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Subsidiarity Ex Ante and Ex Post: From the Early Warning System to the Court of Justice of the European Union

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Abstract

The subsidiarity principle divides competences between the European Union and its Member States. The Lisbon Treaty suggests a connection between ex ante and ex post subsidiarity review. Ex ante, national parliaments were given a role via the early warning system (EWS). Ex post, legislation is subject to review by the Court of Justice of the European Union (CJEU). More than 10 years after Lisbon, this article is the first to theorize and evaluate whether there is indeed a connection. Our theory predicts a conditional connection. Quantitatively, we provide a two-way classification of Member States based on their use of the EWS and CJEU subsidiarity cases. Qualitatively, we look back from court cases to the Council stage and analyse the Advocate General's opinions in subsidiarity cases. We find a weak conditional connection. A key explanation appears to be the Court's limited willingness to enforce subsidiarity and hence the limited incentives to go to court.

Keywords: early warning system; European Court of Justice; judicial review; subsidiarity

Introduction

The principle of subsidiarity is a cornerstone of the European Union's (EU's) constitutional design and balance of power (Cass, 1992; Schütze, 2009). In areas of shared competence, Member States are in principle in charge of new policies. The EU can only make new policies if there are clear cross-border effects or benefits of scale. Since the Treaty of Lisbon, the principle is safeguarded through ex ante scrutiny by national parliaments (NPs) and ex post judicial review by the Court of Justice of the European Union (CJEU). The early warning system (EWS) entails ex ante and political scrutiny of proposed EU legislation. Ex post judicial review is the result of Member States being able to file for annulment of adopted legislation. In this article, we are interested in the connection between both. Specifically, we theorize and investigate empirically the link between ex ante and ex post subsidiarity scrutiny. Whilst the Treaty of Lisbon arguably intended a link, we theorize this link to be conditional on many factors. Empirically, we find it to be weak indeed.

The drafters of the Lisbon Treaty appeared to have a connection in mind: When the threshold for a yellow card under the EWS is not reached, or when a parliament is not satisfied with the outcome of the EWS, ex post judicial review should be open as a last remedy. As phrased by Davies (2006), the intention was to provide 'the possibility for parliaments to finally take the matter before the Court of Justice, if the Commission did not accept their complaints'.[1] Irrespective of the intentions of the drafters, a link between the two systems simply seems necessary for them to function effectively: '[…] the

[1]Note that this comment pertained to the draft Constitutional Treaty. However, the subsidiarity provisions of the draft Constitutional Treaty were more or less directly taken over by the Lisbon Treaty (Barrett, 2008).

Protocol's significance will depend on the support of the ECJ in policing the conduct of the Union Institutions. The ECJ must ensure that the "reasoned opinions" of national parliaments are properly considered […]' (Barber, 2005, pp. 204–205). In spite of the intended connection by the treaties, with ex post review by the Court as a remedy where ex ante scrutiny through the EWS failed, these review mechanisms have thus far only been studied in isolation.

As we will theorize, the connection between ex ante and ex post subsidiarity enforcement is likely to be limited in practice. There are many steps between the EWS and the adoption of policy that could be challenged at the CJEU. For instance, subsidiarity concerns may be amended away by the European Commission (henceforth: Commission). Unpopular proposals may be dropped by the Commission or voted out in the Council of the European Union (henceforth: Council).

What, then, if any, is the empirical connection between ex ante scrutiny and ex post review of subsidiarity in the EU? That is the question taken up by this article. Specifically, do we see the same countries being active ex ante and ex post? Or are some countries only active in one of the two? Does the Court engage with subsidiarity arguments from the EWS? All in all, we find that there is a weak empirical connection between ex ante and ex post enforcement of subsidiarity.

We contribute to the understanding of subsidiarity in the EU in the following ways. First, we theorize the expected strength of the link between ex ante and ex post subsidiarity scrutiny and show that it is conditional on many factors. Second, we document Member States' use of both systems and develop a typology. Third, we trace individual court cases back to the Council stage and the EWS and find evidence consistent with a conditional link: Court action only seems to follow activity in the EWS if there was (still) opposition at the Council stage. Finally, analysing jurisprudence, we find that the Court gives little incentives to move for annulment and that even Advocates General (AGs) show little engagement with subsidiarity arguments in their opinions.

The remainder of this article is organized as follows. The rest of the introduction reviews the literature and theorizes the conditional connection between ex ante and ex post subsidiarity review. Section I provides the data and two-way classification of Member States' behaviour related to subsidiarity ex ante and ex post. It also looks back from court cases to Member States' voting behaviour in the Council. Moreover, Member State incentives to go to court are shaped by past jurisprudence. Section II hence looks at the substance of subsidiarity considerations in CJEU decisions as well as AGs' opinions and the relation to prior reasoned opinions (ROs). Finally, the Conclusion section discusses the results and concludes.

Theorizing the Connection between Ex Ante and Ex Post Subsidiarity Control

A short historical overview is necessary to understand the connection between ex ante and ex post control of the subsidiarity principle. Subsidiarity found its way in the treaties when the Treaty of Maastricht was adopted. However, the post-Maastricht reality was that of strong concerns that the principle was insufficiently taken seriously (Craig, 2012, p. 77).

Thus, the 2001 Declaration of Laeken, which ultimately resulted in the Treaty of Lisbon, defined some key challenges for the EU, two of which are relevant for our discussion: providing a better division and definition of competence and bringing the EU closer

to its citizens. In the Treaty of Lisbon's Protocol on Subsidiarity and Proportionality, these challenges have been addressed jointly. With the overall objective of embedding subsidiarity more strongly in the EU's constitutional framework and to allow it to impact decision-making better, the Protocol introduced the right for NPs to scrutinize EU legislative proposals and for the CJEU to engage with subsidiarity-based claims more. As Craig rightly asserts, this should create a comprehensive upgrading of the principle. NPs' rights and CJEU jurisdiction are not isolated but jointly strengthen subsidiarity throughout the full decision-making process from the impact assessment by the Commission to a possible procedure before the CJEU (Craig, 2012, p. 78).

The provisions of the Protocol on judicial review underline this point of a joint strengthening of subsidiarity. The CJEU would have jurisdiction to review legislation on compliance with subsidiarity anyhow under Article 263 of the Treaty on the Functioning of the European Union (TFEU). The Protocol specifies the conditions under which subsidiarity-based actions may be brought to the Court. Article 267 of the TFEU provides that 'Member States' may institute such proceedings, which practically means Member States' governments. The Protocol prescribes, however, that NPs should be enabled to bring a matter to the CJEU as well.[2] The right to scrutinize EU legislation under the EWS is thus supplemented by access to court provisions, thus providing a strong argument in favour of a connection between ex ante and ex post scrutiny. Parliaments that did not manage to build a strong enough coalition of NPs (to reach the yellow or orange card thresholds), or to convince the Commission to withdraw or amend its proposal (the EWS does not give NPs the right to block legislation from being adopted), would still have the right to individually address the Court. In this way, judicial review completes the overall role of NPs as 'watchdogs of subsidiarity' under the Treaty of Lisbon (Cooper 2006).

Thus, subsidiarity's history since the Treaty of Lisbon suggests a connection between ex ante scrutiny through the EWS and ex post judicial review. The argument for such a connection is fostered further by a substantive argument. The increased and more explicit role of subsidiarity in the legislative process should make judicial review easier: As the arguments in favour of EU action would need to become better substantiated, more elaborate and refined, the Court would be in a better position to assess those arguments (Craig, 2012, p. 78).

Other factors, however, challenge the strength of the intended connection between ex ante and ex post subsidiarity scrutiny. They point to a connection that is conditional.

First, the actors are different: NPs in the EWS versus governments in the CJEU. However, beyond the obvious connection of parliament holding the executive accountable, per Article 8 of the subsidiarity protocol, Member States may have specific rules that allow parliament to force the government to move for annulment. So, the difference in actors can only be a partial explanation at best.

[2]As alluded to in Article 8 of the Protocol on subsidiarity, Member States may have internal rules that allow parliaments to instruct the government to move for annulment at the CJEU. This is not unlike the link between the EWS and voting in the Council: Some Member States have mandating rules; that is, parliament can instruct a minister to vote a certain way (van Gruisen and Crombez, 2019; van Gruisen and Huysmans, 2020; Winzen, 2012). Federal and decentralized Member States may have specific and varying procedures for the involvement of regional parliaments in EU scrutiny (Borońska-Hryniewiecka, 2017; Granat, 2018; Schneider et al., 2014).

Related to the first point, in exceptional cases, positions in the Member States may change over time. Several years may elapse between the EWS and potential CJEU cases after adoption of new EU policies. This means that the opinions or even compositions of parliaments and governments may have shifted. As an example, the Netherlands submitted an RO against the European Public Prosecutor (EPPO). Yet, in the end, not only did the Netherlands not challenge it in court, but it even voluntarily joined the EPPO under enhanced co-operation, perhaps because opinions in the Netherlands had shifted.

Second, over the course of the legislative process, the actual content of EU legislation may change significantly from the Commission's proposal to the final legislative act. Even before amendments from the Council and the European Parliament (EP), the Commission may have changed the proposal based on the political dialogue and the EWS (Cooper, 2006; Rasmussen and Dionigi, 2018). Hence, the Commission may have amended away the most important subsidiarity concerns. In addition, proposals targeted within the EWS may have been dropped altogether (van Gruisen and Huysmans, 2020) or fail to obtain a majority in the Council, meaning that they will never end up in court.

Thus, legislative proposals may be amended to address NPs' concerns or may be withdrawn altogether. The possibility of judicial review would hence only remain relevant in cases in which these concerns have not been sufficiently addressed. This could be the case for Member States and NPs that found themselves in an isolated negotiation position. Generally, however, the higher the responsiveness of the EU's legislative institutions, the less likely it will be that a strong connection will exist.

Third, cost–benefit calculations may mean that some Member States will only engage in one of the systems, depending on the strength of their position and how isolated they are. The EWS, whilst having resulted in only three yellow cards, seems to have engaged the Commission in terms of changing or even dropping proposals (Cooper, 2019; Jaroszynski, 2020; van Gruisen and Huysmans, 2020). This means that there are clear policy incentives for NPs to engage in the EWS. However, the ability to build coalitions and to co-operate with other NPs (Auel and Neuhold, 2017; Christiansen et al., 2014; Malang et al., 2019) may be a key success factor. Some countries may find this more difficult.

In contrast to incentives to engage in the EWS, incentives to launch a court case seem much more limited.[3] On the cost side, Member States may fear reputational costs. Moving for annulment may cost diplomatic capital as it is perceived as uncooperative by the EU institutions and other Member States. Moreover, the potential benefits may appear limited. In particular, since the Court has never annulled legislation on the basis of subsidiarity, the odds of winning appear slim. On the other hand, launching a court case does

[3]Indeed, judicial review of subsidiarity has been limited. In the pre-Lisbon period, De Búrca (1998) argued already that the CJEU was treating subsidiarity issues with 'only minimal scrutiny'. Up until now, the court has never annulled a legislative act for violation of the principle. Öberg (2017) puts forward two main reasons. First, the principle of subsidiarity is vague and often political in spirit. This makes it difficult to interpret (van den Brink, 2012) and renders it unfit for judicial review (Jančić, 2015). Second, even if the Court would be more willing to enforce subsidiarity, it suffers from an institutional disadvantage in terms of legitimacy, resources and competence. The Court's reluctance to enforce subsidiarity must however be qualified, especially since its decision in the Vodafone case, which will be discussed later in more detail.The Court's reluctance to enforce subsidiarity, or to at least rigorously investigate it through procedural review, is also evident from the Commission's behaviour when asked to defend its proposal's compliance with subsidiarity. According to some, the arguments put forward by the European Commission are often standard, very simple (Miettinen and Tervo, 2017) and sometimes just generally of poor quality (Craig, 2012). Yet, despite these deficiencies, they seem reasonable enough to pass the procedural review of the court (Öberg, 2017).

have one important advantage compared to the EWS: It does not require collective action. A single Member State could, in theory, veto EU legislation by asking for annulment based on subsidiarity grounds.

Substantively, a considerable gap thus exists between NPs, which apply the EWS in a broad manner with relative success, and the CJEU, which has been reluctant to accept subsidiarity claims. The latter obviously negatively impacts the incentive to institute proceedings. Given the low odds of success, why bother going to court? This lack of incentives places an important limit on the connection that one can expect between ex ante and ex post scrutiny. Hence, Section II will study the Court's relevant jurisprudence to assess Member States' incentives to go to court.

Finally, the EWS, at least in theory, is only about subsidiarity – although in practice, parliaments often bring in considerations of proportionality, legal basis or substance as well (Fasone, 2013; Huysmans and van Gruisen, 2022; Jančić, 2015; Jaroszynski, 2020; Tacea, 2021; van den Brink, 2012). Whilst non-subsidiarity arguments are often brought in, the Commission reserves the right to ignore those in the context of the EWS, as became clear in its response to parliamentary objections to the EPPO (Wieczorek, 2015). In contrast, at the CJEU, Member States can and do overtly move for annulment based on multiple grounds. Rather than having to put all weight on subsidiarity, they usually bring a set of arguments in the hope that at least one of them will convince the Court. In short, the fact that subsidiarity is usually only one of the official grounds in CJEU cases may lead to a disconnect in terms of the arguments used between ex ante and ex post subsidiarity review.

Hypothesizing a Conditional Connection

Based on our theoretical arguments and the literature discussed above, we theorize a conditional connection. In particular, we only expect both ex ante and ex post subsidiarity actions on a given proposal by the same Member State, if (a) the parliament and government are reasonably aligned and their preferences are stable over time, (b) subsidiarity concerns are not amended away during the legislative process and the proposal is actually adopted and (c) Member States expect a reasonable chance of success in both systems. Before investigating this conditional connection at the level of individual cases, we develop a typology of Member States on the basis of their overall use of both systems.

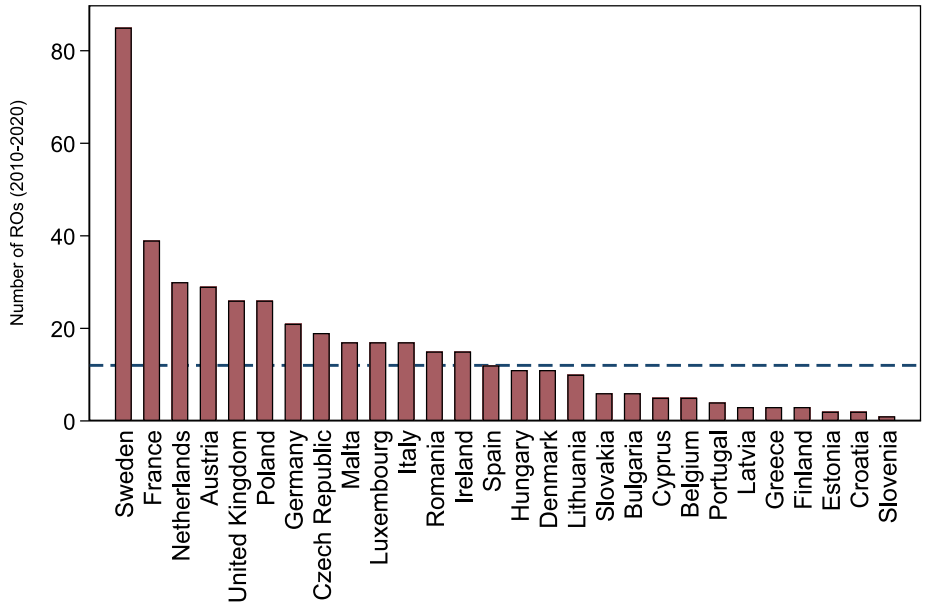
I. Subsidiarity Ex Ante and Ex Post

Data

To analyse empirically the activity at the two stages, we collected data for the period 2010–2020, that is, the first 11 years the EWS was in operation. All Member States of the EU-28 are covered. This includes Croatia, as of its accession in 2013, and the United Kingdom, which formally left the EU on 1 January 2021.

For the EWS, the 2010–2018 data were sourced from Huysmans and van Gruisen (2022), supplemented with data from the InterParliamentary EU information eXchange (IPEX) for the missing years 2019–2020. We define an EWS objection as at least one chamber of parliament having filed a Reasoned Opinion (RO) on a proposal. This leads to a total of 440 objections over the period 2010–2020. Figure 1 presents the number of ROs by Member State.

FIGURE 1: Number of Reasoned Opinions (ROs) by Member State (2010–2020). [Colour figure can be viewed at wileyonlinelibrary.com]



Notes: The dotted line indicates the rounded median number of ROs (12).

The average number of EWS objections (15.8) is somewhat skewed by the outlier Sweden; the median number of objections per Member State is 11.5. The ex ante activity of Member States was classified as having parliaments issuing more (12 or more) or fewer than 12 than the median.

For subsidiarity cases at the CJEU, the data were sourced from the Commission's annual reports on subsidiarity, supplemented with information from the IPEX, EurLex and Curia. For the period 2010–2020, this resulted in 18 cases related to subsidiarity.[4] Of these, only nine involve Member States requesting annulment.[5] The remaining cases involve either firms or individuals, or are requests from national courts for a preliminary reference. Famous examples of the latter type are Vodafone (C-58/08) and Swedish Match (C-151/17).

For the nine cases involving Member States moving for annulment, we coded the Member States filing the case (often more than one), as well as any Member States siding with the EU institutions and hence against annulment. Table 1 gives an overview of these

[4]For the Commission to consider a CJEU case to be related to subsidiarity depends on whether the parties in the case have invoked the principle. See, for example, the annual report from 2020, COM(2021) 417 fin, p. 8.

[5]To give some insight into how this relates to the CJEU's overall case load: In the period 2017–2021, the amount of cases brought to the CJEU has varied between 737 (2020) and 966 (2019) annually. Direct actions for annulment – of which Member State requests for annulment are part – amount to 29 (2021) to 63 (2018). Within the category of requests for annulment, it must be noted that also EU institutions have the right to request annulment and that such requests may concern non-legislative acts as well (which greatly outnumber legislative acts). Although there are no exact data on the Member State requests for annulment of EU legislative acts, it is thus safe to assume that these requests are rare (source: CJEU annual report 2021, most notably pp. 230–231).

Table 1: CJEU Subsidiarity Cases Involving Member States.

Topic	*Case number*	*Moving for annulment*	*Siding with EU institutions*
Airport charges	C-176/09	LU, SK	
Financial statements	C-508/13	EE	
State aid digital TV	T-461/13	ES	
Flavoured cigarettes	C-358/14	PL, RO	IE, FR, UK
EU agricultural guarantee fund	T-28/16	DE	
Relocation	C-643/15; C-647/15	SK, HU, PL	BE, DE, GR, FR, IT, LU, SE
Emissions	C-128/17	PL, HU, RO	
Weapons	C-482/17	CZ, HU, PL	FR
Posted workers	C-620/18; C-626/18	HU, PL	DE, FR, NL, SE

Abbreviations: CJEU, Court of Justice of the European Union; EU, European Union.

cases. The ex post activity of Member States was then classified as having governments either (a) predominantly taking cases for annulment to the CJEU (two cases or more), (b) predominantly siding with the EU institutions (two cases or more) or (c) being neutral (the remainder). Those classified as neutral are hence the ones with less than two cases against or siding with the institutions; this includes 11 countries that did not take sides in any of the nine cases. The threshold of two cases on either side was chosen to obtain a reasonable separation of Member States. A higher threshold would have left only Hungary and Poland against the institutions (four and five cases, respectively) and only France siding with the institutions (four cases).

Since there are only nine relevant cases at the CJEU, no statistics can be run. Our analysis should rather be seen as exploratory and providing a case selection framework for more in-depth qualitative case studies or comparative work.

Overall Ex Ante and Ex Post Subsidiarity Activity

Table 2 shows our two-way classification of Member States' ex ante and ex post subsidiarity activity, based on the data of the previous subsection. The result is a 2-by-3 matrix. We gave each of the six cells a descriptive name. However, these names may still hide variation within one cell.[6] For instance, countries in the cell that we name 'neutral scrutinizers' may appear neutral at the CJEU because of an actual desire to be neutral or simply because of a lack of interest or a lack of capacity. Investigating the differences within this group and others hence seems a promising avenue for future work.

Starting from the top left cell, Poland and Romania are the only countries that have above-median EWS objections and complained in at least two subsidiarity cases at the CJEU. We call them subsidiarity hardliners – subsidiarity watchdogs that bark and also bite. Two other countries have complained in at least two subsidiarity cases but are less active in the EWS: Hungary and Slovakia (though Hungary is just below the median, with

[6]In addition, the limited number of court cases is a caveat to be kept in mind when considering the classification. For instance, Sweden is classified as a pro-EU scrutinizer because it sided with the institutions on two counts (relocation and posted workers). Yet, in both cases, Sweden may have sided with the institutions because those particular proposals were beneficial for Sweden – and not because it necessarily wants to defend the EU in general.

Table 2: Ex Ante and Ex Post Subsidiarity Activity.

CJEU subsidiarity cases *EWS objections*	*Side against EU institutions ≥2*	*Neutral*	*Side with EU institutions ≥2*
Above median ≥12	*Subsidiarity hardliners* PL, RO	*Neutral scrutinizers* AT, CZ, ES, IE, IT, LU, MT, NL, UK	*Pro-EU scrutinizers* DE, FR, SE
Below median <12	*Ex post hardliners* HU, SK	*Non-enforcers* BE, BG, CY, DK, EE, FI, GR, HR, LT, LV, PT, SV	*Pro-EU non-scrutinizers* /

Abbreviations: CJEU, Court of Justice of the European Union; EU, European Union; EWS, early warning system.

11 EWS objections). We call them ex post hardliners: They are not so active ex ante, but they do put their foot down ex post. Perhaps they have difficulties building coalitions in the EWS and prefer to take cases to the CJEU directly. They do not bark but do bite.[7]

Nine countries have above-average EWS activity but are neutral at the CJEU: Austria, Czechia, Spain, Ireland, Italy, Luxembourg, Malta, the Netherlands and the United Kingdom. We call them neutral scrutinizers: They are active in ex ante scrutiny, but ex post they do not take subsidiarity cases to the CJEU. They bark but do not bite.

Three countries are active in the EWS but tend to side with the institutions at the CJEU, against the complaining Member States: Germany, France and Sweden. Hence, we call them pro-EU scrutinizers. They are active ex ante, but ex post they defend the EU against subsidiarity cases. They bark but defend against the dogs that bite.

The remaining 12 countries are non-enforcers: Judging by their ex ante and ex post activity as shown in Table 2, they do not seem to care much about subsidiarity, neither ex ante nor ex post. One caveat is that they may be active in scrutinizing proposals but end up concluding that subsidiarity has not been breached. Hence, we call them non-enforcers rather than non-scrutinizers. Future work may compare countries within this cell.

Perhaps unsurprisingly, the Visegrád 4 (Czechia, Hungary, Poland and Slovakia) dominate the top left corner of the matrix: They are very active on subsidiarity.

Interestingly, there are no pro-EU non-scrutinizers. This suggests that scrutiny in the EWS should not necessarily be seen as being anti-EU. The pro-EU scrutinizers show that it is possible to care about the EU but not take it to court for annulment of legislation. This seems in line with the idea of soft Euroscepticism: wanting to change the specifics of the EU rather than being opposed to European integration per se (Huysmans, 2019; Taggart and Szczerbiak, 2004). Conversely, there are no countries that defend the EU ex post but are not active ex ante. Many countries that are not active in ex ante enforcement seem to be somewhat indifferent: not sending ROs but also not coming to the defence of the institutions at the CJEU.

All in all, only two groups of countries show consistent behaviour ex ante and ex post. Subsidiarity hardliners Poland and Romania are active both ex ante and ex post. The 12

[7]The image is slightly different if we take a look at countries' activity in the political dialogue (Rasmussen and Dionigi, 2018). However, we leave the political dialogue out of scope, since we focus on subsidiarity.

non-enforcers show little enforcement activity both ex ante and ex post. The two ex post hardliners only show above-average enforcement activity ex post. The neutral scrutinizers object a lot during the EWS but show low ex post activity. And the pro-EU scrutinizers are active ex ante but come to the defence of the institutions ex post. Hence, the aggregate activity pattern of Member States shows a disconnect between ex ante and ex post scrutiny of subsidiarity. If we consider subsidiarity as a tool to block legislation, it suggests that Member States differ in the strategies they use.

Negotiations in the Council

The previous subsection has shown that countries show different overall patterns of ex ante and ex post activity when they try to block EU legislation. Some Member States are more active ex ante and others ex post. However, this does not mean that there is no connection between ex ante and ex post subsidiarity. Condition (b) of our theorized conditional connection stipulates a connection only if subsidiarity concerns are not amended away during the legislative process and the proposal is actually adopted. After all, in response to ROs, the Commission, the Council and the EP may have amended away subsidiarity concerns. Likewise, the Commission may have dropped its proposal altogether. As such, to observe a link, initial opposition by Member States should not have been amended away towards the end of the legislative process.[8] To capture this conditional connection, we move away from the aggregated analysis and turn to a more fine-grained analysis.

In what follows, we study individual proposals and trace them back through the legislative process. For this purpose, we use the CJEU policy cases as identified in Table 1. It should be emphasized again that there are only a very limited number of court cases to look back from. Nonetheless, this exercise can yield valuable insights into the dynamics between Member States' behaviour at the EWS and the CJEU and how it is affected by negotiations in the Council.

For each of the identified court cases, we traced back Member States' behaviour in the EWS and the Council.[9] This approach has two main advantages. First, the fact that a Member State was able to start a case at the CJEU implies that the Commission has not withdrawn its proposal. Second, if the initiation of a case at the CJEU by a Member State was preceded by a 'No' vote in the Council by that same Member State, it reveals that concerns were not sufficiently amended away.

Table 3 shows that most court cases launched by Member States were indeed preceded by opposition in the Council. In particular, a total of 13 Member States sought to annul legislation at the CJEU. Amongst those 13, a vast majority (10) was preceded by a 'No' vote in the Council. The latter demonstrates that Member States who are outvoted in the Council, and demonstrate strong reservations with a proposal, use subsidiarity complaints at the CJEU as a last resort to annul legislation. Luxembourg, for example, was outvoted on the Airport Charges Directive. Not only did it vote against the proposal in

[8]There are other conditions that matter too. For example, in the theoretical section, we have argued that preferences can change over time and that Member States – as rational and strategic actors – need to expect a reasonable chance of success in both systems for them to also use it. We refer back to these arguments in the analyses of cases.

[9]The EWS does not apply to three of the nine case studies presented in Table 1. This leaves us with six cases for which we can track Member States' behaviour through the entire legislative process.

Table 3: Opposition in All Three Stages of the Legislative Process (EWS–Council–CJEU).

Case	*Stage 1: EWS*	*Stage 2: Council*	*Stage 3: CJEU*
Airport charges	-	LU	LU, SK
Financial statements	-	EE, HU	EE
Flavoured cigarettes	BG, CZ, GR, IT, PT, RO	PL	PL, RO
Emissions	-	PL, HU, RO, DK, LT, AT	PL, HU, RO
Weapons	SE	CZ, PL, LU	CZ, HU, PL
Posted workers	BG, CZ, DK, EE, HR, **HU**, LV, LT, **PL**, RO, SK	**HU**, **PL**	**HU**, **PL**

Notes: Opposition in the Council is captured by formal 'No' votes only. Governments can also show their dissent by abstentions and negative statements. For the purpose of this analysis, formal 'No' votes are best suited because they demonstrate the strongest form of dissent (Hosli et al., 2011). Compared to Table 1, this table shows that three cases have been dropped. The EWS does not apply to those cases, for example, because they concern non-legislative acts, or because the legislative does not fall under the area of shared competences, to which the EWS applies. Abbreviations: CJEU, Court of Justice of the European Union; EWS, early warning system.

the Council, it also issued a statement warning that it reserved the right to move for annulment based on subsidiarity grounds, which it eventually also did.

When we look at Member States' behaviour in the EWS, there appears to be limited alignment with subsidiarity activity observed at the Court. Only on the Posted Workers Directive did Poland and Hungary submit an RO and later also file for annulment at the CJEU (emphasized in bold in Table 3). Importantly, their voting behaviour in the Council – they both voted against – suggests they were dissatisfied with the compromise reached, leading them to resort to the CJEU as a final recourse. By contrast, other Member States that issued ROs before a proposal's adoption seemed to be satisfied with the compromise reached in the Council as they did not oppose it, rendering legal action unnecessary.[10]

These findings confirm the significant mediating role that negotiations in the Council play in shaping a connection between ex ante and ex post subsidiarity activity of the Member States.

II. Subsidiarity Cases at the CJEU

As described in the Theorizing the Connection Between Ex Ante and Ex Post Subsidiarity Control section, the Subsidiarity and Proportionality Protocol of the Lisbon Treaty strengthened both the ex ante and ex post mechanisms, suggesting a link between the two. Under Article 8, cases for annulment may be brought by Member States or 'notified by them in accordance with their legal order on behalf of their national Parliament'. Hence, parliaments that did not get their points across in the EWS may instruct their governments to initiate a procedure for annulment. Thus far, however, the CJEU has never annulled an EU legislative act for breach of subsidiarity. This section assesses how the CJEU's approach impacts the intended link between ex ante and ex post scrutiny and how this incentivizes Member States and Member State parliaments to address the Court.

[10]The only exception is the behaviour of Romania during the flavoured cigarettes directive. It issued an RO and appealed at the CJEU but did not oppose it in the Council.

These questions necessitate an analysis of the substantive approaches of the Court, especially as its sensitivity to subsidiarity seems to be increasing.

Court Cases

Let us first look at the three yellow cards that have thus far been issued. The yellow card against the Posted Workers Directive was followed by a court case initiated by Poland and Hungary (C-620/18 and C-626/18). The Polish Sejm and Senate and the Hungarian National Assembly had issued ROs, next to the parliaments from nine other Member States (Fromage and Kreilinger, 2017). However, these Member States did not join Poland and Hungary in their cases at the CJEU. Remarkably, however, in the court cases, neither Poland nor Hungary made any claim that the subsidiarity principle had been breached (Verschueren, 2021).

The regulation on the EPPO's office has not been challenged before the Court. After the yellow card was issued, the regulation was adopted under enhanced co-operation. Some Member States whose parliaments had issued ROs did not join the enhanced co-operation, but others did. Still, this has not resulted in any of the non-joiners challenging the legality of the regulation. The first ever yellow card on the right to strike (the so-called Monti II regulation) resulted in the Commission withdrawing the proposal, and hence, no court case could be brought. The yellow cards thus show little connection to CJEU subsidiarity scrutiny.

The CJEU is known to only limitedly scrutinize subsidiarity. Indeed, the CJEU's approach may be qualified as reluctant and for long was limited to procedural aspects, thus lacking any substantive review (van den Brink, 2012). This procedural review was limited to checking whether the EU legislator had properly considered subsidiarity. Later on, the Court seemed to become more sensitive to substantive subsidiarity arguments. The substantive approach the Court adopted in the *Vodafone* case (C-58/08) remains somewhat of a one-off, however. In that case, the Court decided that the Roaming Regulation complied with subsidiarity even though it included provisions on retail prices that usually involve only a domestic context. The Court, however, ruled that these retail prices are inextricably linked to wholesale prices, which do contain a strong cross-border dimension. The regulation as a whole thus respected subsidiarity according to the Court, and the cross-border dimension served as the key substantive argument.

A year later, in 2011, the Court had to decide on the directive on airport charges (C-176/09). This directive applies to airports that process more than five million passengers annually and to the biggest airport in each Member State even if it processes less than five million passengers. Luxembourg took issue with the latter aspect of the directive's scope of application and brought a case before the court. The CJEU, however, concluded that the Luxembourgish government had substantiated its subsidiarity claim in too weak a way to be able to meaningfully address it. The Luxembourgish government had given more weight to other arguments, such as the principle of equal treatment of the Member States and proportionality. Still, the Court's reasoning included a substantive subsidiarity dimension where it argued that the EU legislature's choice in this regard did not violate subsidiarity. It referred to the privileged position that Member States' main airports enjoy even if they are smaller in absolute terms.

A further interesting case regarded the legality of a directive laying down accounting requirements for financial statements of undertakings (C-508/13). The directive pursued two objectives: (i) harmonizing financial information of EU undertakings so that addressees of the financial information have comparable data and (ii) avoiding that small and medium-sized enterprises would be faced with unreasonable burdens. Neither the Estonian parliament – the directive proved difficult for Estonia to implement – nor any other NP had issued an RO on the proposal. Nevertheless, in the procedure before the Court, Estonia put forward a range of subsidiarity-based arguments, arguing that objective (ii) could be better achieved at the national level. The Court, in addressing those arguments, shed more light on the substantive interpretation of subsidiarity. In particular, the Court stated that the second objective was intricately connected to the first, so the EU would indeed be better suited to pursue the two objectives in combination. The CJEU equally argued that the assessment of subsidiarity should be limited to the legislative act as a whole and does not extend to each individual provision thereof. Lastly, the Court turned a deaf ear to Estonia's claim that its more advanced position in terms of its electronic reporting system should have been considered when adopting the directive. The more general conclusion is thus that individual specific positions that Member States may hold towards a certain issue do not necessarily result in a negative subsidiarity assessment.

Opinions by the AG

In other decisions, the Court has been even more reluctant to engage in substantive subsidiarity review. In some cases, the Court did not address subsidiarity even when the parties in the procedure claimed the principle had been violated (van den Brink, 2012). What explains the Court's reluctance? This may have to do with the Court viewing subsidiarity as a political rather than a legal principle. Another reason, though, could be a possible lack of consensus within the Court on whether and how to give substantive meaning to subsidiarity. In that light, it is worth examining whether AGs engage more with subsidiarity.[11]

Contrary to the Court, AGs are not constrained by consensual decision-making. If AGs would engage more with subsidiarity, that would suggest that the line between the political and the legal nature of the principle is perhaps thinner than the Court's reserved approach might suggest. Moreover, more robust approaches by AGs may be the harbingers of a changing approach by the Court itself and thus indicative of how incentives to address the Court may change. This would, in turn, impact the link between ex ante and ex post scrutiny. Our analysis of the AG conclusions[12] documented in Appendix S1 leads us to distinguish three distinct situations:

- cases involving extensive subsidiarity assessments;
- cases involving minor subsidiarity points; and
- cases in which subsidiarity aspects are not addressed at all.

[11]AGs are important in the CJEU. They are called to present their opinions, advising the Court on how to decide cases. Whilst the Court is not bound by an AG's opinion, in practice, such an opinion is often followed.

[12]Unfortunately, AG conclusions are not available for all cases in which subsidiarity is relevant. For example, the court case on the directive on financial reporting obligations (C-508/13) did not include an AG opinion, even though there was a clear subsidiarity issue on the table. As such, though subsidiarity is an EU constitutional principle, its relevance in a particular case does not automatically trigger the need to involve an AG.

As this classification already suggests, our analysis does not reveal a fundamentally different approach to subsidiarity between the CJEU and AGs. Some AG conclusions ignore subsidiarity claims altogether, as the AG did in the Swedish match case. In other cases, AGs dismissed subsidiarity-based claims with only cursory arguments. There are however also some interesting examples of AG conclusions that involve a much more substantive and comprehensive approach to the principle. Maduro's conclusion on the subsidiarity aspects of the Roaming Regulation involved an assessment of the transnational aspects of the issue. More importantly, the conclusion of AG Kokott on the tobacco directive involved an elaborate assessment of the substantive aspects of the directive (the added value of EU action and the cross-border dimension) but equally addressed how the EU legislature should justify legislation and how she viewed the political and judicial meaning of the principle.

If adopted by the Court, such approaches would provide specific and concrete tools for NPs to substantiate subsidiarity claims before the Court and to apply these already in their ROs. In light of the enhanced chances this would create of winning, the incentives for NPs and governments to bring such cases to court would be significantly strengthened. Thus, the connection between ex ante and ex post scrutiny would be significantly fortified as well. It seems, however, that this does not (yet) reflect the current state of affairs.

Conclusions

This article theorized a conditional connection between ex ante and ex post subsidiarity review. In particular, we only expect both ex ante and ex post subsidiarity action on a given proposal by the same Member State, if (a) the parliament and government are reasonably aligned and their preferences are stable over time, (b) subsidiarity concerns are not amended away during the legislative process and the proposal is actually adopted and (c) Member States expect a reasonable chance of success in both systems.

Our empirical analyses confirm that there is at best a weak conditional connection between the EWS and subsidiarity cases at the CJEU – both in terms of overall activity at the Member State level and in terms of substance. A key reason seems to be the limited willingness of the Court – and even its relatively unconstrained AGs – to engage with subsidiarity and hence the limited incentives to start a court case for annulment on subsidiarity grounds.

Future research may seek to test the relative importance of our arguments for a conditional connection as explanations for why some countries are active ex ante but not ex post and vice versa. In addition, detailed process-tracing research for individual cases may follow subsidiarity concerns all along the way from the EWS to the Council and national decisions on whether or not to proceed to the CJEU.

The question remains why the Court has been so reluctant to police subsidiarity ex post (Barber, 2005; Craig, 2012; De Búrca, 1998; Miettinen and Tervo, 2017; Öberg, 2017; Panara, 2016; Weatherill, 2005).[13] If the Court's ex post enforcement is weak, can one really expect the ex ante system to meaningfully constrain the institutions? As the ex ante EWS does not provide a binding veto, the Court's enforcement of subsidiarity is essential

[13]For a somewhat dissenting view, see Horsley (2012), who suggests that subsidiarity should actually (also) be interpreted as a restraint on the Court.

to keep fears of EU competence creep in check. In the long run, if subsidiarity would be perceived as toothless, 'National political elites, liable to be outvoted, are likely to react negatively; so too national Parliaments and constitutional courts, and, perhaps in the long term most alarming of all, citizens are likely to suffer alienation' (Weatherill, 2005, p. 28). In short, ineffective policing of subsidiarity because of a limited link between ex ante and ex post subsidiarity enforcement could lead to Euroscepticism, EU polity contestation and calls for leaving the EU. Hence, our findings are important for the EU's future.

Perhaps the Court shows restraint to avoid raising political disputes that would threaten the political sustainability and legitimacy of the CJEU (Panara, 2016). This would, however, seem an unconvincing argument in light of the much more activist approach the Court has taken in other areas. Indeed, as de Waele (2010) puts it, the Court has become 'the architect of ever more numerous institutional innovations, transforming and constitutionalizing the Treaty architecture'. Why would subsidiarity, as a key principle of the treaty architecture, be excluded from the Court's attention?

In any case, the Court's reluctance remains puzzling and unsatisfactory from an institutional design perspective: The Lisbon Treaty and its protocol on subsidiarity suggest that ex post judicial review is the ultimate remedy if ex ante subsidiarity scrutiny fails. This conception of judicial review as the ultimate remedy is hard to square with the Court's argument that the existence of the EWS proves that subsidiarity is political and hence not really justiciable, at least not substantively.

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References

Auel, K. and Neuhold, C. (2017) 'Multi-arena Players in the Making? Conceptualizing the Role of National Parliaments Since the Lisbon Treaty'. *Journal of European Public Policy*, Vol. 24, No. 10, pp. 1547–1561.

Barber, N.W. (2005) 'Subsidiarity in the Draft Constitution'. *European Public Law*, Vol. 11, No. 2, pp. 197–205.

Barrett, G. (2008) '"The King is Dead, Long Live the King": The Recasting by the Treaty of Lisbon of the Provisions of the Constitutional Treaty Concerning National Parliaments'. *European Law Review*, Vol. 33, No. 1, pp. 66–84.

Borońska-Hryniewiecka, K. (2017) 'Differential Europeanization? Explaining the Impact of the Early Warning System on Subnational Parliaments in Europe'. *European Political Science Review*, Vol. 9, No. 2, pp. 255–278. https://doi.org/10.1017/S1755773915000375

van den Brink, T. (2012) 'The Substance of Subsidiarity. The Interpretation and Meaning of the Principle after Lisbon'. In Trybus, M. and Rubini, L. (eds) *The Treaty of Lisbon and the Future of EU Law and Policy* (Edward Elgar), pp. 160–178.

Cass, D.Z. (1992) 'The Word That Saves Maastricht? The Principle of Subsidiarity and the Division of Powers Within the European Community'. *Common Market Law Review*, Vol. 29, pp. 1107–1136.

Christiansen, T., Högenauer, A.L. and Neuhold, C. (2014) 'National Parliaments in the Post-Lisbon European Union: Bureaucratization Rather Than Democratization?' *Comparative European Politics*, Vol. 12, No. 2, pp. 121–140.

Cooper, I. (2006) 'The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU'. *Journal of Common Market Studies*, Vol. 44, No. 2, pp. 281–304.

Cooper, I. (2019) 'National Parliaments in the Democratic Politics of the EU: The Subsidiarity Early Warning Mechanism, 2009–2017'. *Comparative European Politics*, Vol. 17, No. 6, pp. 919–939. https://doi.org/10.1057/s41295-018-0137-y

Court of Justice of the European Union. (2022) 'Annual Report 2021 Judicial activity'. Available from: https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-07/qd-ap-22-001-en-n.pdf

Craig, P. (2012) 'Subsidiarity: A Political and Legal Analysis'. *Journal of Common Market Studies*, Vol. 50, No. S1, pp. 72–87. https://doi.org/10.1111/j.1468-5965.2011.02228.x

Davies, G. (2006) 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time'. *Common Market Law Review*, Vol. 43, No. 1, pp. 63–84. https://doi.org/10.54648/cola2005083

De Búrca, G. (1998) 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor'. *Journal of Common Market Studies*, Vol. 36, No. 2, pp. 217–235. https://doi.org/10.1111/1468-5965.00107

Fasone, C. (2013) Competing Concepts of Subsidiarity in the Early Warning Mechanism. *LUISS Working Paper Series*, *SOG-WP4*. https://doi.org/10.2139/ssrn.2243503

Fromage, D. and Kreilinger, V. (2017) 'National Parliaments' Third Yellow Card and the Struggle Over the Revision of the Posted Workers Directive'. *European Journal of Legal Studies*, Vol. 10, No. 1, pp. 125–160.

Granat, K. (2018) *The Principle of Subsidiarity and Its Enforcement in the EU Legal Order: The Role of National Parliaments in the Early Warning System* (Hart Publishing).

van Gruisen, P. and Crombez, C. (2019) 'National Parliamentary Control and Voting in the Council of the European Union'. *European Journal of Political Research*, Vol. 58, No. 3, pp. 981–1000. https://doi.org/10.1111/1475-6765.12316

van Gruisen, P. and Huysmans, M. (2020) 'The Early Warning System and Policymaking in the European Union'. *European Union Politics*, Vol. 21, No. 3, pp. 451–473. https://doi.org/10.1177/1465116520923752

Horsley, T. (2012) 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?' *Journal of Common Market Studies*, Vol. 50, No. 2, pp. 267–282. https://doi.org/10.1111/j.1468-5965.2011.02221.x

Hosli, M.O., Mattila, M. and Uriot, M. (2011) 'Voting in the Council of the European Union after the 2004 Enlargement: A Comparison of Old and New Member States'. *Journal of Common Market Studies*, Vol. 49, No. 6, pp. 1249–1270. https://doi.org/10.1111/j.1468-5965.2011.02196.x

Huysmans, M. (2019) 'Euroscepticism and the Early Warning System'. *Journal of Common Market Studies*, Vol. 57, No. 3, pp. 431–447. https://doi.org/10.1111/jcms.12809

Huysmans, M. and van Gruisen, P. (2022) 'Substance and Subsidiarity: The Economic Dimension of Conflict in the Early Warning System'. *Journal of European Integration*, Vol. 44, No. 3, pp. 411–427. https://doi.org/10.1080/07036337.2020.1869956

Jančić, D. (2015) 'The Game of Cards: National Parliaments in the EU and the Future of the Early Warning Mechanism and the Political Dialogue'. *Common Market Law Review*, Vol. 52, No. 4, pp. 939–975.
Jaroszynski, T. (2020) 'National Parliaments' Scrutiny of the Principle of Subsidiarity: Reasoned Opinions 2014–2019'. *European Constitutional Law Review*, Vol. 2, pp. 1–29. https://doi.org/10.1017/S1574019620000048
Malang, T., Brandenberger, L. and Leifeld, P. (2019) 'Networks and Social Influence in European Legislative Politics'. *British Journal of Political Science*, Vol. 49, No. 4, pp. 1475–1498.
Miettinen, S. and Tervo, J. (2017) 'Subsidiarity, Judicial Review and National Parliaments After Lisbon: Theory and Practice'. *Europarättslig Tidskrift*, Vol. 20, No. 1, pp. 15–41.
Öberg, J. (2017) 'Subsidiarity as a Limit to the Exercise of EU Competences'. *Yearbook of European Law*, Vol. 36, No. 1, pp. 391–420. https://doi.org/10.1093/yel/yew027
Panara, C. (2016) 'The Enforceability of Subsidiarity in the EU and the Ethos of Cooperative Federalism: A Comparative Law Perspective'. *European Public Law*, Vol. 22, No. 2, pp. 305–332.
Rasmussen, M.B. and Dionigi, M.K. (2018) 'National Parliaments' Use of the Political Dialogue: Institutional Lobbyists, Traditionalists or Communicators?' *Journal of Common Market Studies*, Vol. 56, No. 5, pp. 1108–1126. https://doi.org/10.1111/jcms.12711
Schneider, E., Rittberger, B. and Wonka, A. (2014) 'Adapting to Europe? Regional MPs' Involvement in EU Affairs in Germany'. *Regional and Federal Studies*, Vol. 24, No. 4, pp. 407–427.
Schütze, R. (2009) 'Subsidiarity After Lisbon: Reinforcing the Safeguards of Federalism?' *Cambridge Law Journal*, Vol. 68, No. 3, pp. 525–536. https://doi.org/10.1017/S0008197309990183
Tacea, A. (2021) 'From Legal to Political Reasoning: National Parliaments' Use of Reasoned Opinions in the Area of Freedom, Security and Justice'. *Journal of Common Market Studies*, Vol. 59, No. 6, pp. 1573–1589. https://doi.org/10.1111/jcms.13213
Taggart, P. and Szczerbiak, A. (2004) 'Contemporary Euroscepticism in the Systems of the European Union Candidate States of Central and Eastern Europe'. *European Journal of Political Research*, Vol. 43, No. 1, pp. 1–27.
Verschueren, H. (2021) 'The CJEU Endorses the Revision of the Posting of Workers Directive'. *ERA-Forum*, Vol. 22, No. 3, pp. 557–567. https://doi.org/10.1007/s12027-021-00680-8
de Waele, H. (2010) 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment'. *Hanse Law Review*, Vol. 6, No. 1, pp. 3–26.
Weatherill, S. (2005) 'Better Competence Monitoring'. *European Law Review*, Vol. 30, No. 1, pp. 23–41.
Wieczorek, I. (2015) 'The EPPO Draft Regulation Passes the First Subsidiarity Test: An Analysis and Interpretation of the European Commission's Hasty Approach to National Parliaments' Subsidiarity Arguments'. *German Law Journal*, Vol. 16, No. 5, pp. 1247–1270. https://doi.org/10.1017/s2071832200021118
Winzen, T. (2012) 'National Parliamentary Control of European Union Affairs: A Cross-National and Longitudinal Comparison'. *West European Politics*, Vol. 35, No. March, pp. 657–672.

Supporting Information

Additional supporting information may be found online in the Supporting Information section at the end of the article.

Data S1. Supporting information.