the objectives of the CEAS and fails to adequately reflect the case law of the European Court of Justice. Paradoxically, it fosters discord, as it does not limit the discretion of Member States nor enhance the level of protection. This is particularly evident in the case of defining a "safe third country," which grants Member States greater discretion in determining the connection between the asylum seeker and the third country to which they could be expelled. Despite portraying this resolution as an undeniable negotiating triumph, it foresees an even broader utilization of a mechanism that could indiscriminately curtail access to asylum in Europe.

3. The principle of subsidiarity and the harmonisation of legislations

Nevertheless, the principal objective of achieving the internal market has driven a broadening of competences within the Union. Particularly in shared sectors aimed at harmonizing legislative, regulatory, and administrative provisions among Member States, it is apparent that subsidiarity lacks a critical element:[17] the evaluation of the adequacy of regulation at the national level. This constitutes an attribution in favour of the sole entity capable of adopting harmonization measures.[18]

This is true in criminal matters, as provided under art.83(1) TFEU, exclusively for "the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension" and regarding social systems, even if art.153 TFEU allows the European Union to act in order to "'support and complement' Member States' social policies, it does not […] exclude making certain regulatory choices at the EU level and thus harmonising national laws. However, legislation at EU level must be justified in the light of the principle of subsidiarity".[19]

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[16] Spanish Presidency of the Council of the European Union, Press release *The Council and the European Parliament reach breakthrough in reform of EU asylum and migration system*, 20 December 2023.

[17] However, there has been no shortage of criticism among the scholars in this regard: by way of example, according to E. HERLIN-KARNELL, "[…] there is a clear absence of subsidiarity in recent proposals governing legislative initiatives in the area of EU criminal law. So, despite the reassuring words of the report in question, EU criminal law, broadly interpreted, seems to be exempted from the wings of subsidiarity. And even when subsidiarity raises its head in this area, it is to confirm the need for EU action not to restrain it: during the publication process of the present article the Commission presented two proposals, on the fight against terrorism and on data transfer rules, respectively, which refer to subsidiarity and proportionality. Nevertheless, the result of the outcome of such an assessment is held to indicate the necessity of EU legislation" ["Subsidiarity in the Area of EU Justice and Home Affairs Law - A Lost Cause?" (2009) 15 *Eur. Law Jour.* 352]. V. anche P. DE HERT AND I. WIECZOREK, "Testing the principle of subsidiarity in EU criminal policy. The omitted exercise in the recent EU documents on principles for substantive European criminal law" (2013) *New Jour. Eur. Crim. Law* 293.

[18] A. MOLINAROLLI, "Spunti problematici in materia di sussidiarietà europea", *https://archiviodpc.dirittopenaleuomo.org/d/2766-spunti-problematici-in-materia-di-sussidiarieta-europea*, 16 January 2014.

[19] Opinion of Advocate General Ćapeta, delivered on 23 March 2023, *XT, KH, BX, FH and NW v Keolis Agen SARL* (C-271/22 to C-275/22) EU:C:2023:243 at [38].

In the first sphere, there are measures which, if adopted solely at the national or Union level without considering international coordination and cooperation, would have limited efficacy, thereby impeding the functioning of the single (including digital) market. This is because they could potentially facilitate other criminal activities such as terrorism, drug trafficking, and human trafficking.[20]

In the second sphere, these measures represent actions through which the Union has intervened to reconcile various objectives, including the well-being of its citizens and the sustainable development of Europe based on a highly competitive social market economy. These measures aim at achieving full employment, social progress, and ensuring adequate social protection. Therefore, these actions are intended to guarantee that every worker enjoys the right to safe, healthy, and dignified working conditions, while simultaneously ensuring gender equality across all sectors, including employment, labour, and remuneration.[21] In this context, consideration should also be given to the debated directive concerning adequate minimum wages,[22] which seeks to address the needs of workers and their families in relation to national economic and social conditions.

In both instances, the principle of subsidiarity has functioned as a centripetal force, legitimizing the exercise of relevant powers by European institutions on behalf the common interest in the establishment and smooth operation of the internal market.

More broadly, the EU legislator has found it considerably straightforward to assert jurisdiction over numerous areas of regulation that directly or indirectly impact the establishment or functioning of the internal market. It has enacted legislation for the harmonization of legislative, regulatory, and administrative provisions among Member States, as only a legal framework at the EU level allows for the elimination of barriers to the free movement of goods and services, as well as the elimination of distortions of competition,[23] as stipulated by Articles 114 and 115 of the TFEU.

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[20] For example: Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA [2019] OJ L 123/18; Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law [2018] OJ L 284/22; European Commission, "Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures" COM/2022/684 final.

[21] For example, among many others, Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] OJ L 186/105; Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ L 188/79.

[22] Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union [2022] OJ L 275/33.

[23] *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (C-491/01) EU:C:2002:741 at [64]: "[…] the market for tobacco products, especially cigarettes, in the Community is one in which trade between Member States represents a relatively large part. Second, national rules laying down the requirements to be met by products, in particular those relating to their designation, composition or packaging, are in themselves liable, in the absence of harmonisation at Community level, to constitute obstacles to the free movement of goods".

For the aforementioned reasons, the inclusion of the internal market within shared competences appears subject to debate, particularly when considering that, historically, the concept of exclusive competence emerged precisely within the framework of the obligation to establish the "common market," defined in highly binding terms. Over time - mainly through ECJ judgments - this led to the delineation of a group of exclusive competences, primarily focused on the four fundamental freedoms and certain essential common policies or corollaries to its establishment (such as the removal of customs barriers, competition policy, common commercial policy, agricultural and fisheries policy, and transport policy).

While the demarcation line of the initial bloc of exclusive powers evolved with the progression of European integration, the current division between the internal market and competition policy seems less functional, given that they are two sides of the same coin. It appears short-sighted to have underestimated the dynamics of the four freedoms, which have engendered and will continue to foster momentum toward accompanying measures necessitating common legislation.

From this perspective, EU action aims to achieve an effective internal market for consumers that strikes the right balance between a high level of protection and business competitiveness. Taking into account the principle of subsidiarity, EU institutions have harmonized certain relevant aspects of consumer discipline (for example, contracts), thereby ensuring the protection of their health, safety, and economic interests (Article 169 TFEU).

This also applies with regard to the objectives posed by technological transformation, which necessitates the balancing of various needs. These needs are aimed at promoting progress while simultaneously safeguarding fundamental rights and economic interests in the digital environment. Pursuant to Article 114 TFEU, the European Union has intervened with its own Regulations to contribute to the smooth functioning of the internal market and ensure a safe, predictable, and reliable online environment in which the fundamental rights enshrined in the Charter are duly protected. These objectives "cannot be sufficiently achieved by the Member States because they cannot achieve the necessary harmonisation and cooperation by acting alone, but can rather, by reason of territorial and personal scope, be better achieved at the Union level […]".[24]

It has been tacitly assumed that EU institutions would have better regulated the fairness and contestability of the digital sector and basic platform services, aiming to promote innovation, high-quality digital products and services, fair and competitive prices, as well as high quality and broad choice for end-users in the digital sector; this is all the more true if one considers the activities of gatekeepers and their scope and effects.[25]

[24] Recital 155 of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1.

[25] Recital 107 of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1. On both the DSA and the DMA

More recently, thanks to Article 114 TFEU, the European Parliament and the Council have reached a political agreement for the adoption of the Artificial Intelligence Act (AI Act). This Regulation holds particular significance, as it establishes, for the first time, "a uniform legal framework in particular for the development, marketing and use of artificial intelligence in conformity with Union values".[26]

In summary, regarding the exercise of competences related to or impacting the establishment and functioning of the internal market, it is now redundant to attempt to draw a clear boundary between the European Union and the Member States. The EU's legal and institutional framework has established facilitated (or rather imposed) cooperation from above, fostering continuous dialogue among the different powers.[27]

4. The role of the subsidiarity principle in environmental and energy matters

Concrete examples illustrating the milestones achievable through such collaboration are evident in actions undertaken within the environmental and energy sectors. While these sectors exhibit distinct features and characteristics, their evolution tends, at least in certain aspects, towards convergence.

Beginning with the environment, it has been and remains the primary sector necessitating essential collaboration between the EU and its Member States. This is because no single Member State can effectively pursue environmental protection objectives alone.[28] Consequently, the environmental protection policy, initially deemed "subsidiary," has progressed through a blend of effectiveness and capacity. These criteria have justified numerous interventions by the Union, effectively placing the policy within the exclusive competences of the EU.

Articles 130R-130T of the EC Treaty, introduced by the Single European Act, formalized Community action to address the most significant environmental challenges. This approach presupposed that the predetermined objective could be better achieved at that level. At that time, the legitimacy of Community intervention had to be evaluated on a case-by-case basis, with the immediate criterion being negative. This involved establishing the impossibility for Member States to ensure a level of environmental protection equivalent to that of the Community.

In this context, in the Opinion delivered in Case 300/89 concerning the legal basis of the Directive on titanium dioxide residue, Advocate General Tesauro emphasized that, in

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acts, see M. EIFERT, A. METZGER, H. SCHWEITZER AND G. WAGNER, "Taming the giants: The DMA/DSA package" (2021) 58 *C.M.L. Rev*. 987.

[26] European Commission, "Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts" COM/2021/206 final.

[27] Some scholars even claimed that the principle of subsidiarity is like "a sleight of hand: if you want to act, it allows you to do so, if you don't want to (for political reasons), subsidiarity gives you a splendid alibi": J.H.H. WEILER, "L'Unione e gli Stati membri: competenze e sovranità" (2000) *Quaderni costituzionali* 11 (translation is by the author).

[28] K. LENAERTS, "The Principle of Subsidiarity and the environment in the European Union: Keeping the balance of federalism" (1994) 17 *Fordham International Law Journal* 846.

this sector, Community competence should be exercised if environmental protection objectives could not be more effectively pursued at the national level.[29] He added that harmonization action, under Article 100A, could be undertaken whenever necessary for the realization of the internal market.[30]

It is evident, firstly, that the application of the principle of subsidiarity was considered a genuine constraint on Community powers, requiring it to demonstrate the superior validity of the action it undertook in advance.

Secondly, the possibility of judicial review of the decision concerning the correct application of the principle is implicitly outlined. Thus, the Court did not neglect to exercise this scrutiny in the specific case, observing that the Council had failed to adequately justify the appropriateness of an EEC action competing with that individually undertaken by the Member States.

This jurisprudential orientation favoured the issuance of Community acts introducing minimal protection. It deemed legitimate, among the various abstractly adoptable measures, the least invasive and proportionate one in relation to the proposed objective. This gave Member States complete freedom to integrate and specify these measures: Article 130T recognized to them the power to issue acts providing more extensive protection than that envisaged at the Community level.

However, the Achilles' heel of such an approach was soon revealed, as the greater effectiveness of Community action could be easily and swiftly demonstrated compared to what individual States could undertake. This was especially true considering their differing approaches to combating pollution. Only three Member States (Denmark, Germany, and The Netherlands) had immediately shown sensitivity to environmental protection, envisioning comprehensive and consistent interventions aimed at achieving high protection standards. In other MS, environmental protection relied on sectoral and sporadic actions, effective for addressing specific problems, but insufficient and inadequate for comprehensive environmental protection.

These divergences have indeed facilitated, pending the development of more extensive cooperation, the frequent recourse to the adoption of measures by EU institutions to ensure the pursuit of "common" objectives. The intervention of the higher level has consistently found justification in the fact that pollution often transcends national borders, and disparities between national regulations risk distorting competition and hindering the realization of the internal market. Embracing these rationales, both the Community and subsequently the Union have, under the principle of subsidiarity, asserted competence to regulate sectors of significant environmental interest. This includes intervening where Member States, acting individually, have failed to find an adequate solution, and promptly establishing rules when a solution at the universal level is undoubtedly more effective.

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[29] Delivered on 13 March 1991, *Commission of the European Communities v Council of the European Communities* EU:C:1991:115 at [I – 2890].

[30] On this point, cf. also F. ROELANTS DU VIVIER AND J.P. HANNEQUART, "Une nouvelle stratégie européenne pour l'environnement dans le cadre de l'Acte unique" (1988) *Rev. mar. com*. 205.

It is nearly self-evident that the attainment of environmental policy objectives, given the breadth and cross-border nature of ecosystem degradation, would be easily undermined if they were not shared or left to the discretion of each individual Member State. This is particularly true because, given the capacity of the more environmentally conscientious States to ensure a high level of environmental protection, the adoption of divergent and less 'sensitive' regulations by just one State would suffice to compromise its quality.

In light of the foregoing, the principle of subsidiarity in environmental matters has prioritized the adoption of actions by institutions, while giving Member States the discretion in how to pursue common objectives. The adoption of common, standardized rules across the European Union has facilitated the reduction of disparities among Member States and the pursuit of ambitious goals, in alignment with the commitments made by the Union on the international stage.

Furthermore, environmental requirements have been incorporated into the development of all EU policies, attributing cross-cutting significance to environmental issues and emphasizing that their protection can only be collectively shared.[31]

However, upon examining the rationale behind the measures enacted in this sector, the principle appears to have deteriorated into a rhetorical formula that mirrors a long-established customary practice, which assigns to EU institutions the responsibility for guiding environmental policy. Through an analysis of legislative practices, it becomes apparent that the Union's authority to regulate – i.e. to prove that the intervention of the supranational legislator is more effective - is supported by a standardized expression. For example, "Since the objectives of this Regulation, namely to contribute to a high level of environmental protection and ambitious climate action, to sustainable development and to the achievement of the objectives and targets of environmental, biodiversity, climate, circular economy, relevant renewable energy and energy efficiency legislation, strategies, plans and international commitments of the Union, through good governance and a multi-stakeholder approach, cannot be sufficiently achieved by the Member States but can rather, by reason of the scale and effects of this Regulation, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union".[32]

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[31] See art.11 TFEU e art.37 CFREU. In this sense, see, formerly, O. PORCHIA, "Tutela dell'ambiente e competenze dell'Unione europea" (2006) *Riv. it. dir. pubb. com*. 17.

[32] Regulation (EU) 2021/783 of the European Parliament and of the Council of 29 April 2021 establishing a Programme for the Environment and Climate Action (LIFE), and repealing Regulation (EU) No 1293/2013 [2021] OJ L 172/53. See also, more recently, the heading "Subsidiarity" in the Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828, 22.3.2023: «The problems tackled by this Directive are of a cross-border nature and on a European and global scale. The SGD has already fully harmonised certain rules on the sale of goods purchased by consumers. As this proposal changes one aspect of these rules in order to promote repair within the legal guarantee, the change needs to be done at EU level. In the absence of EU-level action, national initiatives outside the scope of the SGD would follow in all likelihood and take different approaches in order to promote repair beyond the legal guarantee in line with the goal of more sustainable consumption. While they could bring certain benefits to consumers and the environment at national level, they would at the same time create or increase

Similar considerations can be drawn concerning energy policy, albeit with specific reference to certain aspects. The operationalization of the subsidiarity principle aimed at centralizing competence, reflecting the expansive nature of EU powers, is evident in the relationship established by Article 194 TFEU between EU energy policy and the imperative to preserve and improve the environment.

While acknowledging that measures adopted by the Union cannot impinge upon "a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply" (Article 194, para 2, second sentence), it is undeniable that the evolution of the energy system, heavily reliant on profound and rapid transformations in supply, markets, and technologies, underscores the increasing importance of adopting a comprehensive vision capable of addressing the integration and interconnection needs of energy markets while safeguarding the ecosystem.

For this very reason, as is well known, attention in recent decades has been directed towards decarbonization and taxonomy (referred to as sustainable finance), focusing on activities that can facilitate climate neutrality by 2050. These are highly sensitive matters that inherently demand the establishment of "unified" parameters and conditions to guide the EU economy through the energy transition and towards a green energy system based on renewable sources. Conversely, a fragmented regulatory environment, marked by significant disparities between Member States, could undermine these efforts.[33]

Therefore, the consolidation of relevant competence within the Union's sphere appears not only natural but also logical. In this regard, the EU institutions have enacted numerous measures with the objective of reducing emissions by at least 40% compared to 1990 levels by 2030. Additionally, they have established a financial framework to encourage investments in renewable energy projects in Member States, utilizing financial instruments.[34] These are very specific acts, even in the case of Directives (e.g., RED I, RED II and, most recently, RED III),[35] which leave Member States thin margins for manoeuvre during transposition – subject, however, to very strict scrutiny by the Commission.

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fragmentation of the internal market. EU action is therefore necessary in order to achieve the overall objective of a functioning internal market with more sustainable consumption of goods purchased by consumers. It is only through EU action that the desired effect of promoting repair and reuse in the context of cross-border sales can be achieved consistently across the internal market».

[33] Cf. European Commission, "Annual Report 2022 on the application of the principles of subsidiarity and proportionality and on relations with National Parliaments" COM/2023/640 final, p.13.

[34] *Ex multis*, Regulation (EC) No 1099/2008 of the European Parliament and of the Council of 22 October 2008 on energy statistics [2008] OJ L 304/1; Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140/16.

[35] Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 [2023] OJ L, 2023/2413 (RED III). See also Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC [2014] OJ L 153/62.

Hence, the energy policy aspects intersecting with environmental policy exhibit a qualitative enhancement in the rules enacted by EU bodies, notwithstanding the declared subsidiarity and self-restraint of its action. Other aspects, which do not affect the ecosystem in any manner, remain subject to close collaboration, as expressly stipulated by the relevant conventional provision identifying solidarity as the guiding philosophy of the policy.

It is widely acknowledged, even by case law,[36] that solidarity entails that both the EU institutions and the Member States are obliged to take into account, in the implementation of this policy, the interests of both the Union and the various Member States and to balance these interests in order to avoid conflicts. Solidarity also constitutes a concrete manifestation of the principle of sincere cooperation[37] and, transcending the fulfilment of specific obligations mandated by the Treaties, is realized through the harmonization of interests, mutual loyalty, and mutual respect.[38]

5. Other shared competences: economic and territorial cohesion, health

The exercise of other shared competences, as envisioned by Article 4 TFEU, remains entrusted to a classical form of subsidiarity, so to speak. As is well-known, this form "is composed, on the one hand of a negative criterion, according to which the objectives envisaged cannot be sufficiently achieved by the Member States, and, on the other hand, a positive criterion, according to which those objectives can, by reason of their scale or their effects, be better achieved at EU level. Those two components of the principle of subsidiarity ultimately address a single question, from two different angles, namely whether action should be taken at EU level or at national level in order to achieve those objectives".[39]

In matters of economic, social, and territorial cohesion, the principle has merely reinforced the evident and imperative collaboration among the competent authorities to mitigate disparities between regions and foster harmonious development across the Union. Cohesion has evolved into the principal financial policy, firmly anchored in the functioning of structural funds and the pursuit of strategic objectives that are sufficiently broad to accommodate diverse national requirements.[40]

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[36] *Poland v Commission* (OPAL pipeline) (T-883/16) EU:T:2019:567.

[37] Above all, A. BIONDI, E. DAGILYTĖ AND E. KÜÇÜK (eds.), *Solidarity in EU Law. Legal Principle in the Making* (Cheltenham: Edward Elgar Publishing, 2018).

[38] See *Commission of the European Communities v Italian Republic* (Premiums for slaughtering cows) (39/72) EU:C:1973:13 at [24 and 25].

[39] *Illumina v Commission* (T-227/21) EU:T:2022:447 at [158]. The judgment has been challenged before the Court of Justice (case C-611/22 P), recalling the Opinion of Advocate General Kokott, delivered on 23 December 2015, *Pillbox 38 (UK) Limited v The Secretary of State for Health* (C-477/14) EU:C:2015:854 at [165].

[40] In 2021-2027 EU cohesion policy has set a menu of 5 policy objectives: "1. a more competitive and smarter Europe; 2. a greener, low carbon transitioning towards a net zero carbon economy; 3. a more connected Europe by enhancing mobility; 4. a more social and inclusive Europe; 5. Europe closer to citizens by fostering the sustainable and integrated development of all types of territories" ("Priorities for 2021-2027", *https://ec.europa.eu/regional_policy/policy/how/priorities_en*).

Consequently, it falls upon the States, regional, and local authorities to identify their respective needs, establish programming, and oversee the financial interventions allocated by the funds, based on a multiannual financial framework and, recently until 2026, the Next Generation EU. In line with the principles of subsidiarity and proportionality, Member States bear primary responsibility for implementing and supervising interventions. In the absence of Union rules, national regulations govern eligible expenses, although the Commission may define such rules when necessary to ensure fair and uniform application of the Structural Funds.

The entire operational system of the Funds is structured around collaborative efforts among relevant authorities, guided by the principle of subsidiarity. This collaboration has been formally reinforced, leading to increased engagement of economic and social partners in planning and monitoring interventions. To delineate responsibilities more effectively, national authorities have been identified as directly responsible for timely implementation of collective action, based on criteria established at the Union level. This implementation is achieved through legislative, regulatory, and administrative instruments defined by each Member State in accordance with its constitutional framework. Conversely, the Union possesses extensive powers for managing committed financial resources, contingent upon compliance with the realization of EU policies, particularly with regard to harmonious development (art.174 TFEU).

The analysis of shared jurisdiction concerning "'common safety concerns in public health matters, as defined in this Treaty," presents a more intricate scenario (art.4, para. 2, let. *k*, TFEU).

The complexity arises primarily from the Treaty provisions governing the subject matter, which delineate a distribution of competences between the European Union (EU) and its Member States that is notably convoluted and incongruent with the stated objectives. Secondly, it stems from the practical challenges encountered, particularly during the Covid-19 pandemic crisis, where the limitations of this distribution had to be addressed swiftly, often navigating through uncertainties, to mitigate the significant challenges posed by the spread of the virus.

Indeed, the specific realm of "shared competence" undeniably encompasses significant health threats with transborder or international ramifications, such as pandemics or bioterrorism, as well as notable health considerations associated with the free movement of goods, services, and individuals.[41] In contrast, the domain of public health is reserved for the Member States, pertaining to aspects not explicitly delineated by the Treaties,[42] which include the formulation and execution of health policies, encompassing financial

[41] For an example of EU intervention, see Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L 88/45.
[42] On this point, see the impact of State Aid rules on the organization of national health systems: e.g., European Commission, Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, 2012/C 8/02.

allocation, organizational structure, and the provision of healthcare services and medical assistance.[43]

In accordance with Article 6 TFEU, the "protection and improvement of human health" falls under the category of "complementary" or "supporting" competences. These competences entail a graduated intervention by the Union in accordance with national needs, often manifesting as mere coordination of actions among Member States. Consequently, the primary and exclusive authority to regulate this sector rests with the Member States; the Union, however, may be tasked with assuming a supplementary and/or ancillary role without supplanting them. As stipulated in Article 2, paragraph 5, TFEU, not only the Union does lack the authority to supplant the competences of the Member States in pertinent sectors, but crucially, the adoption of legally binding acts "shall not entail harmonization of Member States' laws or regulations".[44]

On occasion, the exclusion of harmonization of national regulations in the field of health has been circumvented through the adoption of measures aimed at approximating national provisions concerning the functioning of the internal market, as established by Article 114 TFEU, which also seeks to safeguard public health.[45] This implies that, via the issuance of measures adopted under other provisions of the Treaties, there has been an indirect harmonization of certain national provisions in the field of health. [46]

The Court of Justice, extending its scope beyond explicitly designated provisions,[47] has identified numerous alternative avenues to ensure a high standard of protection for human health. It has affirmed that the imperative of economic development must be balanced against the quality and enhancement of human living conditions, and that it is essential to mitigate the adverse effects of economic activities and technological advancements on health.[48]

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[43] On this topic, E. MOSSIALOS, *Health systems governance in Europe: the role of European Union law and policy* (Cambridge: Cambridge University Press, 2010).

[44] On this point, may we refer to G. TESAURO, *Manuale di diritto dell'Unione europea*, 4th ed., edited by P. DE PASQUALE AND F. FERRARO (Napoli: Editoriale Scientifica, 2023), pp.76-77.

[45] Cf. D. ANDERSON, "Shifting the Grundnorm (and other tales)", in D. O'KEEFFE AND A. BAVASSO (eds.), *Judicial Review in European Union Law.* Liber Amicorum *in Honour of Lord Slynn of Hadley*, Vol. I (The Hague: Kluwer Academic Publishers, 2000) p.348.

[46] *Federal Republic of Germany v European Parliament and Council of the European Union* (Advertising and sponsorship of tobacco products) (C-376/98) EU:C:2000:544 at [76-78, 84 and 88]. On this judgment, see T.K. HERVEY, "Community and national competence in health after Tobacco advertising" (2001) 38 *C. M. L. Rev*. 1442: "From the point of view of Community competence in health, the ruling reinforces what is clear from the Treaty provisions: there are limits to the scope of lawful Community activity in the health field. However, the ruling is also indirect confirmation that health protection is not a matter simply of national competence. Rather, the protection of human health must be guaranteed by both national and EU-level institutions". See also *Swedish Match AB v Secretary of State for Health* (C-210/03) EU:C:2018:938 at [31].

[47] In addition to those mentioned: arts 153, 169 and 191 TFEU.

[48] For example, *Criminal proceedings against Jean Harpegnies* (Plant protection products) (C-400/96) EU:C:1998:414; *United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities* ("Mad cow disease") (C-180/96) EU:C:1998:192; *Associazione "Verdi Ambiente e Società - Aps Onlus" (VAS) and "Movimento Legge Rifiuti Zero per l'Economia Circolare" Aps v Presidente del Consiglio dei Ministri and Others* (Disposal of waste) (C-305/18) EU:C:2019:384 espec. at [31 and 32].

The Court of Justice has consistently reaffirmed that the imperative of economic development must consider the quality and enhancement of human living conditions, and that it is imperative to mitigate the adverse effects of economic activities and technological advancements on health. [49]

However, in practical terms, the Union's commitment typically manifests as mere encouragement for cooperation among Member States and simple support for their actions. This applies both to matters falling under shared competence (common issues in the field of health) and to the broader complementary competence (improvement of human health). The primary responsibility remains with national authorities, who are mandated to coordinate their policies and programs among themselves, in collaboration with the Commission (Article 168, para 2, TFEU).

While the importance of coordination efforts cannot be overstated, particularly in ensuring the consistency of measures taken by various competent authorities during international health emergencies, it is essential to remember that EU institutions are bound to respect the responsibility of Member States in defining health policy, organizing and delivering health services and medical care, and allocating necessary resources (Article 168, para 7, TFEU).

The MS reservation is affirmed by Article 35 CFREU, which guarantees everyone the right of access to preventive healthcare and the right to receive appropriate medical treatment "under the conditions established by national laws and practices". This is further supported by regulations concerning the free movement of goods, persons, and services, which allow for restrictions justified by health protection, provided they are deemed necessary and proportionate.

Consequently, while the protection of health is recognized as a fundamental right and duly safeguarded, the regulation of competences in health policy is significantly influenced by the Member States' willingness to govern the sector. [50] This was particularly evident during the Covid-19 pandemic, as national authorities initially asserted a clear intention to independently manage the health crisis. [51] Consequently, the Commission did not enact preventive measures to guide Member States towards strategic priorities and the adoption of shared operational frameworks. In the meantime, MS implemented disparate measures, resulting in significant repercussions for the market, competition freedom, and, most critically, the spread of the pandemic.

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[49] *Artegodan GmbH v European Commission* (C-221/10 P) EU:C:2012:216 at [99]: "[…] the protection of public health must unquestionably take precedence over economic considerations".

[50] KAI P. PURNHAGEN, A. DE RUIJTER, M.L. FLEAR, T.K. HERVEY AND A. HERWIG, "More Competences than You Knew? The Web of Health Competence for European Union Action in Response to the COVID-19 Outbreak" (2020) *Eur. Jour. Risk Reg*. 7, Special Issue.

[51] European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP)) at [let. E]: "[…] the EU response to the COVID-19 pandemic has so far been marked by a lack of coordination between Member States in terms of public health measures, including restrictions on the movement of people within and across borders and the suspension of other rights and laws; whereas with our economy having been put on hold, the effects of the ensuing disruption on European citizens, businesses, workers and the self-employed will be dramatic".

In summary, health policy is impacted by the fragmentation of competences and inadequately robust regulation, consistently risking the collapse of an inherently fragile system. For that reason, a comprehensive reassessment of competences in this sector seems, perhaps more than in others, necessary and pressing.

6. Protocol (No 2) on the application of the principles of subsidiarity and proportionality

It should be noted that the attraction of shared competences within the sphere of the European Union has also been facilitated by the effective operation of the control mechanisms provided for in Protocol (No 2) on the application of the principles of subsidiarity and proportionality (hereinafter, "Protocol No 2").

As is well known, Protocol No 2 outlines a detailed process that commences during the preparation phase of proposals. Indeed, for many years, the Commission has preceded legislative proposals with numerous preparatory and consultative documents (such as green, white or blue papers), in which the issue of the necessity or desirability of a new legislative act in light of the principle of subsidiarity and proportionality is thoroughly analysed. These documents initiate engagement with stakeholders, including Member States and their institutions. The feedback derived from these consultations influences the formulation of the proposal.[52]

This means that the assessment of compliance with the two principles predominantly takes place during the drafting of new legislative acts, so that any objections are resolved preventively and any discordant elements that could lead to conflicts are corrected.

The dialogue between the Commission and the interested parties primarily involves national parliaments. Even before the proposal is formalized, in the spirit of fair and

[52] G. DAVIES, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, in *Comm. Market Law Rev.*, vol. 43, n. 1, 2006, p. 76: «The Commission procedure for applying subsidiarity is set out in its impact assessment guidelines. These provide a procedural framework for the preparation of legislative proposals which is intended to safeguard subsidiarity and proportionality. However, familiar problems emerge. Firstly, the problem to be solved, and implicitly the general nature of the desired outcome, is defined before subsidiarity is considered. Secondly, whether Member States can achieve this outcome sufficiently is considered exclusively in terms of the problem itself and other Community goals. Thirdly, while at a later stage of the procedure attention is paid to the impact of the measure this is done in a limited way: the emphasis is overwhelmingly on impacts on non-public actors such as consumers and industry, and where the impact on public bodies is – briefly – mentioned, the focus is on economic and functional factors. National policy and autonomy interests are further marginalized by a consistent emphasis on quantifying impacts whenever possible. Nowhere in the entire process is there any explicit consideration of national autonomy, nor any weighing of Community against Member State goals, except perhaps for the warning, repeated several times, that impact assessments are "not a substitute for political judgement"». V. anche P. CRAIG, *Subsidiarity: A Political and Legal Analysis*, in *Jour. Comm. Market Stud.*, vol. 50, n. 1, 2012, p. 74: «There was a paradox in the post-Maastricht world that was readily foreseeable, albeit problematic nonetheless. The subsidiarity calculus was applicable in areas that did not fall within the Community's exclusive competence. The subsidiarity concept that was intended to alleviate competence disputes between the EC and the Member States was therefore predicated on the meaning of exclusive competence, for which the Maastricht Treaty provided no ready definition. This naturally led to diverse interpretation of this term. The Commission took the view that an area fell within exclusive competence if the treaties imposed a duty to act».

productive cooperation, inter-institutional dialogue can continue until national legislative assemblies have received satisfactory clarifications in response to critical observations regarding the potential violation of the principles of subsidiarity and proportionality - and until the Commission has duly taken them into account. Indeed, every year, they provide opinions to the Commission on (non-legislative) initiatives, thus expressing their interests even at an earlier stage and/or at other stages of the legislative process. Nonetheless, it is within the Conference of Parliamentary Committees for Union Affairs of the Parliaments of the European Union (COSAC) that inter-parliamentary cooperation has found fertile ground for the development of constructive dialogue.

It is thanks to the forms of cooperation developed by the Commission that the so-called "early warning" procedure has never reached the relevant threshold for the so-called "orange card" and this has only occurred on three occasions for the so-called "yellow card".[53]

Efforts to ensure a correct interpretation and application of the principles of subsidiarity and proportionality have effectively translated into the definition of a so-called "active" subsidiarity model, characterized by greater participation of all stakeholders, especially national, local, and regional authorities, which often play a specific role in the implementation of EU legislation. Thus, despite the almost negligible number of alert procedures activated, over the years, the mechanism has allowed national parliaments to exert a commendable influence on negotiations concerning proposals.

The Commission's approach has evolved over the years, both concerning the increasingly comprehensive justifications contained in the reports accompanying the proposals, and particularly in the responses to national parliaments, even when no threshold has been reached. Undoubtedly, the contributions of national parliaments have served, especially in the early years of the Protocol No. 2, to draw the Commission's attention to the need to justify any regulatory intervention at the Union level.

In the report for the year 2022, the Commission emphasized that "Overall, there was little change, compared to previous years, in the intensity of national Parliaments' monitoring of respect for the principles of subsidiarity and proportionality – to ensure that EU action is taken only when necessary and only to the extent necessary – and their relations with the Commission with an active written and oral dialogue" and it added that some of the reasoned opinions "were not grounded on clear-cut criticism of a subsidiarity breach but rather on a perceived lack of analysis of national circumstances"[54].

Finally, it is worth noting that, when confronted with issues concerning the observance of the principle during the *ex-post* control phase, the Court of Justice initially adopted an extremely cautious approach, respectful of the choices made by the EU legislators. This attitude, based on an analysis of the (few) judicial decisions recorded in the last decade,

[53] The first instance was in 2012, concerning the proposal for a regulation on the exercise of the right to bring collective actions within the framework of freedom of establishment and freedom to provide services (known as Monti II); the second instance was in 2013, on the proposal for a regulation establishing the European Public Prosecutor's Office (EPPO); and the third instance was in May 2016, regarding the directive on the posting of workers.

[54] *Supra*, footnote 1.

does not appear to have changed subsequently. Nonetheless, certain cases brought before the EU judge have provided an opportunity for some significant clarifications regarding the nature of the principle and, thanks to the interpretative efforts of the Advocates General, regarding the procedural provisions contained in Protocol No. 2.

7. Conclusions

Based on the observations made, it is evident how the decision to tie the exercise of concurrent powers to adherence to the principle of subsidiarity promptly resulted in legitimizing the involvement of European institutions in the view of Member States. This also led to the de facto allocation of additional domains to EU law, even in cases where the existence of explicit competences might have been questioned, to prevent any risk of encroaching upon the fundamental freedoms outlined in the Treaties. This implies that the delineation of shared competence areas was not motivated by the intention to designate subsidiarity as a mechanism to curtail the indefinite expansion of EU law, which would otherwise be inevitable given its precedence. Rather, it stemmed from the necessity to reach a (political) compromise aimed at assuaging certain Member States concerned about the ongoing erosion of their sovereignty.

Hence, to address the questions raised in the introduction, it must be emphasized that the principle of subsidiarity, in certain sectors, has never been employed to determine the appropriate level for undertaking an action, as the objectives outlined in the Treaties unequivocally delineated the entity responsible for exercising the relevant competence.

However, in other sectors, albeit gradually and not without resistance, subsidiarity has started to influence the interactions between Member States and the European Union. It has evolved from being merely a programmatic and static principle to becoming a flexible and dynamic model of a more contemporary policymaking strategy. This evolution is based on collaborative and non-dichotomous frameworks.

In these realms, subsidiarity has traditionally served its designated role as a criterion for identifying the optimal level for exercising a competence. This has been achieved through mechanisms linked to its oversight, thereby shaping a framework aimed at fostering greater involvement of all stakeholders, particularly national, local, and regional authorities, which often play a significant role in the implementation of EU legislation.[55]

Indeed, the EU institutions, particularly the Executive, have, out of necessity, strategically expanded their competences into certain spheres, such as those related to environmental and energy matters, or aspects concerning ecosystem protection. This expansion has been achieved by promoting the subsidiarity principle as a top-down "method" of coordination, which imposes specific obligations of action and restraint. Unlike the softer coordination envisaged for complementary competences, this approach is more directive.

[55] See F. MUNARI, "Principi di sussidiarietà e proporzionalità", in G. AMATO, E. MOAVERO MILANESI, G. PASQUINO AND L. REICHLIN, (a cura di), *Europa. Un'utopia in costruzione*, Vol. I (Treccani: Roma, 2018), p.132 ss.

There has been widespread acceptance of the need for a reassessment of the lists contained in Articles 3 and 4 of the Treaty on European Union (TFEU), especially considering that the distribution of competences outlined in the Treaties no longer aligns with the contemporary socio-economic context and has been significantly altered by practical implementation.

In this regard, the Report on the Final Outcome of the Conference on the Future of Europe, presented in May 2022, which focuses on enhancing the role and actions of the EU in certain areas, is to be welcomed.[56]

Also of note are the Report on Proposals for Treaty Amendments, [57] presented by the European Parliament on November 22, 2023, and the Report on Institutional Reforms in the European Union, dated September 18, 2023, prepared by a working group appointed by the French and German governments. [58] These documents underscore the interest in modifying the existing system, including the allocation of competences.[59]

In light of the foregoing, it is unequivocal that certain competences currently shared should be elevated to exclusive status. This entails revisiting the Commission's 1992 Communication on the principles of subsidiarity, not only in the realms of agriculture, conservation of fisheries resources, and the common organization of markets in fishery products, but also in the domains of environment and biodiversity, encompassing negotiations on climate change.

Conversely, among shared competences, the policy on public health and the protection and enhancement of human health should be fully entrusted. This is particularly critical in addressing transboundary health threats. Accordingly, the institutions would be authorized, pursuant to the principle of subsidiarity, to enact harmonization measures for aspects of common interest. Equally significant would be the inclusion in this competence domain of civil protection, industry, and education, particularly in cases of a transnational nature, such as the mutual recognition of educational qualifications, grades, skills, and

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[56] The full text of the COFE Report is available at this link: *https://www.europarl.europa.eu/resources/library/media/20220509RES29121/20220509RES29121.pdf.* See, e.g., p.11: "We recommend the EU should have stronger competences in social policies to harmonise and establish minimum rules […].

[57] European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties, 2022/2051(INL) at [13-15]: "- establish exclusive Union competence for the environment and biodiversity as well as negotiations on climate change; - establish shared competences on public health matters and the protection and improvement of human health, especially cross-border health threats, civil protection, industry, and education especially when transnational issues such as mutual recognition of degrees, grades, competences and qualifications are concerned; - further develop Union shared competences in the areas of energy, foreign affairs, external security and defence, external border policy in the area of freedom, security and justice, and cross-border infrastructure".

[58] "Report of the Franco-German Working Group on EU Institutional Reform. Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century", Paris-Berlin 18 September 2023, available here: *https://www.politico.eu/wp-content/uploads/2023/09/19/Paper-EU-reform.pdf*

[59] "Report of the Franco-German Working Group on EU Institutional Reform", p.6: "The report discusses several key aspects related to the powers and competences of the EU. It recommends clarifying EU competences, strengthening provisions for addressing unforeseen developments and better involving the EP"; p.11: "Fundamental questions are back on Europe's agenda: The European Union (EU) is reconsidering its geography, institutions, competencies, and funding". See also p.32.

certifications. Additionally, EU powers in the energy sector and in policies concerning external borders in the area of freedom, security, and justice, as well as transboundary infrastructures, should be reinforced.

With further endeavour, it would be feasible to classify as shared competences those encompassing genuine sharing and whose regulation cannot be entrusted solely to individual Member States. For instance, common defence, security, public order, research, and technological development fall within this purview. Such an approach would be logical and consistent, considering the underwhelming outcomes observed in these sectors. Nonetheless, this fundamentally oriented choice (objectively appropriate in practice) should be perceived as a tangible shift in direction. This is owing to the limited success achieved by Member States in asserting autonomy in these areas, akin to economics, foreign policy, and notably, healthcare, particularly amidst crises ranging from financial downturns to health emergencies and conflicts. This underscores the imperative for the Union to attain strategic autonomy externally, mirroring its internal autonomy, thereby extricating itself from the peripheral role often relegated to it by major powers.

Significantly, it would be prudent to include within the category of shared competences (understood in its contemporary context) a new competence in the "digital" domain. Beyond matters concerning the functioning of the single market, owing to its supranational character, the Union can more effectively intercept and safeguard individuals' rights in cyberspace than Member States, where the absence of borders can become pivotal in acquiring rights and freedoms. This facilitates spontaneous connections without ties to specific territories and presents novel opportunities for learning and employment beyond national confines. Explicitly designating a specific competence and introducing corresponding policies outlining the objectives to be pursued in this domain could ensure sectoral harmonization and adequate protection of digital rights within the European Union.

The EU's prioritized intervention in safeguarding digital rights is warranted due to the pervasive technical self-regulation that, while initially fostering the utilization of digital tools, has progressively resulted in unintended consequences concerning the mechanisms safeguarding virtual life, its content, and its values. The digital realm has triggered a fragmentation of established power, which, in some cases, now belongs to private corporations (the digital platforms). The challenge in aligning such power structures within the traditional vertical State-citizen relationship complicates the protection of rights in these legal scenarios. Citizens often lack awareness of how to protect themselves, whom to approach for protection, and from whom they are entitled to be protected.[60]

The persistent yet imperceptible threat to its values has compelled the Union to reiterate numerous times, in the European Declaration on Digital Rights and Principles, [61] the

[60] O. POLLICINO, "Costituzionalismo, privacy e neurodiritti" (2021) *Media Laws* 10, *https://www.medialaws.eu/wp-content/uploads/2021/08/2-2021-Pollicino.pdf*

[61] European Parliament, Council of the European Union and European Commission, "European Declaration on Digital Rights and Principles for the Digital Decade" (PUB/2023/89) OJ C 23/1.

imperative for these rights, akin to those of individuals, to be upheld both in online and offline domains. This is attributable to the ongoing evolution of cyberspace, which engenders virtual worlds in the digital sphere (referred to as the "metaverse"), where individuals, through their avatars, lead parallel lives. Discussions are already underway regarding the protection of corresponding subjective rights in this virtual realm, which could be termed meta-digital rights, and ensuring their parity with real-life rights.

Taking a somewhat visionary stance, one could hope to see the revision of the competence framework accompanied by the adoption of a Charter of Digital Rights. While certain situations concerning the digital society may readily fall within the scope of application of the Charter of Fundamental Rights of the European Union (CFEU), given the broad formulation of the rights enshrined therein - for instance, the protection guaranteed to dignity, health, and family life can encompass digital rights without significant effort - ,[62] it is equally true that others should be suitably incorporated into the EU's primary provisions to prevent the mere interpretative application of existing norms from resulting in a diminution of rights.

Furthermore, in the new framework, the function of the principle of subsidiarity should be recontextualized. Traditionally, the principle dictates that decisions be made at the level closest to the citizens, implying a preference for Member States over the EU in terms of adherence to this premise. However, the current interpretation of the principle oversees only a few and narrowly circumscribed policies, while a more contemporary interpretation is much more pervasive. Rejecting the notion of a rigid dichotomy between the two levels, this modern interpretation serves as a symbol of the unified purpose of the European Union. Moreover, the primacy of EU law over national law renders it unrealistic to entrust the principle with the role of an "arbiter" and even less so as a "limit" to the exercise of legislative competences by European institutions.

As underscored, for certain matters, it is challenging to envisage genuine and effective "competition" between competent authorities, while for others, the principle, in a highly flexible guise, has emerged as a new modus operandi.

A shift in the allocation of competences would also entail significant implications on the external front, particularly concerning the reinforcement of the European Union's role on the international stage. Although it may be immaterial whether the European Union exercises its competence domestically or internationally to prevent Member States from acting autonomously, the exercise of concurrent competence on the international stage is not exempt from the principles of subsidiarity and proportionality.

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[62] The Court of Justice has already been able to assess the impact of internet use on certain rights, albeit not strictly "digital". For example, it has recognized and protected the right to be forgotten and, in two separate judgments, has set territorial limits on its exercise or rather "de-referencing": see *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* (C-293/12 and C-594/12) EU:C:2014:238; *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (C-131/12) EU:C:2014:317; *Maximillian Schrems v Data Protection Commissioner* (Facebook) (C-362/14) EU:C:2015:650; *Google LLC, successor in law to Google Inc. v Commission nationale de l'informatique et des libertés (CNIL)* (Territorial scope of de-referencing) (C-507/17) EU:C:2019:772; *Eva Glawischnig-Piesczek v Facebook Ireland Limited* (C-18/18) EU:C:2019:821.

Consequently, the reclassification of competences should be accompanied by an amendment to paragraph 2 of Article 2 of the Treaty on European Union (TFEU), by adding a new sentence: “When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. *Where the action has an impact on the functioning of the internal market, on competition or is of transnational significance, the Union shall adopt legally binding acts, leaving to the Member States, in accordance with the principle of sincere cooperation, the task to implement them in a timely and correct manner*. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall exercise their competence again to the extent that the Union has decided to cease exercising its competence.”