

ARTICLE

# Demobilising Opposition to European Integration: The Principle of Subsidiarity and the Creation of the European Union, 1988–1992

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By analysing new archival evidence, this article reveals how in the late 1980s, the legal principle of subsidiarity came to be seen as a tool for demobilising opposition to further European integration. At the same time, it also became a projection screen for competing visions for Europe's future: while the European Commission saw subsidiarity as an important foundation for a future European federation and the German government as an essential part of a 'Europe of the regions', the British government hoped to use it to achieve a renationalisation of the European Community. The French government was much more sceptical towards subsidiarity, pointing to the paradox that subsidiarity actually required a strong central authority to achieve its decentralising ends. The article concludes by arguing that the debate on subsidiarity reveals how ambitious and yet contested European integration had become by the early 1990s.

## Introduction

In the second half of the 1980s, the process of European integration gathered considerable momentum as the European Community (EC) moved rapidly towards the twin goals of monetary and political union. By the beginning of the new decade, it was clear that the EC was on the verge of major reform. At the same time, the East-West conflict was drawing to an unexpectedly abrupt end, contributing to a widespread sense that history was accelerating. Such profound changes almost inevitably provoke resistance. It is not surprising, therefore, that critical voices quickly emerged in opposition to the scope and pace of the European reform process. While the British government under the leadership of Margaret Thatcher set the tone in important respects,<sup>1</sup> opponents of further integration, or Eurosceptics as they soon came to be known, existed in many other countries too, as the arduous and fractious ratification process of the Maastricht Treaty in 1992 proved. The treaty was controversial – most spectacularly in France and Denmark, which both held polarising referendums – not only because it made significant substantive changes to European law, but also because it infringed on a number of qualities usually associated with statehood.<sup>2</sup> Most importantly, the treaty formally proclaimed a single European currency as the ultimate goal of monetary union and introduced a novel form of supranational citizenship. The whole project now had a new name, too: the European Union (EU), which for some seemed but one step short of a European federal state.<sup>3</sup>

<sup>1</sup> See Cary Fontana and Craig Parsons, "One Woman's Prejudice": Did Margaret Thatcher Cause Britain's Anti-Europeanism?, *Journal of Common Market Studies* 53, no. 1 (2015): 89–105.

<sup>2</sup> On the Maastricht referendums see Laurent Warlouzet, "The French Referenda of 1992 and 2005: Towards Mainstream Euroscepticism?", *Journal of European Integration History* 28, no. 1 (2022): 57–78; Thorsten Borring Olesen, 'Danes Say No – and Yes: The Maastricht Referendum and its Legacy', *Journal of European Integration History* 28, no. 1 (2022): 101–22.

<sup>3</sup> See Mark Gilbert, *European Integration: A Concise History* (Lanham: Rowman & Littlefield, 2012), 143–71.

As a counterweight to these supranational, state-like elements, a principle known as ‘subsidiarity’ was enshrined in the treaty.<sup>4</sup> The principle originated in Catholic social teaching in the first half of the twentieth century and later became an important element in the constitutional discourse of post-war West Germany. The original idea behind it was simple: nothing should be done at a higher level of government that could be done just as well (or better) at a lower political level. In the European context, most definitions, of which there were many, focused on the relationship between the supranational and national levels. In essence, the idea was that the European institutions should only act when their intervention clearly added greater value than member states acting alone.<sup>5</sup>

If somewhat alien to most non-German ears, the term ‘subsidiarity’ nonetheless became a buzzword in the EC vernacular of the late 1980s. Indeed, by the early 1990s, it had become something of a Community obsession. As one German newspaper put it in 1992, subsidiarity had become the ‘magic word for the Europe-weary’ because it addressed the two principal issues which lay at the root of increasingly vocal opposition to European integration:<sup>6</sup> the much-deplored ‘democratic deficit’ of a Community far removed from its citizens, as well as the erosion of national sovereignty, which was allegedly caused by an excessive regulatory frenzy on the part of supranational institutions in Brussels and Strasbourg. In positive terms, the principle of subsidiarity promised to facilitate a decentralised union of states that would preserve national and regional identities while also enabling shared sovereignty to be exercised in those areas where challenges were transnational in nature and therefore required concerted European action.

Thus far, subsidiarity has rarely made it into the purview of historians of European integration.<sup>7</sup> Indeed, to this day, the vast majority of the existing literature on the topic emanates from legal scholarship and political science.<sup>8</sup> In these fields, most contributions focus on the applicability of the subsidiarity principle, the effectiveness of its control mechanisms, and the legal changes made since 1992.<sup>9</sup> In any case, a historical account of the subsidiarity debate based on archival sources remains a desideratum. Such an analysis reveals that subsidiarity was as much a matter for diplomats and politicians as it was for judges, lawyers and legal scholars.<sup>10</sup> Drawing on newly released government files from the German, British and French national archives, as well as documents from the European Commission, I argue that subsidiarity served a dual purpose. On the one hand, the principle was used to demobilise opposition against further European integration. On the other, it became a more general vehicle for communicating and enforcing competing political visions for the future of the EC.

The analysis will show that the Commission used the principle of subsidiarity to argue that European institutions would only deal with transnational issues and would not unnecessarily interfere

<sup>4</sup> See the full text of the Treaty on European Union (TEU), available at <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:11992M/TXT&qid=1663659820654&from=EN> (last visited Oct. 2023).

<sup>5</sup> See Paul S. Green, ‘Reading Subsidiarity: A Critical Analysis of Interpretations of Subsidiarity in the Discourse on European Union’ (PhD Thesis, Loughborough University, 1998), 87–92.

<sup>6</sup> Klaus-Peter Schmid, ‘Das Zauberwort für Europa-Müde’, *Die Zeit*, 23 Oct. 1992.

<sup>7</sup> A notable exception is the rather short contribution by Piers Ludlow, ‘Subsidiarity: The Emergence of a New Community Term’, in *The European Commission, 1986–2000: History and Memories of an Institution*, eds. Vincent Dujardin et al. (Luxembourg: Publications Office of the European Union, 2019), 158–9.

<sup>8</sup> See e.g. Frank Schorkopf, *Die unentschiedene Macht. Verfassungsgeschichte der Europäischen Union, 1948–2007* (Göttingen: Vandenhoeck & Ruprecht, 2023), 244–51; Michelle Evans and Augusto Zimmermann, eds., *Global Perspectives on Subsidiarity* (Dordrecht: Springer, 2014); Julien Barroche, *État, libéralisme et christianisme. Critique de la subsidiarité européenne* (Paris: Dalloz, 2012); Alessandro Colombo, *Subsidiarity Governance: Theoretical and Empirical Models* (London: Palgrave Macmillan, 2012); Antonio Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford: Oxford University Press, 2002); Christian Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union. Vorgaben für die Anwendung von Art. 3b EGV am Beispiel der gemeinschaftlichen Wettbewerbs- und Umweltpolitik* (Baden-Baden: Nomos, 1996). Other disciplines are involved too. From a philosophical perspective, see for instance Chantal Delsol, *L’État subsidiaire* (Paris: Editions du Cerf, 2016).

<sup>9</sup> For an overview of the vast number of articles published in scholarly journals in the 1990s see the literature quoted in Federico Fabbrini, ‘The Principle of Subsidiarity’, in *The Oxford Principles of European Union Law, Vol. I*, eds. Robert Schütze and Takis Tridimas (Oxford: Oxford University Press, 2018), 221.

<sup>10</sup> The latter are the focus of Julien Barroche’s detailed and insightful analysis. See Barroche, *État*.

with national sovereignty, thus attempting to defuse member state opposition to European integration. It is clear from the sources, however, that the Commission concurrently saw subsidiarity as the legal basis for a future federal system of government at the European level. The West German government also championed the principle as part of a larger vision for a federal Europe in which supranational institutions, nation states and regions coexisted and cooperated in greater harmony. Behind this flowery rhetoric, its commitment to subsidiarity was also aimed at dispersing more tangible domestic conflicts with the regional states (*Länder*), which felt increasingly disempowered by ‘Brussels’. In the British case, critics of European integration occupied a number of seats around the cabinet table. They saw the principle as a potential means of renationalising and thereby democratising the EC, i.e. of transferring competences from Brussels back to the national parliaments, or, in another reading of the term, as a vehicle for economic deregulation. Important voices within the French administration, especially in the foreign office, meanwhile, were highly sceptical of subsidiarity because it threatened to undermine their vision of an EU that derived its legitimacy from decisive collective action by national leaders rather than from a rules-based legal process. However, this did not prevent more pragmatic French politicians, including President François Mitterrand, from invoking subsidiarity to defend the Maastricht Treaty during the referendum debates in 1992.

This article provides the first archive-based analysis of the European debate around subsidiarity with a focus on the four years preceding the Maastricht Treaty. For reasons of space, the highly complex and often legalistic negotiations at the intergovernmental conferences themselves, which would deserve a separate investigation, are omitted. The first section analyses why the European Commission adopted subsidiarity in the late 1980s and pushed it to become a major issue on the European political agenda. The following three sections then examine how German, British and French interpretations of the concept clashed in the run-up to the Maastricht Treaty in the early 1990s. A final section looks at the protracted debates on how to implement subsidiarity in the immediate post-Maastricht period. The article concludes with a discussion on why the principle played an important role in the founding of the EU in the early 1990s, despite ultimately failing to fulfil the high hopes originally placed on it.

### The Introduction of the Subsidiarity Principle by the European Commission

The origins of the subsidiarity principle lay in the Catholic social teachings of the early twentieth century, which were part of the Vatican’s response to the challenges posed by socialism, nationalism, and capitalism. Elucidated most famously in the 1931 papal encyclical *Quadragesimo Anno*, subsidiarity was formulated as a guiding principle for providing individuals, families and local communities as much freedom as possible, while limiting state intervention to those areas where it was essential, such as social welfare.<sup>11</sup> After the Second World War, the principle was revived in the West German constitutional discourse where competences were carefully divided between the federal, *Länder* and local governments in a lesson learnt from Germany’s authoritarian past: Never again should such a strong centralisation of power be possible as in the Nazi state.<sup>12</sup>

Starting in the early 1960s, the concept slowly made its way into the discourse on European unification.<sup>13</sup> One of subsidiarity’s earliest proponents was Alexandre Marc. Drawing on the philosophical and theological heritage of personalism, the French writer and political activist developed a vision for a European federalism that would eschew authoritarian ideologies and in which subsidiarity featured as an important intellectual pillar, as formulated most clearly in his 1965 work *L’Europe dans le monde*.<sup>14</sup>

<sup>11</sup> See in more detail Barroche, *État*, 67–285.

<sup>12</sup> See Josef Isensee, *Subsidiaritätsprinzip und Verfassungsrecht. Eine Studie über das Regulativ des Verhältnisses von Staat und Gesellschaft* (Berlin: Duncker Humblot, 1968), 108–48.

<sup>13</sup> See Barroche, *État*, 410–12.

<sup>14</sup> See Jean-Pierre Gouzy, ‘Le fédéralisme d’Alexandre Marc et le combat pour l’Europe’, *L’Europe en formation* 355 (2010): 28. On the legacy of personalism for European integration see Benedetto Zaccaria, ‘Personalism and European Integration: Jacques Delors and the Legacy of the 1930s’, *Contemporary European History* (first view, 2 Mar. 2023), 1–20.

Marc, in turn, was a strong influence over other pro-European activists such as the Belgian Raymond Rifflet, who later had a successful career in the European Commission, including as an advisor to Jacques Delors in the 1980s.<sup>15</sup> Ralf Dahrendorf, the British-German sociologist, was another early supporter of the principle in the European arena. Shortly after he had joined the European Commission in 1970, he called for 'a shift from the dogma of harmonisation to the principle of subsidiarity'.<sup>16</sup> The concept then made its first fleeting appearance in the Commission's 1975 'Report on European Union'.<sup>17</sup> Roughly a decade later, it resurfaced in the European Parliament's 'Draft Treaty on European Union', principally authored by the Italian federalist Altiero Spinelli, another past collaborator of Alexandre Marc.<sup>18</sup>

It was only in the second half of the 1980s, however, that the debate on subsidiarity really took off. The concept's growing popularity was a response to the shifting political sands. Throughout the history of European integration, questions of national versus supranational competence had always been contested. One only has to recall the 'empty chair crisis' of the mid-1960s, when French President Charles de Gaulle boycotted the Council of Ministers because he feared that the Community was about to overstep its mandate by introducing majority voting.<sup>19</sup> By the 1980s, however, with the concerted push for deeper European integration, fears of a centralised European superstate became more salient than ever. The ambitious plan to create a barrier-free 'single market' by 1992 necessitated far-reaching reforms that would penetrate deep into the realm of national sovereignty.<sup>20</sup> The move towards monetary and political union in the second half of the decade accelerated this process, exacerbating already existing concerns about the speed and direction of the EC's advance. Margaret Thatcher's infamous Bruges speech of 1988, in which she warned of a 'European super-state exercising a new dominance from Brussels', was a clear signal that the question of national sovereignty was back with a vengeance. While the main purpose of the speech was to impress her own party and voters at home, it was also clearly directed at the European Commission.<sup>21</sup> In this context, the principle of subsidiarity promised relief. The hope shared by many, as we shall see, was that subsidiarity, if applied rigorously, could resolve the contentious demarcation between areas where common European action was necessary and those where competencies were better left in the hands of national, regional, or local bodies.

Jacques Delors was quick to recognise the potential of subsidiarity in this new context of accelerated European integration and the growing opposition it provoked. He had briefly referenced the term in his inaugural address as president of the Commission in January 1985,<sup>22</sup> but it was only after a trip to West Germany three years later, where he met representatives of the *Länder* who strongly emphasised the importance of the principle for European integration,<sup>23</sup> that subsidiarity became a central theme of his political thinking.<sup>24</sup> Delors was obliged to listen carefully. Not only because the *Länder* representatives were powerful players within the German context, but also because regional development policy

<sup>15</sup> Eva Schandevyl, 'Early Actors in the Making of Europe: The Input of a Small Group of Belgian Intellectuals', *European Journal for Cross-Cultural Competence and Management* 2 (2012): 174.

<sup>16</sup> See Ralf Dahrendorf under the alias Wieland Europa, 'Ein neues Ziel für Europa', *Die Zeit*, 16 July 1971, 3. See also Schorkopf, *Die unentschiedene Macht*, 244.

<sup>17</sup> European Commission, 'Report on European Union', COM(75)400, 25 June 1975.

<sup>18</sup> See European Parliament, 'Draft Treaty establishing the European Union', 14 Feb. 1984, *Bulletin of the European Communities* 2 (1984): 9. For a contextualisation see Calliess, *Subsidiaritäts- und Solidaritätsprinzip*, 31–59.

<sup>19</sup> See Philip Bajon, *Europapolitik 'am Abgrund.'* *Die Krise des leeren Stuhls 1965/6* (Stuttgart: Franz Steiner, 2012).

<sup>20</sup> Kiran Klaus Patel and Christian Röhl go as far as claiming that, by 1992, '[t]he member state, in substance, was not a state anymore'; Kiran Klaus Patel and Hans Christian Röhl, *Transformation durch Recht. Geschichte und Jurisprudenz Europäischer Integration 1985–1992* (Tübingen: Mohr Siebeck, 2020), 217.

<sup>21</sup> Andrew Roe-Crines and Tim Heppel, 'Legitimising Euroscepticism? The Construction, Delivery and Significance of the Bruges Speech', *Contemporary British History* 34, no. 2 (2020): 207.

<sup>22</sup> See Barroche, *État*, 394.

<sup>23</sup> See J. Ph. Chenuaux, 'La subsidiarité et ses avatars', *Études et Enquêtes* 16 (1993): 44; Kurt Schelter, 'La subsidiarité: principe directeur de la future Europe', *Revue du marché commun et de l'Union européenne* 344 (1991): 138.

<sup>24</sup> See Delors' speeches in front of the European Parliament on 17 Jan. 1989 and 21 Nov. 1990.

had emerged as an increasingly important field of EC activity in the early 1980s.<sup>25</sup> Nonetheless, the Commission still had to manoeuvre warily. Too great a focus on the regions risked offending those member states who were critical of regionalism, such as Britain and France, as we will see later on. Delors' address to the Collège d'Europe in Bruges on 17 October 1989, intended as a riposte to Thatcher's speech a year earlier, spoke of this new sensitivity towards the regions and placed great stress on subsidiarity. For Delors, the principle was a source of inspiration for reconciling supposedly irreconcilable objectives: 'the emergence of a united Europe and fidelity to our nation, to our homeland; the need for a European power . . . and the vital imperative of preserving our nations and regions'.<sup>26</sup>

Delors' openness to the principle of subsidiarity was rooted in his background. Although a member of the French Socialist Party, he did not subscribe to the Jacobin socialist ideal of a strong centralised state. Unlike many of his contemporaries in the French political establishment, he began his career in a Catholic trade union rather than one of the elite schools in Paris. In a sense, therefore, he embodied the Catholic social doctrine at the heart of subsidiarity.<sup>27</sup> But Delors was not the only advocate of subsidiarity within the European Commission. Jérôme Vignon, head of the Commission's planning staff (*cellule de prospective*), Pascal Lamy, Delors' head of cabinet, and Lamy's deputy François Lamoureux, the latter of whom a French newspaper dubbed 'Monsieur subsidiarité', all contributed to the discussion on subsidiarity.<sup>28</sup> Especially Lamoureux, who held a doctorate in law and was in close contact with the academic world, worked behind the scenes on long, sophisticated papers discussing potential applications of subsidiarity within the EC.<sup>29</sup>

The main motivation behind the commitment of the Commission's top officials to the principle of subsidiarity grew out of the necessity to secure the continued cooperation of the member states and their regions. To that end, their task was to reassure national and regional governments that they would not suffer an uncontrolled loss of sovereignty.<sup>30</sup> 'If we do not move towards this clarification', Lamy noted in 1990, 'legitimacy of European action will fade away.'<sup>31</sup> With corresponding urgency, Lamoureux drafted elaborate plans for determining, as transparently as possible, who would be responsible for what in the EU of the future. In a thought piece of December 1989 boldly entitled 'Outline of a new institutional structure', he developed three criteria on which the distribution of competencies should be based. First, the 'criterion of necessity' would decide where EU action was indispensable. This, Lamoureux hoped, would encourage the conclusion that foreign policy ought to be the EU's responsibility. At the same time, he envisaged returning other enterprises like agricultural policy – which had been 'perfected down to the length of carrots' – as well as Euratom and the Coal and Steel Community to the national level, because they were no longer indispensable areas for EU action. Secondly, Lamoureux argued, new European efforts should be assessed against the criterion of complementarity, i.e. whether they would be a useful addition to already existing activities. If, and only if, these two criteria were met, a third and final one would come into play: subsidiarity. This principle would determine which of the necessary actions not yet undertaken by member states could be carried out more effectively at the European level. Through this three-stage test of self-restraint, Lamoureux

<sup>25</sup> Marie Elena Cavallaro, 'Regional Policy: A New Source of Europeanisation', in *The European Commission 1986–2000*, eds. Dujardin et al., 421–40.

<sup>26</sup> Speech by Jacques Delors at the Collège d'Europe in Bruges, 17 Oct. 1989, Historical Archives of the European Union (HAEU), Fonds Jacques Delors (JD) 900.

<sup>27</sup> See Julien Barroche, 'La subsidiarité chez Jacques Delors. Du socialisme chrétien au fédéralisme européen', *Politique européenne* 23 (2007): 157–64.

<sup>28</sup> See Jérôme Vignon, 'Pour une démocratie de nations. L'Europe de Maastricht', *Etvdes* 376 (1992): 151–2; Pascal Lamy, 'Choses vues ... d'Europe', *Notes de la fondation saint-simon* 5 (1990): 23; [anonymous], 'Monsieur Subsidiarité. Un rencontre avec François Lamoureux', *Revue des Affaires européennes* 1 (1993): S46–7.

<sup>29</sup> In Apr. 1990, for example, he met with four law professors to discuss the principle of subsidiarity. See Lamoureux to Delors, 25 Apr. 1990, HAEU, Fonds François Lamoureux (FL) 210.

<sup>30</sup> See Ludlow, 'Subsidiarity', 158.

<sup>31</sup> Lamy, 'Choses vues', 23.

hoped that ‘the development of Community competencies would no longer be perceived as a deprivation, either by the member states or by the citizens’.<sup>32</sup>

At this point, it becomes clear that the discussion around subsidiarity had developed its very own dynamic within the Commission. Jérôme Vignon later stressed that originally ‘the question of subsidiarity had been an issue between the Commission and Germany’, the *Länder* having planted the seed during their 1988 meeting with Delors.<sup>33</sup> However, as the internal documentation analysed here proves, the Commission soon realised subsidiarity’s wider potential. In a report presented to the French section of the federalist ‘European Movement’, Lamoureux, with his characteristic linguistic sensitivity, also described subsidiarity as a medicine administered to a patient suffering from growing pains. Subsidiarity, he wrote, was a kind of sedative; it ensured that the young EU did not burn out too quickly and instead preserved its energy reserves for sustainable future growth.<sup>34</sup> This leads to the second motivation behind the Commission’s commitment to subsidiarity. Brussels saw the introduction of subsidiarity not only as a kind of tranquilliser for national opposition but, in the long run, also as a way to empower supranational institutions. Delors stressed this point in a speech to the European Parliament on 17 January 1990 in which he outlined his vision for the integration process. In a ‘future federation’, which he understood not as a centralised European state but as a ‘federation of the Twelve’, the Commission would become a European ‘executive’. In order to determine which competencies should rest with this federal executive, he acknowledged that ‘the concept of subsidiarity will have to be clarified’.<sup>35</sup> In another speech a year later, he made clear what this meant: subsidiarity was ‘not only a limit to the intervention of a higher authority . . . but also an obligation for that authority to act’.<sup>36</sup> Martin Bangemann, one of the Commission’s vice-presidents, went even further when he wrote that subsidiarity ultimately presupposed ‘a European federal state (*Bundesstaat*) if it is to mean more than the principle of common sense, which obliges everyone not to annoy others unnecessarily’.<sup>37</sup>

Comments such as these should be taken with a grain of salt; they formed part of a Brussels rhetoric that was aimed at certain pro-European audiences. In negotiations with the member states, in any case, the Commission was more modest and only sought to ensure that the subsidiarity principle would be enshrined in the treaties in a way that was conducive to the further development of the Community. It proposed that the European Court of Justice (ECJ) should act as the arbiter of subsidiarity and ultimately decide on whether or not a policy issue belonged at the supranational level.<sup>38</sup> The Commission was confident that the Community, and by extension itself, had more to gain than to lose in this scenario. It was convinced that many of the most pressing challenges facing Europe were transnational in nature and therefore required supranational action: environmental protection and the battle against climate change, for instance, or the need to establish a new international order after the end of the Cold War, to name just two.<sup>39</sup> The Commission had reason to believe that the ECJ would come to a similar conclusion. While no one could predict with certainty how the Court would rule in specific cases, it acted on behalf of the Community as a whole and had a compelling track record as a promoter of European unification. With a series of landmark rulings in the 1970s, the ECJ had established European law as a legal order superior to national law, and through decisions on, inter alia, the

<sup>32</sup> Memorandum titled ‘Outline of a new institutional framework’, 18 Dec. 1989, HAEU, FL 182.

<sup>33</sup> Oral history interview with Jérôme Vignon conducted by Éric Bussière on 15 Dec. 2016, available at [https://archives.eui.eu/en/oral\\_history/INT1158](https://archives.eui.eu/en/oral_history/INT1158) (last visited Dec. 2023).

<sup>34</sup> See report by Francois Lamoureux presented to the European Movement on 6 Feb. 1992, HAEU, FL 38, 1.

<sup>35</sup> See address by Jacques Delors to the European Parliament in Strasbourg, 17 Jan. 1990, *Bulletin of the European Communities Supplement* 1 (1990): 12–13.

<sup>36</sup> See speech by Jacques Delors at the Institut européen de l’administration public in Maastricht, 21 Mar. 1991, HAEU, JD 560.

<sup>37</sup> Martin Bangemann, ‘Es fehlt noch die politische Klammer’, *Wirtschaftsdienst* 73, no. 1 (1993): 7.

<sup>38</sup> See for instance speech by Jacques Delors at the Institut européen de l’administration politique in Maastricht, 21 Mar. 1991, HAEU, JD 560.

<sup>39</sup> See for instance Jacques Delors, ‘European Integration and Security’, *Survival* 33, no. 2 (1991): 100, 107.

mutual recognition of product standards it had advanced the integration of the internal market.<sup>40</sup> Ultimately, the hope in Brussels was that the ECJ would act as a corrective to the Council of Ministers – the institution representing national governments – which, from the Commission’s point of view, was overly preoccupied with the interests of individual member states, no matter how trivial or particular.<sup>41</sup> To the Commission’s chagrin, the ECJ soon signalled that it had strong reservations regarding subsidiarity – a position that changed little in later periods, as we will see. In January 1991, the Court informed the Commission that subsidiarity would not enhance legal certainty; indeed, as a vague philosophical principle that was hard to implement in legal practice, it would have the opposite effect.<sup>42</sup>

It should be noted, however, that the teleological interpretation of subsidiarity as the underlying principle of a future federation also had a self-critical flipside.<sup>43</sup> As Lamoureux noted, subsidiarity would help to ‘discipline’ the Commission.<sup>44</sup> Jacques Delors agreed that the Commission had to put its own house in order first; clumsy and overbearing interventions into the everyday lives of European citizens, as infamously exemplified by the 1976 ‘Lawnmower Regulation’, could no longer be justified, as Delors admitted in March 1991.<sup>45</sup> The regulation had exposed the Commission to ridicule and contempt because it banned the use of lawnmowers in the evening hours. Delors’ central message to the member states’ governments thus reflected a lesson learned: ‘the rule is national competence, the exception is Community competence’.<sup>46</sup> To lend credibility to this new attitude of restraint, the Commission compiled a list of directives which would no longer be adhered to under subsidiarity. For example, it indicated that neither the mandatory labelling of food with nutritional values nor the regulation of animal keeping in zoos would be further pursued. More ambitious initiatives, for example on the indirect taxation of securities, were also to be put on hold owing to their apparent incompatibility with the principle of subsidiarity.<sup>47</sup> This abstemious and self-conscious attitude only went so far, however; in 1993, the Commission published regulations on the minimum length of bananas, inciting further taunts and indignation.<sup>48</sup>

### Subsidiarity and Regionalism: The German Perspective

The Commission thus had good reason to champion subsidiarity; it promised to appease national governments who opposed further integration and, at the same time, pave the way towards a European federation. Yet, the discussion on subsidiarity quickly proved to be controversial.

The German government agreed with the Commission that subsidiarity was an important legal principle for a future European federation but put much more emphasis on decentralisation. In the West German understanding, subsidiarity was closely linked to the imaginary of a ‘Europe of the regions’. On 24 October 1991, in a meeting of his party’s executive committee, Helmut Kohl defended the European federal state as the desired *finalité* of the integration process and pleaded for commitment ‘to this vision. A united Europe on a federalist basis, with subsidiarity, with the principle of

<sup>40</sup> See Richard T. Griffiths, ‘Under the Shadow of Stagflation: European Integration in the 1970s’, in *Origins and Evolution of the European Union*, 2nd edn, ed. Desmond Dinan (Oxford: Oxford University Press, 2014), 184–6; Patel and Röhl, *Transformation*, 61–73.

<sup>41</sup> See speech by Jacques Delors at the Institut européen de l’administration public in Maastricht, 21 Mar. 1991, HAEU, JD 560.

<sup>42</sup> François Lamoureux to Jacques Delors, 29 Jan. 1991, HAEU, FL 556.

<sup>43</sup> On the Janus-faced character of subsidiarity more generally see Calliess, *Subsidiaritäts- und Solidaritätsprinzip*, 26.

<sup>44</sup> See François Lamoureux to Jacques Delors, 10 Jan. 1991, HAEU, FL 558.

<sup>45</sup> See speech by Jacques Delors at the Institut européen de l’administration politique in Maastricht, 21 Mar. 1991, HAEU, JD 560, 6.

<sup>46</sup> Draft speech for Jacques Delors, 9 Dec. 1992, HAEU, FL 38.

<sup>47</sup> Memorandum titled ‘Subsidiarity: Examples of re-examination of pending proposals and legislation in force’, without date, probably Dec. 1992, HAEU, FL 38.

<sup>48</sup> The Commission had good reason to do so: small bananas had an unfavourable flesh to skin ratio and were regulated for sustainability reasons, as they were mostly flown in from overseas. See Patel and Röhl, *Transformation*, 210–11.

regions . . . that seems good to me.<sup>49</sup> Around the same time, a growing number of German politicians and public intellectuals began to see the EC as a problem. The poet and writer Hans-Magnus Enzensberger, for instance, was one of the most prominent critics of the EC at the time. He attacked the ‘colossus that is Brussels’ for being aloof, omnipotent, overly bureaucratic and undemocratic.<sup>50</sup> This critique was echoed by the German *Länder* and their municipalities. In September 1992, for instance, the federation of the German cities and communes (*Städte- und Gemeindebund*) wrote to Chancellor Helmut Kohl, stressing that it

cannot be denied that the process of European integration has now also triggered fears among many citizens in the Federal Republic of Germany that an all-powerful European bureaucracy could impose centralist and bureaucratic regulations without regard for national identities and regional or local characteristics.<sup>51</sup>

As a consequence, the federation of the German cities and communes demanded a ‘concretisation of the European Union’s subsidiarity obligation’.<sup>52</sup>

To be sure, representatives of the regions, especially of the powerful *Länder*, also pursued their own political interests. They were increasingly concerned that European integration undermined their power base within West Germany’s political system. For this reason, the *Länder* had developed their own independent foreign policy over the course of the 1980s. Indeed, some even installed their own embassy-like representations in Brussels in order to challenge the federal government’s European policy on the ground.<sup>53</sup> While they had grudgingly swallowed the Single European Act of 1986, despite its manifold infringements on sensitive regional competencies, for instance in the area of cultural politics, the *Länder* applied the brakes with full force when it came to the Maastricht Treaty. Bavaria, the second largest (and arguably the proudest) among the German states, was particularly outspoken in this respect. The founding of the EU threatened to induce the ‘perfection of centralism’, so claimed Bavarian Minister President Max Streibl in a personal letter to Kohl in the run-up to Maastricht. Any ‘further erosion of Bavaria’s sovereignty’ would be ‘unacceptable’, he continued, in a barely veiled threat to vote against the Maastricht Treaty in the *Bundesrat*, the upper chamber of the German parliament.<sup>54</sup>

Bonn’s commitment to the principle of subsidiarity at the European level must be understood against this background. Anchoring subsidiarity in the treaty on European Union was simultaneously an attempt to demobilise opposition to further integration from within Germany. In a meeting of the CDU’s parliamentary group in June 1992, Helmut Kohl admitted that one of the biggest obstacles to European integration, not just in Germany but elsewhere, was ‘the fear of the Brussels juggernaut, of over-bureaucratisation, of over-centralisation with all that goes with it. . . . A large part of the regulatory nonsense, and it really is regulatory nonsense or regulatory madness in part, has contributed to this mood’. In the same breath, he presented the principle of subsidiarity as a potential remedy.<sup>55</sup> The ministry of the economy largely agreed with this assessment and noted in September 1992 that the government should place a strong emphasis on subsidiarity for it was ‘now necessary to address the

<sup>49</sup> CDU federal executive meeting on 24 Oct. 1991, in Helmut Kohl, *Berichte zur Lage 1989–1998. Der Kanzler und Parteivorsitzende der CDU Deutschland* (Düsseldorf: Droste, 2012), 337.

<sup>50</sup> Hans-Magnus Enzensberger, *Der Fliegende Robert. Gedichte, Szenen, Essays* (Frankfurt a.M.: Suhrkamp, 1992), 117.

<sup>51</sup> Federation of the German cities and communes (*Städte- und Gemeindebund*) to Kohl, 29 Sept. 1992, Politisches Archiv des Auswärtigen Amtes Berlin (PA AA), B 213/156657.

<sup>52</sup> *Ibid.*

<sup>53</sup> See Kiran Klaus Patel, ‘The Transformative Impact of European Integration on Member States: The German *Länder* in Search of a New Role during the Second Half of the 1980’, in *Reshaping Europe: Towards a Political, Economic and Monetary Union, 1984–1989*, eds. Michael Gehler and Wilfried Loth (Baden-Baden: Nomos), 189–208.

<sup>54</sup> Max Streibl to Helmut Kohl, 14 Nov. 1991, Bundesarchiv Koblenz (BA), B 136/34401.

<sup>55</sup> Helmut Kohl during a meeting of the CDU/CSU’s parliamentary group, 30 June 1992, Archi der christlich-demokratischen Politik Sankt Aug., Protokolle 1992, Nr. 123.

concerns in parts of the public and in the *Länder* about future centralist tendencies of the Community. The image of the EC must be freed from the widespread impression of a centralist super-bureaucracy.<sup>56</sup>

These complaints were variations on more general accusations levelled against the EC in the context of the overarching debate on the Community's 'democratic deficit'. While this debate, which intensified from the mid-1980s in correlation with the EC's increase in power, mostly concerned the rights of the European Parliament (or the lack thereof), it shared with the debate on subsidiarity the argument that the EC was too far removed from its citizens.<sup>57</sup> From the German perspective, the introduction of subsidiarity was ultimately also a remedy for making the EC more democratic and transparent. If decision makers could be held directly accountable for their actions, it was argued, the integration project would gain greater acceptance among the population. Conversely, if citizens felt that they were being patronised by unaccountable powers in distant Brussels, they would never develop a positive relationship with the EC. This was at least the view of Marieluise Beck-Oberdorf from the West German opposition party The Greens. In a speech to the *Bundestag* in June 1989, she accused the EC of being 'a power cartel . . . far removed from democracy'. Decentralised, 'subsidiary principles of decision-making', on the other hand, provided the right path to a democratic Europe, she argued.<sup>58</sup>

On the part of the federal government in Bonn there were also other, less noble motives behind its insistence on subsidiarity. Occasionally, it relied on tactical appeals to subsidiarity to avert unwelcome initiatives at the European level – at least that was the accusation made by other member states. The French foreign ministry suspected the German government of using subsidiarity as a fig leaf to conceal its own conflicts of interest. In energy or social policy, the French observed, the Germans liked to invoke the principle to declare that decisions at the European level were unnecessary. In reality, however, the German government was simply unwilling to make concessions that would put it under political pressure at home. At the same time, the accusation continued, rallying to the standard of subsidiarity facilitated a German fantasy of being at the avantgarde of European unification, even though they were actually putting on the brakes – after all, the magic word 'subsidiarity' always included the promise of a European federation.<sup>59</sup>

Bonn's position on European social policy is indeed a fruitful test for verifying this accusation. The German government officially supported the idea of a 'social Europe' as a counterweight to the 'market Europe' it was pushing forward with great determination in the framework of economic and monetary union. Both governing parties, the conservative Christian Democratic Union (*Christlich Demokratische Union*; CDU) and the liberal Free Democratic Party (*Freie Demokratische Partei*; FDP), campaigned for this complementary social reform in the 1989 European elections.<sup>60</sup> One reason for the two parties' rhetorical support for a European social policy was the great popularity of such measures among the population. Surveys at the time suggested that 77 per cent of West Germans supported the idea.<sup>61</sup> However, behind closed doors, powerful voices within the government argued for restraint. Earlier, in November 1988, the Ministry of the Economy and the Ministry of Labour had jointly presented an internal memorandum in which they stressed that it was 'important to ensure that traditional structures are not destroyed lightly. In Europe, social systems have evolved over decades, even centuries. The different structures shape the identity of the citizens in the EC member states.' The memorandum also made no secret of the fact that there was a financial dimension to be considered: 'the Federal Republic of Germany would be burdened with considerable additional financial resources which

<sup>56</sup> Memorandum titled 'Application of the subsidiarity principle in the EC', 2 Sep. 1992, BA, B 102/446928.

<sup>57</sup> On the debate on the 'democratic deficit' see Schorkopf, *Die unentschiedene Macht*, 153–73.

<sup>58</sup> Speech by Marieluise Beck-Oberdorf, 11th German Bundestag, Stenographic report, 149th session, 15 June 1989, 11027.

<sup>59</sup> See note by Pierre de Boissieu, 24 May 1991, Archives diplomatiques La Courneuve (AD), DAEF 3436.

<sup>60</sup> Election campaign brochure by the FDP titled 'Guidelines for the 1989 European Election', BA, ZSG 147 229; Election campaign brochure by the Christian Democratic Union (CDU), titled 'Social progress in Europe!', BA, ZSG 157 209.

<sup>61</sup> See report by Christian von Kudlich titled 'Reputation of the EC in the Federal Republic of Germany in the run-up to the 1989 European elections', 5 June 1989, PA AA, B 200/136044.

would then not be available for other important tasks'. Therefore, the two ministries concluded that social harmonisation at the European level should be 'oriented towards the principle of subsidiarity'.<sup>62</sup> When representatives of the German government thus spoke of subsidiarity, at least in the context of European social policy, they most likely used the term as a placeholder for reduced European involvement.

### Subsidiarity and Thatcherism: The British Perspective

The British government subscribed to the principle of subsidiarity, partly for similar reasons and partly because of its unique agenda and domestic context. It shared with the German *Länder* a profound distaste for any move towards greater centralisation of power in Brussels. Prime Minister Margaret Thatcher especially mistrusted the European Commission under Delors' leadership, whom she believed was covertly engaged in transferring ever more powers to the European level, away from the reach of democratic institutions, namely Westminster.<sup>63</sup> With this knowledge, the foreign office's policy planning staff developed a specifically Thatcherite reading of subsidiarity. Reflecting on the 'democratic deficit' debate, it proposed that 'subsidiarity embodies the democratic political principle that power rests with the people and that the democratic structure of Western European countries vests legitimacy and accountability in national parliaments'. Subsidiarity, the policy planning staff hoped, would then become 'a useful defence for national sovereignty rather than a weapon of Delors' centrifugal federalism'.<sup>64</sup> This ran in parallel with Margaret Thatcher's thinking. She too pitted subsidiarity against the ambitions of the Commission. At a press conference after the European Council meeting of 27 June 1989, the prime minister made clear that subsidiarity meant 'of course, that many things are not suitable at all for the Commission and should be left to the national countries'.<sup>65</sup> By the time the treaty negotiations in Maastricht began, this defensive line was firmly entrenched. In September 1990, an internal report, prepared by the cabinet office together with the foreign office and circulated among cabinet members, stated: 'The principle of subsidiarity should act as a check on unnecessary EC action within Community competence and on the "creeping" extension of that competence'.<sup>66</sup>

That the British government viewed the principle of subsidiarity primarily as an insurance policy against the integrationist aspirations of supranational institutions was also reflected in its insistence on introducing a mechanism that would allow Commission initiatives to be screened for potential subsidiarity breaches even before they entered the legislative process. The foreign office suggested that a 'Constitutional Council' be set up for this purpose, possibly consisting of national parliamentarians. This would have had the advantage of bypassing the ECJ, the foreign office argued, forecasting accurately that the Court would always tend 'either to say it could not judge the matter, or give the benefit of the doubt to the need for Community legislation'.<sup>67</sup> Thatcher, however, was alarmed: 'The whole

<sup>62</sup> Ministry of the Economy and Ministry of Labour, Note titled 'Social dimension of the European Community', presented at the session of the state secretaries for European politics on 11 Nov. 1988, PA AA, B 210/160921.

<sup>63</sup> See Oliver Daddow, Christopher Gifford and Ben Wellings, 'The Battle of Bruges: Margaret Thatcher, the Foreign Office and the Unravelling of British European Policy', *Political Research Exchange* 1, no. 1 (2019): 1–24.

<sup>64</sup> Nicholas Westcott to Michael Arthur, 14 Mar. 1990, The National Archives London (TNA), FCO 30/8579.

<sup>65</sup> See Margaret Thatcher's press conference at the European Council meeting of 27 June 1989, available at [www.margaretthatcher.org/document/107711](http://www.margaretthatcher.org/document/107711) (last visited Oct. 2023). During questions in the House of Commons two days later, she spoke of a 'central commission' that was unjustifiably taking more and more powers for itself. See the debate in the House of Commons on 29 June 1989, Hansard, Vol. 155, Column 1112.

<sup>66</sup> See Richard Gozney to Jonathan Powell, 15 Oct. 1990, TNA, FCO 30/8581.

<sup>67</sup> See note by the steering committee on European questions titled 'EC Institutional Reform: Subsidiarity', Sept. 1990, TNA, FCO 30/8579. This view was based on an assessment by the Royal Court of Justice in May of the same year, where it said: 'Despite its reputation in some quarters, the European Court has in the past been reluctant to intervene in any question which it regards as essentially a matter of political judgment. . . . The Law Officers think the chance that the European Court would be induced to override legislation, on the basis that Community legislation was unnecessary, is remote'. Royal Court of Justice to Hurd, 8 May 1990, *ibid.*

concept of a constitutional body adjudicating on what belongs to the centre and what does not is a central feature of federal systems of government'.<sup>68</sup>

The British departed even more significantly from the German understanding of subsidiarity when it came to regionalism. Like their counterparts in Germany, MPs from Scotland and Wales took the subsidiarity debate as an opportunity to challenge the central government in London. They argued that there were plenty of domestic policy areas that could be better regulated in the individual parts of the United Kingdom than in the capital. The government in London, however, had no interest whatsoever in the promotion of regional autonomy at home. Thatcher's successor John Major reacted by pointing out that subsidiarity only concerned the distribution of competences between the international and national levels and thus had nothing to do with devolution.<sup>69</sup> It is obvious how great the conceptual differences between the United Kingdom and West Germany were on this point.<sup>70</sup> This did not go unnoticed by the British side. In a telegram to the foreign office, the British embassy in Bonn warned: 'A potential problem with all this is that, while subsidiarity is seen by us as a means of retaining the authority of the nation state, the Germans . . . are likely to see it also, and probably more importantly, as maintaining the power of the regions'.<sup>71</sup>

In addition, a further current of thought existed that interpreted subsidiarity as a principle of economic liberalism. Such a reading of subsidiarity found widespread support within the ordoliberal factions of the German government.<sup>72</sup> The most ardent promoters of this kind of market-oriented understanding of subsidiarity, however, were situated in the United Kingdom's Department for Trade and Industry (DTI). They defended the position that, historically speaking, the age of political intervention in the economy had passed and posited that subsidiarity should serve to suffocate any new attempts at economic regulation from Brussels. In a letter to the cabinet office, which coordinated the different ministries' positions on subsidiarity, the DTI stated that 'we will not so much be looking to subsidiarity to prevent EC action altogether in particular DTI areas, as to limit the degree of regulation'.<sup>73</sup> From the DTI's perspective, the Commission could also be a useful agent of economic liberalism. The Department noted that the Commission's far-reaching competences in controlling state subsidies, for instance, were explicitly desired and in accordance with the principle of subsidiarity.<sup>74</sup> On this point, the DTI thus pursued opposing priorities to Thatcher, who rejected a strong role for the Commission altogether. This sort of thinking was not lost on Brussels. Subsidiarity may 'under no circumstances become a deterrent weapon in the hands of "laissez-faire" devotees', Jacques Delors underlined in a speech in March 1991.<sup>75</sup>

Historically, however, the market-oriented understanding of subsidiarity lay firmly within its semantic spectrum. The principle had always been directed against 'an excess of state intervention', as Oswald von Nell-Breuning emphasises, one of the authors of the papal encyclical *Quadragesimo Anno*. 'The collectivist current of our time and the megalomania symptomatic of it must indeed be countered again and again with this side of the principle of subsidiarity'.<sup>76</sup> In the context of neoliberalism's rise in the 1980s and 1990s, this facet of subsidiarity was a valuable selling point in conservative, economically liberal circles in the United Kingdom and elsewhere.

<sup>68</sup> Jonathan Powell to Richard Gozney, 19 Oct. 1990, TNA, FCO 30/8581.

<sup>69</sup> See address on the occasion of the Edinburgh European Council by John Major at the House of Commons on 14 Dec. 1992, Hansard, Vol. 216, 27.

<sup>70</sup> See on this debate Andrew Scott, John Peterson and David Millar, 'Subsidiarity: A "Europe of the Regions" v. the British Constitution?', *Journal of Common Market Studies* 32, no. 1 (1994): 58–65.

<sup>71</sup> See Pauline Neville-Jones to John Kerr, 27 Apr. 1990, TNA, FCO 30/8579.

<sup>72</sup> See for instance draft memorandum of the government of the Federal Republic of Germany on subsidiarity, 8 Sept. 1992, BA, B 102/446928.

<sup>73</sup> Bill Stow to Peter Parker, 18 June 1990, TNA, FCO 30/8580.

<sup>74</sup> *Ibid.*

<sup>75</sup> Speech by Jacques Delors at the Institut européen de l'administration politique in Maastricht, 21 Mar. 1991, HAEU, JD 560.

<sup>76</sup> See Oswald von Nell-Breuning, 'Subsidiaritätsprinzip', *Staatslexikon. Recht, Wirtschaft und Gesellschaft* 7 (1962): 827–8. On the anti-socialist dimension of the Catholic social teachings see Barroche, *État*, 136–44.

Altogether, therefore, there were at least four different interpretations of subsidiarity: as the organising principle of a future federation; as the guarantor of the autonomy of the regions; as a defence for national sovereignty; and as a vehicle for economic deregulation. To conclude this section, it is worth considering the French perspective as the government in Paris often perceived more clearly than most the contradictions involved in the application of subsidiarity at the European level.

### Between Scepticism and Pragmatism: The French Perspective

By comparison with its European neighbours, the French government was rather unenthusiastic when it came to subsidiarity. This may seem surprising, since many of the principle's most energetic individual advocates were French, including Alexandre Marc, François Lamoureux, Jacques Delors and even former French President Valéry Giscard d'Estaing, who became a vocal supporter of subsidiarity in the late 1980s and early 1990s whilst in opposition.<sup>77</sup> Political circumstances, however, prevented the incumbent French government from accepting certain readings of subsidiarity. Presiding over a highly centralised state, it was certainly not fond of regionalism and was therefore unsympathetic towards the German position. In addition, the French government was led at the time by the Socialist Party, which rejected the market-oriented understanding of subsidiarity for obvious reasons. At the same time, however, it did share concerns of a 'creeping' federalism and an overly powerful Commission. For French President François Mitterrand, it was always clear that power should ultimately rest with the heads of state and government and not with supranational institutions.<sup>78</sup> In this respect, it would have been easy to find common ground on subsidiarity, especially between Paris and London. However, if subsidiarity were to become a justiciable principle, then the ECJ would become too powerful, some in the French administration feared even more than the British. Pierre de Boissieu, director in the foreign ministry, grandson of Charles de Gaulle and a true *souverainiste* in the general's tradition, was especially vocal in this regard.<sup>79</sup> He warned of a slippery slope that could lead to a 'government of the judges': 'we reject a constitutional system in which it is up to the Court of Justice to determine what the Community can and cannot do, must and must not undertake'.<sup>80</sup> The French, by contrast, envisioned a Community in which national leaders enjoyed as much political leeway as possible, acting as a collective European 'chef d'État'.<sup>81</sup> From this perspective, a strictly codified principle of subsidiarity was an unwanted limit on the Community's capacity to act. The general secretariat of the interministerial committee (*Secrétariat général du Comité interministériel*), a clearing house for the different ministries' positions on European affairs attached to the prime minister's office, largely agreed. It found that the introduction of the subsidiarity principle would not solve anything but instead 'hinder a harmonious development of European integration'. As the EC was based on a complex system of power-sharing, it would be impossible for the ECJ to strictly separate which political level was responsible for what. 'The very idea of a sectoral delimitation of competences', the secretariat concluded, 'would be largely artificial'.<sup>82</sup>

This rather sceptical line of argument carried through to the negotiations over the Maastricht Treaty, during which the French delegation insisted at length on relegating subsidiarity to the preamble of the Union Treaty, whose provisions did not fall under the aegis of the ECJ.<sup>83</sup> But if the ECJ was not to decide whether specific issues called for central action, then who would? Pierre de Boissieu saw the greatest challenge in the paradox that a subsidiarity-based polity could not do without a strong European executive that took and enforced these kinds of decisions. He thus concluded: 'Subsidiarity is an ambiguous, confusing and dangerous concept'.<sup>84</sup>

<sup>77</sup> See Valéry Giscard d'Estaing, *Report of the Committee on Institutional Affairs on the principle of subsidiarity. Session Documents 1990, Document A3-0267/90*, 31 Oct. 1990, available at <http://aei.pitt.edu/48136/> (last visited Dec. 2023).

<sup>78</sup> See Hubert Védrine, *Les mondes de François Mitterrand. À l'Élysée, 1985–1995* (Paris: Éditions Fayard, 1996), 460.

<sup>79</sup> See Craig Parsons, *A Certain Idea of Europe* (Ithaca: Cornell University Press, 2003), 219.

<sup>80</sup> See note by Pierre de Boissieu, 25 Nov. 1991, AD, DAEF 3438.

<sup>81</sup> See Elisabeth Guigou to François Mitterrand, 20 Mar. 1990, AN, AG/5(4)/JLB 54.

<sup>82</sup> See note by the Secrétariat général du Comité interministériel, 13 July 1990, AN, 20040483/3.

<sup>83</sup> See note by Pierre de Boissieu, 10 Dec. 1990, AD, DAEF 3434.

<sup>84</sup> Note by Pierre de Boissieu, 27 July 1990, AD, DAEF 3433. See *ibid.* It should be noted that Eurosceptic critics of the Maastricht Treaty in Germany, who filed a constitutional complaint with the German Federal Constitutional Court in

Ultimately, however, not everyone in the French government shared such strong reservations. Élisabeth Guigou, for instance, who was Mitterrand's advisor for European politics in the Elysée before she became minister for European affairs, spoke much more favourably about subsidiarity than her colleagues in the foreign ministry.<sup>85</sup> The president himself proved to be rather pragmatic, too. During his referendum campaign in the summer and autumn of 1992, he used the principle proactively to defend the Maastricht Treaty. In a television debate with Philippe Séguin, the leader of the no-camp, Mitterrand argued that fears of an overly intrusive EU were unfounded because, according to the principle of subsidiarity,

the Community only takes care of things that the states do not want to take care of on their own, or cannot take care of on their own . . . this means that normally, it is the states that look after their own interests, but that for a certain number of issues that go beyond their decision-making capacities, they decide together.<sup>86</sup>

It is thus not without irony that subsidiarity contributed to the successful ratification of the Maastricht Treaty in France, despite the serious reservations about the principle in some quarters of the French administration.<sup>87</sup>

### Subsidiarity and the Maastricht Treaty

The compromise on subsidiarity found in the Maastricht Treaty reflected the ambivalence surrounding it.<sup>88</sup> In the preamble, the member states committed themselves to the creation of 'an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity'. In the main part of the treaty, article 3b then stated that in areas that did not fall within the EC's

exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.<sup>89</sup>

This formulation is strongly reminiscent of the Commission's abovementioned considerations. In both cases, the two criteria of necessity and effectiveness were central: the EU should only take action if the member states were overburdened and only if it could itself provide an added value. However, the treaty did not clarify whether subsidiarity was first and foremost a political-philosophical guideline, as formulated in the preamble, or primarily an enforceable right, as article 3b seemed to suggest. If the latter was the case, then the treaty was crucially lacking a list of enumerated competences that the ECJ could have referred to. Nowhere in the Union Treaty was it specified which policy areas

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1992, also recognised this inherent contradiction. They argued that subsidiarity was a 'principle of statehood' reserved for the member states. See Manfred Brunner, 'Das Subsidiaritätsprinzip als europäisches Prinzip', in *Die Subsidiarität Europas*, ed. Detlef Merten (Berlin: Duncker & Humboldt, 1993), 22.

<sup>85</sup> In 1990 she wrote to Mitterrand, without explicitly using the term subsidiarity, that it was high time 'to initiate a real reflection on what should remain at Community level and what should be left to the nation states'. AN, AG/5(4)/EG 270, Élisabeth Guigou to François Mitterrand, 6 Feb. 1990. Later she spoke out expressly in favour of subsidiarity. See for instance interview with Elisabeth Guigou, *Les Echos*, 9 Jan. 1992.

<sup>86</sup> Debate between François Mitterrand and Philippe Séguin on TF1, 3 Sept. 1992, available at [www.vie-publique.fr/discours/138357-declarations-de-m-francois-mitterrand-president-de-la-republique-tf](http://www.vie-publique.fr/discours/138357-declarations-de-m-francois-mitterrand-president-de-la-republique-tf) (last visited Oct. 2023).

<sup>87</sup> Julien Barroche, 'Discours et pratique de la subsidiarité européenne depuis le traité de Maastricht jusqu'à nos jours', *Droit et société* 80, no. 1 (2012): 24.

<sup>88</sup> For a comprehensive legal analysis of the Maastricht stipulations on subsidiarity see Calliess, *Subsidiaritäts- und Solidaritätsprinzip*, 61–166.

<sup>89</sup> TEU, Article 3b.

actually fell under the ‘exclusive competence’ of the Community and where it shared responsibilities with the member states. This weakened justiciability for it was questionable on what basis the Court should decide whether subsidiarity applied in specific cases.<sup>90</sup>

In many ways, the Treaty of Maastricht was only a single milestone, albeit an important one, in a much longer debate. The signing of the treaty was followed by tedious negotiations on the correct interpretation and application of the principle. Subsidiarity again came to the fore during the British Council presidency in the second half of 1992. There were two immediate reasons for this. One was that the British government under the new Prime Minister, John Major, continued to push for subsidiarity to appease the increasingly vocal opponents of the Maastricht Treaty at home.<sup>91</sup> Another reason was the Danish Maastricht referendum of June 1992, in which voters had rejected the treaty. In order to convince its electorate to vote Yes in a second referendum, the Danish government now sought assurances that the transfer of national sovereignty would not exceed certain limits.<sup>92</sup> In December 1992, the EC finally agreed on an interpretation of article 3b in a lengthy protocol. While it compensated for important differentiations missing from the original treaty text, it continued to reflect dissent. The British government provided a distinct accent. The protocol affirmed that subsidiarity contributed to the respect of national identities and protected the member states’ spheres of power. Simultaneously, however, the protocol stated that subsidiarity was a dynamic concept that ‘allows the Community to extend its action when circumstances so require’.<sup>93</sup>

These continued ambiguities contributed to the ECJ keeping an extremely low profile in the matter.<sup>94</sup> Usually, it accepted a well-sounding declaration by European institutions as to why an initiative was more effective at the EC level as proof that subsidiarity was respected, thus treating the principle ‘as an instrument of low intervention and minimum scrutiny’.<sup>95</sup> This was not because of the Court’s integrationist agenda, however – at least not exclusively, since there were actually very few legal challenges based on subsidiarity, on average only one case per year.<sup>96</sup> All in all, article 3b thus turned out to be a paper tiger. In response, the 2007 Treaty of Lisbon charged member states’ parliaments with the supervision of compliance with subsidiarity in the hope that they would revitalise the principle. The new procedure, through which national parliaments could show European institutions a ‘yellow’ or ‘orange card’ if they felt a proposed legislative act interfered unnecessarily with national or regional sovereignty, also possessed limited impact. Political bodies such as parliaments are not necessarily well equipped to function as instances of legal review. They speak the language of politics, which is not always suitable to stand up against well-versed Commission experts trained in European law.<sup>97</sup> Another hurdle is the high thresholds that must be met (one-third or one-quarter of the member states’ parliaments, depending on the policy area), and a lack of cooperation between national parliaments.<sup>98</sup> In 2021, for instance, national parliaments submitted 360 critical opinions to the European Commission which never reached the required threshold. As a result, not a single legislative act had to be withdrawn that year based on subsidiarity.<sup>99</sup>

<sup>90</sup> See Estella, *The EU Principle of Subsidiarity*, 90.

<sup>91</sup> See Annika Savill and Anthony Bevens, ‘Major Acclaims Subsidiarity: British EC Presidency Launched with Stress on Sovereignty – Labour Cools on Referendum’, *The Independent*, 1 July 1992, 1.

<sup>92</sup> See Olesen, ‘Danes’, 110–16.

<sup>93</sup> See conclusions of the European Council in Edinburgh, 11 and 12 Dec. 1992, available at [www.consilium.europa.eu/media/20492/1992\\_december\\_-\\_edinburgh\\_eng\\_.pdf](http://www.consilium.europa.eu/media/20492/1992_december_-_edinburgh_eng_.pdf) (last visited Oct. 2023).

<sup>94</sup> Fabbrini, ‘The Principle’, 232–3; Barroche, *État*, 469–70.

<sup>95</sup> Gráinne De Búrca, ‘The Principle of Subsidiarity and the Court of Justice as an Institutional Actor’, *Journal of Common Market Studies* 36, no. 2 (1998): 225.

<sup>96</sup> Fabbrini, ‘The Principle’, 234.

<sup>97</sup> See Gareth Davies, ‘The Post-Laeken Division of Competences’, *European Law Review* 28, no. 5 (2003): 695–96.

<sup>98</sup> See Barroche, *État*, 504–5.

<sup>99</sup> Annual report 2021 by the European Commission on the application of the principle of subsidiarity and proportionality and on relations with national parliaments, 1 Aug. 2022, COM(2022) 366 final, 1 and 7.

## Conclusion

Subsidiarity ultimately failed to be the magic formula it was expected to be in the late 1980s and early 1990s. As this article has shown, the principle was in fact a projection screen for different and frequently incompatible political visions of the future of European integration. Amongst other things, subsidiarity was expected to create the foundation for a future European federation, foster regionalism, preserve the nation-state, and promote economic liberalism.

To a certain extent, it was in the nature of the EC that terms and concepts would be interpreted differently against the background of opposing political interests or specific cultural and historical dispositions. What amplified this effect, however, was the EC's unprecedentedly rapid and fundamental change in the 1980s and 1990s. In this extraordinarily dynamic time, when the future seemed full of possibilities, competing visions emerged with particularly strong contours. Subsidiarity was not the only concept on which these competing visions crystallised. Nicolas Jabko, for example, has shown a similar phenomenon for the term 'single market' in the same period. Depending on political preferences, it could either refer to deregulation and the reduction of political intervention in the economy or to the strengthening of supranational institutions to create market control mechanisms at European level.<sup>100</sup>

Was the EU's obsession with subsidiarity therefore just another case of mutual misunderstanding, albeit a particularly unproductive one? To conclude, there are two aspects worth considering. First, it is important to stress again that subsidiarity had significant symbolic value. Arguably, the Treaty of Maastricht would not have survived the ratification process without it. This is especially true for Germany; the subsidiarity clause was a central demand of the *Länder*, without which they would not have approved the treaty in the upper chamber of parliament. In France and the United Kingdom, too, subsidiarity featured heavily as an argument for those defending the Treaty.<sup>101</sup> It is, of course, hard to isolate and measure the impact of the subsidiarity argument in these debates, but there is certainly some justification to the thesis that subsidiarity actually 'saved' Maastricht.<sup>102</sup>

The second point is analytically more valuable. If one widens the aperture, it becomes clear that the whole debate around subsidiarity was deeply revealing about the state of the integration project. On the one hand, it shows how far European integration had gone by the beginning of the 1990s that politicians felt the need to insert a safeguard against uncontrolled further integration into the founding treaty of the EU.<sup>103</sup> Comparable debates did not take place within NATO or the Council of Europe for the simple reason that nobody expected those organisations to develop the same supranational drive as the EU. In other words, the lengthy, sometimes tedious debates around subsidiarity were proof of a certain maturity. The EU of the early 1990s had developed extraordinarily high ambitions in a growing number of policy fields which clearly set it apart from other international organisations in Europe. On the other hand, the debate around subsidiarity showed that the teleological narrative of the EU irresistibly moving towards an 'ever closer union', as the famous line in the preamble of the Maastricht Treaty ran, provoked resistance, not only from the fringes but also from within the political establishment of the EU.

This conflict remained of fundamental importance in the following decades, even if, once enshrined in the Treaty, subsidiarity proved rather ineffective and quickly lost its saliency. The Brexit referendum, for instance, was narrowly won by the Leave camp partly because British

<sup>100</sup> See Nicolas Jabko, *Playing the Market: A Political Strategy for Uniting Europe, 1985–2005* (Ithaca: Cornell University Press, 2006).

<sup>101</sup> For the French case see above. For the British case see the debates in the House of Commons on the Maastricht bill on 8 and 11 Mar. 1993, in both of which the term was mentioned more than sixty times. Hansard, Vol. 220.

<sup>102</sup> See for instance Kees van Kerbergen and Bertjan Verbeek, 'The Politics of Subsidiarity in the European Union', *Journal of Common Market Studies* 32, no. 2 (1994): 219–21; Deborah Z. Cass, 'The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community', *Common Market Law Review* 29, no. 6 (1992): 1107–36.

<sup>103</sup> See Renaud Dehousse, 'Does Subsidiarity Really Matter?', *European University Institute Working Paper Law* 92, no. 32 (1992): 30.

Euroscptics were able to evoke credible fears that ‘Brussels’ was undermining the United Kingdom’s sovereignty.<sup>104</sup> The transfer of national sovereignty rights to the supranational level still remains a bone of contention also in the post-Brexit EU, even in areas such as foreign policy, where there had always been sound arguments based on subsidiarity for action at the European level.<sup>105</sup> The ‘democratic deficit’, which was another defining issue in the debate on subsidiarity in the 1980s and 1990s, also continues to occupy the EU. Indeed, the Union is faced today with the painful question of what part its own institutional design played in producing at least some of the frustrations that fuel the persistent opposition to European integration.<sup>106</sup> Thus, for all that has changed since the ratification of the Maastricht Treaty in 1992, the problems, arguments and questions around the subsidiarity debate of thirty years ago seem – for better or worse – to be as close and relevant as ever.

**Competing interests.** The author declares none.

<sup>104</sup> See most recently Andrew Glenncross, ‘A Revolutionary Moment Founded on Forgetting: How Narratives of the UK’s Place in Europe and the World Made Brexit Possible’, *Journal of European Integration History* 29, no. 1 (2023): 43–6.

<sup>105</sup> For the wider debate on sovereignty in the EU see Nathalie Brack et al., eds., ‘Understanding Conflict of Sovereignty in the EU’, *Journal of European Integration Special Issue* 41, no. 7 (2019), 817–953.

<sup>106</sup> See for instance Jan Zielonka, *Counter-Revolution: Liberal Europe in Retreat* (Oxford: Oxford University Press, 2018), 37–53; Luuk van Middelaar, *Alarums and Excursions: Improvising Politics on the European Stage* (Newcastle upon Tyne: Agenda Publishing, 2019), 217–63; Geert Mak, *The Dream of Europe: Travels in the Twenty-First Century* (London: Harvill Secker, 2021), 178–83.

**Cite this article:** Jaeschke V (2025). Demobilising Opposition to European Integration: The Principle of Subsidiarity and the Creation of the European Union, 1988–1992. *Contemporary European History* 34, 75–90. <https://doi.org/10.1017/S0960777324000109>