‘Doing Less More Efficiently’, or How Relevant the Enduring Principle of Subsidiarity is For the Current Debate on EU Reform

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The EU’s amassing of crises over the past decade – from the financial crisis, to the euro crisis, and then to the Greek crisis, from the Crimean crisis to the Ukrainian crisis, from the Syrian crisis to the migration crisis, Brexit, Catalonian and rule of law crises have shaken the confidence of even the most ardent supporter of integration that the European Union will be able to find appropriate responses to the hardships it is facing. The seriousness of the situation was described by the President of the European Commission, Jean-Claude Juncker, in terms of unprecedented gravity:

> “never before have I seen such little common ground between our Member States, […] so few areas where they agree to work together, […] so many leaders speak only of their domestic problems, with Europe mentioned only in passing, if at all, […] representatives of the EU institutions setting very different priorities, sometimes in direct opposition to national governments and national Parliaments, […] national governments so weakened by the forces of populism and paralyzed by the risk of defeat in the next elections, […] so much fragmentation, and so little commonality in our Union”.[1]

Despite “a certain mood of gloom and doom among EU scholars” as far as the Union’s capacity to handle complex situations is concerned, there is another side of the story that deserves to be uncovered, namely that the crises have ushered in a process of introspection into the Union’s inner strengths and weaknesses, as well as its abilities for crisis management.[2] The 60th anniversary of the Treaty of Rome, on 25 March 2017, was regarded as a moment charged with significance for launching a thorough discussion on a shared vision of how EU27 should move forward and overcome the trauma of Brexit. By then, it had become more than evident that the European Union could not continue to muddle through as if nothing had happened. The transition from a technocratic, elite-driven polity whose main rationale was market integration by regulatory policies has become increasingly prominent since the 1990s.[3] The advance towards the objectives set out in the original treaties has fuelled the demand for more integration due to increased interdependence between Member States, spillover effects and external pressures, and has led to the gradual integration of core state powers (monetary policy, foreign policy, defence policy, border control) with strong redis-

1. J.-C. JUNCKER, *State of the Union Address 2016: Towards a better Europe – a Europe that protects, empowers and defends*, Strasbourg, 14.09.2016.
2. T. BÖRZEL, *Researching the EU (Studies) into demise*, in: *Journal of European Public Policy*, 25(2018), pp.475-485, here p.476.
3. G. MAJONE, *The Rise of the Regulatory State in Europe*, in: *West European Politics*, 17(1994), pp. 77–101.

tributive effects, but exposed to limited democratic control.[4] One of the most visible side effects of this transformation already anticipated in the scientific literature was that of politicization of integration due to the mounting opposition to excessive centralization. So, the cumulative transfer of political authority to the European level, especially during a crisis, in areas where neither national parliaments nor the European Parliament had sufficient authority so as "to generate social acceptance of EU redistributive policies" at domestic level has increased the politicization of the integration process and rendered the need to redesign the integration process imperative.[5]

The present article proceeds by discussing first the alternative routes considered for the reform of the European project and the manner in which the principle of subsidiarity, veiled now under catchphrases like 'Doing less more efficiently' or 'Being big on big things and small on small things', has been revived in the ongoing deliberations. The paper continues by exploring how this principle has influenced the shape of European construction since its inception. The aim is to uncover how a principle that was at the heart of all major decisions on European integration could maintain its sustained appropriateness in the never-ending debate on the future of the European Union. After identifying the main shortcomings of applying the principle of subsidiarity in a political setup characterized by increased politicization, slow decision-making and an entrenched need to find the lowest common denominator, the most recent attempts for its adjustment will be placed under scrutiny. Assuming that with the spread of the integration process over more and more core state powers, closely associated with the very existence of the State, subsidiarity has already suffered a series of transformations, the key questions that will guide this research will be centred on this central principle for the EU's system of governance. They are linked to the contributions it has made to protecting Member States from over-centralization, to the identification of the most recent efforts aimed at its fine-tuning to the present context and to the investigation of its resources to keep providing useful solutions to the current problems of the European Union.

4. See T. BÖRZEL, *From EU Governance of Crisis to Crisis of EU Governance: Regulatory Failure, Redistributive Conflict and Eurosceptic Publics*, in: *Journal of Common Market Studies*, 54(2016), pp.8-31; P. GENSCHEL, M. JACHTENFUCHS, *From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory*, in: *Journal of Common Market Studies*, 55(2017), pp.1-19; IDEM., *More Integration, Less Federation: the European Integration of Core State Powers*, in: *Journal of European Public Policy*, 23(2016), pp.42–59.; P. De WILDE, *The Politicization of European Integration: Towards Democratic Renationalization?*, in: A. HURRELMANN, S. SCHNEIDER (eds), *The Legitimacy of Regional Integration in Europe and the Americas*, Palgrave Macmillan, New York, 2015, pp.19-33.
5. T. BÖRZEL, *From EU Governance of Crisis…*, op.cit., p.26.

Reckoned paths out of the crisis

Against the backdrop of the manifold crises affecting the European Union, the perspective that "Europe's challenges show no sign of abating", and being aware of the need for action in politically sensitive areas at a time when the capacity of action of both the European institutions and the Member States was limited, the President of the European Commission considered that it was his duty to attempt to engage all stakeholders within the European project in a reflection on the Future of Europe.[6] In order to steer up the debate, he put forward not his own vision of the future, but five scenarios, each offering rough outlines of possible ways of action and their implications for the policies of the European Union and its outlook. Juncker's approach appears to have taken into consideration the fact that for many Europeans the Union is "either too distant or too interfering in their day-to-day lives", for others unable to cope with the growing number of crisis situations, while for others it is so little known that it is difficult for them to accept its merits in terms of raising their standard of living.[7]

The first scenario outlined in Jean-Claude Juncker's White Paper on the Future of Europe, titled 'Carrying On', assumes that EU27 focuses on delivering its positive reform agenda in 'incremental' steps, tackling problems as they arrive. Member States continue to muddle through agreeing to deepen the EU's single market, put together some of their military capabilities and "speak with one voice on foreign affairs", while preserving key responsibilities like border control. A lot then depends on the willingness and ability of EU actors to adjust and find solutions to different challenges. The second scenario calls for 'Nothing but the Single Market' and presumes that the EU abandons the experiment of integration of core state powers and retreats to market integration. As such, the EU27 is gradually re-centred on the single market. Under these circumstances, "decision-making may be simpler to understand, but the capacity to act collectively is limited" and "this may widen the gap between expectations and delivery at all levels". The third scenario, 'Those who want more, do more', foresees more horizontal differentiation in the form of closer integration among those Member States "who want more". An option in favour of this formula would mean that willing Member States ("coalitions of the willing") could agree to do more together in specific policy areas such as defence, internal security, taxation or social matters. Multispeed Europe, as this scenario is better known, leaves unclear how it would improve problem-solving in existing fields of integration. In the case of scenario no. 4, 'Doing less more efficiently', EU27 focuses on key strategic policy fields, delivering more and faster in these areas, while leaving more room for manoeuvre to Member States, regional and local authorities, by doing less elsewhere. So, the focus will be on "better tackling certain priorities together", by doing more in "a reduced number of areas", not on 'doing less'. The fundamental problem of this scenario is

6. J.-C. JUNCKER, *White Paper on the Future of Europe. Reflections and scenarios for the EU27 by 2025*, European Commission, COM(2017)2025, 01.03.2017.
7. Ibid., p.6.

that it relies on Member States agreeing among themselves on the areas in which they want to cooperate more efficiently. 'Doing much more together', the fifth scenario, presumes that Member States decide to do much more together across all policy areas to answer key challenges for cross-border cooperation (e.g. fiscal policy, integration of refugees, etc.). In doing so, European institutions will need to be equipped with "far greater and quicker decision-making". Nevertheless, in this case "the risk of alienating parts of society which feel that the EU lacks legitimacy" is high.

Designed so as to avoid the old dichotomy between 'less Europe' and 'more Europe', the five scenarios "range from the status quo, to a change of scope and priorities, to a partial or collective leap forward". As such, the scenarios are just intellectual tools meant to enlighten and better structure the reflection process, therefore being "neither mutually exclusive, nor exhaustive", a decision in favour of a "combination of features from the five scenarios" that might "best help advance our project" not being excluded.[8] Until now, only two of them have managed to remain in the spotlight and become subject to intense scrutiny, namely the third 'Those who want more, do more' and the fourth 'Doing less more efficiently'. The Rome Declaration of the heads of state and government of EU27 from March 2017, in which they expressed their commitment to continuing the integration process, made references precisely to these two proposals for the future of Europe –

> "[we] will act together, at different paces and intensity where necessary, while moving in the same direction, as we have done in the past, in line with the Treaties and keeping the door open to those who want to join later",

with reference to the third scenario, and "[we] want the Union to be big on big issues and small on small ones", which points in the direction of the fourth scenario.[9]

How has the scenario of 'Doing less more efficiently' come to gain relevance?

After the launch of the White Paper on the Future of Europe, attention has focused almost exclusively on the third scenario due to the evident German and French support for it. Discussions on the European Union advancing at "different speeds", based on "variable geometries" or in the logic of an *à-la-carte* menu are by no means entirely new, but have always been very sensitive since they contradicted the initial logic of European integration, specifically that all Member States would apply all the policies established by the *acquis* at the same speed, no derogation being possible unless justified, limited, and transitory. Nevertheless, ever since the Treaty of Maastricht came into force, differentiation in the sense of allowing those capable and willing to go further has become inevitable. The Treaty of Amsterdam only reinforced this trend by integrating the Schengen agreement into the text of the Treaties and introducing

8. Ibid., p.15.
9. European Council, 149/17, The Rome Declaration. Declaration of the leaders of 27 member states and of the European Council, the European Parliament and the European Commission, 25.03.2017.

specific provisions on enhanced cooperation. The European Union has managed to accommodate different formats of cooperation among Member States with the current institutional infrastructure.

This third scenario, however, opened the perspective of institutionalizing the existence of a small coalition of Member States who can further decide by themselves on who else might be allowed to join their club. Worried about the creation of an inner circle of Member States to which they might not be able to belong, especially the non-Eurozone Member States became extremely outspoken in opposing this scenario despite the assurances that in a Europe with two or more speeds there would be "no exclusion" and the doors would remain open for participating in all activities.[10] In their public statements, these countries did not voice these apprehensions too loud, but chiefly referred to the risk of excessive complexity, the danger of undermining the unity of the European project, and the peril of further alienating European citizens. In the end, it was not the force of these arguments that mattered for the slow sliding of this scenario from the foreground, but the inability of Germany and France to build up momentum for their stated preferences. It is against this backdrop that the fourth scenario has gradually gained attention due to some circumstances to be analysed below.

Firstly, it has yielded endorsement to the Union's cohesion in a manner that the third scenario could not offer. Given the multitude and depth of the present-day challenges, this scenario offered the perspective of building up trust in the European Union, in its capacity of collective action and its strategic leadership since it focused on delivering more and faster in selected policy areas while doing less in others. Its main rationale of taking decisions at the most appropriate level, without splitting the Member States between frontrunners and laggards is considered to be its most distinctive feature and explains the attractiveness it enjoys with both the public and some European decision-makers.

10. In Romania, for instance, due to the fact that it is neither part of the Eurozone, nor of the Schengen area, the third scenario was viewed only as paving the way to two classes of Member States. This led to a split in the public opinion between those who advocated rapid integration into the Eurozone (the criteria for accession to the Schengen area are already fulfilled and a decision in this respect is solely political) and those who considered that accession to the Eurozone could only take place when the country would be ready for it and, until then, Romania should not be relegated to a second-class position. Călin Popescu-Tăriceanu, the President of the Romanian Senate, stated that it would be "inconceivable" to distribute Member States "in groups vertically to the political decision – some on the stage, others in the lodge and the last on the outskirts" and deemed it "unacceptable that the dynamics of convergence, however slow it may be, should be replaced by a hierarchy process based on decision-making capacity and level of development". See C. POPESCU-TĂRICEANU, *Speech before the Two Chambers of the Romanian Parliament on the occasion of the visit of Jean-Claude Juncker, President of the European Commission*, 11.05.2017, on http://www.cdep.ro/pls/steno/steno2015.stenograma?ids=7784&idl=1; See also BUNDESREGIERUNG, *Pressekonferenz von Bundeskanzlerin Merkel und dem Präsidenten von Rumänien, Klaus Iohannis*, Mitschrift Pressekonferenz, Berlin, 19.06.2017, on https://www.bundesregierung.de/Content/DE/Mitschrift/Pressekonferenzen/2017/06/20170619pkmerkeliohannis.html. A similar stance was expressed in the press conference of the German Chancellor with the Bulgarian Prime Minister, Boyko Borissov.

Secondly, this scenario was the soul script of Jean-Claude Juncker, a high-level politician with considerable political clout, formed in the shadow of a group of statesmen with an essential contribution to European unity, for whom he has a profound respect and whose heritage he is determined to carry on.[11] He made extensive references to such an approach to European integration from the very moment when he entered the competition for the top position of the European Commission, through the Spitzenkandidaten system:

> "I want a better Europe. A Europe that is big on big things and small on small things. Over the next five years, we need to focus on the important issues I have outlined: foreign and defence policy, industrial policy and strengthening the internal market, further integration of the Eurozone, legal migration. However, at the same time, we should stop with regulating each and every corner and every aspect of the daily lives of our citizens. […] As Commission President I would like to continue and step up this important work. To be bigger on the important issues, Europe will have to be more modest and smaller on many other issues. Not every stakeholder interest must be satisfied in Brussels".[12]

This emphasis on 'being big on big things' turned out to be an important part of his political credo. It meant to him that the Commission "no longer regulated oil cans or showerheads", but "concentrated instead on what we can do better together rather than alone […] in line with the principle of subsidiarity".[13] Moreover, he managed to include these ideas in the strategic documents issued by the Commission throughout his mandate – the White Paper on the Future of Europe, the Rome Declaration, the State of the Union discourses in front of the European Parliament from 2016 to 2018. In November 2017, he set up a Task Force on Subsidiarity, Proportionality and 'Doing less more efficiently', under the leadership of Frans Timmermans, the Commission's first vice-president. Made up of three representatives of the EU's Committee of the Regions and three elected members of national parliaments (Austria, Bulgaria and Estonia), each acting in their personal capacity – the European Parliament declined the offer of having representatives in the Task Force –, the group's mandate comprised three tasks outlined from the beginning by the Commission President in the form of questions that required meaningful answers on: 1. the better application of the principles of subsidiarity and proportionality in the work of the Union's institutions; 2. the re-delegation of responsibility for certain policy areas to the Member States; 3. the ways to increase the involvement of regional and local authorities in the preparation of and follow-up to Union policies.[14]

11. J.-C. JUNCKER, *A new start for Europe, Opening Statement in the European Parliament Plenary Session*, Strasbourg, 15.07.2014.
12. J.-C. JUNCKER, *Europe's Challenges for the Next Five Years: Towards a Stronger, Better Europe*, Speech by Jean-Claude Juncker, EPP candidate for President of the European Commission, at the Nueva Economía Fórum, Madrid, 12.05.2014.
13. European Commission, The Road from Rome: A Union that Is Big on Big Issues and Small on Small Ones, Factsheet, 7(2017).
14. European Commission, Active Subsidiarity. A new way of working, Report of the Task Force on Subsidiarity, Proportionality and 'Doing less more efficiently', 10.07.2018.

Finally, Jean-Claude Juncker's favourite option for the future of Europe has found echo in the political preferences of the newly elected Austrian government. Through both the Government Programme and a series of public statements, Austrian Chancellor Sebastian Kurz expressed his preference for scenario no. 4 and for the better anchoring of the subsidiarity principle in the EU's reform projects. The Austrian Government Programme referred to the introduction of subsidiarity checks in the context of the parliamentary procedure, the de-bureaucratization at EU level by applying 'sunset clauses' (provisions of a law that it will automatically be terminated after a fixed period unless it is extended by law) in European legislation, and the rule one-in-one-out.[15] The Austrian Chancellor constantly reaffirmed his view that

> "we need a European Union that focuses more on big issues and withdraws when it comes to small issues on which nations and regions can decide better for themselves".

As for 'big issues,' they had to include the migration question besides "deeper cooperation on security, foreign policy and defence as well as economic and monetary policy".[16] No details have been provided so far regarding the so-called 'small issues'. These political options have gained more weight in view of the Council Presidency taken over by Austria in the latter part of 2018, amid the country's assumed "bridging function" in the European Union between its Western and Eastern members. Austria promised to use its influence during its six months' Council Presidency for stirring up the discussion on subsidiarity and organizing a European Union summit on this issue in Bregenz, in November 2018. Then again, its stance on the future of the European Union and the significance it attached to the principle of subsidiarity has resonated well with those expressed by most countries of the region, above all the four Visegrád states (V4), although some nuances between the positions expressed on both sides still remained, specifically with regard to the policy areas in which Europe should 'do more'.[17] Without losing sight of the major differences between the positions of Austria and those of the Visegrád Group in a number of other important issues, such as rule of law or nuclear energy, we can state that their mutual interest, albeit for clearly different reasons, in a Europe that 'is big on big things and small on small things', has helped to elevate this scenario on the agenda of discussions on the future of Europe.[18]

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15. Österreichische Volkspartei, Freiheitliche Partei Österreichs, Zusammen Für unser Österreich. Regierungsprogram 2017–2022, https://www.bundeskanzleramt.gv.at/regierungsdokumente, 20.12.2017, p.23.
16. B. KOHLER, S. LÖWENSTEIN, *Ein Gespräch mit Bundeskanzler Kurz über seine Pläne für Österreich und Europa – und über die Erfahrungen mit großen Koalitionen*, in: *Frankfurter Allgemeine Zeitung*, 17.01.2018.
17. See for instance V4 Statement on the Future of the EU, 26.01.2018, on http://www.visegradgroup.eu/v 4-statement-on-the-180129, and Joint Statement from the Official Meeting of the Speakers/ Presidents of the Visegrad Group Parliaments, 02.03.2018, on http://www.visegradgroup.eu/documents/official-statements. See also the official statements by individual V4 leaders on the future of Europe.
18. See for instance Cabinet of the Prime Minister of Hungary, Viktor Orbán's press conference after his talks with Chancellor of Austria Sebastian Kurz on http://www.miniszterelnok.hu/viktor-orbans-press-conference-after-his-talks-with-chancellor-of-austria-sebastian-kurz/print, 30.01.2018.

'Doing less more efficiently' was a core element of the Commission's vision for the EU, but has only gradually, due to favourable circumstances, gained prominence in the ongoing discussions on the future of Europe. The fourth scenario was anchored in a conception of the European Union in which this has its focus set on political priorities and is guided by the principle of acting 'big on big things and small on small things'. This scenario is intimately associated with the principle of subsidiarity, which has been lain at the foundation of European construction from the beginning. It remains to be explored in the second part of this paper why subsidiarity remains such a difficult to pin down concept in the work of the European Union and, along with it, how 'Doing less more efficiently' can offer insightful solutions to the future reform of the European Union in the politically sensitive atmosphere at present. It is the Janus-like character of subsidiarity that helps it in being

> "endorsed as much by those who hope to use it to justify an enlargement of the Community's powers as by those who, on the contrary, intend to halt this process and preserve the powers of the Member States".[19]

Subsidiarity – in search of some necessary clarifications

Evolving from the Latin *subsidium*, which meant 'aid' or 'assistance' from the background, in politics, the principle of subsidiarity came to be associated with the idea "that a central authority should have a subsidiary function, performing only those tasks which cannot be performed at a more local level". The principle received a first consecration from the Catholic Church in the Encyclical *Rerum Novarum* ('Of New Things', 1891), in response to the social problems brought about by the Industrial Revolution, but was given full recognition forty years later, in the Encyclical *Quadragesimo Anno: On Reconstruction of the Social Order* (1931):

> "Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organisations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them. The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly".[20]

Being established as a principle governing the demarcation of competences between a "greater and higher association", in this case the Union, and "lesser and subordinate

19. V. CONSTANTINESCO, *Who's Afraid of Subsidiarity?*, in: *Yearbook of European Law*, 11(1991), pp.33-55, here p.35.
20. PIUS XI, *Quadragesimo Anno: On Reconstruction of the Social Order*, 15.05.1931, https://web.archive.org/web/20060902085107/http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html.

organizations", namely the Member States, the principle of subsidiarity has made its way into the political and legal order of the European Union at a time when centralizing tendencies were manifested with unprecedented intensity. The Treaty of Rome had already enabled the Union to take whatever measures needed to establish a common market (Art. 100) or to attain objectives for which the Treaty had not endowed it with the necessary powers (Art. 235), allowing it to make incursions into policy areas in which it had not been granted a formal competence.[21] The Single European Act provided for a broadening of the Union's sphere of competence and for a proliferation of majority voting in many fields of policy-making.[22] It is not a coincidence that the first expression of subsidiarity in the EU treaties surfaced in the Single European Act, in relation to the environmental policy. Against the backdrop of the centralising tendencies that became manifest at the level of the European Union at the end of the 1980s, in the context of the Maastricht Treaty negotiations, the impetus for strengthening the principle of subsidiarity came essentially from two directions. On the one hand, there were those Member States worried by the seemingly endless growth of the Union's powers – first and foremost the UK, but to a lesser extent also Denmark and Portugal. On the other hand, there were the regions that became alarmed that the centralist drift might lead to a shrinking of their powers.[23] Also, the Commission, eager to increase the acceptability of the Union's decision-making, embraced this principle with enthusiasm. Its main purpose was to provide Member States with a guarantee of a limitation in the exercise of the powers of the European Union.

The principle of subsidiarity was codified in Article 3b of the Treaty of Maastricht, flanked by the principle of conferral (of attributed powers) and the principle of proportionality (of the means chosen with the need for action), which should have set together principles of common action and, at the same time, norms for a less intrusive EU governance.[24] It was more than obvious from the onset that the demarcation line

21. Treaty establishing the European Economic Community, Final Act, 25.03.1957, [hereinafter Treaty of Rome]. The principle of subsidiarity is Nevertheless also implicit in a number of other articles of the Treaty of Rome. See V. CONSTANTINESCO, *Who's Afraid of Subsidiarity?*, op.cit., pp. 41-45. For a more detailed account on the advancement of the principle of subsidiarity within the legal framework of the European Union see K. ENDO, *The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors*, in: *Hokkaido Law Review*, 44(1994), pp.553-652; R. SCHÜTZE, *From Dual to Cooperative Federalism. The Changing Structure of European Law*, Oxford University Press, Oxford, 2009, pp.243-264, and D.Z. CASS, *The Word That Saves Maastricht – The Principle of Subsidiarity and the Division of Powers within the European Community*, in: *Common Market Law Review*, 29(1992), pp.1107-1136.
22. Single European Act, 01.07.1987, O.J. L 169/1 [hereinafter SEA] (amending Treaty of Rome).
23. P. GREEN, *Subsidiarity and European Union: Beyond the ideological impasse? An analysis of the origins and impact of the principle of subsidiarity within the politics of the European Community*, in: *Policy and Politics*, 22(1994), pp.287-300, here pp.291-292. See also R. DEHOUSSE, *Does Subsidiarity Really Matter?*, European Union Institute Working Paper LAW 92/32, 1992, p.5.
24. Treaty on European Union (Maastricht text), 29.07.1992, O.J. C 191/1 [hereinafter TEU].

between these three principles was anything but clear-cut.[25] As far as the subsidiarity principle was concerned, Article 3b TEU stated just that "in areas which do not fall within its exclusive competence", action is to be taken "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States" and can "by reason of the scale or effects of the proposed action, be better achieved by the Community". As such, its dual nature was more than evident from the first explicit advent of the principle in the text of the Treaty on European Union. Its negative character, in the sense of a prohibition of common action, as long as the objectives could be achieved by the Member States by their own efforts, and its positive character in the form of an ability to act should such action appear necessary, were almost simultaneously assumed. Although a legal principle enshrined in the text of the Treaty, its dependence on words such as "sufficiently" and "better", which leave room for subjectivity and disputes, made it prone to political "settlement" in the sense given by Bertrand de Jouvenel.[26] It came to be valued more as a "solution-concept" than as an "achievement-concept", given the diverging theories on it and the competing proposals for solving it.[27] This observation becomes even more important especially if we take into consideration that the Treaty remained silent in clarifying how subsidiarity would be secured within the EU system.

In view of the difficult ratification process of the Maastricht Treaty due to its Danish rejection by referendum and the tightness of the French vote, and in anticipation of the tough political battles in the UK and Germany, the European Council set out in 1992, at its summit in Edinburgh, a number of clarifications with regard to the position of the subsidiarity principle within the wider constitutional framework of the EU and to its proper application when considering a draft piece of EU legislation. These were later incorporated into the Protocol on the application of the principles of subsidiarity and proportionality of the Treaty of Amsterdam.[28] Accordingly, the principle of subsidiarity needed to respect the treaties and the *acquis communautaire* and related solely to areas in which the Union did not have exclusive com-

25. I. COOPER, *Is the Subsidiarity Early Warning Mechanism a Legal or a Political Procedure? Three Questions and a Typology*, European Union Institute Working Paper RSCAS 2016/18, 2016, p.12. See also R. SCHÜTZE, *Subsidiarity after Lisbon: reinforcing the safeguards of federalism?*, in: *Cambridge Law Journal*, 68(2009), pp.525-536, here p.526, and G.A. BERMANN, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, in: *Columbia Law Review*, 94(1994), pp.331-456, here p.388; R. DEHOUSSE (ed.), *Europe: The Impossible Status Quo*, Macmillan, Basingstoke, 1997, pp.67-74; P. CRAIG, G. DE BÚRCA, *EU law: text, cases, and materials*, Oxford University Press, Oxford, 2011, p.97.
26. "What makes a problem one of 'politics' is the fact that it is presented in terms which admit of no solution in the narrow sense of that term. […] a political problem cannot be solved. It may be settled, but that is not quite the same thing". Cited in V. CONSTANTINESCO, *Who's Afraid of Subsidiarity?*, op.cit., p.54.
27. J. WALDRON, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, in: *Law and Philosophy*, 21(2002), pp.137–164, here p.158.
28. Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 02.10.1997, O.J. C 340/1 [hereinafter Treaty of Amsterdam], Protocol on the application of the principles of subsidiarity and proportionality [hereinafter Subsidiarity Protocol].

petence. At the same time, a two-fold subsidiarity test for the proposed legislation was envisaged. Firstly, a test for its effectiveness had to be undertaken in order to verify whether action at national level was capable of producing the desired result. In the case of a positive answer, Member States' action should have been given preference. Secondly, a test for its efficiency was regarded as necessary, meaning that a comparative assessment in terms of costs and benefits was to be carried out in order to attest whether the objectives could be "better achieved" at Union level. This examination was to be performed in accordance with three specified requirements that the draft legislation had to fulfil – its transnational character, its usefulness since a failure to act would "conflict with the requirements of the Treaty" and its benefits "by reason of its scale or effects compared with action at the level of the Member States". The Subsidiarity Protocol further provided that directives were to be preferred to regulations and framework directives to detailed measures; that EU measures "should leave as much scope for national discretion as possible" and that "well-established national arrangements and the organization and working of Member States' legal systems" should be respected.[29] The implementation of these provisions was considered to fall within the responsibility of all EU institutions and procedural obligations were specified for each of them.

What is more important for our analysis is the fact that from this point onwards we have been witnessing a shift of interest to the procedural implementation of the subsidiarity principle understood in the sense of process management (the so-called 'how?' question), to the detriment of its substantive side whose focus lay on the basis upon which power is distributed (the 'where' question). Although its substantive nature was unambiguously reaffirmed, what mattered increasingly was not only when the Union would have been entitled to act, but especially how this would have been done. For this purpose, mechanisms to protect Member States against unjustified interventions from the Union in the form of procedures became increasingly important. Away from the high expectations that these procedures could provide the Member States with the protection they deemed necessary, subsidiarity assessment continued to involve subtle policy choices. Nevertheless, this preference for procedure relative to the principle of subsidiarity was more than obvious in the negotiations on the Treaty of Lisbon.

In fact, the Lisbon Treaty reinforced subsidiarity in Article 5(3) with only slight differences, but changed the provisions of the Protocol on the application of the principles of subsidiarity and proportionality in such a way that it no longer contained any reference to the substantive character of the subsidiarity principle.[30] Instead, it elaborated on the new institutional arrangements for consultation on draft legislative

29. European Council, Conclusions of the Presidency, Annex I – Overall Approach to the Application by the Council of the Subsidiarity Principle and Article 3b of the Treaty on European Union, Edinburgh, 11-12.12.1992, on https://www.consilium.europa.eu/media/20492/1992_december_-_edinburgh__eng_.pdf.
30. When referring to the Member States' capacity of action, a mention was inserted that this relates to "either at central level or at regional and local level". Consolidated Version of the Treaty on European Union, 2010, O.J. C 83/01.

acts (Protocol No. 2), mostly regarding the new procedure of subsidiarity monitoring by national parliaments (Protocol No. 1). The most important aim of these two protocols was "to establish a system for monitoring" the application of the principles of subsidiarity and proportionality. Again, each Union institution was called upon to "ensure constant respect" for the two principles in the sense that draft legislative acts had to be justified with regard to their compliance with the above-mentioned principles, in a statement which also contained an

> "assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation".

Additionally, it was decided that the "reasons for concluding that a Union objective can be better achieved at Union level" should be substantiated by "qualitative and, wherever possible, quantitative indicators".[31] The compliance with the principle of subsidiarity was to be monitored by the national parliaments, whose role would be elevated to that of "watchdogs of subsidiarity".[32] Two distinct procedures for monitoring the enforcement of subsidiarity were conceived and incorporated into the Protocol (No. 2), allowing each national parliament to produce within eight weeks a reasoned opinion on this issue. In the "yellow card" procedure, where the negative votes amounted to one-third of all the votes allocated to the national parliaments, the European Union draft had to be reviewed in the sense that

> "the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originate[d] from them, [might] decide to maintain, amend or withdraw the draft".

The role of national parliaments was strengthened to a certain extent in the so-called "orange card" procedure, which was to apply to the ordinary legislative procedure for the case that the negative votes of the national parliaments amounted to a half of all the votes allocated to them. In this case, the Commission's justification for maintaining the proposal, as well as the reasoned opinions of the national parliaments, would be submitted to the Union legislator, which would have to consider whether the proposal was compatible with the principle of subsidiarity. Where either the Council or the Parliament found that the proposal violated the principle of subsidiarity, the proposal was rejected.[33]

This part of the analysis indicates that against the backdrop of increased contestation of the integration process due to its gradual incorporation of core state powers, the consolidation of the principle of subsidiarity was regarded as an absolute necessity. The association of national parliaments with the decision-making process was

31. Consolidated version of the Treaty on the Functioning of the European Union, 2008, O.J. C 115/47 [hereinafter TFEU], Protocol (No 2) on the application of the principles of subsidiarity and proportionality [hereinafter Protocol (No 2)].
32. I. COOPER, *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, in: *Journal of Common Market Studies*, 44(2006), pp.281–304.
33. Art. 7, Protocol (No. 2).

hoped to "kill two birds with one stone", by strengthening both the federal and the democratic safeguards within Europe.[34] In itself, this provision could hardly be regarded as a sweeping innovation, but merely the latest in a series of institutional reforms aimed at entrenching subsidiarity into the legal culture of the European Union. Since the role of national parliaments falls short of having a veto right, their ultimate success was made to depend on the Commission's decision to amend or withdraw the draft in view of their purely advisory reasoned opinions.[35] Even in the unlikely situation in which the Commission would accept to modify this draft, the amended document would no longer have to be subject to a new subsidiarity control on the grounds that the principle of subsidiarity is not respected.[36] Moreover, the amendments made by the Council and the Parliament to the Commission's proposals are no longer subject to subsidiarity control. This situation brings us to the conclusion that although we have an entire procedure for *ex ante* subsidiarity control, as a matter of fact no single institution has "final interpretive authority".[37] The gap between what has been aforethought and what has been achieved through the Lisbon Treaty in terms of subsidiarity control becomes even greater if we take into account the situation of the European Court of Justice. This institution has an *ex post* jurisdiction "in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263" TFEU by Member States, or notified by them "in accordance with their legal order on behalf of their national Parliament or a chamber thereof".[38] Nevertheless, in so far as it has been notified, and this has seldom been the case, the Court has avoided ruling on the substantive aspects of the principle of subsidiarity and remained reluctant to interpret subsidiarity as a strong limit on Community power, particularly if the Commission, the Council or the Parliament had taken a decision on a particular legislative act, and preferred to focus on compliance with the procedures laid down in the treaties.[39] Irrespective of the way one looks at it, the substantive side of subsidiarity involves some sort of political judgments that the Court would rather try to avoid.

A more radical step in the sense of creating a so-called "red card" mechanism, which would have allowed the national parliaments to block a draft piece of legislation, was viewed as problematic since it could alter the distribution of power in the EU's complex system of governance and aggravate the "political interweaving" of the EU and national level, thus deepening what Fritz W. Scharpf defined as the "joint

34. R. SCHÜTZE, *Subsidiarity after Lisbon…*, op.cit., p.527.
35. Art. 7, Protocol (No. 2).
36. See P. KIIVER, *The conduct of subsidiarity checks of EU legislative proposals by national parliaments: analysis, observations and practical recommendations*, in: *ERA Forum*, 12(2012), pp.535–547, p.540.
37. I. COOPER, *Is the Subsidiarity Early Warning Mechanism…*, op.cit., p.9.
38. Art. 8, Protocol (No. 2).
39. P. CRAIG, G. DE BÚRCA, *EU law…*, op.cit., p.98. See also E.A. YOUNG, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales From American Federalism*, in: *New York Law Review*, 77(2000), pp.1612-1737, here p.1679; P. GREEN, *Subsidiarity and European Union…*, op.cit., p.295, C. LAZĂR, *Subsidiarity in the Union law: a success or a failure?*, in: *AGORA International Journal of Juridical Sciences*, 1(2014), pp.71-81, here pp.78-80.

decision trap".[40] To conclude, the Treaty of Lisbon has had, with all the limitations set out above, a greater contribution to the strengthening of the procedural side of the principle of subsidiarity than of its substantive nature, thus continuing a tradition that had become evident since the European Council in Edinburgh. However, the situation has been far from comforting since the political *ex ante* control of subsidiarity could not stop draft legislation from entering into the legislative procedure and even be adopted, while the experience gained so far has shown that the *ex-post* judicial control carried out by the European Court of Justice focused almost exclusively on the procedural dimension of subsidiarity control, and left untouched substantive issues, therefore lowering the effectiveness of this control. As such, the centralist pressure that was supposed to be avoided continued to remain prominent. Under these circumstances, in the next section we intend to assess the extent to which this development contributed to allaying Member States' fears of intrusive EU action.

'Doing less more efficiently': Can subsidiarity still 'save' or is it just 'the wrong idea, in the wrong place, at the wrong time'?[41]

In its essence, the principle of subsidiarity is so elementary that its value can hardly be denied. The real issue has always been to turn it into a practical concept useful to distinguish, in the web of functions assumed by public authorities in intricate systems of governance, those that should remain within the purview of lower levels, and those which should be fulfilled at a higher level. Its implicit promise was to help with the repatriation of Union powers back to the Member States, to protect them against centralizing tendencies, thus making the integration process more palatable to the people, assuming that in this manner the needs and preferences of the local communities could be better addressed, administrative costs lowered, political innovation invigorated, the voice of the citizens better heard, and in general diversity fostered.

The continued absence of its clear conceptual contours has given rise to a series of controversies.[42] It was assumed that the "divergence in foundations has led to significant divergence in interpretation".[43] Furthermore, it rendered its enforcement politically and legally very difficult since in deciding upon its main tenets – the means for implementation and the line of reasoning – the demarcation among the two was

40. R. SCHÜTZE, *Subsidiarity after Lisbon…*, op.cit., pp.530-531.
41. D.Z. CASS, *The Word That Saves Maastricht…*, op.cit.; G. DAVIES, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, in: *Common Market Law Review*, 43(2006), pp.63-84.
42. D. WYATT, *Subsidiarity. Is it too vague to be effective as a legal principle?*, in: K. NICOLAIDIS, S. WEATHERILL (eds), *Whose Europe? National Modes and the Constitution of the EU*, Oxford, 2003, https://europaeum.org/wp-content/uploads/2017/09/Whose-Europe.pdf, pp.86-98; *Is the Subsidiarity Early Warning Mechanism…*, op.cit.
43. M. JACHTENFUCHS, N. KIRSCH, *Subsidiarity in Global Governance*, in: *Law and Contemporary Problems*, 79(2016), pp.1-26., here p.6.

far from clear.[44] This delicate balance between the political and legal character of the principle of subsidiarity has tilted gradually in favour of the former.[45] Then, while a preference for local action was evident from its inception, the enforcement of the principle has led, in the EU context, to centralization in decision-making, a tendency that becomes pervasive if we take into consideration the four guidelines put forward by Maria Cahill in her attempt to provide an ontology-sensitive approach to the principle of subsidiarity.[46] Also, although it concerned the distribution of powers between different levels of government, it was not evident who would have to set the policy goals or to apply the principle – the Member States or the Union.[47]

From a historical and legal point of view, subsidiarity was more than a matter of powers.[48] It also involved clarifications with regard to how the principle was going to be put into practice. The difference between the delimitation of powers and their exercise may seem slim, but, as we have shown above, it is still important. Up to now, it has managed mainly to expound how the Union exercises its powers in areas of shared competence, and offered few clues as to where these competences should rest. The procedural dimension of subsidiarity has so far been the dominant perspective. Successive reforms of the legal framework of the European Union have had the effect of constantly strengthening this dimension. Thus, the EU legislative institutions need to engage in a specific inquiry before concluding that action at the Union rather than at Member State level is justified. This has been seen as a means of disciplining European institutions, in particular the Commission, in exercising the powers that had been conferred to them. Nevertheless, the reforms left unanswered the concerns with regard to the substantive side of the principle of subsidiarity, namely the commitment to provide a mechanism to adjudicate between the levels of government when powers are shared.

As far as the 'Doing less more efficiently' alternative for the future of Europe is concerned, it has to be stated that from its outset this scenario has maintained a certain ambiguity with regard to where the equilibrium is to be found between 'doing less' in more policy areas and doing 'more effectively' in fewer. If we turn our attention to the first end of this continuum, we have to reckon with an increased role assumed by the Member States. When looking to the other end, we have to consider an increased Union action. This analysis of the limits brings us to the question of how the competences in the governing system should be allocated and explains the close connection between this scenario and the principle of subsidiarity. 'Doing less more

44. I. COOPER, *Is the Subsidiarity Early Warning Mechanism…*, op.cit.
45. See also R. SCHÜTZE, *From Dual to Cooperative Federalism*, op.cit., p.243; G.A. BERMANN, *Taking Subsidiarity Seriously*, op.cit., pp.339 and 390.
46. M. CAHILL, *Theorizing subsidiarity: Towards an ontology-sensitive approach*, in: *International Journal of Constitutional Law*, 15(2017), pp.201-224, here pp.217-223; see also G. DAVIES, *Subsidiarity: The Wrong Idea…*, pp.67-72.
47. J. BEDNAR, *Subsidiarity and Robustness: Building the Adaptive Efficiency of Federal Systems*, and A. FØLLESDAL, *Competing Conceptions of Subsidiarity*, both in: J.E. FLEMING, J.T. LEVY, *Federalism and Subsidiarity*, New York University Press, New York, 2014, pp.231-256 and pp. 220-221.
48. R. DEHOUSSE, (ed.), *Europe: The Impossible Status Quo*, op.cit., p.66.

efficiently' assumes a more decisive EU action in a limited, mutually agreed number of areas, whereas elsewhere the EU stops acting or reduces its engagement, leaving the Member States the chance to intervene and experience. Still, the real problem is that so far there has been no clear treaty provision, or legal doctrine on how to decide on the most appropriate level of action. The latest attempt to come up with the necessary clarifications, the Task Force on Subsidiarity, Proportionality and 'Doing less more efficiently' managed, after six months of work (from February to July this year), to advance only modest solutions,[49] thus fuelling the idea that, since the group worked under the helm of one of the top Commission officials, it was keener to "fine-tune the internal workings of the Commission" than to use the "opportunity for a much bolder institutional experimentation in an attempt to fundamentally modernize EU governance".[50] Although by far the most expected was the response to the question on the re-delegation of responsibility for certain policy areas to the Member States, it is precisely in this respect that the members of the Task Force have remained the most elusive.

The Lisbon Treaty made it legally possible to restore to the Member States some of the competences that they had transferred to the European Union either through the review of primary legislation or by the repeal of secondary legislation.[51] However, the procedural difficulties that this redistribution of competences entails and the absence of political consensus on those competences that should be re-nationalized make this option only theoretically viable. What will matter under the current circumstances is not so much how to relocate powers between Union and Member States in areas of shared competence, but to conceive specific mechanisms to protect the Member States against unwarranted interferences from the Community and to provide cooperation among the various levels of authority which are responsible for a given problem. As it is now formulated, the principle of subsidiarity is ill-adapted to the problems it is meant to solve and can bring little clarification to how the 'Doing less more efficiently' scenario may be put into practice. Nevertheless, the principle of subsidiarity is not to be dismissed as such, but reconsidered as a practical tool for better "structuring arguments" on the very sensitive issues of distribution of competences in a complex system of governance.[52] According to Graine De Burca, Euro-

49. A commitment to 'active subsidiarity' that requires a common understanding of subsidiarity and proportionality and a greater participation of all stakeholders, in general, national, regional and local authorities, in particular, a 'model grid' for assessing subsidiarity and proportionality more consistently across the European institutions and national and regional legislatives and the lowering of the thresholds that trigger yellow-card and orange-card procedures (but considering a green-card procedure that would allow National Parliaments to propose to the Commission to take action incompatible with the current treaty framework). European Commission, Active Subsidiarity A new way of working, op.cit., pp.10-13.
50. D. JANCIC, *Frans Timmermans' subsidiarity proposals do not go far enough to address the EU's democratic deficit*, http://blogs.lse.ac.uk/europpblog/2018/07/26/frans-timmermans-subsidiarity-proposals-do-not-go-far-enough-to-address-the-eus-democratic-deficit/, 26.07.2018.
51. R. ZBIRAL, *Restoring Tasks from the European Union to Member States: A Bumpy Road to an Unclear Destination?*, in: *Common Market Law Review*, 52(2015), pp.51-84.
52. A. FØLLESDAL, *Competing Conceptions of Subsidiarity*, op.cit., p.226.

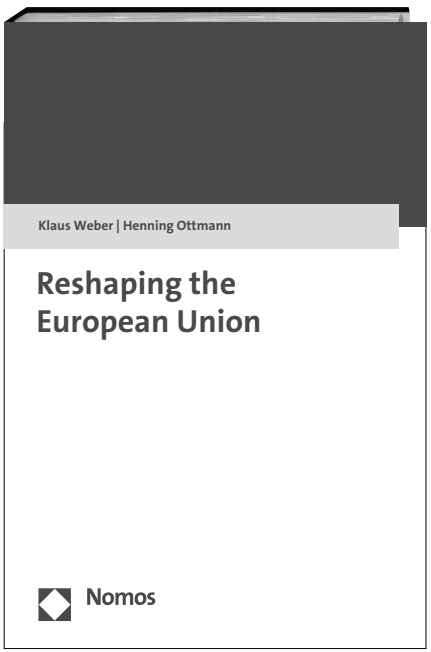
pean integration has a rich tradition of evolving through the aid of "weasel words", which are deliberately chosen for their ambiguity in scope and meaning, and are per se able to mediate between very different understandings and conceptions of the issue under discussion.[53]

Conclusions

From the former "permissive consensus" that marked the first decades of European integration, Europe seems to be moving more and more towards a period of "constraining dissensus".[54] If in the first half of its existence, the regulatory policies, considered as essential for the creation of the Single Market, have been at the heart of the European Project, with the advance of the integration in the area of core state powers their maintenance as preferred working method has led to increased contestation and politicization. The EU's reform scenario 'Doing less more efficiently' has gradually come to be seen as an alternative to the much better-thought-out option of 'Those who want more, do more', which builds on the idea of differentiated integration. This fourth scenario in the order proposed by Jean-Claude Juncker for the future reform of the European Union is closely related to the principle of subsidiarity, given the latter's association with the idea of demarcation of competences among different levels of government. As in the case of subsidiarity, this scenario was seen as capable of providing the necessary space in which the diversity of national values could blossom. It offered the perspective of a united Europe, without splitting the Member States between leaders and stragglers. Its focus would be on "better tackling certain priorities together", by doing more in "a reduced number of areas", not on "doing less". Nevertheless, the precise contours of the reform that would need to be undertaken are far from clear and the current experience with the enforcement of the principle of subsidiarity could offer even less elucidation. It remains to be seen to what extent the favourable moment for a better anchoring of the idea of 'Doing less more efficiently' in the reform project of the European Union can be maintained after the departure of Jean-Claude Juncker from the helm of the European Commission and the end of the Austrian Presidency. The modest results of the Task Force on Subsidiarity, Proportionality and 'Doing less more efficiently' can only reinforce this pessimistic perspective on subsidiarity, unless its supporters provide sound and rational arguments in order to uproot its shortcomings and offer a reliable solution for how decisions are to be made with regard to the areas in which the Member States are to cooperate more efficiently and those in which EU action remains essential.

53. G. DE BÚRCA, *Reappraising Subsidiarity's Significance after Amsterdam*, in: *Harvard Law School – Jean Monnet Working Paper*, 7(1999), p.11.
54. L. HOOGHE, G. MARKS, *A postfunctionalist theory of European integration: From permissive consensus to constraining dissensus*, in: *British Journal of Political Science*, 39(2008), pp.1-23.

Reshaping the European Union



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This book proposes a profound reform of the EU and identifies its deficiencies. The book's proposals are based on the concepts of limited supranationality and a balanced view of the nation state. The EU is mainly needed to secure peace, promote prosperity, compensate for the relatively small size and limited power of its member states, and ensure their compliance with the essential principles of Western civilization. The balanced view of the nation state implies avoiding nationalism and war and safeguarding the advantages which a well-designed nation state has in comparison to the EU. The book presents a variety of proposals, such as redesigning EU law-making and EU treaty-making, subordinating the role of the European Commission, a Court of Appeal, and a new composition of the European Central Bank. It also discusses possible ways to ensure the survival of the Eurozone. If the book's proposals are translated into practice, the EU could be in better shape in the future.