



European Commission proposal for a Soil Monitoring Law

Technical Briefing on the Principles of Subsidiarity and Proportionality

On 5 July 2023, the European Commission published its [legislative proposal for a Directive on Soil Monitoring and Resilience](#) (Soil Monitoring Law, or SML). The Directive aims to establish a soil monitoring framework for all soils across the EU and to improve soil health with the view to achieve healthy soils by 2050. A previous attempt to legislate on soil at EU level in 2006 failed due to the opposition from a minority of Member States, who, among others, criticised the initiative as allegedly infringing upon the principle of subsidiarity. As we proceed with the current co-decision procedure, it can be anticipated that similar concerns may resurface. This technical briefing gives an overview of the principles of subsidiarity and proportionality, demonstrating that the current legislative proposal fully upholds both principles and that any opposing claims are of a political, rather than legal, nature.

→ **RECOMMENDATION** Uphold the principles of subsidiarity and proportionality

EU co-legislators should uphold the Commission's positive subsidiarity and proportionality check for the SML and ensure that the law is based on the principles of subsidiarity and proportionality.

What do the principles of subsidiarity and proportionality do?

The principles of subsidiarity and proportionality are defined in Article 5 of the Treaty on European Union (TEU) and Protocol (No. 2) on the application of principles of subsidiary and proportionality.¹ Together, these principles govern the use of the Union's competences and ensure that actions taken at the EU level, as opposed to Member State level, are always justified.²

The principle of subsidiarity is essential to regulating EU action whenever the Union does not have exclusive competence, or sole decision-making authority. It authorises the Union to exercise its powers when the objective of the action cannot be effectively achieved at Member State level. Of particular importance is the principle's interaction with the proportionality principle, which sets limits to a warranted EU action by requiring that the proposed measures be suitable, necessary and not excessive in relation to the sought objective.³ Therefore, while the subsidiarity principle defines the conditions under which the Union can legislate, the principle of proportionality informs the content of the EU action.

¹ Article 5 TEU and [Protocol on the application of the principles of subsidiarity and proportionality](#) (2008).

² EUR-Lex, [Principle of subsidiarity](#).

³ EUR-lex, [Principle of proportionality](#).

The principle of subsidiarity⁴ was officially included within the general principles of EU law in the Treaty of Maastricht⁵ and gradually evolved alongside the proportionality principle⁶ and the principle of conferral,⁷ with which it is intrinsically intertwined. The development of the principle of subsidiarity occurred in parallel with the expanding scope of EU policy competences and the increasing exercise of powers by the Union institutions. As such, the principle plays an important yet flexible role, arbitrating tensions between political integration and decision-making proximity⁸ while adapting to the changing relationship between the EU and its Member States (see [ClientEarth briefing from 2022](#)).⁹

The Soil Monitoring Law and the subsidiarity question

The Commission provides Article 192(1) of the Treaty on the Functioning of the European Union (TFEU)¹⁰ as the legal basis for the SML. Article 192 TFEU outlines how Article 191 TFEU, which specifies the objectives of EU environmental policy, should be implemented, whether through an ordinary legislative procedure (Article 192(1)) or a special one (Article 192(2)).

Environmental protection is a shared competence between the Union and the Member States under the EU Treaties.¹¹ Therefore, any legislative proposal of the European Commission related to environmental protection must undergo a subsidiarity check. Forming a part of EU environmental policy, this was the case for the legislative proposal for a SML, which the Commission has recognised as complying with the principle of subsidiarity (see [subsidiarity grid](#) and explanatory memorandum of the [Commission proposal](#)).

The Commission's positive subsidiarity check for the SML is in accordance with Article 5(3) TEU, as the objectives of the legislative proposal a) cannot be sufficiently achieved by the Member States and b) can be better achieved at EU level:

a. The objectives of the proposed action cannot be sufficiently achieved at Member State's level

Addressing soil protection solely at the domestic level is inadequate considering that soil degradation is widespread across all Member States, most of which have not implemented nor adopted national legal frameworks to address the issue. The transboundary negative effects of soil degradation should be understood as widely as possible. The term "transboundary" does not refer only to the effects occurring on both sides of a country's border, but it entails also looking at the broader consequences of inaction on climate, biodiversity, pollution and long-term food system resilience. Without healthy soils, the objectives and targets of the European

⁴ According to Article 5(3) TEU: *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.*

⁵ Please refer to Article 5 of this [consolidated version of the Treaty](#).

⁶ Article 5(4) TEU: *Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*

⁷ Article 5(2) TEU: *Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.*

⁸ Lenaerts, K., *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, Fordham Journal of International Law, Vol. 17, N. 4, 1993, p. 848 and 856.

⁹ ClientEarth [EU Soil Health Law: Legal principles underpinning the framework](#) (2022).

¹⁰ European Union, [Consolidated version of the Treaty on the Functioning of the European Union](#), 26 October 2012, OJ L. 326/47-326/390.

¹¹ Article 4(2)(e) TFEU.

Green Deal – such as the target of climate neutrality by 2050, as enshrined in the EU Climate Law¹² – will be unattainable.

- b. *The objectives of the proposed action, by reason of the scale or effects, [can] be better achieved at Union level*

It is estimated that about 60-70% of soils in the EU are not healthy,¹³ which means that Member States have failed to protect soils on their own and action at EU level is urgently needed. Soil monitoring systems that exist at Member State level¹⁴ are fragmented, incomplete and lack harmonisation across the EU. The added value of EU action stems also from the need to develop a common definition of healthy soils, harmonise indicators and soil descriptors, and identify common monitoring methodologies that can be integrated into the activities carried out by Member States.

In the past, the principle of subsidiarity was misapplied by a minority of Member States to block the 2006 Soil Framework Directive; however, considering the above and the Commission's own comprehensive assessment, claims that an EU law addressing soil would be in breach of subsidiarity were without any clear legal reasoning.

What about proportionality?

Having established compliance with the subsidiarity principle, the Commission proceeded with its proposal for a SML, setting out necessary measures to be adopted at EU level in accordance with the principle of proportionality. Taking the form of a Directive, rather than a Regulation, the SML leaves space for Member States to shape these measures and establish their own course of action towards achieving the overall objective of the SML: to have all soils in the EU healthy by 2050. Granting this flexibility and showing consideration for the local specificities of soils across Member States, the Directive sets obligations at EU level without being excessive or unnecessarily burdensome on Member States. Therefore, EU level measures to address soil health are not only warranted but also proportionate, as further confirmed in the Commission's impact assessment (see [subsidiarity grid](#) and explanatory memorandum of the [Commission proposal](#)).

Conclusion

In formulating the legislative proposal for a Soil Monitoring Law, the Commission conducted a comprehensive subsidiarity and proportionality check. It has been irrefutably demonstrated that Member State action is insufficient to achieve the proposed action's objective, that EU action on soil health brings added value, and that the proposed EU level measures for achieving the action's objective are both necessary and proportionate. Therefore, the Commission's positive subsidiarity and proportionality check for the new soil legislation is warranted and fully in compliance with the EU Treaties, and we strongly recommend for EU co-legislators to uphold this position and dismiss any unfounded claims against the Commission's proposal.

¹² [Regulation \(EU\) 2021/1119](#) of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Law").

¹³ European Commission, [Caring for soil is caring for life](#) (2020).

¹⁴ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – [EU Soil Strategy for 2030 Reaping the benefits of healthy soils for people, food, nature and climate](#) (2021), p. 21.