



College of Europe
Collège d'Europe



Natolin

European Legal Studies
Etudes Européennes Juridiques

RESEARCH PAPERS IN LAW

1/2005

Jacques Pelkmans,

Jan Tinbergen Chair, College of Europe, Bruges and WRR, The Hague

Subsidiarity between Law and Economics

© *Jacques Pelkmans, 2005*

Subsidiarity between Law and Economics

Jacques Pelkmans

1. INTRODUCTION

There is little doubt that the Convention on the future of Europe and the treaty establishing a Constitution for Europe have moved subsidiarity much higher on the political agenda of the Union. Its application is likely to become an ever returning issue for European and national political actors. Nevertheless, there is a lot of confusion about subsidiarity. In the Convention as well as in the "Brussels circuit" (which includes the national capitals), political actors routinely take the view that subsidiarity is inherently "political", although what that means is rarely, if ever, spelled out in a verifiable manner.

Controversies about subsidiarity may well be exacerbated by a conspicuous reliance, in European law and economics, on mono-disciplinary approaches.¹ Insular mono-disciplinary perspectives on subsidiarity are problematic for several reasons. First, if political actors or their advisors turn to the literature on subsidiarity, they find very different approaches in law and in economics, respectively. Of course, one might venture some hope that the two disciplines could be employed in complementary ways as soon as draft directives would have to be tested on the proper application of subsidiarity. However, this is made particularly hard by the types of reasonings in both disciplines. Indeed, it would seem as if the two fields have moved in separate "trenches" as it were, not only incapable of appreciating one another but even lacking an awareness of another trench in the first place. Second, whereas in European law subsidiarity is assessed in highly critical terms – ranging from irrelevance to damaging for the Union – , the principle is welcomed in economics as a useful basis for the optimal assignment of powers to different tiers of government in the multi-tier

¹ This is likely to apply just as well to political science, with its focus on political legitimacy aspects and explanations of power struggles between different tiers of government in the overall EU system. However, the present contribution will concentrate on the perspectives found in European law and in economics.

Union. Third, it is questionable whether the fragmented, almost binary state-of-the-art in the literature is of much help to analysts in the Commission, national administrations or national parliaments having to conduct respectable subsidiarity tests. The practice, since the Maastricht treaty, of an absence of any testing for subsidiarity in many directives or, at best, a very superficial statement without any methodology or analysis, will be difficult to improve upon if mono-disciplinary wisdom remains so prevalent. Altogether, this state of affairs risks to put into jeopardy the praiseworthy 'early warning' procedure, involving national parliaments in an assessment of the subsidiarity aspect of EU draft legislation before Council would initiate its proceedings. If some national parliaments would conclude "politically" that subsidiarity is violated in a draft law, there will be no way of knowing (except in truly extreme cases) what the meaning of this conclusion is, whether the grounds of other opposing parliaments would not be different or even inconsistent with each other and whether the Union interest in judging subsidiarity has properly been taken into account.

The present contribution is an attempt to raise awareness between the 'trenches' by juxtaposing the two approaches to subsidiarity. Subsequently, I shall set out why, in economics, subsidiarity is embraced as a key principle in the design and working of the Union and how a functional subsidiarity test can be derived from this thinking. Throughout the paper, a range of illustrations and examples is provided in an attempt to show the practical applicability of a subsidiarity test. This does not mean, of course, that the application of the test can automatically "solve" all debates on whether subsidiarity is (not) violated. What it does mean, however, is that a careful methodology can be a significant help to e.g. national parliaments and the Brussels circuit, in particular, to discourage careless politicisation as much as possible and to render assessments of subsidiarity comparable throughout the Union. The latter virtue should be of interest to national parliaments in cooperating, within just six weeks, about a common stance in the case of a suspected violation of the principle.

The structure of the paper is as follows. Section 2 gives a flavour of very different approaches and appreciation of the subsidiarity principle in European law and in the economics of multi-tier government. Section 3 elaborates on the economics of multi-

tier government as a special instance of cost / benefit analysis of (de)centralisation in the three public economic functions of any government system. This culminates in a five-steps subsidiarity test and a brief discussion about its proper and improper application. Section 4 applies the test in a non-technical fashion to a range of issues of the "efficiency function" (i.e. allocation and markets) of the EU. After showing that the functional logic of subsidiarity may require liberalisation to be accompanied by various degrees of centralisation, a number of fairly detailed illustrations of how to deal with subsidiarity in the EU is provided. One illustration is about how the subsidiarity logic is misused by protagonists (labour in the internal market). A slightly different but frequently encountered aspect consists in the refusal to recognize that the EU (that is, some form of centralisation) offers a better solution than 25 national ones. A third range of issues, where the functional logic of subsidiarity could be useful, emerges when the boundaries of national competences are shifting due to more intense cross-border flows and developments. Other subsections are devoted to Union public goods and to the question whether the subsidiarity test might trace instances of EU decentralisation: a partial or complete shift of a policy or regulation to Member States. The paper refrains from an analysis of the application of the subsidiarity test to the other two public functions, namely, equity and macro-economic stabilisation.² Section 5 argues that the use of a well-developed methodology of a functional subsidiarity test would be most useful for the national parliaments and even more so for their cooperation in case of a suspected violation of subsidiarity. Section 6 concludes.

2. SUBSIDIARITY : LEGAL AND ECONOMIC PERSPECTIVES COMPARED

2.1. Can European law accommodate 'subsidiarity'?

European lawyers are highly skeptical whether the principle of subsidiarity 'fits' the logic of the EU treaties as well as the case-law. A few quotes would suffice to illustrate the apprehension. Toth (1992) argues that subsidiarity "... is totally alien to and contradicts the logic, structure and wording of the founding treaties and the jurisprudence of the ECJ" (p. 1079) ; "...it is a retrograde step. Without providing a cure for any of the Community's ills, it threatens to destroy hard-won achievements."

² Pelkmans, 2005, for a discussion of these aspects.

(p. 1105). Geelhoed (1991) is similarly harsh. Subsidiarity "... cannot, due to its lack of determinacy, provide a clue about the assignment of competences.." ; "... it is, moreover, completely inappropriate to serve as a criterion for the vertical distribution of public powers" and it is "impractical and useless" (pp. 434/44).³ Dehousse (1992) asks: "Does subsidiarity really matter? " and answers that it is 'overrated' as a concept : "...[it is] ..ill-adapted to the problems it is meant to solve.." and "..as a general guideline in favour of decentralisation ... its direct utility as a legal instrument is limited" (p.28). Although other authors have assumed a more understanding attitude in attempting to come to grips with the place and function of subsidiarity in the EU system⁴, most authors would seem to concur in calling into doubt or rejecting subsidiarity as a *legal* principle and as a constitutional principle. Few would disagree with Dehousse (1992, p. 21 and p. 19, respectively) concluding that "...in divided-power systems, the most effective defences against centralising pressures are to be found in the political process rather than in the judiciary. If this is true for federal systems, should it not be so *a fortiori* in the Community system, where Member States enjoy greater powers? Defining at what level a task is better accomplished is primarily a political problem; it should therefore be left to the political process" ; "... in discussions of a clearly political nature, the ECJ would awaken the ghost of a "gouvernement des juges"..."

Interesting is the inclination in legal writings to search for objective criteria for the application of the principle. In a number of articles on the subject, it is observed that distinct ideological preferences may lead to contrasting advocacies pro and against (more) centralisation. Also, divergent interests at a certain moment in time tend to lead Member States to bias their arguments in favour or against shifts in the exercise of shared competences and it is often far from obvious whether one stance is superior to another one or whether only one view is in some sense "correct" (hence, the other ones flawed). Indeed, Boutens (2003, p. 129) holds that "... dependent on who applies the principle, the result will differ".⁵ Since these objective criteria cannot be traced, it is invariably concluded that subsidiarity is "political".. The role of the ECJ

³ My translation from Dutch.

⁴ See, for example , Constantinesco (1991), Kapteyn (1991) and especially, Cass (1992).

⁵ My translation from Dutch.

should be no more than procedural.⁶ In a rich survey, Estella (2002, p. 177) finally comes to the same conclusion, Subsidiarity is "... ill adapted ... for solving the federal legitimacy problems of the Community... Functionally speaking, the principle seems devoid of any clear legal content". Estella, however, goes one step further, following an extensive analysis of ECJ case law. His finding is that the ECJ has avoided to apply the principle even when it could have done so on procedural grounds. He suggests that the Court regards the principle as a menace to the integration process.

Given the sharp focus of lawyers on the constitutional assignment of competences, and ultimately on the role of elected politicians with respect to shifts in the exercise of powers between tiers, there has been little attention for the rather different approach to subsidiarity in economic thinking. There are few exceptions (e.g. Emiliou, 1992) or just cursory references to the literature on the economics of federalism (e.g. Geelhoed, 1991) but without incorporating it in the assessment.

During the Convention and the subsequent IGC, the conclusions of the early debate on subsidiarity were not overturned. The clarifications on subsidiarity in the constitutional treaty and the protocol hold no surprise for lawyers⁷ and the introduction of the 'early warning' procedure is widely regarded as a question of strengthening political legitimacy, which does not affect the inferences summarized above. Curiously, though, few if any lawyers seem to have paid much attention to *how* national parliaments are going to assess the proper application of subsidiarity in draft laws of the Union. This "how" question is crucial for the mechanism to assume any significance at all. A concern about the procedure itself of the early warning mechanism rather than the substance of proper tests for no less than 25 parliaments (if not more in 2007) is clearly not a priority nor is it likely to present many problems in the first place. Does this not risk to leave a vacuum? What experience, experiments or academic guidance could the national parliamentarians benefit from? One and a half decades of living with subsidiarity in the treaty can be summarized in

⁶ Although Kapteyn (1991) goes a little further.

⁷ See the more detailed and explicit text of Art. I-11 (compared to art. 5, EC) and the simplified language in the Protocol on the Application of the Principles of Subsidiarity and Proportionality, notably art.5, (as compared to the Amsterdam Protocol, in particular art. 1, 5 and 9).

an admittedly crude way by noting that neither the institutions in Brussels nor the ECJ have paid much attention to its application. Are we to conclude that also the legal profession has not much of substance to offer to those decision-makers? In section 5 we shall return to this question with some concrete suggestions.

2.2. Can the economics of subsidiarity be relevant in the EU context?

In economics a long tradition exists of seeking the optimal assignment of powers to the respective tiers of government. While this thinking can be traced back to writings in the 19th century, a useful modern start would be Tinbergen's (1954) distinction between 'negative' and 'positive integration'. Both concepts are meant to accomplish a higher level of economic welfare for the cooperating countries, or, where relevant, even the world. Negative integration responds to cross-border externalities of national actions which negatively affect the welfare of partner countries. Liberalisation – in other words, a regime of prohibitions of such actions – will allow market-driven mobilities across borders which, after some adjustment period, would lead to higher welfare for all around. However, where cross-border externalities reduce the effectiveness of domestic action by 'leakages' which work out positively for partners, a risk emerges that partners will 'free ride'. The upshot will be that the initiating country is likely to reduce its efforts so that, from an economic welfare point of view, "too little policy or regulation" is produced by the government. Positive integration – forms of joint regulation or policy – can 'internalize' such problems and lead to optimal policy making for all.⁸ The weakness of this line of thinking is that it remains too abstract and macro, even if the underlying logic is powerful and relevant for the EU. In federal countries the incentives to render such thinking more operational was of course relatively strong. Therefore, a second line of thinking emerged from the economics of federalism based on seminal works of Tiebout (1956), Oates (1972) and others. Whereas the integration approach led by Tinbergen asks the question how increasing cross-border activities and effects can best be accommodated by regimes of negative and even positive integration, the federalism approach starts from the presence of a single country where (internal) cross-border mobilities are fully

⁸ See also Tinbergen (1956).

accepted, whether actually or potentially. Thus, for the latter, the question asked is rather what the optimal degree of *decentralisation* is, both to combine unity with diversity and to achieve efficiency (hence, economic welfare) and effectiveness of policies at the relevant tier of government. Whereas the integration approach is inclined to focus on the mobilities of goods, services and factors of production over borders, trying to understand how best an internal market should be built by combining negative and positive integration, the federalism approach is focussed on 'public economics' traditions of taxation, the provision of public and collective goods, a single money as well as equity issues, thereby taking for granted the prior existence of an internal market in a single polity.

In the EU of 2005, ambitions have increased so much that both lines of thinking would seem to have some relevance. Indeed, the Union has gone far in 'completing' the internal market and created a single money regime. We shall see, however, that it also lacks some fundamental properties taken for granted in the economics of federalism. Similarly, there is lingering resistance to a consistent application of the integration approach as it is feared that this might affect the satisfaction of local preferences too much, thereby undermining the degree of diversity so dear to EU Member States. The Convention amounted to a unique occasion to reveal much more reliably than in any other way the preferences held in national constituencies (with so many national parliamentarians having to express themselves on numerous details of the Constitution). The upshot is that the single document now signed by the Member States, a kind of *status-quo-plus* as it were, can be considered as a reasonable proxy of the desired combination of national and EU powers. Nevertheless, there can be little doubt that some shifts in this combination of competence assignments will occur in the near future. Nor is it unlikely that the exercise of the assigned competences will be subject to changes over time. Economists are not deterred by the dictum that such decisions about 'subsidiarity' are fundamentally "political". Their motivation is rather to underpin the analysis underlying such political decisions with functional reasoning, attempting to demonstrate what might be the best among alternative arrangements in terms of overall economic welfare of the Union, taking explicitly into account the diversity of

preferences in a multi-tier setting.

In so doing, economic thinking is often far removed from the careful distinctions and finesse which lawyers have developed in rationalising the institutional and indeed constitutional subtleties of the Union. That is, economists analysing subsidiarity seem to move in a trench, too, without paying much attention to the 'fit' of their conclusions to the Union construct. The present paper cannot hope to overcome this in a single stroke. The author will attempt, to the best of his ability, to reduce the gap between the two disciplines by faithfully working within the EU context or referring to it where possible.

3. THE BASIC ECONOMICS OF MULTI-TIER GOVERNMENT

3.1. Optimal (de)centralisation

The starting point of the economic theory of federalism (or, in the EU context, of multi-tier government) consists in asking the question whether centralisation of public economic functions is welfare improving. The answer is that all-out centralisation is bound to be sub-optimal (see below why). In federal countries this leads to the problem of the optimal degree and forms of *de*centralisation. However, in the process of economic integration between countries which retain the sovereignty to transfer (or not) powers to a common level, it leads (*mutatis mutandis*) to the problem of the optimal degree and forms of centralisation. In purely analytical economic terms, and abstracting from politics, these two questions should functionally come to the same answer. However, the current state of economic integration and Union building in Europe – advanced though it is - is politically so radically different from a federation operating as a single country that such a purely theoretical approach adds more to confusion than to insight.

3.2. Great caution before applying 'economic federalism'

There are four critical differences between European integration and a federal

country. First, the political logic of ever more ambitious economic integration is very different indeed from the logic of (economic) decentralisation in a mature federation. Of course, in Europe this is well-known and a routine inspection of the minutes of the Convention plenary and the 11 Working Groups reveals many examples of inhibitions. Whereas a considerable degree of centralisation is an established fact in federations, be it with significant variance between federations, the political costs of even minor shifts to more economic or institutional centralisation weigh heavily in European integration. And until today every country has veto power on any treaty-based shift, a power which profoundly influences any proposals for centralisation in the first place. The Convention has thrown off the taboos and inertia of the Nice IGC but, while deepening the debate and better appreciating numerous options, this is a far cry from a functional re-design of the treaty into a Constitution with a *federal* logic. Second, an advanced degree of completion of the internal market must itself be politically acceptable before the economics of subsidiarity can be usefully applied. The completion of the internal market can be justified economically by typical subsidiarity criteria but that would often be correct at world level too. However, such deepening entails profound and manifold consequences for the domestic capacity to regulate markets, protect workers or consumers and maintain the welfare state, to mention only some of the main aspects. These state activities usually result from intense political debate, based on local preferences. Once there is a minimum willingness to accept a high degree of liberalisation, with sufficiently strong mechanisms to formulate joint regulation where appropriate, the logic of economic integration begins to apply. In that event it might lead to what political scientists call “spill-over”⁹, that is, a positive complementarity between policy domain A (say, part of the internal market) and policy domain B. Once domain A is firmly integrated it becomes more attractive – possibly welfare improving - to integrate domain B as well. Such dynamic complementarities are not well modelled in economics or political science but there is a wide-spread conviction that they tend to explain the almost continuous deepening and widening in the EU over decades, given a credible minimum of internal market accomplishments. As a result the stages of economic integration become ever more ambitious and the subsidiarity question has to be

⁹ Not to be confused with what *economists* call spill-overs, see further.

posed ever more insistently.

The EU is still the only instance of regionalism where not simply internal free trade prevails but indeed free movement, credibly enforced moreover by a common guardian (the Commission) and a supreme Court. This deep commitment to the internal market is ultimately a political prerequisite for the sensible application of subsidiarity. At the far end of the spectrum this commitment can be perceived as "federal". Elsewhere on the spectrum it all depends. In the EU the national labour markets are still protected like fortresses and the so-called "free" movement of workers (in art. 39, EC; however in art. 3, EC only persons) does not refer to a significant degree of *economic* freedom at all. Distortions that would never be acceptable under caselaw for goods, services or capital do not even raise an eyebrow when it comes to labour markets, mutual recognition does not apply (see the intrusive analysis by Fiorella Kostoris Padoa Schioppa, 2003) and approximation and other forms of central governance in this area are largely taboo. As we shall see, this political fact of refusing to go for an internal market for labour pre-empts powerful complementarities to emerge and this, in turn, profoundly affects the results when applying a subsidiarity test.

Third, the EU still lacks a number of properties that are taken for granted in a federal country. Since 1999 it has a single currency but there are still three "outs" in the EU-15 and thirteen since May 2004. The EU has no right to tax, no common army or defense and more an uncommon than a common foreign policy. Even the customs, though operating on exactly the same rules and bound into a common information and management system everywhere, has remained national, despite the courageous abolition of internal frontiers. In all these instances the economics of subsidiarity yields firm conclusions in favour of at least somewhat (more) centralisation, yet politically it remains taboo.

Fourth, the EU has no central government.

3.3. Making the economic case for centralisation

Given these political constraints, we can now return to the question why all-out centralisation is bound to be sub-optimal. Welfare improvement is always a matter of the (better) satisfaction of preferences. If a representative democracy is capable of revealing the preferences of the voters well, the satisfaction of voters' preferences will be the more likely, the closer the government is to the voters. There are two reasons for this: on the one hand, proximity to voters will enable policy makers to "read" the preferences better than more distant policy makers, and on the other hand, policy makers at the local or regional level will be able to respond to such revealed preferences without having regard to the preferences of other localities or regions, unlike a higher tier of government. In the ideal system, at least for the sake of preference satisfaction, there should be three means of enforcement or discipline: voice, replacement of policy makers and exit. *Voice* refers to the many ways voters express views in between elections as well as in the elections themselves; the probability of re-election drives policy makers. Policy makers who do not respond to revealed preferences can also be *replaced* and locally this process can be geared to local issues. *Exit* refers to movement to other localities or regions in response to a disregard of preferences. If exit is costly in financial or socio-cultural terms, local policy makers enjoy more discretion.

These elementary points underlie the priority that the subsidiarity principle gives to decentralisation. In the theory of multi-tier government the subsidiarity principle is simply an assignment rule for *optimal institutional design*: close correspondence of public policy with voters' preferences will often require the assignment of policy competences to local government. For all-out centralisation to be optimal, one would have to make very extreme assumptions like congruent preference sets for all voters in all localities or regions and the full information at the central level about these preferences, or, alternatively, full information at the central level about the differences in regional preferences and the unrestricted capacity at the central level to differentiate any policy or rule at every level so as to satisfy these preferences at very low costs. It is from the rejection of such pointless abstractions that the subsidiarity principle derives its bias towards decentralisation. It follows that the case for centralisation has to be made.

However, this is not the end but merely the beginning of the story. The implicit assumption in the reasoning so far is that localities or regions are not in any way interdependent. Moreover, there is no mention of cost: certain preferences may require public policies which are too costly to provide locally or even regionally but could be payable if provided by a group of localities or regions or even countries. The *interdependence* between regions in a modern economy is of course very strong. The nature of such interdependence will affect a rational assignment of powers. Cross-border externalities¹⁰ between regions or countries linked together by markets and otherwise can be negative or positive. Positive externalities imply that the local effectiveness of the measure taken in region A is reduced by the positive effects it has on the policy objectives of region B. Decentralisation can then generate a typical prisoner –dilemma in that a refusal of region B to cooperate or pay will make A reticent to persevere with the measure, with the result that too little is done (hence, satisfaction of preferences is less than possible). At a higher level of government this externality can be internalized. Negative externalities are conflictuous as they result from “beggar-thy-neighbour” policies: the effectiveness of a measure taken in region A is at the expense of welfare in region B. Examples include cross-border pollution or trade protection. Prohibitions or common rules at a higher level of government can internalize these problems.

Where policies are *costly*, especially if the minimum fixed costs are high before any provision is feasible, economies of scale may militate against decentralisation. CERN, the particles accelerator in nuclear physics near Geneva, is supported by many countries for reasons of scale. This example shows that scale, as an argument to move away from pure decentralisation, need not automatically imply centralisation; durable cooperation may do very well.

Therefore, the case for centralisation under subsidiarity hinges on scale and cross-border externalities arguments. Note that this assignment to a *higher* level on functional grounds is just as much “subsidiarity” as the a priori presumption that

¹⁰ Or spill-overs, in economics.

preferences tend to be better satisfied by *local* government. Subsidiarity is a two-way principle!! Its initial bias might be towards decentralisation, yet, once the case is properly made, centralisation can be compelling on the basis of exactly the same (assignment) principle.

3.4. The public economic functions of the EU

Inspired by the economic theory of federalism, the analysis can be taken one step further. Whereas the theory of economic integration is focussed on the removal of barriers to trade and other mobilities, and, where relevant, on the common regulation or policies that this would require, the economic theory of federalism originates from 'public economics', concerned with the economic functions of the state. The fundamental economic function of the state is to supply public goods. A pure public good (or service) is non-rival in consumption and non-excludable in supply. The latter property creates an incentive to free-ride on the suppliers and since everybody will do this, the good or service will not be supplied (cost cannot be recuperated from consumers who do not pay) or too little of it will be supplied. This can be resolved by assigning the state with the supply and give it the right to tax so as to cover the costs. Defense, domestic security and ensured access to justice are typical public goods. Until recently, these aspects were hardly or not associated with the process of European integration.¹¹ Of course this is different today and probably in the future. Moreover, there are public functions where positive externalities between regions or countries can be so strong – hence, the temptation to free ride, with undersupply as a result - that the difference with public goods is a matter of gradation. Basic research and knowledge creation illustrate this point whilst network infrastructures exhibit somewhat similar characteristics.

Given the more advanced state of EU economic integration, as a result of deepening and widening of its scope, the economics of subsidiarity is becoming more and more a blend of economic integration analysis and public economics. In integration approaches the attention is focussed on the emergence and gradual completion of

¹¹ One still wonders how credible the EDC proposal of 1953 actually was.

the internal market in goods, services, capital, labour and technology, and the manifold consequences this entails for the economic case of (further) centralization.¹²

In the tradition of public economics the internal market is largely, if not completely, taken for granted and attention is concentrated on the public functions the EU system should or should not fulfil at the central level, wholly or partly.¹³

Since the Single Act, the internal market has been deepened and widened in scope so much that the EU began to assume elements of public functions which had not been seriously envisaged before. In particular, the initial role of the EU level was merely to establish the internal market and to make it function properly. In public economics this is called the "allocation function" of the state. With the deepening of the internal goods market via regulation and mutual recognition, the emergence of the internal market for services and the free movement of capital, the implications for the other two public economic functions of the state, namely "redistribution" and "macro-economic stabilisation", became ever more important. Acknowledging that the Union has, by now, become concerned with some aspects of all three public economic functions, however, should not make us forget the four crucial differences with a federal country (see 2.2.). The EU is pre-federal. This state of the art has neither been altered by the Convention, nor by the final text of the Constitution.

3.5. The subsidiarity test

The Amsterdam Treaty restricts the application of subsidiarity to public economic functions where competences are concurrent at (that is, shared between) the Member States' and the EU levels. Article 5, EC prescribes:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed actions cannot be sufficiently achieved by the Member States and can

¹² Pelkmans, 1982; Pelkmans, 1985; Pelkmans, 2001, ch. 4; see also Padoa Schioppa et al., 1987 for a systemic view as well as Sapir et al., 2003.

¹³ CEPR, 1993; CEPR, 2003; Tabellini, 2002; Oates, 1999; Calmfors et al., 2003; Inman & Rubinfeld, 2002.

therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.

Therefore, any action taken by the Community must fulfil two conditions. First, in areas of shared competence, the Community must demonstrate 'a need to act in common', as given by the existence of either economies of scale or cross-border externalities. If either of these conditions hold, non-cooperative policy making would be less efficient, or even detrimental, compared to cooperative policy making. This is broadly in line with the basic economics of subsidiarity. Second, any action must be proportional to the desired objective. Again, this is a logical corollary to the primacy of lower-tier government, where possible and efficient: no more than that which is necessary to attain the objective should be done at the 'central' level. Thus, when deciding whether to enact binding or non-binding measures, the EU level must justify the need for non-discrimination and legal certainty (both being indivisible in nature) before considering uniformity in measures. Even then, the EU should demonstrate the costs of differentiation before opting for a high degree of uniformity. The degree of binding could also increase, commensurate with the degree of complexity. If these justifications fail, EU regulations or directives would be disproportionate and only coordination, recommendations or consultation should be pursued. When binding measures (that is, legislation) are needed, framework directives should first be considered as they leave greater discretion to national and regional governments; if they would be inappropriate, directives may still be preferable to EC regulations which are directly binding for all economic agents in the market. Where possible and efficient, Member States should play the primary role in policy implementation.¹⁴

One important criterion to decide upon the degree of centralisation, once the need-to-act-in-common test is passed, is credibility. If all Member States would voluntarily

¹⁴ This interpretation is close to that actually proposed by the European Commission. See SEC (29) 1990, *The principle of subsidiarity*, 27 Oct 1992. A concise instruction to the various EU institutions, broadly reflecting those considerations, is found in the Protocol on the Application of the Principle of Subsidiarity and Proportionality attached to the Amsterdam Treaty.

cooperate on a given policy issue, there would seem to be no need for centralisation. As game theory teaches, simple and repetitive cooperative games lead to 'learning' and may eventually result in efficient bargaining. But non-repetitive cooperation is often difficult to agree upon, for instance when the number of interested parties is large, the range of policy alternatives is wide, the problem is complex, and when (relative) gains and losses of players would be unevenly distributed. What really matters for economic agents in the market, however, is whether cooperation is credible, hence sustainable. Credibility of cooperation is low if information is highly imperfect or asymmetrically distributed, especially in complex policy areas, because this renders it impossible to monitor compliance. Credibility is also low when the incentives to cheat are strong and the ability or willingness to impose collective sanctions is perceived as minimal. If cooperation cannot come about, or it would not be credible, there is a case for centralisation.

The subsidiarity test can then derive assignments to the Union level as follows, in five steps:

Identify whether a measure falls within the area of shared competences (if exclusive to the EC, the treaty test does not apply);

Apply the criteria (scale and externalities, Art. 5, EC, and possibly other criteria) – this is the 'need to act in common' test;

Verify whether credible cooperation is feasible;

If 1 and 2 are confirmed, and 3 denied, then the assignment is to the Union level;

Define to what extent (proportionality) implementation, monitoring and enforcement should also be assigned to the EC level, or, indeed, can be assigned to the Member States, perhaps in a common framework.

The test would become fully general – that is, not bound by the treaty's text – if the first step is ignored and all possible criteria are considered in the second step. Note also that step 3 may lead to cooperation at levels lower than the Union level, at EU level, or at continental or world level.

3.6. Application of the test

Art. 5, EC and the Protocol on Subsidiarity and Proportionality as attached to the Amsterdam treaty¹⁵ add clarity without altering or adding much substance to the test. What matters is how to apply it, and perhaps even more how not to! This test is a *functional* one and can only be operational if goals and instruments, and indeed the legal basis for the assignment of powers to a higher level, are not themselves controversial. In some areas of today's European Union this condition is not fulfilled (e.g. foreign and security policy) and in some other cases the legal issue whether powers are shared or not cannot always be ascertained. However, these points ought not to be exaggerated, short of going counter to the very essence of subsidiarity itself. As soon as the subsidiarity test *itself* is politicized it becomes worthless and pointless. With political disagreement about goals or too great political sensitivities about central powers, the "better achievement" of certain policies is logically excluded, hence becomes irrelevant. In such cases, the refusal to consider centralisation is a pure political act – which might be legitimate, of course – but not a 'test'. The test is only useful if it is first accepted that it is a functional one which informs political decision-makers about costs and benefits as well as the implications of further (de)centralisation.

The test should also *not* be confused with the ultimate political decision to (de)centralise. Whereas the *test* is functional, the *decision* ought to be political, precisely because of the sensitivity at the level of local/regional preferences which are often only sufficiently revealed once clarity is provided about the repercussions. How difficult it is to properly "read" preferences of complex decisions with formidable repercussions has been underscored by the introduction of the single currency in Europe, no matter how carefully prepared and how much effort invested to reach the public and make citizens understand. Such political decisions have to be made by *elected* agents who are politically *accountable*. Only in such a way can subsidiarity decisions acquire political legitimacy. Decisions as important as monetary union are

¹⁵ This is just as true for the text of art. I-11 sub 3 of the Constitution (not yet ratified). The two amendments of the present art. 5, EC, (namely, the explicit "in areas which do not fall within its exclusive competence" and the reference to the "regional and local level") are clarifications of the spirit of subsidiarity.

constitutional and require direct involvement of national parliaments or the voters. But many decisions about (de)centralisation do not have such a dramatic character and the subsidiarity test could be a highly useful *functional* underpinning of an ultimately *political* decision.

From an economic point of view the Protocol seems to have little added-value to art. 5, EC. Three guidelines in item (5) of the Protocol are not independent from each other. Indeed, the ‘transnational aspects’, ‘conflicts with the requirements of the treaty’ and significant ‘damage ‘ to other Member States’ interests are all manifestations of cross-border externalities. They will also, more often than not, overlap. In detailed methodologies or subsequent 'manuals', all possibilities must be covered which might render it necessary to verify whether the subtle differences between these three guidelines of item (5) of the Protocol matter in specific instances. However, this is not the object of the present paper which aims to explain the functional logic and exemplify its application, rather than elaborate a full legal, institutional and technical analysis. The same goes for the simplified version of the protocol attached to the Constitution.¹⁶

It is perhaps instructive to provide five selective points on the application of the test. First, sometimes it is suggested that the uniformity of Community / Union law can serve as a reason to justify centralisation. One can view this uniformity as a public good once the case for it is made in a concrete instance. But it is not always necessary to uphold uniformity; one might needlessly suppress the satisfaction of local preferences when clinging to this notion. Hence, the principles of proportionality and differentiation have to be taken into account. Second, in trade policy or (e.g.) fishing rights the Union’s bargaining power is of course boosted by centralisation. However, that is not an additional criterion because it amounts to a combination of (a threat of negative) externalities and scale. Whether such common power is welfare increasing is doubtful; it *is* for the Union but presumably at the expense of negotiating

¹⁶ Art. 5 of this Protocol combines what are currently items (5) and (9) of the Amsterdam version of the Protocol, in a much shorter text. Other than a reference to the implications for Member States in the case of a European framework law (a new legal instrument in the Constitution), the requirements are essentially the same. Moreover, the guidelines in the protocol, derived from Edinburgh, remain 'acquis' in the event further precision might be needed.

partners. If the Union's common power boils down to countervailing power (for example, vis a vis the US) this matters little as it will tend to offset their positioning but in the case of developing countries it is dubious. Third, the EU-25 is rich in its diversity of preferences. Nevertheless, selective issues might be supported by far-reaching homogeneity because of common elements in European culture or destiny or as a result of a long period of European integration which might prompt intergenerational convergence of preferences. Such degrees of homogeneity are hard to measure and the Euro-barometer is not suitable. Still, recent empirical work on apparent preferences (CEPR, 2003, pp. 25/6; Calmfors et al., 2003, pp. 85 – 88) shows remarkable similarities between the European peoples on key domains such as internal security and foreign policy¹⁷, which are not reflected in the state of European integration. Clearly, homogeneity of preferences has the effect of strongly reducing the costs of centralization.

Fourth, subsidiarity in the context of this paper is a Union issue. But functionally, subsidiarity is not confined to the EU level. The need-to-act-in-common can be addressed in a smaller group (for example, adjacent countries; the Rhine Convention where the EU is represented via the Commission; the cleaning-up of the Mediterranean need not involve Finland or Ireland) or a larger association of states (whether the OSCE, the OECD, the signatories of the Kyoto protocol, or the European Space Agency, etc.). Such cooperative ventures do not move beyond the third step of the test. Finally, centralisation in this literature is a generic term that can be easily misunderstood, even when moving to step 4 in the EU. It does not necessarily refer to a strong variant of transferring certain powers to the Commission or, stronger still, an independent agency like the ECB. Centralisation has many intermediate options with different cost/benefit ratios. Like in any proper cost/benefit analysis, the alternative options have to be compared in the test. However, it can also refer to the mere prohibition of Member States to act, in other words, what Jan Tinbergen (1954) used to call "negative integration". Even taking merely the limited form of 'negative integration', centralisation may be felt by some at Laender or

¹⁷ However, it should be noted that the questions posed were highly general and of course, the answers were, for every individual, non committing.

national level as a “regulatory gap “ or as excessive intrusion into their autonomy. It should be clear that, even when no explicit common regulation or common funding is at stake (no ‘positive integration’), there is merit in having careful regard to proportionality and differentiation so as to pre-empt avoidable suppression of preferences due to free movement or establishment.

4. SUBSIDIARITY AND EU EFFICIENCY

4.1. Liberalisation and centralisation

A closer study of how the EU was built up strongly suggests that more and deeper liberalisation tends to generate ever stronger functional pressures to centralize, at least to some (though varying) degree. As noted there is little point in employing the principle of subsidiarity if there is only a minimal and exception-ridden willingness to accept selected economic mobilities, actual or potential, over frontiers within the integrating group. Despite the ambitions of the old EEC, the design flaws in the Rome treaty made it impossible to accomplish its own intermediate goals (like a true common market). The EEC was incapable of getting beyond what amounted to a “customs-union-plus” after 25 years (Pelkmans, 1985). The willingness to accept economic mobilities was simply too selective or conditional. The Single Act changed this radically (see Pelkmans, 1988 ; 1994). In turn, this set into motion a forceful process of deepening and widening of the internal market in the broad (i.e. economic) sense of the word, which is still not petered out. With a lag this has moved subsidiarity questions to the top of the EU agenda in all three public economic functions: efficiency, equity and macro-economic stabilisation. Hence, the Padoa-Schioppa report (1987), the deepening and widening in the Maastricht treaty and lingering ideas for selective centralisation in the recent Convention. However, the Convention has opted for a status-quo approach, with amendments in decision-making but hardly or not in the transfer of powers to the Union level.¹⁸

¹⁸ In the public choice literature, a shift away from vetoes to QMV is nevertheless regarded with suspicion, as it might be in the interests of national governments and EU bodies alike to opt for greater ‘europeanisation’. Only direct involvement of national parliaments, having an interest to remain ‘closer to the voters’, would protect ‘subsidiarity’. The new text in the Constitution, in particular the involvement of national parliaments, goes some

Looking back to two decades of follow-up to the Single Act, one observes that the internal goods market has largely been established, a significant achievement.¹⁹ Besides the strong 'negative integration' that it entails, a range of centralizing arrangements have been set up or strengthened. They proved acceptable precisely because of the willingness to live with and benefit from untrammelled goods mobilities.

The logic of subsidiarity - whether implicit or explicit - implies indeed that far-reaching liberalisation can require some degree of centralisation beyond mere 'negative integration' (Sun & Pelkmans, 1995-a). I shall mention three examples but many more can be found. The first example is concerned with the 'management' of 'free movement' of goods. The centralising element, indispensable for credibility, is the EU-priority over domestic legislative processes if mutual recognition is endangered. We refer to the 83/189 Committee, meanwhile called the 98/34 Committee (working on the so-called 'mutual information' directive 98/34), which is a low-key, yet remarkably effective body, probably doing more for the integrity of the internal goods market than many directives (for extensive assessment see Pelkmans, Vos & di Mauro, 2000). Member States are barred from proceeding with their domestic legislative processes of laws or decrees, which could imply regulatory/technical barriers to goods trade, following notification, and even (much) longer if new barriers are suspected to arise. The Committee has proved capable of protecting mutual recognition, and thereby free movement as well, if not promoting it by ensuring equivalence or mutual recognition clauses and/or references to European standards in national laws.²⁰

way to dispel these suspicions. See Vaubel, 1994a; 1994b; 1995; 1997; Hosli, 1994; Buchwitz, 1998 and Dunleavy, 1997.

¹⁹ This should not be interpreted to mean that the internal goods market cannot be further improved, for example, due to measures in other policy domains (e.g. tax issues; patents). Also, the actual functioning of what is "acquis" leaves much to be desired (e.g. mutual recognition).

²⁰ Note how important this 'low-key' centralisation has been, in that, every year in the EU-15, some 600-700 national draft laws first pass the Committee before domestic legislation (often with requested amendments) can proceed.

A second example is the complete turn-around in network industries on the basis of the very same article (Art. 86, EC) that served as the rationale for the now defunct Sacchi doctrine, which long prevented any move towards an internal market for network industries (Pelkmans, 2001b). Grossly simplifying the matter, the core test amounts to a severe look at proportionality: are exclusive rights for public utilities really 'necessary' (indispensable) for the entrusted tasks? If not, can forms be found which do not completely or not at all disrupt free movement, as well as free establishment and, as a corollary, insert some degree of competition? Once the turn-around is accepted, however, the ensuing liberalisation requires a lot of central legislation. Subsequently, autonomous agencies at EU level come in (e.g. rail safety; aircraft safety; air traffic control) and step-3-type credible cooperation between national regulators (possibly with the Commission as well) has to be practiced. Nowadays, examples of cooperation among national regulators include the ERG in telecoms and the CEER in electricity and gas. If not credible, step 4 would suggest an EU regulator.²¹ In the 2003 telecoms regime the Commission has obtained, after a battle between the EP and the Council, a kind of last-resort power if step-3 cooperation fails and the internal market or competition policy would suffer. The turn-around in the area of network markets has caused alarm in certain circles which assert that mobility and competition override their national preferences to 'protect' public services. In Amsterdam, in the Convention and in the subsequent IGC attempts were observed to create an explicit EU legal base for public service obligations. One interpretation of these pressures is an even greater regulatory centralisation in network markets.

A third example is in financial services and capital markets where a new wave of further liberalisation, standardisation and regulation between 2000 and 2005 has prompted a more centralizing Lamfalussy method. And in the run-up to the Giovannini (2002) report, a former telecoms regulator, now chairman of the London Stock Exchange (Don Cruickshank, 2001) argued that clearing and settlement in securities markets have strong natural monopoly characteristics as indeed has been recognised

²¹ Of course, the Commission already has strong competition powers and thus could be seen as a partial regulator. See Pelkmans, 1998, for the detailed application of the subsidiarity test to the issue of a European regulator for telecoms.

in the US – this would imply further reaching centralisation as a corollary of deepening liberalisation.

4.2. Misusing ‘subsidiarity’ for labour markets

Establishing the internal market for labour has thus far failed. The regulation of labour markets, including the prevalence of national collective agreements, is (largely) considered as a Member State competence and this is routinely argued to be ‘consistent’ with subsidiarity. Here, subsidiarity is (mis)used as a fig leaf because cross-border labour mobility is *only* accepted *if* it is sure to remain trivial or residual. If free movement is systematically throttled, clearly, a functional subsidiarity test is thereby pre-empted, too. Whereas the host-country control principle is giving way in all other EU markets so as to facilitate free movement and competition, it is still prevailing for migrant labour in the EU. It is little realized why the host-country-control principle undermines free movement, without formally making it impossible. First, between EU countries with significant disparities in wage levels, host country control precludes wage competition, because the migrant from a low-wage EU country is not allowed to accept work below the host-country wage levels. In other words, the host country demand for migrant labour is no longer determined by wage differences, the crucial advantage of this category of migrants. As a result, the host country demand for (legal) migrant labour will reduce to a trickle, unless (and to the extent that) there are shortages in sectors or agglomerations. Second, even when wages differ little (say between the EU non-cohesion countries) host country control accentuates uncertainty about future rights, rules and customs because it discourages harmonisation, also when it would be justified. Indeed, precisely due to the insistence on host country control, Member States show a strong propensity to consider migrants as irritant special cases. Intra-EU migrants notice preciously little in national conduct that confirms art.10, EC on the Member States' Community loyalty. Migrants and frontier workers are insufficiently protected from the vagaries of national administrations, whether in fiscal, health, social, pensions, housing or other matters. Only the ECJ mitigated some of the consequences of ‘host country control’ for migrant workers. The Veil (1997) report on frontier workers showed how “unfree” the

movement of workers still is. In 2001 (33 years after the free movement of workers had been declared!) the Commission issued a communication to finally begin to tackle the numerous barriers to cross-border labour mobility.²² Yet, the ‘posted workers’ directive 96/7 uses *EC* powers to protect *national* discretion in labour market regulation, which reveals the preference for fragmentation. How protectionist and arbitrary the posted-workers directive works out in actual practice, was demonstrated in Commission studies on the internal market for services.²³

Given the manifest unwillingness to accept genuine free movement of labour, of course testing for subsidiarity becomes pointless. The upshot is that very little labour market regulation has been harmonised, except for health & safety in the workplace.²⁴ Behind the fears one can discern an unwillingness of workers in A to compete with workers from B (certainly not on wages and secondary conditions) but also “Angst” about unpredictable effects on the finances of the “welfare state” and on those who (should) carry the burden of paying for it.²⁵ This national protection of labour markets greatly enlarges the discretion for national decision makers, which, in turn, may well have the effect of further increasing the rigidities. In particular, host country control seems very hard to remove. Breaking these taboos would eventually have consequences for employment protection legislation (Young, 2003) at the EU level, presumably under some kind of regulated mutual recognition (see Kostoris Padoa Schioppa, 2003) , as well as for selected EU rules for the welfare states or indeed an elementary EU welfare state itself. Nobody knows how far off this scenario is.

4.3. Resisting subsidiarity if it implies more centralisation

Centralisation is occasionally resisted by merely ignoring subsidiarity. This is made

²² COM (2001) 106 of 1 March 2001, New European Labour Markets, open to all, with access for all.

²³ See in particular, COM(2002) 441 of 30 July 2002 on The state of the internal market for services.

²⁴ Which is, actually, a response to *goods* market competition, not labour mobility. The idea behind it is that regulatory competition providing competitive advantages to firms in (say) country A, merely because of lowering safety requirements in factories or building sites (etc..), is considered unacceptable. At this general level of overall aims, the EU consensus is strong, hence, a series of directives prevent a ‘race to the bottom’. The subsidiarity test is therefore easily satisfied. However, there are indications, that these occupational health and safety rules have not been subjected to serious proportionality tests!

easier under unanimity but it does even happen under QMV. This state of affairs reflects a mistaken perception that subsidiarity is a one-way principle pointing to cases of decentralisation, not to instances of centralisation. Cases under unanimity include tax competition versus tax cooperation or approximation, and infrastructure.²⁵ A case under QMV is found in the problem of nuclear safety standards. The two unanimity examples illustrate resistance against functional arguments in favour of more centralisation. As noted, a functional subsidiarity test is neutral between centralisation and decentralization: it simply depends on the step-2 criteria and the credibility and effectiveness aspects. Vetoes create a strong bias towards a unidirectional test: discretion for the Member States, even when the functional test would suggest otherwise. Of course, unanimity is often justified by political legitimacy considerations. Precisely in these cases, decision-makers and the wider public need to be fully aware what the costs and benefits of such vetoes are and, indeed, the costs and benefits of alternative solutions as long as vetoes remain.

First, there is taxation. The VAT solutions (under the destination principle still, even after EC-1992) may pass the subsidiarity test (the first 4 steps) but not the proportionality test (see Verwaal & Cnossen, 2002). The tax borders pushed back to enterprises are unduly costly (an average of 5 % of the relevant trade value, with a large variance to 12 % or higher). A shift to the origin principle would raise economic welfare. But it would require a common Clearing House (due to imbalances of revenue and, possibly, tax rate disparities). The objection that a Clearing House would be too involving and/or too risky for treasuries can be largely addressed by the Keen & Smith (1996) proposal for a common VAT rate for B2B transactions, while keeping fiscal sovereignty for the nationally distinct B2C rates. But the Member States are simply not interested. They would seem to regard the origin principle as de-facto too 'centralising', in the sense that functional pressures to approximate rates due to tax competition would be much stronger. National tax autonomy would be impaired. Moreover, the greater the tax rate disparities, the greater the role of the Clearing House, too. Even more fascinating is the query whether the EU should not

²⁵ For a prominent example of this 'Angst', see Sinn & Ochel, 2003.

²⁶ For another example, namely, codified technology, in the form of property rights, in particular, the EC patent, see Pelkmans, 2005.

be given the right to tax so as to facilitate least-cost solutions to thorny approximation problems (like energy taxation and capital earning taxes), while pre-empting or reducing distortive disparities in the single market. Or would mere approximation do (based on the “how” test, that is, step 5)? The EU reached a solution on capital earnings and savings without introducing the EU-right-to-tax, and without far-reaching harmonization, but the act-in-common comprises several tax havens outside the EU and in the EU it requires a constitutional change (about bank secrecy) in e.g. Austria! For the CO2 tax, long contested by business, the final solution is also very different: a trading system of emission rights, derived from the Kyoto obligations. In other words, it is good to realize that the alternative itself of EU taxation also implies complicated and intrusive solutions, and (for earnings on financial capital and savings) a degree of dependence on outside tax havens. Just rejecting the EU tax option does not solve anything and a functional subsidiarity and proportionality test can be revealing here. As far as corporate taxation is concerned, the crux of the test will consist in a systematic consideration of both the costs and the benefits of tax competition, as well as both the costs and benefits of tax coordination (or harmonisation), while having due regard to both the tax base and the tax rates. Doing this properly will avoid the dysfunctional insistence on complete tax sovereignty, which, in a genuine, deep internal market, is inefficient.²⁷ In corporate taxation, negative cross border externalities might cause a kind of 'race to the bottom', ending in inefficiently low levels of public goods or services (disregarding preferences). However, the empirical evidence for a revenue decline of company taxes in EU countries is thus far lacking. This, in turn, could be explained by higher profits (at least, during the 1990s) or by compensating lower rates by changes in the corporate tax base.

Indeed, it is hard to deny that the numerous disparities in the tax base tends to generate competitive distortions: the endless lobbying for tax breaks and the sensitivities in attracting foreign direct investment (played out by multinationals, of course) prompts almost permanent drift in the tax base, both nationally and in an

²⁷ For a thorough survey, see Zdrojow, 2003; see also Devereux, Lockwood & Redoano, 2002 for strong empirical evidence of corporate tax competition on the basis of fiscal reaction functions ; a crucial source is also the elaborate treatment in COM (2001) 582 , in particular the accompanying Commission Staff paper SEC(2001)1681 of 23 Oct. 2001 on Company taxation in the internal market.

internal market context. For these reasons, there is a prima facie case for a common tax base (or at least, for ruling out a range of 'harmful tax practices' linked to the base).²⁸ The minimum rate argument, in particular now that the new Member States wish to use this instrument to attract foreign direct investment, is a more difficult matter. For instance, lower corporate rates (indeed, revenue) may also be compensated by a greater preference for indirect taxation, especially where tax collection is problematic (Fuest & Fuest, 2004). There is little doubt as well that the EU strongly favours catch-up growth in Central Europe and doing this via lower corporate rates is consistent with the aims of cohesion spending via the EU budget. Moreover, minimum tax rates may have the effect of protecting governments' expenditures, without much control by tax payers. The recent political protests of German and French ministers against low corporate tax rates in the new Member States might well express a desire to maintain this 'protection' because the budget pressures these countries are subject to have nothing to do with threats of a 'race to the bottom'. Therefore, it is advisable to retain significant degrees of tax competition, while excluding harmful practices. A workable compromise, combining steps 3 and 4 of the test, would be to harmonize the tax base or important elements of it, supplemented by a low common minimum rate, above which effective tax (rate) competition can be kept alive (de Mooij, 2004).

As to infrastructure, the EU has hardly been assigned a role. The obvious externalities and, at times, the scale aspects cannot possibly have been missed out by the policy makers. How come, centralisation has not even been pursued in a light form until the trans-European networks were born (in the Maastricht treaty) and very timidly since? One reason is that (for highways) step 2 was executed in the loose framework of the UN-ECE for decades and this worked, though slowly, and less than efficiently. Network infrastructures were also "solved" by cooperation between state-owned monopolies, always too little and too late, and – as we can now testify - at huge costs. It was the European Round Table of Industry (ERT) which, for the first time, raised alarm about the many "missing links" when looking at infrastructure from a European, and not national, point of view (ERT, 1984). The sunk inefficiencies in

²⁸ See Klemm, 2004, for a careful verification.

Europe, resulting from the refusal to assign the EU level with infrastructural powers sufficient to ensure effective, least-cost EU-wide transit and ample and smooth cross-border connections of all kinds, have gradually reduced over time but are probably still causing a lot of waste. The US and Canada had infrastructural works of a nationwide character *precede* the internal integration of local markets, at least for railways. And the US interstate highways have been built by the Dep. of Defence! Just imagine that, despite Europe's density, the incipient freight rail liberalisation could exploit efficient long-haul transit lines. Just imagine that EuroControl would have been allowed to centralize the air traffic controls early on and would have executed them in only a few, interconnected centres over the continent. Such examples illustrate the very high 'welfare' costs of sticking to a dysfunctional refusal of a subsidiarity test. Of course, there is no denying that one would have to resolve the troublesome financial burden sharing for such ventures, and that the budgetary inhibitions have been, and are probably still, quite deep.²⁹

Extreme fear for centralisation can play a role even when decision-making is under QMV rather than under unanimity. A long-standing example consists in the slow and partial emergence of nuclear safety standards in the EU. Although the Euratom treaty has not brought what the drafters had in mind shortly after the Suez crisis, surely (one would presume) it has delivered common safety regulations at the highest level? Making EU safety rules is a well justified core activity of the Union in all cases of potential or actual cross-border externalities. Thus, in the internal market, conventional power plants are subject to strict environmental (mainly, emission) directives for clear reasons of cross-border negative externalities. Thus, for mobile products, as soon as the risks are very high, the EU does not hesitate to enact very strict directives.³⁰ Such a cost of centralisation is not regarded as disproportionate precisely because it is justified by the required confidence among Member States when dealing with such unusual risks. In this light it is curious, to say the least, that

²⁹ The Galileo project has eventually overcome this point. Note that, here, the public good character is strong, no Member State could provide such infrastructure alone, and the political costs of dependence on the US system are 'enormous' for the Union. For most infrastructure, the case for a joint approach is not so overwhelming.

³⁰ For example, the old-approach directive 84/527 on welded unalloyed steel gas cylinders, a range of almost 40 chemical directives, the ATEX directive 94/9 on protective systems in an explosive environment (etc. etc.) which, almost by their nature, have the effect of eliminating much of the national regulatory discretion.

the enormous risks of nuclear installations – which obviously can translate into terrible cross border externalities - have only been dealt with less than halfheartedly at the EU level. Without going into this sensitive matter in detail, suffice it to say that what one observes is a three-layered system of national regulatory requirements, several (fairly general) directives at Euratom level, and intense cooperation supporting - and voluntary adherence of - IAEA safety standards (which are not legally binding) complemented by two recent intergovernmental Conventions.³¹ The upshot is that the EU only has, what the Euratom treaty calls, "basic safety standards" (public health and protecting workers against ionising radiation) and a patchwork of nationally distinct other safety rules, which can only partly be explained by different technologies and national systems.

Nevertheless, the EU forced several new Member States to organize the closure of major nuclear power plants (notably, Lithuania relying for 80 % of its electricity on Ignalia), at huge costs for these countries, despite the IAEA approval of its upgrading in e.g. the Lithuanian case and despite the fact that the EU-15 never legislated overall nuclear safety standards in the acquis. It is good to realize that subsidiarity can justify regulation at world level (if credible at step 3). It is also useful to remember that the recent Commission proposals³² only refer to high minimum standards and explicitly allow Member States to satisfy preferences for still stricter regulations if desired, which is consistent with subsidiarity as well. The Commission does not propose an EU inspection agency but mere peer review. Nevertheless, the Council adopted a Resolution³³ that argues for a legally non-binding, incentive driven harmonisation process, based on a deep review of why national nuclear standards are so different. This resolution is a flat denial of one of the main reasons why the Euratom treaty has been written. The assertion of some opposing Member States like Germany and the UK that the Commission proposals would have no value added (which would seem to be a reference to art. 5, EC on subsidiarity where the EU level must be seen as doing

³¹ On nuclear safety, and on waste, respectively, all Member States having ratified except Estonia and Malta.

³² COM (2003) 32 of 30 Jan. 2003 on safety of nuclear installations, and one radioactive waste; the weaker amended versions in COM (2004) 526 of 8 Sept. 2004.

³³ See Council document 5585/04 proposing a revised text of the draft directive and (under doc. n° 5821/04) resolution 5821/04, both of 30 Jan. 2004.

"better" than the Member States) sounds peculiar after a period of decades of attempting only light cooperative modes and even more so when combined with a simultaneous call to investigate all national standards.³⁴ Finally, the Commission proposed that a better assurance be accomplished about sufficient long run funds for (expensive and time consuming) decommissioning and the subsequent durable management of the large amount of dangerous waste emerging from it. The resistance to this sensible, if not indispensable requirement which is undoubtedly in the common interest, would seem to be equally dysfunctional. A sober and analytically sound subsidiarity test might have revealed the political nature of the Council's reaction, and supported the European public interest on functional grounds.

4.4. The functional boundaries of national powers

The deepening and widening of European integration has also led to implications for *national* powers which are, and have long been, *uncontroversial* in subsidiarity terms. I shall discuss two important examples of policies under national competences: public health and the media.³⁵ The issue here is not whether the assignment of such powers should be at the national level. This is widely regarded as justified. Rather, the issue is where the boundaries of such national competences are, whether these boundaries shift or ought to shift for various reasons and whether the subsidiarity test is a useful tool in identifying them. Given the functional nature of the test, what we are therefore interested in are the functional boundaries of national powers.

In public health, widely defined, there are numerous aspects of the internal market which apply such as free movement of medical professionals and mutual recognition of diploma's, free movement of medicines (despite nationally distinct reimbursement systems, hence curious patterns of parallel trade) and harmonisation of pharmaceutical regulation and strict certification of new medicines via a common EU agency, free movement of medical devices (under harmonisation, too), food safety

³⁴ The UK government asserted, on the basis of a questionnaire with two responses (!), "that ...they offer no added value, could undermine national regulators as well as the current global safety regime and therefore lead to a lower level of safety than prevails at present". None of such assertions seems to relate to what the Commission actually had proposed in 2003. UK government response, 21 August 2003.

³⁵ For a discussion of education which raises similar issues, see Pelkmans, 2005.

and health aspects of environmental regulation, to mention some important ones. Nevertheless, public health in a narrow sense, that is, the organisation and financing of health care and social protection systems, is a national competence. Since Maastricht and Amsterdam, the treaty comprises art. 152, EC stating that "Community action shall complement national policies" to ensure "a high level of public health" while "excluding any harmonisation of the laws and regulations of the Member States". The complementary element at EU level was initially expected to consist of common Research and Development for diseases where scale can bring the costs down (per country) while pursuing greater excellence (e.g. cancer, AIDS, rare diseases) and a common interest in reliable quality information on health issues throughout the EU.

For at least three reasons, this very modest view of an EU role in public health (again, in the narrow sense) has altered since the late 1990's. First, a series of ECJ rulings starting with Kohl and Decker in 1998 have reduced the 'immunity' national health systems were thought to enjoy from EU law and case law on the internal market and competition policy.³⁶

Not only can patients move freely in the EU when seeking healthcare, the ECJ recognised the right of patients to be reimbursed - under certain conditions – for non-hospital health services received in other Member States without prior permission of the social or private insurance at home. For hospital services permission is needed but even in those cases rights are recognised, provided certain price and overall financial constraints are met. At the same time, the ECJ "recognized the need for Member States to be able to plan health services to ensure access to a balanced range of high-quality treatment, to avoid the risk of seriously undermining the financial balance of the social security system, and to control costs...[] ..Member States should continue to exercise their responsibility for setting policies in a range of areas in order to organise and finance their health and social security systems, while

³⁶ A brief survey of the case law between 1998 and 2003 and a careful analysis of a range of possible implications for Member States, taking into account their distinct reimbursement systems, is found in a Commission Staff Paper SEC (2003)900 of 28 July 2003, Report on the application of internal market rules to health services, addressed to the Member States.

respecting Community law" (High Level group, 2004, p. 8). Although the logic of the rulings has gradually begun to be appreciated in health circles, even the EU High Level group (with health ministers, in their personal capacity) calls for authoritative reviews of the legal situation and for proposals on how the legal certainty can be improved. Second, facilitated by globalisation and European-wide food value chains, cross-border health threats such as contagion (SARS, Creutzfeld-Jacobs disease from mad-cow disease, HIV, bird's flue, etc.) require tight coordination and common preventive measures in Europe in order to maintain a minimum of confidence with the public at large. Interestingly, the Constitution, in art. III-278, 1b, speaks of "...combating serious cross-border threats to health". Although this article speaks explicitly about the EU "complement[ing] national policies", the cross-border externalities criterion is satisfied here so that a test might be studied further. Third, a much more pro-active view on the link between health and (the EU) prosperity (goals) has recently been assumed by the Commission, to some extent stimulated by the relatively poor state of health in some new Member States after transition and the steeply increasing costs of health everywhere in the EU, be it as a share of GNP or in the form of lost working days or indeed of too many cases of avoidable death. Former Commissioner David Byrne has issued the basics of what he calls an EU health strategy, a more ambitious way of looking at the EU tasks than ever before (Byrne, 2004). A new EU agency has been founded [on disease prevention and control], much more cooperation between health systems is promoted, similar ('unharmonized'?) health impact assessment systems will be developed, more joint health research, an EU Health portal (for reliable info) as well as eHealth and a European health card, not to speak of 'EU leadership' with respect to public health in international organisations. Most, if not all, of these actions are presented as cooperative. Nonetheless, the three reasons together do beg the question where the functional boundaries of the national competences of public health ought to be drawn. Another fascinating example where the starting point has been the recognition of national powers concerns the media. Like public health and education, media was initially not even mentioned under complementary or supporting activities at the Union (then, EEC or EC) level. Unlike the other two, media is still not incorporated in the

treaty nor for that matter in the Constitution³⁷; stronger, the very word 'media' is not employed in the treaty.³⁸ The reality is, however, radically different from what one might surmise from the absence of media in the treaty. Insofar as 'media' refers to TV broadcasting or more precisely to the audiovisual sector³⁹, the interaction between technological progress with respect to transmission techniques (including satellite) and later 'convergence', on the one hand, and progressive case law, harmonisation and policy making at EU level, on the other hand, has led to an internal market of broadcasting services. The ambition and impact has proved to be appreciable: no wonder, being based on negative and positive integration with respect to communication infrastructures, services based on home country control (origin principle) and contents regulation. Interestingly, case law and the intense political debate about what and what not to harmonize have been concerned with national powers over national culture and ways to foster and protect it. At first sight, this profound concern would seem to reconfirm the assignment of any media policy to national governments only, because before the Maastricht treaty the word culture was equally absent from the treaty. The Maastricht provision actually underscored the assignment since any EU involvement is to support "the flowering of the cultures of the Member States". The Constitution, in art. III-280, has simply taken over what is currently art. 151, EC without any change. An addition, art. 87 sub d., EC, specifies that state aids are allowed if supporting national culture and cultural heritage under some restrictions having to do with the functioning of the internal market and competition, which, again, seems to affirm national competences. The Amsterdam Public Broadcasting Protocol reflects this perspective on state aids to public broadcasting.

Today, the EU audiovisual internal market is based on the free movement of services, with far-reaching limits on the national capacity to restrict or prevent incoming services from other Member States, even if such services (say, in the language of the receiving country) are solely emitted from another Member State to evade national

³⁷ At least in Title III, chapter V, on supporting, coordinating or complementary action.

³⁸ Since the treaty of Amsterdam, the Protocol on Public Broadcasting, concerned with its financing by the state, is attached. In Title II, on values, art. II-71/2, the word media is mentioned in connection with pluralism.

³⁹ There is no policy and virtually no case law on other media such as radio or the written press.

regulatory provisions on broadcasting at home. In this sense, one could say that the mutual recognition (or origin principle) has generated a form of regulatory competition putting pressure on domestic broadcasting systems of a range of Member States. Harmonisation is accomplished in the TV without frontiers directive⁴⁰ and concerns mainly a limited form of contents regulation. These developments reflect the gradual emergence of commercial broadcasting, based on the inapplicability of the natural monopoly argument for (public monopoly) broadcasting, itself enabled by technological progress and less scarcity of spectrum for broadcasting. Europe has moved towards a system of 'dual broadcasting', that is, co-existence of public and private/commercial services. In the light of 'convergence' driven by digitisation, internal market logic and EU competition policy, a range of other constraints have further reduced national and regional, even local, discretion. A sample of examples of such constraints includes whether or not to disallow commercial broadcasting in a Member State (e.g Austria , the Netherlands), how precisely to define the mission of public broadcasting (so as to identify cross-subsidisation of state-aided broadcasters for programmes outside their mission), the proper policy with respect to "must-carry" obligations of cable monopolists (often , municipalities in the EU), the opening up of cable transmission, the (un)desirable link between quotas for European programmes and the competitiveness of the EU audiovisual producers, etc. etc. Furthermore, both via the Strassbourg Human Rights court and via the EU merger regulation even political and democratic aspects have moved to a European level. The EU merger regulation (art. 21) specifies that plurality of the media is regarded as a legitimate public interest justifying certain protective measures by the Member States. In the years 1995 and 1996 Commissioner Monti has attempted to draft a directive on media concentration (rejected by the EP after a lot of debate, inter alia because it would be too weak on plurality) and the EP requested a Green Paper on pluralism and concentration in the European media in 2002. And the Constitution, in art. II-71 sub 2 says that "the freedom and pluralism of the media shall be respected".

The case of the (audiovisual) media shows very forcefully that a functional perspective on subsidiarity, rather than a mere political or literal reading of a

⁴⁰ The amended one is directive 97/36 of 30 June 1997 in OJ EC L 202 of 1997, pp. 60 ff.

catalogue of national powers, facilitates the appreciation of possible shifts in the boundaries of national competences over time, driven by markets, technology or scale, in turn affecting the "need-to-act-in-common". It should also be helpful to assume an analytical rather than intuitive view on how to best re-arrange the combination of national and EU powers. Thus, if the Union is in agreement to keep and cherish its 'dual broadcasting' system, unlike in several other parts of the world, it would be advisable to apply a detailed subsidiarity test in this sensitive area of policy and politics.

4.5. Towards Union public goods?

One could stretch the "allocation function" much further. One could discuss domains such as JHA, CFSP and defence. The latter two domains have a less compelling link with the internal market. JHA emerges (mainly) from the abolition of internal frontiers and testifies how many different meanings are given to the notion of (the free movement of) persons. It also testifies how far one is forced to move in a cooperative if not centralizing direction for a "zone of internal security" to be effective. As a (Union) public good, however, a half-baked approach is glaringly inconsistent and will incessantly be exploited by asylum seekers, economic immigrants and criminals. As a consequence, citizens will not find the weak, cooperative solutions credible [remember the wording of step 3 of the test] and this will continue to exert pressures for more efficient and effective solutions. These have to be assessed in detail but inevitably will cause a significant increase in the now trivial JHA Union budget, and prompt, in part, more centralizing solutions. A manifestation of this trend is the shift to the Community method for JHA in the Constitution.

CFSP is typically treated by economists as a Union public good par excellence. Analytically, this may be correct but the question is whether this analytical observation brings us any further. The argument for a credible CFSP does *not* hinge on the discipline of cross-border mobilities in the internal market, one of the two standard criteria for the subsidiarity test. Instead, it is based on convictions that the Union as a Community of "values" should provide itself with the means to defend and

promote these values internally and externally. At this level of abstraction, the argument can be extended to common defence functions of the Union. A related point consists of the discrepancy between the economic might of the Union and its political frailty. Only a properly organised and to some extent centralized CFSP could re-equilibrate this imbalance. Since this reasoning only has a remote link with the internal market and is primarily concerned with the willingness to produce and enjoy the public good in common, the cardinal issue here are *preferences* and their translation into the public policies and positioning in the CFSP as well as the effective political accountability towards the citizens. At a general level of Eurobarometer questions, European citizens are indeed massively in favour of a more European approach in foreign and security policy, and, to a lesser extent and with a sharper differentiation between countries, in defence as well. However, preference revelation in specific issues and the permanent process of political accountability are highly sensitive in these areas, also inside the composing nation-states of the Union. It is for these important reasons that the simplistic and far too general public goods approach having been advocated in recent economic papers and reports (e.g. CEPR, 2003; Tabellini, 2002; etc.) does not add much value. Where the link with the internal market is direct (e.g. the scale and externalities arguments are more compelling in joint R & D in military technology, standardisation between NATO and the EU rapid joint force, and joint procurement) a subsidiarity test might be helpful to overcome petty resistance.

4.6. Back to the Member States?

Finally, what about more decentralisation in the EU? It is good to note first that most of the so-called 'spending ministries' are and have always remained at the national level: public health, social housing, infrastructure, education, defence, social policy and justice & police. These national policies easily cover three-quarter or more of the national budgets. Very few of these expenditures have any counterpart in the (small) EU budget. The overwhelming majority of issues and aspects covered by these domestic activities neither induces cross-border effects nor are they of a scale that the Member States cannot handle alone. Thus, the status quo that many key policies

are at the Member State level is justified by subsidiarity considerations.

Beyond that, couldn't a subsidiarity test clarify that national powers ought to be strengthened or re-instated. In principle, yes. Since the Union has gradually been built up over only a few decades, there are not many candidates for this possibility. One is the CAP, now that agricultural policy at EU level is under quasi-permanent reform. Since the instruments of the CAP have become far less intrusive and more market based, and since farmer's income is nowadays targeted via direct transfers (so-called direct income payments, under some restrictions), the subsidiarity case for some measure of decentralisation and, indeed, differentiation of payments in accordance with national standards of living is becoming stronger. An added advantage would be that inter Member States' transfers for the CAP would reduce to a trickle, which would take the sting out of many EU budget disputes (see chapter 15). Another possible candidate is the class of measures under cohesion and the structural funds. The case for decentralising the funding for relatively poor regions in relatively rich EU countries is no doubt very strong indeed (again, see chapter 15). A third example can be found in certain specialised aspects of the common competition policy, namely about art. 81, EC, with respect to inter-firm agreements, where the Union has recently decentralised the policy and enforcement to the national competition authorities. However, in this instance the actual change is minor because the law and policy has remained the same, only the execution is decentralised, with explicit cooperation between those authorities and a residual but crucial role of the Commission.

5. "EARLY WARNING" AND SUBSIDIARITY TESTS

The Constitution, not yet ratified, has introduced an "early warning" system. It gives the national parliaments six weeks, following the publication of EU draft legislation, to object against the proposals on the grounds of suspected violation of the subsidiarity principle. National parliaments will have to organize themselves if they want to take the 'early warning' system serious. There are two immediate issues to be resolved and several implications of them.

First, national parliaments have to reflect and decide on a range of aspects of an institutional nature on how they set up a system of internal reading and assessment, given the powers of (usually) two Chambers, the functions of specialized EU committees (and the relation with subject-based committees, dependent on the subject matter of the draft legislation), the overload of EU initiatives (hence, the query whether prior selection makes sense), the need of expert advice and a host of related questions. All these institutional tussles do not take away the need to answer how the *substance* of proposals is going to be assessed. It is here that the subsidiarity test, as set out and illustrated in the present paper, could be elaborated into an operational test which can be routinely employed by parliamentary committees and their services. The test cannot and should not replace the final political judgment of the parliamentarians, it merely provides them with the functional logic, in the proper sequence, to assess the appropriate assignment to the national and/or Union level. The basics of the test is the same, time and again, and this will help to prevent arbitrary or unsystematic shortcuts. It can be done in a transparent fashion so that trade-offs or a different political weight given to certain aspects can be clarified and politicians have no difficulty in making their choices whilst voters and the press will quickly develop a similar routine in appreciating these political choices.

Second, 25 national parliaments will have to develop a way of working with each other on the assessment of subsidiarity, for the simple reason that one-third of the national parliaments will be needed before an "early warning" will legally force the Commission to think again. At the very least, national parliaments will need a real-time mutual information system amongst themselves. But once such a system would begin to transmit signals of dissatisfaction about a specific draft proposal of the Commission, there is a risk of aping or mimicking the 'first movers' without, perhaps, a full appreciation of the strength or consistency of the reasoning or the underlying motives of a vote against. There are several other risks. A parliament could abuse the 'early warning' procedure to signal its resistance against a proposal and couch it "politically" in terms of subsidiarity. Alternatively, a parliament might have difficulty with a proposal and a declared backing by the government. In order not to cause the

fall of the cabinet, a shrewd tactic could be to initiate a campaign against it on the basis of a violation of subsidiarity. What these illustrations demonstrate is the need for as much comparability of the national tests as possible. Indeed, what is the Commission expected to do if the threshold of one-third of the national parliaments is reached but the reasons of suspected violation are purely "political" (and perhaps on distinct grounds) in some cases , while in other cases the rejection is based on a systematic test, yet these tests are not comparable in structure or even as to motives? The subsidiarity test as developed above would have the double advantage of facilitating and disciplining the work in every parliament, if not helping each other to some degree for certain elements of the test, and making it almost immediately comparable over all 25. Since the core of the test is a functional one, the Commission will have a hard time rejecting the substance of the test out of hand, the more so, of course, if 8 or 9 parliaments employ the same methodology and end with a similar political judgment.

Once the power of these two arguments for the widespread use of a functional subsidiarity test is fully appreciated, one could take the reasoning one or two steps further. A coordinated move of the national parliaments, for instance, in the form of mutually agreed methodological guidelines in the spirit of the present paper, will likely compel the Commission to reflect once again about the analytical basis and method of its subsidiarity test and about the "fit" with what the parliaments intend to use. This would be great news because, thus far, little attention has been paid to the substance of testing draft proposals for subsidiarity. It is true that in 1991 /1992 the inclusion of subsidiarity in the Maastricht treaty and the Edinburgh guidelines led to a chilling effect, and probably rightly so : over 60 old, sometimes odd, proposals were withdrawn by the Commission after renewed scrutiny.⁴¹ Furthermore, there is little doubt that a greater political awareness has emerged to refer to the need-to-act-in-common (step 2) and to give priority, where relevant, to step-3 forms of cooperative solutions between Member States, perhaps even without the Commission explicitly

⁴¹ See COM (93) 545 of 24 November 1993 Commission report on the adaptation of Community legislation to the subsidiarity principle

taking part. The new procedures of "regulatory impact assessment"⁴² explicitly include a subsidiarity and proportionality test as part of the assessment, although few details about the method of it are provided. Some deepening about the substance of tests is desirable and doing this first of all functionally, based on a similar analytical foundation as the national parliaments, before coming to a political judgment, would serve quality and transparency.

Nevertheless, this may well turn out to be a hopelessly idealistic picture of what is to be expected. National parliaments will swiftly discover how massive the task would be if they were to inspect all draft laws of the Union. Even if they are selective, perhaps only responding to preliminary soundings from "Brussels" on unpublished early draft texts or to Green papers foreshadowing draft laws, it will not be an easy task to deliver an authoritative assessment, except in the case of a grave overreaching by the Commission. Also, the coordination with other parliaments may, in actual practice, lead to quick disillusion. Moreover, the sensitivity of assigning even the most trivial coordinating function to COSAC (informal meetings of the EU committees of national parliaments in the Union) is appreciable for all kinds of reasons. At the moment, it is not even equipped to run a mutual information system between parliaments in real-time. Finally, yet another complication consists of the possibility that the European Parliament is of a manifestly different view than (some) national parliaments. The fact that the EP has no formal role in the "early warning" procedure does not mean that its political conviction does not matter.

It is for all these reasons as well as for the assured quality of the subsidiarity test itself (that is, in the European public interest) that one should take the reasoning another step further still. It would be preferable to set up an independent body to conduct an authoritative subsidiarity test on a routine basis.⁴³ This body should be staffed with lawyers, economists and political scientists and have guaranteed cooperation from the Commission as a right. The permanent staff can be small and rotating specialists

⁴² See e.g. COM (2002) 276 of 5 June 2002, Communication on Impact Assessment ; Commission Staff paper SEC (2004) 1377 of 21 October 2004, Impact assessment : next steps.

⁴³ The Dutch Socio-Economic Council has, in its report on the Convention, first proposed this idea. The present author is a member of the committee writing the report. See SER, 2003.

should be a normal added value. A budget for technical subcontracting and (many) workshops or hearings ought to be available. This body should scrutinize the annual programme of the Commission for potentially difficult or sensitive proposals and prepare its own work programme accordingly. The body should largely set its own agenda of studies but should, within the limits of its capacity, be at the disposal of national parliaments for doing tests or pre-studies at cost price. There are five advantages of this suggestion. First, all national parliaments have ready access to solid and consistent tests that they can use when desired. Second, individual parliaments need not be inhibited by the problems of producing a test of (say) highly complex or technical pieces of draft laws as they can rely on the body to do it or request the body to do it for them at cost price and (usually) in a matter of weeks, if preparatory work of the body already exists. Third, the overall costs in the Union will remain low as this forms a typical case of scale economies, without in any way blocking other assessments by other institutes when they see reasons for it. Fourth, the body can develop expertise and experience quickly so as to realize a consistent, well-thought-out test, with both hard and soft criteria. This should serve the Union well. Fifth, it would also greatly facilitate the coordination between national parliaments because they will all avail of the same methodology and the same reports. The European Council should adopt a declaration, explicitly endorsed by the Commission, tasking the Commission with the elaboration of a subsidiarity test or perhaps several variants of it in a Green Paper, together with a concrete proposal for the setting up of this independent body.

6. CONCLUSIONS

Between economists and lawyers there seems to be little awareness of each other's quite distinct perspectives on subsidiarity, their rationale and their application in the EU context. Indeed, one suspects that each discipline apparently moves in its own "trench", implying that European lawyers as well as economists are incapable of appreciating the merits of the other approach. The paper attempts to juxtapose the central tenets of the two perspectives of subsidiarity and subsequently provides a series of cases or examples in the Union, illustrative of different aspects of the

application of subsidiarity in the economic tradition. The analysis is limited to aspects of the "efficiency function" (or, allocative function) of the EU, and does not go into issues of equity or macro-economic stabilisation. It is submitted, however, that the efficiency function of the EU is by far the most important one for the application of the subsidiarity principle.

Based on the subsidiarity test which can be derived from the economics of multi-tier government, five types of illustrations are provided : the misuse of subsidiarity in keeping national powers ; the refusal to apply a functional test, arising from the fear that it would show why the EU level would offer better solutions ; the application of the principle in case the boundaries of what are essentially national competences are uncertain due to greater intensity of cross-border flows or other developments ; illustrations of possible Union public goods; and finally, illustrations of EU decentralisation, that is, a partial or complete shift of what is or was thus far EU policy or regulation to the Member States.

The last section of this contribution sets out the double advantage for national parliaments in employing a subsidiarity test, based on the functional analysis in the present paper. It is particularly useful to dispose of a well-founded methodology which would be comparable, if not essentially similar, in all 25 parliaments so that the six weeks of the 'early warning ' procedure could yield a swift and efficient coordination of national subsidiarity reports. Stronger, it would be both more efficient and effective to establish a common, independent body (staffed with lawyers, economists and political scientists) employing a standard and analytically sound functional methodology for subsidiarity tests. Of course, the political decision, including the weights of qualitative aspects or the consideration of trade-offs, remains fully in the hands of nationally accountable parliamentarians. However, the work of such a body and the methodology underlying it would greatly help national parliamentarians to concentrate solely on the politics of the case, leaving the numerous technical matters (not to speak of the enormous workload, given many EU proposals every year) to specialists. Since the body would work for all the parliaments, the coordination between the 25 would be far easier and, in any event, not be distracted by

methodological or technical issues. It would also support the parliaments of the very small Member States as they might lack scale and expertise to cope with the 'early warning' procedure for so much draft EU legislation. For the proposal to ever become feasible, it is of the essence that European lawyers and economists begin to climb out of their trenches. It is hoped that this paper might provide an incentive.

REFERENCES

- Boutens, K, 2003, Het subsidiariteitsbeginsel : een kwestie van toepassing (The subsidiarity principle, a question of application) in : Internationale Spectator, March , Vol. 75/3, pp. 127 – 132.
- Buchwitz R. 1998, A positive analysis of European deregulation, Aussenwirtschaft, Vol. 58, IV, pp. 553-571.
- Buti M., Eijffinger S. & Franco D., 2003, Revisiting the Stability and Growth Pact: grand design or internal adjustment?, Economic Papers n° 180, Brussels (European Commission, DG EcFin), January.
- Byrne D., 2004, Enabling good health for all, a reflection process for a new EU health strategy, Brussels, European Commission, 15 July.
- Cass, D, 1992, The word that saved Maastricht? The principle of subsidiarity and the division of powers within the EC, Common Market Law Review, Vol. 29, pp. 1107 – 1136.
- CEPR, 1993, Making sense of subsidiarity: how much centralisation for Europe?, Monitoring European Integration Volume 4, CEPR, London. (Begg D. et al)
- CEPR, 2003, Built to Last: A political architecture for Europe?, Monitoring European Integration, Volume 12, CEPR, London. (Berglöf E. et al)
- Calmfors L. et al 2003, Report on the European economy 2003, CESifo, Munich, European Economic Advisory Group (EEAG).
- Constantinesco, V., 1991, La subsidiarite comme principe constitutionnel de l' integration europeenne, Aussenwirtschaft, pp. 439 – 459.
- Cruikshank D., 2001, Clearing and settlement – the barrier to a Pan-European capital market, speech at Chatham House, 26 April.
- Dehousse, R., 1992, Does subsidiarity really matter ? , Florence, European University Institute, EUI Working Paper Law no. 92/32.
- Devereux M., B. Lockwood & M. Redoano, 2002, Do countries compete over corporate taxes?, CEPR discussion paper nr. 3400, London.
- Dunleavy P., 1997, Explaining the centralisation of the EU: a public choice analysis, Aussenwirtschaft, Vol. 52, I-II, pp. 183-212.

Emiliou, N., 1992, Subsidiarity : an effective barrier against "the enterprises of ambition"?, *European Law Review*, Vol. 17/5, pp. 383 – 407.

Estella, A., 2002, *The EU principle of subsidiarity and its critique*, Oxford, Oxford UP.

Fuest C. & W. Fuest, 2004, A minimum corporate tax rate would be harmful for both high and low tax countries, *Intereconomics*, July/August , Vol. 39/4.

Geelhoed, L.A., 1991, Het subsidiariteitsbeginsel: een communautair principe ? (The subsidiarity principle , a communitarian principle ?), *SEW*, July/August 1991, no. 7/8, pp. 422 – 435.

Giovannini A. et al, 2002, Cross-border clearing and settlement arrangements in the EU, Brussels, European Commission, *Economic Paper* n° 163 (DG EcFin), February.

High Level Group, 2004, High level process of reflection on patient mobility and healthcare developments in the EU, Brussels, European Commission, February, EU website under 'health/ph'.

Hosli M., 1994, The political economy of subsidiarity, in: Laursen, ed., *The political economy of European integration*, Maastricht, EIPA.

Inman R. & Rubinfeld D., 2002, Subsidiarity, governance and EU economic policy, *CESifo Forum*, 4/2002, Munich.

Kapteyn, P., 1991, Community law and the principle of subsidiarity, *Revue des affaires europeennes*, pp. 35 – 43.

Keen M. & Smith S., 1996, The future of value added tax in the EU, *Economic Policy*, n° 23 (October).

Klemm A., 2004, A minimum rate without a common base ?, *Intereconomics*, July/August, Vol. 39/4.

Kostoris Padoa Schioppa F., 2003, Mutual Recognition, Unemployment and the Welfare State, *BEEP briefing* n° 3, Bruges, College of Europe.
<http://www.coleurop.be/template.asp?pagename=ecopublic&language=EN>

Mooy R.de, 2004, A minimum corporate tax rate in the EU combines the best of two worlds, *Intereconomics*, July/August, Vol. 39/4.

Oates W., 1999, 'An Essay in Fiscal Federalism', *Journal of Economic Literature*, 37; 3, pp. 1120-49.

Padoa Schioppa T. et al., 1987, Efficiency, stability and equity: a strategy for the evolution of the economic system of the European Community, report of a study group appointed by the EC Commission, Brussels.

Pelkmans J., 1982, The assignment of public functions in economic integration, Journal of Common Market Studies, 1982 (Vol. XXI, 1-2) Sept./Dec.

Pelkmans J., 1985, The institutional economics of European integration, in Cappeletti M., Weiler J. & Secombe M. (eds.), Integration through law – Europe and the American federal Experience, Vol. 1, Book I, Walther de Gruyter, New York/Berlin.

Pelkmans J., 1988, A grand design by the piece ? An appraisal of the internal market strategy, in : R.Bieber et al. ed.s , 1992 – One European market ?, Baden- Baden (Nomos).

Pelkmans J., 1994, The significance of EC-1992, The Annals (of the American Academy for Political and Social Science), Vol. 531 , January.

Pelkmans J., 1998, A European Telecoms Regulator? in: P. Vass, ed., Network industries in Europe: preparing for competition, London (Centre for Regulated Industries).

Pelkmans J., 2001a, European integration, methods and economic analysis, 2nd revised edition, Pearson Education, Harlow and New York.

Pelkmans J., 2001b, Making EU network markets competitive, Oxford Review of Economic Policy, Vol. 17, 3 , autumn.

Pelkmans J., Labory S. & Majone G., 2000, Better EU regulatory quality: assessing current initiatives and new proposals , in G. Galli & J. Pelkmans, ed.s., 2000, Regulatory reform and competitiveness in Europe, Vol. 1, Cheltenham (E. Elgar).

Pelkmans J., Vos E. & di Mauro L., 2000, Reforming product regulation in the EU: a painstaking, iterative two-level game, in: G. Galli & J. Pelkmans, ed.s., 2000, Regulatory reform and competitiveness in Europe, vol. 1, Cheltenham (E. Elgar).

Pelkmans J. & Casey J.P., 2004, Can Europe Deliver Growth?, BEEP briefing n° 6, <http://www.coleurop.be> at ECO and BEEPs , Bruges, College of Europe.

Pelkmans J., 2005, Testing for Subsidiarity, revised paper presented at the Europa Kolleg, Hamburg, to be published in a book about the conference 'A Constitution for the European Union', edited by Thomas Bruha.

Sapir A. et al., 2003, An agenda for a growing Europe, Brussels, July.
http://europa.eu.int/comm/dgs/policy_advisers/experts_groups/ps2/high_level_stu

dy_group_index_en.htm

Sinn H.W. & W. Ochel, 2003, Social Union, convergence and migration, Journal of Common Market Studies, Vol. 41/5.

Sun J.M. & Pelkmans J., 1995-a, Why liberalisation needs centralisation - subsidiarity and EU telecoms, The World Economy, Sept. 1995 (Vol. 18,5).

Sun J.M. & Pelkmans J., 1995-b, Regulatory competition in the internal market, Journal of Common Market Studies, March 1995 (Vol. 33,1).

Tabellini G., 2002, The assignment of tasks in an evolving European Union, CEPS policy briefing n° 10, CEPS, Brussels.

Tiebout C.M., 1956, A pure theory of local expenditures, Journal of Political Economy, Vol. 64, No.5, October, pp. 416-424.

Tinbergen J., 1954, International economic integration, North-Holland, Amsterdam.

Tinbergen J., 1956, Economic policy, principles and design, Amsterdam/New York, North Holland.

Toth, A. , 1992, The principle of subsidiarity in the Maastricht treaty, Common Market Law Review, Vol. 29, pp. 1079 – 1105.

Vaubel R., 1994-a, The political economy of centralization and the EC, Public Choice, Vol. 81, pp. 151-190.

Vaubel R., 1994-b, The public choice analysis of European integration, a survey, European Journal of Political Economy, Vol. 10, pp. 227-249.

Vaubel R., 1995, The centralisation of Western Europe, London, Institute of Economic Affairs, Hobart Paper n° 127.

Vaubel R., 1997, The constitutional reform of the EU, European Economic Review, Vol. 41, pp. 443-450.

Veil S. et al., 1997, Report of the High Level Panel on the free movement of persons, to the Commission, Brussels (18 March).

Young D., 2003, Employment protection legislation: its economic impact and the case for reform, Economic Papers n° 186, July (European Commission, DG EcFin).

Zodrow G., 2003, Tac competition and tax coordination in the EU, International tax

and public finance, Vol. 10, pp. 651 – 671.



RESEARCH PAPERS IN LAW

1/2003, Dominik Hanf et Tristan Baumé, “Vers une clarification de la répartition des compétences entre l'Union et ses Etats Membres? Une analyse du projet d'articles du Présidium de la Convention”.

2/2003, Dominik Hanf, “Der Prozess der europäischen Integration in Belgien. Voraussetzung und Rahmen der Föderalisierung eines ehemaligen Einheitsstaats”.

3/2003, Dominik Hanf, “Talking with the “pouvoir constituant” in times of constitutional reform: The European Court of Justice on Private Applicants’ Access to Justice”.

4/2003, Horst Dippel, “Conventions in Comparative Constitutional Law”.

5/2003, Ludwig Krämer, “Access to Environmental Information in an Open European Society - Directive 2003/4”.

6/2003, Ludwig Krämer, “Überlegungen zu Ressourceneffizienz und Recycling”.

7/2003, Ludwig Krämer, “The Genesis of EC Environmental Principles”.

8/2003, Takis Tridimas, “The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?”.

1/2004, Dominik Hanf et Pablo Dengler, “Accords d’association”.

2/2004, David Mamane, “Reform der EU-Wettbewerbsregeln für Technologietransfer-Verträge: Einfahrt in den sicheren Hafen?”.

3/2004, Donald Slater and Denis Waelbroeck, “Meeting Competition : Why it is not an Abuse under Article 82”.

4/2004, Jacques Bourgeois and Tristan Baumé, “Decentralisation of EC Competition Law Enforcement and General Principles of Community Law”.

5/2004, Rostane Mehdi, “Brèves observations sur la consécration constitutionnelle d’un droit de retrait volontaire”.

1/2005, Jacques Pelkmans, “Subsidiarity between Law and Economics”.