

The Subsidiarity Principle in EU Environmental Law

Written by Sian Affolter

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SIAN AFFOLTER, MAR 26 2021

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According to the Seventh Environment Action Program of the EU, 'many environmental trends in the Union continue to be a cause for concern', and in order to live well in the future, it is now necessary to take urgent and concerted action (European Parliament and Council 2013, annex point 6). On the one hand, this is due to insufficient implementation of existing EU legislation. On the other hand, the question arises whether the necessary legislation exists at all. When looking at recent developments in EU environmental law, it can be noted that the principle of subsidiarity has become an increasingly debated subject matter, explaining why action cannot be taken at Union level. This chapter discusses the role played by the principle of subsidiarity in the field of environmental law and illustrates key points by looking at EU legislation where the subsidiarity principle mattered in the adoption of law.

At times, as this chapter will show, the principle is falsely used to explain the EU's inactivity in environmental affairs. To make this point, the basis of EU competence to take action in the field of environmental law is set out. Then, the principle of subsidiarity will be explored in general as well as more specific terms of environmental law. This serves as the basis for the analysis of two examples. First, it will be shown that EU legislation on soil protection – which was rejected by the member states – would have been in line with the principle of subsidiarity. Second, an amendment to the directive on the deliberate release of genetically modified organisms (GMOs) which re-nationalised the authorisation procedure will be analysed as regards subsidiarity. Finally, a conclusion is drawn, arguing that the principle of subsidiarity in its legal sense is sometimes used as an 'excuse' for the Union's (politically motivated) inactivity.

It is important to note that acts of EU environmental law can be motivated by different objectives. First of all, there is the genuine aim to protect the environment. Yet, there is also the aim to realise the goals of the internal market, which can be strongly influenced by environmental policy concerns. In the case of the latter, especially product- or production-related regulation often includes elements of environmental policy. For this reason, two different cases are chosen below: one as a legislative act based solely on environmental protection, and one, as a product-related piece of legislation, with strong components of environmental policy.

EU Competences

According to the principle of conferral, established in Article 5 (1) of the Treaty on European Union (TEU), the EU may only take action if the treaties – and thus the member states – have granted the power to do so to the Union. For the practical working of subsidiarity, it is decisive whether the competence granted to the EU by the relevant provisions is of an exclusive or non-exclusive nature. Only in the case of non-exclusive competences does the subsidiarity principle come into play (see Streinz 2012, note 21). As environmental protection constitutes a cross-sectional task to be pursued in all EU policy fields, relevant measures can be issued in many different areas and, hence, with diverse foundations of competence. This is not least because of Article 11 of the Treaty on the Functioning of the European Union (TFEU) stating that requirements of environmental protection are to be integrated into the definition and implementation of Union policies and activities. The next section will focus on the two main bases of EU competence regarding environmental protection, Article 192 and Article 114 TFEU.

The Subsidiarity Principle in EU Environmental Law

Written by Sian Affolter

Article 192 TFEU

What action is to be taken to achieve the objectives of European environmental policy rests with a decision by the Council and the European Parliament. The objectives themselves are listed in Article 191 TFEU and include the preservation, protection and improvement of the quality of the environment, the protection of human health, the prudent and rational utilisation of natural resources and the promotion of measures to deal with regional or global environmental problems at an international level. Indeed, the EU competence in the field of environmental policy is defined by these policy objectives. Due to the wide remit of the list and the broad understanding of the term 'environment', the Union's competence to take action is rather extensive (Epiney 2019, 105). Furthermore, as the policy area is not mentioned in the list of EU exclusive competences contained in Article 3 TEU, the Union's competence deriving from Article 192 TFEU must be of a non-exclusive nature and the subsidiarity principle is, therefore, of relevance.

Article 114 TFEU

Environmental measures can be based on Article 114 TFEU, if their primary aim is related to the objective of realising the internal market. This rule serves as the basis of EU competence to adopt measures for the approximation of national provisions which envisage the establishment or the functioning of the internal market. Therefore, it is possible that environmental measures follow from Article 114 TFEU if they, for example, constitute a product- or production-related regulation, further characterised by certain considerations related to environmental protection. As does Article 192 TFEU, Article 114 TFEU confers a non-exclusive competence to the Union. Thus, the subsidiarity principle is of importance in the field of environmental policy independent of the basis of competence for the concerned regulation. However, the objective of the regulation may still have an influence on the principle's implementation.

The Principle of Subsidiarity and Environmental Law

As mentioned above, the existence of a competence does not necessarily imply an EU right to jump into action. In fact, this is where the principle of subsidiarity matters. It does not contain any indication as to the limits of a certain competence, but instead limits the use of such competences (Kadelbach 2015, note 30). According to Article 5 (3) TEU, when non-exclusive competences are concerned, the EU:

shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States ... but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Two main aspects can be deduced from the wording of Article 5 (3) TEU. First, the need to examine before any action is taken whether its objective can be *sufficiently* achieved by the member states. This is the so-called negative criterion (see Kadelbach 2015, note 35). And second, in the sense of a positive criterion, the objective of action must be *better* achievable at Union level by reason of scale or effects. The principle of subsidiarity, thus, combines a Union perspective with that of the member states (Epiney 2019, 139). The negative criterion can be fulfilled due to objective reasons, i.e. a member state is unable to achieve the objective in question. Yet, this can also be due to subjective reasons: one or several member states would be able to achieve the objective, but do not take the necessary action. The positive criterion, by contrast, is examined in terms of quantity or quality. In the first case, the objective can be better achieved by reason of its quantitative extent, e.g. when the objective is the fighting of global or cross-border environmental hazards. An example for the case of the objective being better achievable at EU level due to its qualitative extent would be when the objective interacts with other objectives of the Union (such as the realisation of the internal market).

The Subsidiarity Principle and Measures of Environmental Law

In the following, these general remarks shall be specified with regard to measures of environmental law, as set out by Epiney (2019, 140–3). As has been pointed out, environmental policy measures can be based on different objectives when examining questions of EU competence. The focus might be on particular aspects of environmental protection

The Subsidiarity Principle in EU Environmental Law

Written by Sian Affolter

as well as on the aim of realising the internal market, thus the objective of market integration. If the primary aim of a measure is the latter, the criterion of not sufficiently achieving the objective at the member-state level is fulfilled whenever national measures lawfully impede the goal of market integration. Similarly, in the case of the main objective being derived from Article 191 TFEU, this criterion is typically fulfilled because of a broad understanding of the objectives listed in Article 191 TFEU. Therefore, it is sufficient for the negative criterion to be fulfilled if an environmental problem exists in one or more member states without being addressed adequately by the respective authorities. However, the existence of different – yet in terms of results equivalent – solutions by individual member states would imply that the objective of a measure is sufficiently achieved at national level.

Moreover, the criterion of the EU being able to better achieve the objective will frequently be fulfilled. For example, in the case of the realisation of the single market, the objective would be clearly contradicted if different national regulations continued to apply. Also, as regards measures orientated towards the achievement of genuine environmental protection, a respective policy objective is often better achieved at Union level, since this is the case as soon as the EU measures, overall, lead to an improvement of environmental quality.

As a consequence, the question whether the objective is better achieved at the level of the EU by reason of the scale or the effects of the proposed action becomes the decisive consideration. It must be assessed, if the objective to be achieved (or the identified environmental problem) is of such a comprehensive nature that action at EU level must be regarded as necessary. This appears to be the case in two situations: first, the proposed action addresses an environmental problem with cross-border effects suggesting large-scale, co-ordinated action. Then the question of maintaining or ameliorating environmental quality is not just relevant at national or regional level, but concerns many, if not all, member states. Second, the proposed action refers to the objective of market integration. Then, the necessity to adopt measures at EU level regularly derives from the operation of the internal market and the related guarantees of the 'four fundamental freedoms' and undistorted competition (see the European Court of Justice 2001, paragraph 32; 2002, paragraph 182; and rather clearly 2016, paragraph 150). To a certain extent, measures such as product- or production-related regulations can often also be qualified as environmental measures. However, the extensive character (or scale) of the action which calls for EU-wide measures does follow from the goal of market integration rather than an objective of environmental policy as such.

In sum, the application of the criteria identified above suggests that the setting of product- or production-related measures at EU level will, as a rule, conform to the subsidiarity principle. This is due to their important implications for the practical working of the internal market. As far as measures of genuine environmental policy are concerned, it has to be assessed on a case-by-case basis whether the EU is able to better achieve the objective of the proposed action given either its scale or effects. Presumably, this will often be the case since interdependent ecosystems turn seemingly local environmental problems into cross-border challenges. Thus, only in exceptional circumstances will the principle of subsidiarity constitute an opposing factor to EU action taken in the field of environmental policy. For that matter, it can also be found that the jurisprudence of the European Court of Justice (2001, paragraph 30–4; 2002 paragraph 180–5; 2011, paragraph 176–80) generally seems to grant the Union's organs a rather large scope in this regard. Nevertheless, it is of particular importance when it comes to the concrete design of policy measures which should allow for the taking into account of local specificities.

Selected Environmental Measures

Proposed Soil Framework Directive

In 2006, the Commission presented a proposal for a directive establishing a framework for the protection of soil (European Commission 2006). The objective of this directive, as stated in its recital 8, was to establish a common strategy for the protection and sustainable use of soil. The proposed directive, however, was never adopted and eventually withdrawn by the Commission in May 2014 (European Commission 2014, 3).

The proposal foresaw an obligation on part of the member states to identify risk areas of soil erosion due to water or wind, decline of organic matter, compaction, salinisation and landslides. It granted member states a timeframe of five years to do so once the EU legislation had come into force (Article 6). In addition, the Soil Framework Directive would

The Subsidiarity Principle in EU Environmental Law

Written by Sian Affolter

have expected member states to draw up a programme of measures, including risk reduction targets, measures for reaching those targets, a timetable for the implementation of measures as well as an estimate of the allocation of private or public funding (Article 8). It furthermore would have obliged member states to identify contaminated sites and to establish a national remediation strategy on the basis of an inventory of such sites. A proposed Article 12 also requested soil status reports be made available to the competent authority and the other party whenever a site on which potentially polluting activity has taken place was being sold. Finally, a proposed Article 16 would have established a far-reaching obligation for member states to make information available and largely increased their reporting duties (Petersen 2008, 149).

One of the main reasons for the rejection of the Soil Framework Directive by many member states was an alleged breach of the subsidiarity principle (Petersen 2008, 149). This claim can be assessed by drawing on the negative and positive criterion embedded in the legal codification of the principle.

As regards the former, the objective of the proposed action – the protection of soil and the preservation of its functions – was not met by several EU countries (Scheil 2007, 180). The desired objective was thus not *sufficiently* achieved at domestic level. Yet, whether it could be *better* achieved at the Union level due to the scale or effects of the proposed action was widely debated. As stated above, this is the case when the environmental problem addressed by the action has cross-border effects and calls for large-scale or co-ordinated action or when EU action is necessary to guarantee the fundamental freedoms and undistorted competition.

In the example of the Soil Framework Directive, both elements would have been present. Although the soil protection issue has a strong local component, trans-boundary effects cannot be denied. It is noteworthy that soil plays an important role in the context of climate change. It is the largest natural storage of carbon on a global scale, making its preservation an essential goal (Heuser 2007, 121; Klein 2007, 12). Therefore, the importance of healthy soils for the mitigation of climate change is more than evident. Moreover, the protection of soils greatly influences the protection and preservation of other resources such as biodiversity and groundwater, which in turn also have clear cross-border effects. While the protection of these resources is also envisaged by other, more specialised, EU instruments, this does not preclude common action in the field of soil protection.

Arguably, the proposal of a Soil Framework Directive would have complied with the principle of subsidiarity. In general, the principle does not stand in the way of EU action in the field of soil protection. In other words, the claim of the member states that the proposed legislative act was incompatible with the subsidiarity principle appears to have been without legal foundation. Most likely, the raised concerns were brought forward to prevent the adoption of a politically undesired regulation.

Amended GMO Directive

In April 2015, the EU regime for GMOs changed with Directive 2015/412/EU amending Directive 2001/18/EG on the deliberate release of such organisms. The modified legislation introduced new possibilities for member states to restrict or prohibit the commercial cultivation of GMOs in their territory. Originally, the regime regarding the deliberate release of GMOs was characterised by the EU's attempt to centralise regulation in order to prevent the distortion of competition and to guarantee a uniform protection of the environment (see Christoforou 2004, 641; Salvi 2016, 202–4). However, some member states raised complaints to articulate their preference for a final say on GMO cultivation. This led to said amendment which indeed re-nationalises the competence to decide whether GMOs can be cultivated in a certain territory (see Geelhoed 2016, 20–1; Martínez 2015, 86).

More precisely, Directive 2015/412/EU introduced the possibility to restrict or prohibit the cultivation of GMOs at two different stages of the procedure: first, member states can demand that the geographical scope of the written consent or authorisation is amended so not to affect their territory; or second, they can adopt measures restricting or prohibiting the cultivation of GMOs, if the authorisation does cover their territory (Article 26b (1) and (3) Directive 2001/18/EC). These measures must be in conformity with EU law, reasoned, proportional, non-discriminatory, and based on compelling grounds. Article 26b (3) provides a non-exhaustive list to this end, stating environmental policy objectives first. Yet, any national measures must not stand in conflict with environmental risk assessments carried

The Subsidiarity Principle in EU Environmental Law

Written by Sian Affolter

out by the European Food Safety Authority (EFSA) prior to the authorisation of GMOs (Art. 26b (3)). As a consequence, member states cannot rely on arguments in direct contrast to the facts established by the EFSA.

The directive's recitals and the preparatory work of the Commission show that, among other factors, subsidiarity concerns were relied upon to explain the amendment (recital 6 and 8 Directive 2015/412; European Commission 2010, 8). But does subsidiarity necessarily ask for a re-nationalisation in the case of GMOs? Further examination is required to determine whether the pre-amendment regime was indeed in conformity with the principle.

Again, the two criteria set out above are relevant. In a first step, the objective of the measure – the regulation of the authorisation procedure for GMOs at EU level – is to be determined. According to Article 1 Directive 2001/18/EC the main objective of the EU's GMO regime is 'to approximate the laws, regulations and administrative provisions of the Member States and to protect human health and the environment'. This applies whether GMOs are placed on the market or deliberately released into the environment for other purposes. Furthermore, as this directive is based on Article 114 TFEU, it was also adopted with the aim of a functioning internal market in mind. Clearly, the negative subsidiarity criterion (a member state not sufficiently meeting the objective) is fulfilled as diverging regulations for domestic GMO authorisation can or did lead to restrictions of the fundamental freedoms in the internal market.

As regards the second criterion (the objective is better achieved at EU level due to scale or effects of the action) the main objective of the GMO regime can only be achieved if regulation takes place at the EU level, making EU action a necessity. Thus, the positive subsidiarity criterion can also be considered as fulfilled. In sum, the regulation of the authorisation procedure at EU level conforms to the principle of subsidiarity. In fact, the normative density of the regulation leaves little discretion to national authorities.

At the same time, the GMO regime demands from the EU to ensure the protection of the environment. This can be derived from numerous legal sources. On the one hand, the acts of the EU secondary law in question set forth the protection of the environment as an aim. On the other hand, this can already be derived from the EU obligation to strive for a high standard of environmental quality when issuing regulations on the basis of Article 114 TFEU, as foreseen by Article 114 (3) TFEU. For this reason, the objective of the protection of the environment is to be duly incorporated into the acts under examination here. In the present case, this was done originally, *inter alia*, by obliging the EFSA to network and to consult with national authorities while carrying out environmental risk assessments. The EU also granted the member states a possibility to opt-out, if new information on risks of GMOs for human health or the environment became available.

Nevertheless, member states claimed that this was insufficient – or the risk assessments not sufficiently executed – which then constituted one of the reasons for the adoption of an amended GMO regime (see Geelhoed 2016, 24–8; Salvi 2016, 203). Arguably, re-nationalising parts of the regime's authorisation procedure is beneficial to the environment as a whole, as it can be expected that certain member states will issue extensive restrictions or bans of GMOs. Yet, this runs counter to the measure's other – probably even primary – objective of realising the internal market. Thus, the answer to the question which level is better able to achieve the dual objective of the measure must point in the direction of the EU. The objective of the realisation of the internal market can only be achieved at a centralised level, and the objective of the protection of the environment can be duly incorporated in the framework of the regulation.

In other words, placing the regulation on GMO authorisation at Union level must be considered in line with the subsidiarity principle. The re-nationalisation resulting from the adoption of Directive 2015/412/EU seems to be driven by other political reasons. As stated above, product- or production-related regulations will most often be in line with the principle of subsidiarity, as their main objective is primarily related to the realisation of the single market. The objective of the protection of the environment must then be achieved by designing EU regulations in an adequate way.

Conclusion

The principle of subsidiarity in EU environmental law suggests a distinction between actions aiming for genuine

The Subsidiarity Principle in EU Environmental Law

Written by Sian Affolter

environmental protection and actions aiming primarily at market integration, but also containing elements of environmental policy. The chapter has shown that these actions can rely on different EU competences. In the first case, the action will generally rely on Article 192 TFEU; whereas it is Article 114 TFEU in the second. It can be concluded that measures based on Article 114 TFEU will most often conform to subsidiarity, as the principle's negative and positive criterion will be fulfilled. For actions following Article 192 TFEU, it must be assessed on a case-by-case basis if due to the scale or the effects of the action, it is to be expected that the EU is able to better achieve the objective of the action. This is the case whenever the action addresses an environmental problem which has cross-border effects calling for large-scale or co-ordinated action. The two examples presented here confirm the general remarks.

The proposal for a Soil Framework Directive, as an act based on Article 192 TFEU, would have been in conformity with the principle as all its criteria were met: not all member states protect soil in a sufficient manner and respective cross-border effects as well as the role of soil in the fight against climate change suggest the Union to be much better placed to achieve the objective. Similarly, the analysis of the amended GMO Directive, as an act based on Article 114 TFEU, showed that the changes to the authorisation procedure did not constitute a necessity deriving from the principle of subsidiarity. In fact, locating the GMO regime at EU level has to be seen in conformity with the principle. Given the main objective of the measure – the approximation of laws – this is impossible to achieve at national level and puts the EU in the 'better' position. Even if the subsidiarity test is carried out with regard to the internal market objective, environmental protection must, however, be duly incorporated into the relevant EU law.

From a legal point of view, claims that measures of EU environmental law breach the subsidiarity principle are frequently unfounded, as the limits set by the principle for EU action appear quite wide. However, as environmental protection is a main goal of EU law, supranational action must also consider local and regional problem constellations. This can be done, for example, by giving a large leeway to member states in terms of policy implementation, by providing mechanisms that recognise local and regional specificities, or by granting extensive opt-out provisions. Of course, the conclusion that subsidiarity breaches often appear legally unfounded does not preclude the EU from non-action or re-nationalisation of certain competences for political reasons. At times it does, however, appear that the principle of subsidiarity in its legal sense is used as an excuse for the Union's (politically motivated) inactivity.

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The Subsidiarity Principle in EU Environmental Law

Written by Sian Affolter

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