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Direction

the foundation for european reform



RICHARD TORR

THE LOCAL IMPACT OF EU LAW, WHO'S KEEPING SCORE?

ACCOUNTABILITY, TRANSPARENCY AND EFFICIENCY





NEW DIRECTION
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THE LOCAL VALUE OF EU LAW: WHO'S KEEPING SCORE?

- RICHARD TORR

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Regardless of one's enthusiasm for the EU, it is a reality in our lives and the lives of those we represent. It is, therefore, important that we engage with EU institutions whenever necessary so as to get the best out of them where we can. We need to be sufficiently informed and aware of their activities to campaign for changes and improvements when we have concerns. The EU affects local government in a huge number of ways; getting hold of grants is only one part of the story. Better knowledge, a fairer deal and upholding subsidiarity principles are key aims of my work as a local authority leader turned MEP. This document focusses on the last of these.

The temptation to groan when the word "subsidiarity" is used is an understandable one, but it is a key concept for preventing too much top down control, supervision and legislation. It thus ought to have resonance for local government and Conservative local government in particular.

"Did this need to be done at EU level?", "What effect has this regulation ended up having?" These are the sort of questions that are often posed and for which anecdotal answers are often provided. Is there a way to move beyond the anecdotal? How can we formulate an evidence based assessment? Is there a way that the impact of legislation can be looked at that is user-friendly, accessible and objective?

This document is a significant step towards providing such a way. The research and case studies that respected expert in this field, Richard Torr, has put together point the way forward to the creation of a "Subsidiarity Scoreboard". A Scoreboard that will take making such assessments out of the laboratory and the hands of only highly qualified statisticians and give it to those who work in local government or in business. The very people who need to know how new (or existing) rules work, what their impact could be and thus be in a position to lobby for changes or re-assessments.

I had a Professor at Newcastle University who used to be furious when television weathermen described temperatures or changes to pressure as "academic", using the term as shorthand for "irrelevant". Although I find academic studies interesting and far from irrelevant, I do not want this document and the hard work that has gone into it to be "academic". To go from establishing the principle of the Scoreboard - as this document does - to actually creating the tool we at New Direction need to hear from those on the front line and to take their views and priorities into account. We can ensure thereby that this research is actually used. We look forward to hearing your views.

As well as thanking Richard Torr for his hard work on this document, I would like to acknowledge the input made by: Witold d'Humilly, Caroline Scott, Neva Sadikoglu-Novaky & Jack Berringer, as well as several other colleagues from the ECR in the European Parliament and the Committee of the Regions.





Richard Torr

Richard spent the first 20 years of his working life measuring the performance of technology and building consultancy and outsourcing businesses. In around 2010 his focus shifted to the use of performance measurement for strategic improvement, dabbling in the Balanced Scorecard, 'big' data science and visualisation. He now helps organisations use causal systems thinking to measure messy situations and translate human beliefs into visual evidence and decisions. As well as working with early-stage businesses and corporate departments, he also carries out pro-bono assignments.



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EXECUTIVE SUMMARY

This paper describes the concept of a Subsidiarity Scoreboard which seeks to detect which EU laws, once implemented, have lower value 'on the ground' than a more local option would have done. This new evidence would illuminate further those laws most in need of scrutiny and reform.

The EU Subsidiarity Principle hinges on a prediction that EU legislation can achieve a future objective in a 'better' way than action by a Member State, or no action at all. Upon a blend of beliefs and evidence which make 'ex-ante' forecasts about the future, EU laws are made and implemented. We might hope that - more often than not - an EU law achieves the claimed effects better than a Member State could have done.

But what if this act of clairvoyance, however sophisticated or biased, turns out to be wrong? What if the hoped-for gains fall short of those achievable by other, more local, means? What if a regulation or directive, instead of adding value, subtracts value from the lives of citizens?

However laudable the purpose, research and process which led to its creation, an EU law with a lower value than a Member State option now, in effect, breaches the Principle of Subsidiarity and with it the Treaty on European Union.

The Scoreboard is a tool for monitoring the likelihood that the Subsidiarity Principle is under threat on the ground because of existing EU legislation. Making this evidence visible and transparent should help decisions about where to prioritise reforms, of both the legislation itself and the process which produced it.

The Scoreboard re-uses the idea of 'cards' from the Early Warning System as a tangible way of ranking existing EU laws based upon concerns about both their subsidiarity journey and eventual local value. Grey and Black Cards are proposed - alongside the Yellow, Orange or Red - to accumulate 'marks' against legislation with elevated process and local value concerns.

This idea leads to the visual concept of clusters of Grey and Black Cards on a 'Reform RADAR' which reveal potential targets for subsidiarity or proportionality action.

A SCOREBOARD FOR VISUAL DECISION-MAKING

Ultimately, a Scoreboard should lead to better decision-making. In this case, the two decisions are broadly:

1. Which existing legislation should be prioritised for reform because of concerns about its lower value relative to a more local option?
2. Which parts of the legislative process should be prioritised for reform to avoid concerns about local value in the future?

If uncertainty exists in these decisions, the chosen priorities for reform have more chance of being wrong. For example, there may be an EU law which negatively affects a great many citizens but doesn't appear on the current 'Reform RADAR'.

To make these two decisions we would need to observe something about the EU legislation which is creating 'lower value' on the ground, as well as linking this back to likely process causes. In order to detect the value of this legislation relative to a local alternative, something needs to be measured.

This measurement may not need high accuracy to have decision value, indeed the data collected may be biased in terms of both beliefs and statistical error. This may trigger further measurement investments which seek higher value information. Conversely, not all measurements will have value in reducing uncertainty so we should avoid measuring things just because the data are easy to obtain.

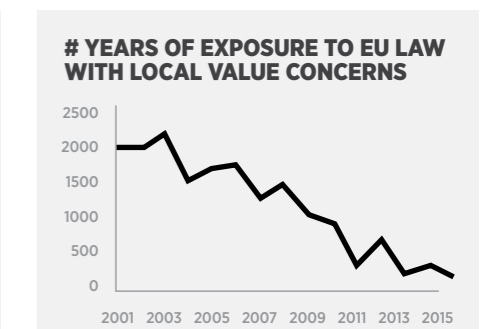
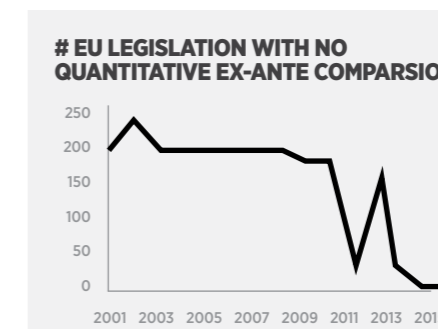
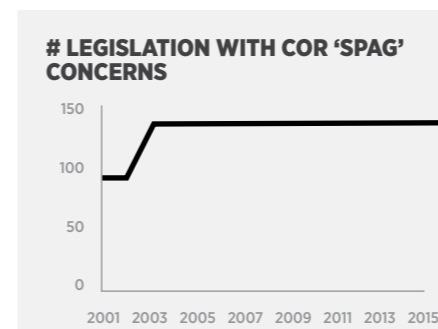
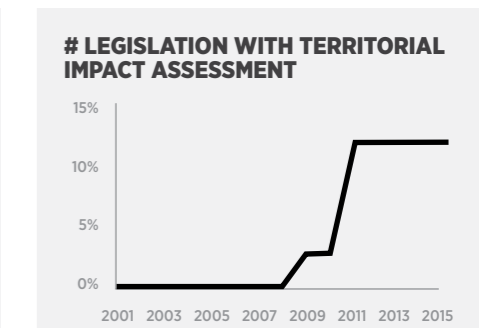
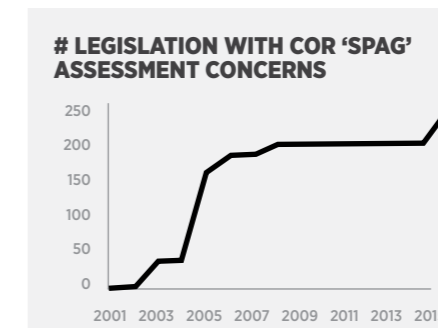
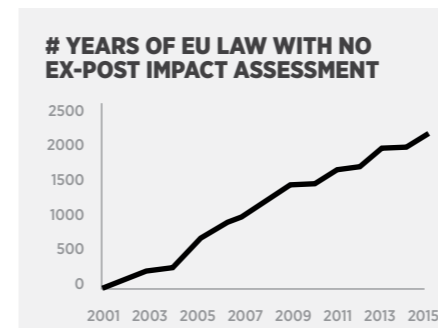
Next, the measurement should be communicated in a way which creates insight and leads to a decision, even if that decision is to 'do nothing' or 'do more measuring'. A well-designed visual Scoreboard should draw in a curious audience and lead them to seek further insights. The visual needs of the audience must be considered to steer a course between the executive 'decision tool' and the promotional 'infographic'.

Publishing of the Scoreboard to the internet should enable access and transparency with VoteWatch Europe <http://www.votewatch.eu/> as a possible model.

MOCKUP
THE LOCAL VALUE OF EU LAW SCOREBOARD

What a visual scoreboard could look like.

LEGISLATION [TOP20]	#	LEGISLATIVE PROCESS			LOCAL VALUE	
		PRE-CARDS	POST-CARDS	EXPOSURE [YEARS]	CARDS	EXPOSURE [LOSSES]
Androlla (2002/317/EC)	9	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■
Morteau sausage (2008/335/EC)	8	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■
Sabodet (2007/486/EC)	8	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■
Balkenbrij (2001/344/EC)	8	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■
Bloedwors (2003/242/EC)	8	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■
Krakowska (2009/53/EC)	8	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■
Chorizo (2003/491/EC)	8	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■
Lincolnshire sausage (2008/239/EC)	8	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■
Bloedworst (2008/61/EC)	8	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■
Bierschinken (2002/485/EC)	7	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■
Bockwurst (2012/209/EC)	7	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■
Chipolata (2013/428/EC)	7	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■
Rosette de Lyon (2009/155/EC)	7	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■
Cotechino (2015/260/EC)	7	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■
Frikandel (2004/239/EC)	7	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■
Metworst (2009/75/EC)	7	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■
Paio (2009/188/EC)	7	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■
Bufifarra (2013/345/EC)	7	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■
Embutido (2006/361/EC)	7	■ ■ ■ ■ ■	■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■



GREY & BLACK CARDS

The idea for Grey & Black Cards is stolen from the Subsidiarity & Proportionality Early Warning System (Treaty of Lisbon Protocol 2). The EWS triggers Yellow and Orange (and now Red) cards based on the number of reasoned opinions raised on proposed legislation. Grey & Black Cards extend this idea over 'Earlier Warning' and 'Later Warning' timeframes.

The football 'foul' analogy is already a sticky, tangible idea which could be used to compare the gap between pre-legislative opinion and the eventual real-world effect. Stretching the football analogy further, the current legislative process is like asking pundits to predict the result of a game before kick-off whereas the true goal count accumulates on the Scoreboard.

PROCESS GREY CARDS

The first idea is that EU added value would be expected to arise from a 'good' process. If certain boxes are 'ticked' in this process then the chance of a subsidiarity or proportionality concern – and the number of grey cards – should fall. For example, legislation which has been subjected to a credible subsidiarity evaluation ought to reduce concerns about citizen exposure to unproven laws. The attributes on the list could be yes/no checkboxes and also have some magnitude.

For example:

- **Has this legislation had ex-post evaluation?**
No = A Grey Card
- **How many years have citizens been exposed to non-evaluation?: 10 = Size of the Grey Card.**

The colour grey could denote gaps in the legislative process or 'grey areas' of pre-legislative uncertainty. Grey could also imply a lack of clarity or transparency in the process.

LOCAL VALUE BLACK CARDS

The second idea is that asking people to record cases of local concern about added value will produce a black card. The colour black could denote actual cases detected on the ground or any post-legislative concerns. Black cards can also accumulate in magnitude depending on the total number of reported cases, in how many member states and the likely number of affected citizens. This will naturally result in a tally of beliefs about cases which are most 'front of mind'. Careful sampling and then aggregation of this sentiment would be expected to reveal patterns worthy of further scrutiny. The grey and black card ideas augment one another. If a 'good process' is a precursor to 'good local value' then there should be both fewer grey and black cards. However, legislation with many 'process' grey cards might trigger 'local value' surveys. Likewise, if 'local value' black cards are detected, the 'process' might be scrutinised more closely. Over time, this body of scores would be mutually enriching and could perhaps become predictive.

SUBSIDIARITY SYSTEMS THINKING

A Systems Thinking approach leads us consider the factors which may influence the legislative journey, the eventual local impacts and how feedback loops could lead to a better subsidiarity system.

A simple causal loop diagram has been sketched from the mental model created in the course of the study. This system will naturally seem different, even simplistic, to those immersed in the EU law-making and political subject matter. It does, however, help to suggest which parts of the system might be valuable objects of measurement.

Eight candidate results were identified in this work which could represent what an 'ideal' subsidiarity system might look like. These are shown on the diagram as blue boxes. The overall ideal outcome of subsidiarity is the 'Added value of EU Law over and above Member State action' and this is shown in the pink box.

CANDIDATE RESULTS

The eight candidate results are summarised below and covered in more detail in Part 3 of the study. For each result, measures should be deliberately designed to detect the degree to which the result is occurring. These are simplified to illustrate possible Grey or Black Card attributes.



RESULT #1

EU Citizens are not exposed to EU law with a lower value than a sub-EU alternative

This is the eventual goal of the Subsidiarity Principle expressed after implementation once the effects of legislation on the ground are better understood. This is where local cases will be sought which quantify the net losses to citizens, businesses and administrations which could have been avoided with a local alternative.

BLACK CARD Legislation reported as producing a 'net loss' for local participants with estimates of exposure.



RESULT #2

EU Citizens are not exposed to laws which don't have an Ex-Post Impact Assessment

An Ex-Post Impact Assessment is the main instrument for detecting the achievement of the intended objective. The longer legislation stands after implementation without being assessed, the greater the 'window' of citizen exposure to any undesirable effects.

GREY OR BLACK CARD Legislation duration and population exposure without an ex-post impact evaluation.



RESULT #3

EU Citizens are not exposed to EU law with active subsidiarity/value concerns

EU laws with subsidiarity or added value concerns could increase the chance of there being actual but unquantified negative impacts. These concerns could arise from a wide range of sources and be recorded until addressed.

GREY OR BLACK CARD Legislation has active subsidiarity/added value concerns.



RESULT #4

New subsidiarity concerns are being detected from new sources

Subsidiarity/Added Value concerns are already captured through pre- and post-legislative monitoring efforts. This result seeks to detect whether new local data collection efforts are producing visibility of concerns which weren't previously on the RADAR.

GREY OR BLACK CARD Legislation with subsidiarity/value concerns which wasn't already on the RADAR.



RESULT #5

Added value is compared quantitatively to Member State alternatives

The presence of this comparison would be expected in pre-legislative (ex-ante) impact assessments. With clarity about the objective of some legislation, it should be possible to quantify the predicted difference between EU action with Member State options. A quantitative comparison which seeks to disprove a Member State (null) hypothesis could reduce the chance of confirmation-seeking cases.

GREY CARD Ex-Ante Impact Assessment with no quantitative non-EU option comparison.

GREY CARD Absence of Ex-Ante Impact Assessment.



RESULT #6

Non-receipt of reasoned options isn't because of EWS protocol barriers

There could be reasons why reasoned opinions aren't received for legislative proposals, which arise from the logistics of the process rather than absence of an opinion. These barriers could be masking genuine subsidiarity concerns.

GREY CARD Legislation received a count of Reasoned Opinions.

GREY CARD Legislation with EWS protocol problems.



RESULT #7

Territorial Impact Assessments are carried out.

It might be expected that the use of Territorial Impact Assessments would take into account regional conditions and produce a more accurate added value forecast. Legislation subjected to TIAs would be on the subsidiarity RADAR and more likely to detect and influence potential concerns.

GREY CARD Legislation without a Territorial Impact Assessment.



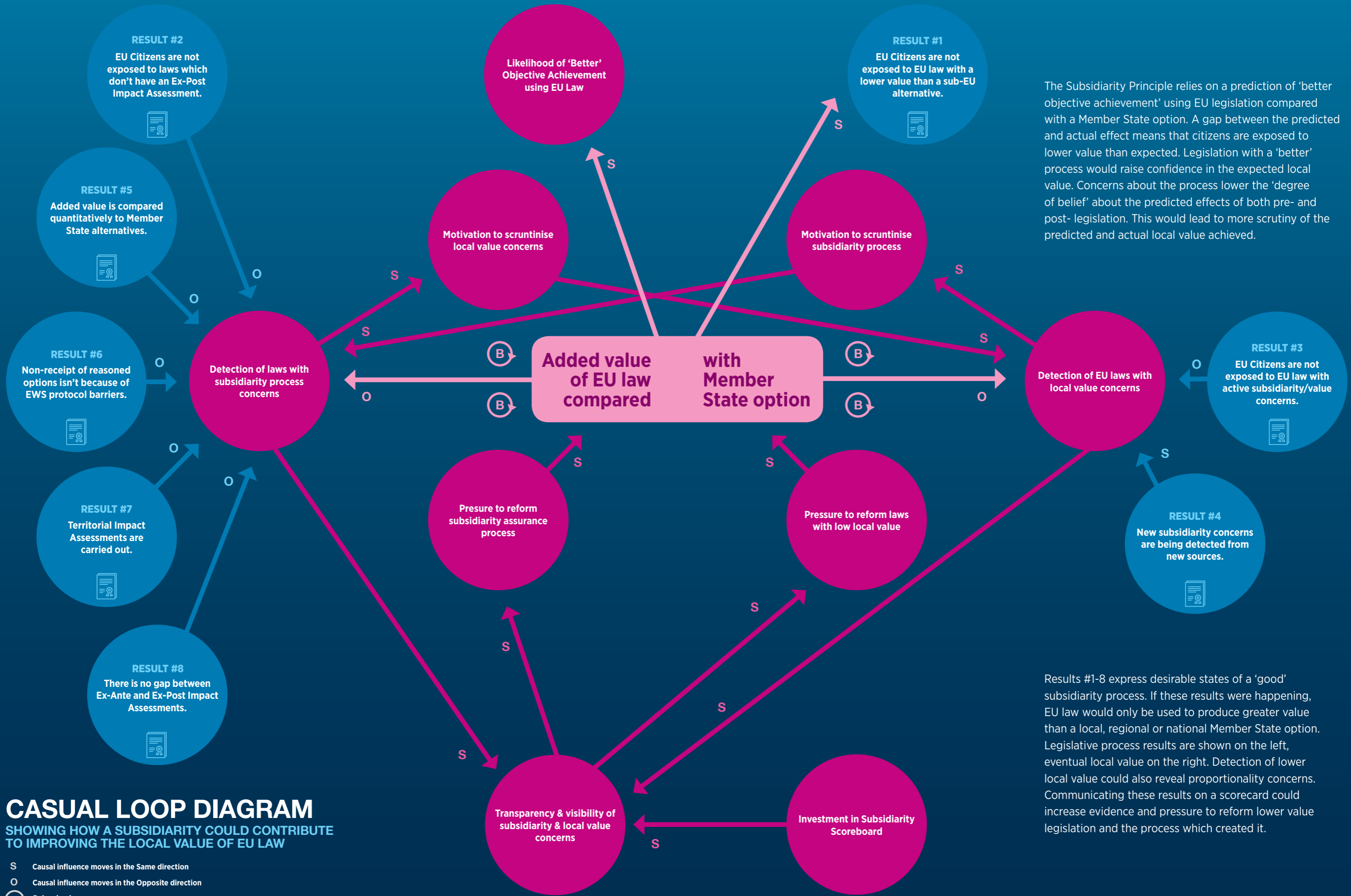
RESULT #8

There is no gap between Ex-Ante and Ex-Post Impact Assessments

Ideally, objective achievement will be accurately forecasted at pre-legislation. If an ex-post assessment is performed, it should either confirm objective achievement or reveal a gap. If there is a systemic gap between ex-ante and ex-post assessments then the case for 'better' objective achievement using EU law is being over-stated.

GREY OR BLACK CARD Ex-Post Impact Assessments don't evaluate the predicted/actual objective achievement gap.

GREY OR BLACK CARD Ex-Post Impact Assessment shows a shortfall in objective achievement relative to the forecast.



The Subsidiarity Principle relies on a prediction of ‘better objective achievement’ using EU legislation compared with a Member State option. A gap between the predicted and actual effect means that citizens are exposed to lower value than expected. Legislation with a ‘better’ process would raise confidence in the expected local value. Concerns about the process lower the ‘degree of belief’ about the predicted effects of both pre- and post- legislation. This would lead to more scrutiny of the predicted and actual local value achieved.

Results #1-8 express desirable states of a ‘good’ subsidiarity process. If these results were happening, EU law would only be used to produce greater value than a local, regional or national Member State option. Legislative process results are shown on the left, eventual local value on the right. Detection of lower local value could also reveal proportionality concerns. Communicating these results on a scorecard could increase evidence and pressure to reform lower value legislation and the process which created it.

CASUAL LOOP DIAGRAM
 SHOWING HOW A SUBSIDIARITY COULD CONTRIBUTE TO IMPROVING THE LOCAL VALUE OF EU LAW

- S Causal influence moves in the Same direction
- O Causal influence moves in the Opposite direction
- B Balancing loop

POTENTIAL DATA SOURCES

■ PROCESS (OR PRE-LEGISLATIVE) GREY CARDS

Scoring of the process for 'good' subsidiarity and proportionality is an informed administration exercise. This could be populated in part by work in the Committee of the Regions and by exploring other existing data sources (EUR-LEX).

The next step in this effort is to identify the key 'Process Grey Card' attributes and then rank a subset of existing legislation using these criteria.

■ LOCAL VALUE (OR POST-LEGISLATIVE) BLACK CARDS

The Committee of the Regions estimates that 70% of EU legislation is implemented by local and regional authorities of which there are more than 90,000 across the EU.

Mandate holders in local and regional authorities would be expected to be a conduit for scoring legislation based on known cases. Legal representatives or enforcement officers could be examples of informed groups with knowledge of both the legislation and individual cases.

The next step in this effort is to approach potential groups with the knowledge and reach to populate case-based surveys and run online data collection experiments.

SCOREBOARD BARRIERS & MVP

There are naturally a number of barriers to overcome in bringing a Scoreboard to life. There will be concerns about cost of data collection relative to the perception of value. There's uncertainty about how to achieve adequate sampling in the face of regional and linguistic challenges. There are administrative costs associated with 'scoring' existing legislation in a range of dimensions. There are practical questions about how to raise awareness of the tool and the degree of accessibility for both the recording of cases and the Scoreboard output itself.

A Minimum Viable Product (MVP) is envisaged in the first instance; a prototype tool which can be built at relatively low cost to collect experimental datasets and seek out a decision-making fit for its audience.



MEASURING THE LOCAL IMPACT OF EU LAW THOUGHTS ON A SUBSIDIARITY SCOREBOARD

“ Which EU laws create less value than more local ones (or none at all) and is the legislative procedure getting better at preventing this effect? ”

PURPOSE

The purpose of this article is to explore ideas for a Subsidiary Scoreboard proposed by the ECR Policy Group on Subsidiarity and Localism. The Policy Group brings together the local and regional experience of the Committee of the Regions and Parliament members with the aim of ensuring that decisions are taken at the lowest practicable level - national and sub-national - in line with the principle of subsidiarity.

The concept of a Subsidiarity Scoreboard is a response to the need for monitoring and reporting of the impact of EU legislation at a local level and the use of this evidence to guide the agenda for reform.

And, in the words of the Policy Group Chairman, Andrew Lewer MEP, the Subsidiarity Scoreboard should also indicate:

“ ...the political willingness to transfer legislative power to the member states when amending EU legislation and spending procedures. ”

1 WHY A SCOREBOARD?

1.1. ADDED VALUE DETECTION

Does some EU law affect citizens more negatively than a national law (or no law at all) would have done? If so, what can be done to avoid this in the future?

If decisions are taken at too high a level, there is a danger of a 'one size fits all' approach which isn't well tailored to local, regional or national situations. An ill-fitting solution with limited flexibility is less able to adapt to local conditions and yields lower value than it could have done. Detection of the undesirable effects of ill-fitting EU law is the flipside of EU Added Value.

The undesirable effects of an EU law for citizens, businesses and public administrations could be described as having 'lower net benefits', 'lower added value', a 'greater burden' or a 'higher cost'. Whatever the terminology, these are the kinds of negative effects the subsidiarity and proportionality principles were enshrined to avoid. EU level law-making should only be used (subsidiarity) to some degree (proportionality) if it produces better effects in the real world.

After EU laws are implemented, the line between subsidiarity and proportionality is blurred. Un-necessary action, dis-proportionate action, binding targets or over-zealous 'gold plated' implementation - whilst different causes - could produce similar effects on the ground. Local citizens, businesses and administrations are subjected to burdens and restrictions in achieving the intended objectives.

This article explores how a Subsidiarity Scoreboard might detect these effects by posing two questions:

1. Which existing EU legislation is producing the most negative local effects?

How can we detect the degree to which an EU law is creating a worse effect, in practice, than a more local law would have done? Here, the objects of interest are those laws with negative effects which, in retrospect, should have been avoided.

2. Is the process which upholds the subsidiarity principle getting better?

How can we detect whether the legislative process is getting better at preventing negative effects from happening? Here the object of interest is a process which is designed to stop these negative effects from arising in the first place.

Can we observe something about these objects - burdensome laws and the process by which they are created - to create insights which allow decisions to be made about a reform agenda?

Furthermore, can these things be observed using existing information sources, especially where costly measurement efforts could seem at odds with REFIT and EU reform in general? These sources might include: the Early Warning System, EPRS Impact Assessments, the Committee of the Regions Subsidiarity Monitoring Network and REGPEX.

Legislation is made in the presence of an uncertain future, whatever foresight its protagonists may claim. Whether or not the original intent was laudable, some EU interventions will fall short of their objectives and fall foul of the subsidiarity principle. Updating prior beliefs with new measurement feedback should reduce uncertainty and guide purposeful effort towards better interventions. Feedback in the form of a scoreboard should contribute, in time, to a 'better' subsidiarity system.



CASE STUDIES

ENVIRONMENTAL LEGISLATION

The European Union sets binding environmental targets and often requires special commitments from local authorities. In 2013, the European Union had an extensive set of 63 binding and 68 non-binding targets, with the majority to be achieved by 2015 and 2020.

The local impact is not always fully assessed and concerns have been raised both by local and regional authorities and by national parliaments/chambers in different EU Member States over whether some of the environmental binding EU targets are in-line with the principle of subsidiarity. A subsidiarity scoreboard would enable early warnings to be raised in a transparent manner and act as a platform to amplify these concerns.

ENERGY EFFICIENCY DIRECTIVE 2012

This is an example of a European Commission proposal that had not fully taken into account the local impact and subsidiarity angle. The draft directive initially proposed that

all publically owned buildings should be renovated through mandatory annual target. This also required public bodies to meet high energy efficiency standards when procuring energy-using works, products or services as diverse as IT equipment, rented buildings and tyres. The draft directive would have imposed regular statistical reports, evaluations and monitoring of contractor energy performance. This would have led to significant administrative burdens and costs for local and regional authorities. The text was amended during the negotiations that took place between the Council, Commission and the Parliament.

CIRCULAR ECONOMY PACKAGE

The Circular Economy Package put forward by the European Commission in December 2015 is a legislative proposal which sets EU targets for reduction of waste and a long-term path for waste management and recycling. It consists of bills on waste, packaging, landfill, electric and electronic waste, end of life vehicles,

batteries and accumulators. Initially, the Package was proposed in 2014 but later withdrawn followed by a statement from the Commission that it would be even more ambitious.

One national parliament and two chambers of national parliaments issued reasoned opinions on the 2014 Circular Economy Package and Local and regional authorities raised subsidiarity concerns. Subsidiarity experts saw problems in the binding targets proposed because achievement depends exclusively on national wastehandling measures with no transnational aspects. As previous targets were yet to be met there were also warnings that increased targets would only widen the implementation gap between the Member States.

While some of the targets were softened in the 2015 Circular Economy Package, a response to subsidiarity concerns is yet to be seen. The Commission has not conducted a territorial impact assessment which could have analysed and addressed these subsidiarity concerns in the 2015 proposal.

1.2. A SYSTEMIC FEEDBACK LOOP

In a simple 'subsidiarity system', detection of the negative effect of an EU law would lead to the correction of legislation itself, improvement in the process which spawned it and an eventual upward shift in EU added value.

Ideally, over time, the legislative system would seek an optimal level of law-making which predicts and avoids the negative effects of EU action and reinforces positive ones. To improve this system, feedback is needed about the gap between the effects of EU action compared with member state decisions, whatever the original belief or prediction. In Systems Thinking, this is referred to as a 'Goal-Seeking Archetype'.

A system which makes more accurate 'prediction' and more rapid 'correction' might be expected to reduce the magnitude of citizen exposure to any negative effects. There will be many influences and tensions at work in this system however, even a tendency for self-perpetuation by suppression of feedback and resistance to change. A system with a purpose may seek confirmatory evidence through a lens which neglects alternatives.

A Subsidiarity Scoreboard would aim to create some feedback with which to improve this system. For the feedback to work it would need to be transparent, trustworthy and publicly accessible. It would detect and signal shifts in subsidiarity adherence and inform intervention decisions so that EU law is adding value to the citizens affected by it.

1.3. SUBSIDIARITY: PREDICTING THE FUTURE

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

[Treaty on European Union Article 5(3)]

In simple terms, the principle of subsidiarity considers an objective and compares two future options for its predicted achievement. Member State action is the default option whereas the option for Union action must cross an achievement threshold.

The 'achievement threshold' is usually described by a two pronged subsidiarity test;

1. *The sufficiency, necessity or effectiveness test. Can a member state reach the 'achievement threshold' for an objective by acting alone?*
2. *The added-value, greater benefits or efficiency test. Can the EU do more, or do it at lower cost than a member state acting alone?*

This raises some interesting points about the decision between the options of Member State or EU action.

1. *The entire subsidiarity principle relies upon the concept of future 'objective achievement' and the ability to accurately predict the difference in outcome between the two options.*
2. *An 'achievement threshold' for this objective needs to be known otherwise the idea of 'sufficient' achievement has no meaning.*
3. *There is uncertainty about the degree to which either option will achieve a future objective. Both have a chance of non-achievement however strongly-held the belief.*
4. *Options ought to be compared for the same prediction time frame. Comparing a historical story for one option with a forecasted story for the other would be flawed.*
5. *If we choose one option, how will we know if the objectives have been achieved if they aren't clearly articulated, measureable and verified after implementation?*
6. *If the chosen option fails to achieve the objective, how will we know whether the other option would (or could) be any better?*
7. *The capacity to achieve an objective in implementation may be a greater factor than the selection of the option. In other words a seemingly 'good' decision can still produce a 'bad' outcome and vice versa.*

1.4. SUBSIDIARITY: A HYPOTHESIS TEST

Subsidiarity rules out Union intervention when an issue can be dealt with effectively by Member States at the central, regional or local level. Union action is only justified in exercising its powers when Member States are unable to achieve the objectives of a proposed action satisfactorily.

Because effective Member State action is the default case, subsidiarity could be expressed as a hypothesis test, with the null hypothesis:

“*Union action WILL NOT produce greater benefits in achieving the objective than Member State action.*”

Linking Subsidiarity to the complementary concept of EU Added Value (EAV) might lead us to restate the null case as “European Union action WILL NOT create Added Value”. A scientific method would present robust predictive evidence with which to falsify this hypothesis and show that “European Union action WILL create Added Value”.

Quantitative methods such as multivariate modelling and controlled experiments would be put to work to reject the null hypothesis. The smaller the error in the predictive model relative to the eventual real world effect is the ultimate validation of this hypothesis.

When making decisions, humans can anchor on a favoured intervention and then invest heavily in seeking supporting evidence. This is Maslow's hammer, seeing EU regulation as the only tool in the toolbox. Thinking about subsidiarity as a hypothesis test could help moderate this tendency.

1.5. THE PREDICTION GAP

Legislation sets out to achieve an objective. If that objective is clearly articulated then the difference sought should be observable, detectable and quantifiable in some way, in other words: ‘measurable’. This difference would ideally be a positive shift in something important such as a change for the better in people's lives. This same measure can be used to predict and verify achievement of the objective with some degree of error.

There will always be uncertainty about whether proposed EU legislation will achieve its objective. There may be over-confidence or under-confidence in the minds of the protagonists, shaped by their different mental models and group ideologies, both about the need for the

legislation itself and the proposed intervention. As time goes by, more information comes to light which reduces uncertainty about whether an outcome could be, or is actually, achieved. Not all information which emerges will be trustworthy and unbiased!

When there is high uncertainty about the effects of an intervention, the range of possible outcomes is wider. At the extent of these ranges there may be effects we want to enhance or avoid which may only be influenced by a small number of variables. If we want to increase our confidence that an outcome will be a desirable one then we could choose to invest more in measuring those variables.

Early in the legislative procedure, ex-ante assessments make predictions about the impact of legislation. The variables which inform these forecasts will each have uncertainty with a probability distribution. Some variables will influence the prediction more than others and their probability distributions will shift around when disaggregated into national, regional and local sub-groups.

Aggregating the predicted effect could smooth out differences between these sub-groups, masking subsidiarity and localism effects. This is one reason why the idea of territorial impact assessment makes good statistical sense.

1.6. EX-ANTE IMPACT ASSESSMENT

If subsidiarity is a hypothesis about future objective achievement then the uncertainty of causal beliefs can be reduced with probabilistic evidence.

The EU instrument which conducts options comparison and hypothesis testing is an Impact Assessment. Given the scale of the EU and the breath of policy areas, Impact Assessment is an intensive research effort. Legislation can be assessed ‘ex-ante’ in its draft stages and evaluated ‘ex-post’ after some period of implementation. As more evidence surfaces on the legislative journey, uncertainty about the relative value of EU vs. Member State action ought to be reduced.

Because ex-ante impact assessment is wrestling with the future, any predictions made for added value have a chance of being wrong. Ex-post assessment is a tool for reducing bias and error about whether the expected value has been realised in Member States. Where the actual (ex-post) added value falls short of the (ex-ante) forecast, the subsidiarity hypothesis risks sliding back below the objective achievement threshold.



CASE STUDIES

PUBLIC SERVICES & PROCUREMENT

Approximately 70% of EU legislation impacts local and regional authorities across the Union. This includes public services ranging from water to transportation. The EU rules impact how public money can be used in providing public services to citizens. Ensuring that the EU does not infringe the powers of local and regional governments in these areas and that its action remains proportionate to the challenge remains crucial. This applies to the areas of services of general interest and public procurement.

SERVICES OF GENERAL INTEREST

This refers to “public services” in the EU's legal language, however, a clear-cut definition of what constitutes “general interest” is not given at the EU level, a factor that makes implementation more difficult for local and regional authorities. The term broadly covers public service obligations for water, energy supply, communication, transport, health and social services, education and postal services. These are split into two groups:

- **Market Services with an economic interest such as transportation networks and social housing which are subject to the EU's internal market and competition rules.**

- **Non-market Services of non-economic interest such as compulsory education, healthcare and social services which are exempt from the rules.**

For public services that serve an economic interest, state aid control at the EU level comes into play when these services are financed through public resources but provided by a company. The applicability of the state aid rules has been disputed and there are concerns about whether this overrides the principle of subsidiarity. Protocol (No.26) annexed to the EU Treaties recognises the need for the Union to respect “the wide discretion of national, regional and local authorities in providing, commissioning and organising Services of General Economic Interest”. The Subsidiarity Scorecard could aim to detect whether existing EU rules are giving the necessary freedom and flexibility to local governments to decide how public services are operated.

PUBLIC PROCUREMENT

The process by which public authorities purchase work, goods and services from companies is regulated by the EU. The Union's public procurement rules define how local, regional and national authorities across the EU can tender out for goods and services. Every year, over 250 000 public authorities in

the EU spend around 14% of GDP on the purchase of services, works and supplies. The Union's rules apply for contracts of higher value, whereas national rules apply for those of lower value. These fixed thresholds are laid down by the EU. All contracts from the public sector, which are of higher-value, must be published in the Official Journal of the European Union (OJEU) rather than just being advertised nationally.

The thresholds were lower in Euros prior to 1 January 2016 but the value difference between the Pound and the Euro means that for the UK, the thresholds in Pounds have in fact decreased. This means that UK buyers will now have to publish more of their requirements, rather than less, in the OJEU, which causes more administrative burdens. For UK suppliers, this means that more UK but fewer EU contracts will be subject to OJEU publications and this will mean more competition on national UK contracts and fewer opportunities in other parts of the EU for UK bidders.

The EU recently revised its public procurement rules which came into force on 18 April 2016 so their impact has yet to be seen. The Subsidiarity Scoreboard could aim to detect if the new rules are delivering the positive intended results and if the current thresholds for OJEU are proportionate.

1.7. EX-POST IMPACT ASSESSMENT

Ex-post impact assessment is uniquely placed to detect the gap – positive or negative – between the original objective of legislation and the eventual difference created on the ground. This gap is separated in time, perhaps after a significant lag and expenditure.

Without conducting ex-post assessment in a Member State context, the relative value added or subtracted by an EU law is somewhat hidden. So too is the insight into whether Member State action could now yield higher value. Even with an ex-post assessment, the relative value of alternative Member State action may not be explicitly addressed.

The longer ex-post assessments are delayed, the greater the exposure of Member States and their citizens to uncertain and possibly negative value. The more Member States which experience the negative effects of a law, the greater the pressure to flag it for subsidiarity reform. This raises the tangible idea of ex-post yellow, orange and red cards which reveal the gap between the predicted and actual added value of some legislation.

Ex-post assessment would seem to be the essential tool with which to detect added value and provide subsidiarity system feedback. The presence of an ex-post assessment ought to give some elevated assurance that EU citizens aren't being exposed to unproven laws.

Legislation may contain review clauses which trigger ex-post evaluation. Reviews may also be carried out on a periodic cycle or under other initiatives (such as REFIT). The recency of an ex-post evaluation could serve to increase subsidiarity assurance but their infrequency could make them insensitive to detecting shifts in value and subsidiarity concerns on the ground.



2 GETTING THE MEASURE OF SUBSIDIARITY

2.1. WHAT IS A SCOREBOARD?

A 'Subsidiarity Scoreboard' is the proposed name for an instrument which detects and reports the degree to which subsidiarity is 'working'. Revealing where subsidiarity isn't working would enable decisions to be made about how to improve it.

There are existing Scoreboards in use, some on related topics such as Multilevel Governance (MLG) and REFIT. If the term 'Scoreboard' is well understood as being an instrument for monitoring and reporting performance in European government then this umbrella term could serve it well. In other domains this might be termed a Scorecard, a Dashboard or a Performance Report.

Our mental picture of a Scoreboard could take varying forms. The Scoreboards mentioned above are multi-page reports containing tabulated commentary on particular areas of legislation. Sports fans probably wouldn't think of this as a Scoreboard. Others might imagine a spreadsheet full of numbers or a screen full of red and green traffic lights.

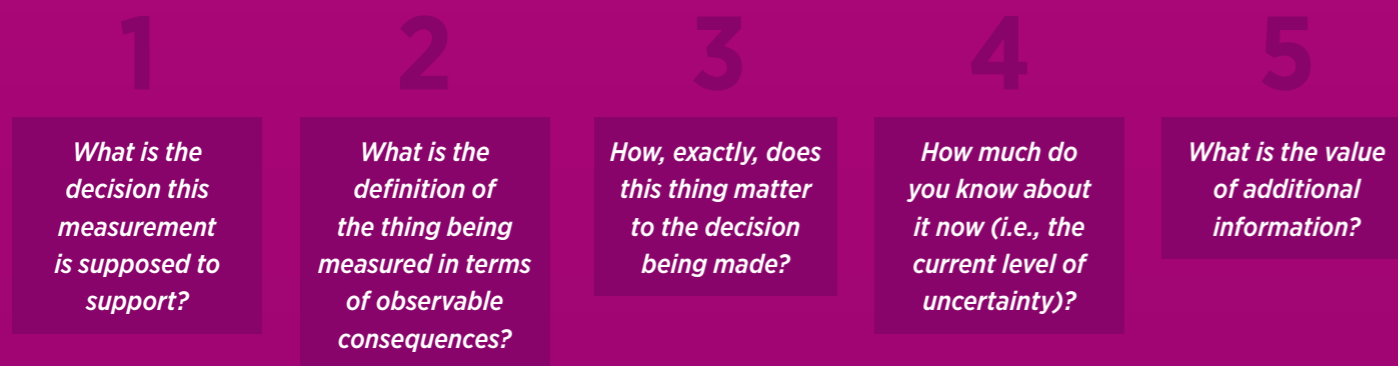
DECISION-MAKING MEASUREMENT

This contemporary definition of measurement comes from US Decision Analyst Douglas Hubbard:

“ Measurement: A quantitatively expressed reduction of uncertainty based on one or more observations.

The concept of measurement as ‘uncertainty reduction’ in order to make better decisions is a central theme of his book ‘How to Measure Anything:

Finding the Value of Intangibles in Business’. Hubbard also suggests 5 questions which can be used to shape a measurement problem:



Considering the observable consequences of a decision is the key to finding a way to reduce uncertainty and determine the value of measurement investments. So before launching into collecting measurement data for a Subsidiarity Scorecard,

we would be wise to consider the decisions we are trying to improve. Through a wide lens, the information collected could have value for the whole EU decision-making process. Examples of decisions in this context might include:



Measurement efforts should be focused on how new information might improve these decisions. Conversely we

have to be aware that not all measurement has equal value for making these decisions.

2.2. VISUAL INSIGHT

The ambition for a Subsidiarity Scoreboard would be for it to be almost entirely graphical to aid rapid comparison and interpretation. It should be possible for an audience to gain a rich situational oversight of ‘subsidiarity’ within a single eye-span and answer questions which inform debate and ultimately a decision to act.

Visual displays are a powerful way to communicate information. When done well, visualisation can produce rapid cognition of the situation at hand. One ambition for the Scoreboard is that it would present its message visually to aid the ‘grasp’ of the message and increase the ‘stickiness’ of its recall. A less-than-perfect measure presented visually can produce more insight and inquiry than a table of numbers or words.

Unlike tables of words, this type of display needs quantitative information, encoded in visual form. Something needs to be observed and counted in the real world, in other words something about subsidiarity needs to be measured.

Without this translation step, measures are harder to design and far less potent in driving and detecting improvement.

The PuMP method seeks a set of ‘differences’ or ‘results’ which we would detect with our senses in the real world if the objective were being achieved. It then crafts statements which express this set of result states in clear, unambiguous language which describes something more measurable. These results statements are then linked in a cause-and-effect map to show the influence each one has upon ultimate goal achievement.

Ideas for candidate results and measures are developed further in this article.

[A PuMP Results Map is similar to a systems thinking causal influence diagram or a balanced scorecard strategy map.]

2.3. THE LANGUAGE OF RESULTS

One of the biggest challenges in measurement design is a lack of clarity about the objective being sought. Rushing to impose measures and targets when the desired systemic shift is unclear invites dysfunctional interventions and unintended consequences.

Take subsidiarity. If we simply ask the question: “How do we measure subsidiarity?” then we will probably fail. The concept and object of subsidiarity aren’t perfectly defined or universally understood. We might also struggle when asked: “Do we want more or less subsidiarity?” because the answer depends upon the objectives of legislation which may itself have unclear or uncertain future outcomes.

Australian Stacey Barr has devised a method called PuMP for designing performance measures. PuMP includes a step which deconstructs the vague language of objectives to make them more measurable.

2.4. MISSING TARGETS

An important topic in the performance measurement field is that of targets, especially in the presence of rewards and penalties. There’s a widely-held belief that ‘KPI’s or ‘metrics’ should be accompanied by targets with antecedent consequences to produce desired human behaviour change. This punitive ‘Skinnerian’ viewpoint pervades both private and public sectors and regulatory bodies but there are many examples of where the fear of loss - or pursuit of gain - produces undesirable behaviour distortion.

Aspirational goals can galvanise collective efforts behind a shared purpose but produce a very different response when ill-considered and imposed with carrots or sticks. Another complexity with targets is how they should be specified in the presence of random variability or in the absence of capacity or influence over goal-achievement.

For all these reasons, the haste to prescribe targets can undermine alternative strategies which might create greater value. The tension between binding targets, subsidiarity and localism is an interesting example.

[https://en.wikipedia.org/wiki/B._F._Skinner]



3 SHAPING RESULTS & MEASURES

3.1. A SUBSIDIARITY SCOREBOARD PERSPECTIVE

Much of the current work in subsidiarity monitoring considers the content of existing and proposed legislation and on what grounds to challenge it. The attention and work is prioritised around policy areas and focused on the units of legislation.

The Subsidiarity Scoreboard idea take an alternative 'outside-in' standpoint, striving to observe whether the subsidiarity principle and process are making a difference and asking what could be done better.

Returning to our two questions:

1. Which existing EU legislation is producing the most negative local impact?

At a point in time each of the 13000 or so EU regulations and directives will be adding or subtracting 'value' for member state businesses, citizens and public institutions (such as Local and Regional Authorities). The perception of value and its magnitude may be different for each territory and the participants within it. A 'subtraction' of value might represent an infringement of rights or a financial loss and perhaps be felt more keenly than the equivalent additive value.

Some EU laws could have added more (or subtracted less) value if they had been enacted at a sub-EU level or not at all. Upholding the principle of subsidiarity requires a method for spotting those EU laws which are producing zero or negative added value compared with a better, more local alternative.

An answer to this question would be expected to produce ranking information which reveals which existing EU legislative acts are in greatest need of change. At the top of the list would be those laws which are exposing businesses or citizens to the most losses which would have been reduced had that law been national or sub-national.

2. Is the process which upholds the subsidiarity principle getting better?

The outcome of an ideal subsidiarity process is that all laws passed by the European Parliament produce a beneficial 'added value' effect for citizens irrespective of the regional and local context. Conversely those EU proposals or laws which produce negative effects for businesses and citizens should diminish over time, whether through revision or rejection.

The answer to this question would be expected to produce time-series information which records how the activity and the outcomes of the process are changing over time.

3.2. SUBSIDIARITY CONCERNS

With over 13,000 active EU regulations and directives it makes sense to just focus on the legislation most likely to produce undesirable 'negative value' for EU citizens. The Committee of the Regions Subsidiarity Work Programme is an example of this pragmatic prioritisation, focusing on those areas with most subsidiarity 'relevance'.

It could be useful to think of a subset of legislation which gives rise to 'Subsidiarity Concerns', wherever these concerns originate from. Concerns may have arisen as reasoned opinions during the Early Warning System (EWS) procedure, or flagged by the CoR Subsidiarity Monitoring Network, its Subsidiarity Experts and other groups.

Concerns could also arise from local and regional representatives, businesses, individual citizens and even the press. These latter concerns might not be expressed in a 'subsidiarity' context and might instead be revealed as disproportionate burdens or a perception of infringement. A judgement about whether an EU or national law would be objectively 'better' might not make sense at this everyday level.

A list could be maintained of the legislation which has 'active' subsidiarity concerns which, once addressed, drop off the list. This catalogue might be populated from existing sources but could then be extended to seek out the concerns of other groups affected by legislation. This might be something which the existing CoR REGPEX platform could be adapted to capture, perhaps with a question of the form:

"Are you of the opinion that Member State action would produce greater value (more benefit or less burden) than EU action in achievement of this objective?"

A simple count of the number of existing acts with active 'subsidiarity concerns' would bring a sense of magnitude to the subsidiarity problem as well as providing the means to signal a shift over time. This list of acts with 'subsidiarity concerns' could then be further qualified by experts and ranked for prioritisation.

A macro-level 'Subsidiarity Concern Index' wouldn't need to seek high integrity, but rather accumulate a tally of beliefs and opinions about where EU action might not be adding value over and above Member State action. This aggregate

'Subsidiarity Concern Index' could be expected to increase initially as new sources of concern are added but then reach some upper bound within the existing body of legislation.

As existing legislation is reformed or repealed and new legislation addresses concerns earlier, the 'Subsidiarity Concern Index' would be expected to decay. If it doesn't decay then the subsidiarity system isn't under control.

3.3. RETROSPECTIVE YELLOW CARDS

A simple count of the laws attracting Subsidiarity Concerns across multiple Member States could give rise to a league table – akin to The Oscars – of the worst-offending legislation. One idea is to re-use the EWS concept of a 'card system' to flag those laws which seemed to abide by the principle of subsidiarity ex-ante but in practice had unintended consequences across multiple Member States.

Where a 'Subsidiarity Concern' is recorded for multiple Member States it could be encoded visually as a 'card'. Instead of formal voting and reasoned opinion from national legal affairs experts, this could simply detect laws which have accumulated the equivalent number of 'Subsidiarity Concerns' from qualified sources.

As well as being a potentially 'sticky' idea, a retrospective card system might be a way of observing whether the current Early Warning System could be improved or used more actively. If the legislative procedure were better at predicting subsidiarity concerns then perhaps more yellow cards would be raised before rather than after implementation.

A failure to anticipate these unintended consequences is wasteful. Not only will resources need to be committed to remediate the legislation but citizens will continue to bear a burden until the subsidiarity problem is put right.

Closure of the 'Card Gap' between ex-ante and ex-post EU law becomes a focus for subsidiarity efforts.

3.4. CITIZEN POPULATION & DURATION EXPOSURE

Extending the 'Subsidiarity Concern' concept further gives rise to the idea of 'Citizen Exposure'.

A Subsidiarity Concern could be weighted according to the population of citizens or businesses affected. At the upper bound this could simply be the population of the member

state from where a subsidiarity concern arose. There might be also be a greater duration of 'Citizen Exposure' if legislation has never been subjected to an ex-post impact assessment or if an assessment didn't address 'territorial' dimensions convincingly.

In this light, some legislation with subsidiarity concerns may reveal greater intensity of exposure. EU law which affects larger numbers of citizens and hasn't been evaluated post-implementation will rise up the rankings. Higher-ranking laws would contribute more to a total measure, perhaps millions of 'Citizen Exposure Years' with some equivalent financial loss, relative to a more local law.

Just because a single Subsidiarity Concern (or an EU Added Value concern) has been raised, it doesn't follow that negative value is produced for every affected 'actor' in a given member state. Expert qualification would then be needed to refine the affected demographics and enrich this further with some 'net negative value' estimates.

3.5. CANDIDATE SCOREBOARD RESULTS & MEASURES

This section proposes ideas for Results and Measures for a Subsidiarity Scoreboard. Results are statements of some desirable end state, whilst Measures are evidence of the degree to which a particular Result is occurring.

The proposed Results/Measures will need to be enriched with more informed domain knowledge. For each Measure, the potential information sources (COR, DG Research, Communications etc.) can be assessed for feasibility of data collection.

These measures would ideally be collected and reported over time – even monthly – to track improvement (or otherwise) but some could yield snapshots which illustrate the current ranking of legislation.

These Results and Measures are grouped by the two central questions.

1. Which existing EU legislation is producing the most negative local effects?
2. Is the process which upholds the subsidiarity principle getting better?

The ideas for a Subsidiarity Concern Index, Retrospective Yellow Cards and Citizen Exposure are expanded in this section.

**RESULTS AND MEASURES FOR
THE REGIONAL AND LOCAL
IMPACTS OF EXISTING EU LAW**



QUESTION

**Which existing EU
legislation is producing
the most negative local
effects?**

RESULT
1

EU citizens aren't exposed to EU legislation with lower value (net benefits) than a sub-EU alternative.

IDEAS FOR MEASURES

MEASURE 1

The number of EU laws with subsidiarity concerns and quantifiable negative (or zero) value relative to a more local action.

MEASURE 2

The estimated annual net loss to EU citizens/groups of legislation with subsidiarity (or EAV) concerns.

MEASURE 3

The accumulated net loss to all citizens/groups affected over the duration of exposure to the legislation.

DESCRIPTION

The subsidiarity principle is being breached if citizens and businesses experience negative or zero added value relative to a more local law with the same objective. In a sense this result is the ultimate destination of a 'working' subsidiarity system.

Where negative or zero EU Added Value (EAV) exists then the necessity and benefits of some EU interventions are questionable and could, more broadly, infringe the liberties of citizens. This is distinct from infringement which might arise from over-reaching legislative objectives or competencies.

Ideally, all the legislation flagged with Subsidiarity/EAV concerns would have its net negative value quantified even if methods vary in confidence. Cases where the determination of relative added value is deemed 'too hard' present a different class of subsidiarity exposure. Reducing the incidence of legislation with subsidiarity/EAV concerns and negative added value would reduce the total citizen exposure to these negative effects.

Identification of legislation with quantified negative value would produce a ranking which could be published to establish priorities for more detailed scrutiny.

INFORMATION SOURCES

The initial scope of this result would be the body of legislation which has being flagged as a 'Subsidiarity/EAV concern'. The 'actual' EU Added Value of this legislation ought to be found in ex-post impact assessment along with gap (positive or negative) relative to the forecasted and default Member State cases. Ex-post Territorial Impact assessments might reveal this more reliably.

In the absence of an ex-post Impact Assessment comparison, other sources could be used to arrive at added value estimates/models including surveys of local and regional actors augmented with some expert judgement.

RESULT
2

EU Citizens are not exposed to legislation which has not had its ex-post value assessed.

IDEAS FOR MEASURES

MEASURE 1

The total number of years of exposure to EU laws with no ex-post evaluation.

MEASURE 2

The average number of years of exposure to an EU law with no ex-post evaluation.

MEASURE 3

The total EU citizen-years of exposure to EU laws with no ex-post evaluation.

DESCRIPTION

We might expect all existing legislation to undergo ex-post evaluation or implementation performance review, ideally with a territorial/local dimension. The longer legislation stands without ex-post evaluation, the longer EU citizens are exposed to a greater chance of unidentified negative impacts.

Some legislation may contain review and sunset clauses which trigger a periodic ex-post review. Until these reviews are triggered for the first time, citizens are exposed to unknown negative effects.

These measures could be further filtered to only count the legislation tagged with subsidiarity/ EAV concerns. Other dimensions could include those with periodic reviews or whether or not ex-post evaluation had a territorial dimension.

Legislation with the longest post-implementation exposure could be ranked.

INFORMATION SOURCES

The scope of this result could be all legislation not under the exclusive competence of the EU and therefore subject to the subsidiarity principle.

The EPRS would be the primary source of this information. Similar information may well be tracked already as part of the rolling programmes of work.

If ex-post evaluation is an ambition for REFIT then data for these measure could arise from this initiative.



RESULT
3

EU citizens are not exposed to existing EU Legislation with active subsidiarity or added value concerns

IDEAS FOR MEASURES

<p>MEASURE 1</p> <p>The number of implemented acts which have had a Subsidiary/EAV concern expressed at some point in their cycle which has not yet been addressed.</p>	<p>MEASURE 2</p> <p>The number of implemented acts which have an active Subsidiarity/EAV concern which have been qualified by subsidiarity experts.</p>	<p>MEASURE 3</p> <p>The number of acts which have Subsidiarity/EAV concerns expressed by more member states than the equivalent 'yellow card' threshold.</p>
<p>MEASURE 4</p> <p>The number of proposed acts currently within the 8 week EWS window which have had a Subsidiary/EAV concern expressed.</p>	<p>MEASURE 5</p> <p>The average number of years of exposure to EU laws with active subsidiarity/EAV concerns.</p>	<p>MEASURE 6</p> <p>The estimated number of citizens exposed to EU laws with active (qualified) subsidiarity/EAV concerns.</p>

DESCRIPTION

Over time, we might expect the number of EU laws which have subsidiarity and EU Added Value questions hanging over them to be reduced by the system.

Subsidiarity/EAV concerns about legislation could arise from multiple sources, at different stages in the legislative procedure and with degrees of qualification, credibility & bias. A concern might arise which is later determined to be due to disproportionate implementation but remains a 'concern' with respect to the source. This result could perhaps be re-phrased as an 'EU Added Value' concern.

It could make sense to split counts between legislative proposals and existing acts. The former would vary according to the volume of active proposals each period. Each will be tagged as having a Subsidiarity (or EU Added Value) concern or not and tracked to determine whether the concern has been addressed.

Whilst appearing simplistic, this result and measures could express the magnitude of the subsidiarity problem as seen by different groups and whether this perception is shifting. This may also give rise to a tangible retrospective yellow/orange/red card and the ranking of the worst-offending laws.

The collection and coding of subsidiarity concerns may be anything but simplistic if sought from more local, even citizen-level, opinion.

INFORMATION SOURCES

Subsidiarity Concerns could arise from many different groups and collection methods. In the simplest case, provided a subsidiarity concern has been expressed by any EU citizen, perhaps in response to an agreed 'opinion' question, this can be recorded against the legislation together with the member state from which it arises. A single opinion detected from an unqualified source is by no means a signal of magnitude but it places this legislation on the 'RADAR'. REGPEX would be one platform which could be used to collect these opinions from its existing Subsidiarity Monitoring Network. The receipt of notifications by the Subsidiarity Watchdog & toolkits would be another as well conduits for Local/Regional government associations. Existing survey instruments such as the Euro Barometer, European Ombudsman, SOLVIT etc could be explored.

RESULT
4

Subsidiarity concerns about existing legislation are being detected from new sources with evidence of local impact.

IDEAS FOR MEASURES

MEASURE 1

A distinct count of the subsidiarity concerns with qualified negative value which have originated from 'outside' the existing CoR/SMN channels.

DESCRIPTION

This result expresses a desire to detect the local impact of implemented EU legislation by soliciting subsidiarity concerns from groups with more local representation, enlarging the pool of data collection. Enabling other groups to contribute subsidiarity concerns with evidence of actual impacts could help to inform the agenda.

Only one measure is proposed in this case because more work is needed to understand the process for collecting and qualifying subsidiarity concerns from target populations.

Some measures might be used to focus on recording concerns from the Committee of the Regions and its Subsidiarity Monitoring Network by promoting the use of the subsidiarity toolkit, REGPEX and watchdog to existing channels.

A series of survey campaigns could be launched to acquire subsidiarity concerns from different groups beyond the existing boundaries. These groups could range from MEPs with exposure to local government to local & regional authority associations to individual citizens & businesses. The purpose of these campaigns is to get a wider picture of subsidiarity concerns on the RADAR and then quantify their exposure & impact using Results #1-3.

Other measures might relate to ensuring that the list of subsidiarity concerns is being maintained or qualified and observing the difference in perspectives between groups & Member States etc.

INFORMATION SOURCES

Soliciting survey-based responses from the existing CoR monitoring network and then wider groups of mandate holders, businesses and citizens. Use of an agreed 'Subsidiarity Question' to count concerns and a method for qualifying and ranking them.



Which existing EU legislation is producing the most negative local effects?

RESULT
5

The added value (net benefit) of EU legislation is compared quantitatively to Member State alternative(s).

IDEAS FOR MEASURES

MEASURE 1

The proportion % of proposed EU legislation published this period whose ex-ante impact assessment explicitly contains an added value options comparison with a Member State alternative.

MEASURE 2

The proportion % of existing EU legislation (with subsidiarity/EAV concerns) whose ex-ante impact assessment explicitly contains an added value options comparison with a Member State alternative.

MEASURE 3

The proportion of existing EU legislation (with subsidiarity/EAV) concerns whose ex-post impact assessment (if present) explicitly contains an added value options comparison with a Member State alternative.

DESCRIPTION

If the subsidiarity principle depends upon a comparison between the added value of EU action vs. Member State action then we might expect this comparison to be made explicitly and quantitatively in each Impact Assessment.

If this comparison isn't made explicitly ex-ante, then uncertainty about the forecasted added value of this draft proposal may not have been reduced enough to prove the subsidiarity hypothesis.

If this comparison isn't made explicitly ex-post, then uncertainty about the implemented added value of this legislation may not have been reduced enough to verify the subsidiarity hypothesis.

Short term, legislation with subsidiarity concerns may not have a quantitative added value comparison and these % proportions will be low. We might hope that the presence of a quantitative Member State vs. EU comparison would eventually reduce the incidence of legislation with active subsidiarity concerns. A signal may emerge which detects the presence of active subsidiarity concerns even after a quantitative comparison has been carried out.

INFORMATION SOURCES

The scope of this measure would be the presence of quantitative EU added value impact assessment both ex-ante and ex-post. Practically, the subgroup for existing legislation may be the body of regulations & directives with active subsidiarity concerns.

Which existing EU legislation is producing the most negative local effects?

RESULT
6

Non-receipt of reasoned opinions is because member states have no subsidiarity concerns.

IDEAS FOR MEASURES

MEASURE 1

The % of proposals whose EWS deadline passed this period for which one or more member states failed to submit a vote/reasoned opinion for other protocol barriers.

MEASURE 2

The distinct count (or %) of member states which failed to submit a reasoned opinion this period for other protocol barriers.

DESCRIPTION

Protocol 2 – the Early Warning System – is the formal mechanism for the detection of subsidiarity concerns during the pre-legislative stages. National legal-affairs bodies will review draft legislative proposals and make a decision whether to respond with reasoned opinions. The more reasoned opinions and member state votes arising, the greater the chance of a local impact in multiple member states.

We might wish that the absence of 'reasoned opinions' was truly because national parliaments had no subsidiarity concerns and not because of other protocol barriers such as in-adequate time, assessment evidence, translations etc.

Relatively few reasoned opinions are raised and there are rarely enough to trigger Yellow cards, let alone Orange or proposed Red cards. This result attempts to capture the 'failure modes' in the EWS for the non-receipt of reasoned opinions. A reasoned opinion which expresses a genuine subsidiarity concern ought to be captured and not 'lost' for the wrong reasons. Indeed the gap between EWS reasoned opinions and CoR REGPEX opinions might serve to detect these failure modes.

Ideally, reasoned opinions don't arrive because the subsidiarity evidence (eg. Impact Assessment) is believed to be credible. If a subsidiary concern exists but no reasoned opinion or vote was received, then the EWS protocol has broken down. Failure reasons could relate to insufficient time to form a response due to recess, availability of experts, voting mandate, domestic consultation, translation etc.

INFORMATION SOURCES

This result and measures depend on the detection of why reasoned opinions weren't received. This might seem counter-intuitive because the presumption is that the absence of a reasoned opinion is acceptance by default of the proposal but there might be other causes of non-receipt. These causes could be counted using a 'sensor' embedded in the protocol itself. The formal channel for submitting draft proposals to national legal affairs bodies may include communications (eg reminders) before the 8 week window closes. Inserting a small number of questions into this communication channel could sample the reasons why member states didn't submit a response by the deadline.

RESULT
7

Territorial Impact Assessments are performed.

IDEAS FOR MEASURES

MEASURE 1

The % of ex-Ante Impact Assessments for legislation with Subsidiarity/EAV concerns which adequately addressed territorial dimensions.

MEASURE 2

The % of ex-Post Impact Assessments/ Evaluations for legislation with Subsidiarity/EAV concerns which adequately addressed territorial dimensions.

MEASURE 3

The % of legislation which still has subsidiarity/EAV concerns after Territorial Impact Assessments have been carried out.

DESCRIPTION

'Adequately' is a bit of a weasel word. We might look at examples of existing Territorial Impact Assessments and understand what we might observe which distinguishes them from a non-Territorial alternative.

We might be interested in whether conducting an ex-ante Territorial Impact Assessment assuages or amplifies subsidiarity/EAV concerns. This might show that TIAs are a useful tool in detecting and exposing predicted or actual subsidiarity effects.

INFORMATION SOURCES

The Committee of the Regions is actively promoting Territorial Impact Assessments and would be well placed to observe their use or otherwise and whether or not these tend to add to or diminish subsidiarity concerns.

Which existing EU legislation is producing the most negative local effects?

RESULT
8

There is no gap between the ex-ante impact assessment and ex-post evaluation of EU added value.

IDEAS FOR MEASURES

MEASURE 1

The % of ex-post evaluations which revealed a statistically significantly lower value than was predicted in ex-ante.

MEASURE 2

The % of ex-post evaluations which did not compare EU added value with the ex-ante impact assessment (and why).

DESCRIPTION

If an ex-post assessment reveals a significantly lower added value than was predicted in the ex-ante assessment then the original predictions were more error-prone. The root causes of lower actual added value could be many – including poor implementation – but these factors ought to be reflected in the forecast.

The greater this predicted-actual gap, the greater the chance that the forecasted net benefits of EU vs. Member State action aren't being realised, the greater the threat to the subsidiarity principle. The smaller the predicted-actual gap, the better the original prediction and the greater the chance that forecasted net benefits will be realised and the higher the confidence that the subsidiarity principle will be upheld.

This result expresses the idea that more accurate added value forecasts – including territorial sensitivity - should ultimately lead to better application of the subsidiarity principle. This result depends upon the presence of both ex-ante and ex-post assessment. It also depends upon a comparable cost/benefits model and hypothesis testing of the actual added value vs. forecasted and null baseline cases. This in turn depends on the presence of clear quantitative outcomes in the original legislative objective, not just those for legislative compliance.

These dependencies could be captured in companion results.

INFORMATION SOURCES

This result and measures depend upon observing the comparison of ex-ante prediction and ex-post performance of legislation. This falls within the scope of EPRS work and may be linked to REFIT initiatives in this area.



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