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DOI

[10.1111/eulj.12115](https://doi.org/10.1111/eulj.12115)

Publication date

2015

Document Version

Final published version

Published in

European Law Journal

[Link to publication](#)

Citation for published version (APA):

Bartl, M. (2015). The way we do Europe: subsidiarity and the *substantive* democratic deficit. *European Law Journal*, 21(1), 23-43. <https://doi.org/10.1111/eulj.12115>

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European Law Journal, Vol. 21, No. 1, January 2015, pp. 23–43.

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The Way We Do Europe: Subsidiarity and the *Substantive* Democratic Deficit

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Abstract: *The new institutional framework of subsidiarity is expected to lower the EU democratic deficit. In contrast to this optimistic scenario, I argue that the success of subsidiarity depends on its capacity to unravel the EU's 'substantive' democratic deficit. Linked to the Union's functionalist institutional design, this dimension of the democratic deficit has developed due to two limitations of EU-level politics. First, the EU functionalist design has narrowed the range of topics open to democratic debate (horizontal substantive democratic deficit). Second, the proportion of the debate which we could genuinely describe as being political is declining as a result of the de-politicisation of EU goals, underpinned by a massive accumulation of allegedly apolitical expert knowledge (vertical substantive democratic deficit). Against this background, I contend that by involving actors relatively alien to the EU functionalist thinking, subsidiarity could offer an opportune ground for the re-politicisation of democratic 'blind spots' in EU policy making.*

I Introduction

Since its introduction in the Treaty of Maastricht, the good ship of subsidiarity has been a vessel loaded with many hopes and dreams but, instead of delivering Europe to the Promised Land, it has steered us to only more disappointments. In a polity where central powers have grown considerably, subsidiarity has been tasked not only the role of acting as a demarcation principle but with remedying the EU democratic deficit. The inability of this principle to achieve either of these objectives, it is argued here, can be attributed to the misapprehension of the 'evil' it aims to address.

More particularly, I argue that the failure of subsidiarity should be attributed to a lack of attention to the EU's most prominent *sui generis* feature: its original functionalist institutional design.¹ I contend that the success of subsidiarity in living up to

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¹ According to international relations theory, 'functionalism' denotes an approach to international cooperation, one which seeks to overcome the world's division by means of cooperation in relation to practical goals and problems. In contrast to international power politics, this cooperation should take place within technocratic international institutions. The design of the European Economic Community was guided by some of these functionalist ideas. The 'function' of the Community was to build a common market within which the economic interdependence of the European states should serve peace on the continent. Even if the EU has gradually enlarged the scope of its purpose, it has not freed itself

its democratic promises depends on its capacity to counter what I will refer to as the *substantive democratic deficit*, that is, the democratically relevant consequences of the EU functionalist design.

The concept of *substantive democratic deficit* aims to capture a twofold constraint on 'the political' in the EU. A *horizontal* constraint results from the limited array of objectives, normative concerns and competences attributed to the EU. As recently argued by Gareth Davies, by limiting the pool of issues possibly open to democratic debate, the 'purposive' EU has often remained oblivious to outstanding normative concerns even though those same concerns are affected by its action.²

Additionally, a less recognised, yet equally important, aspect of the *substantive democratic deficit* is the *vertical* constraint on 'the political' in the EU. The political debate is growing gradually shallower due to the peculiar way in which functionalist entities frame their goals and produce knowledge in support of them. In particular, the insufficient politicisation of EU objectives has, *over time*, given rise to an increasing number of 'assumptions' in EU policy making, which replace the genuine political debate on various politically salient matters, thus undermining the democratic quality of the EU political processes.

Although the principle of subsidiarity was introduced in order to respond to the EU's democratic deficit, the institutionalisation of the principle has actually served to cement the EU's functionalist disposition. Built around the principle of comparative efficiency, EU subsidiarity serves to sanction the functionalist understanding of goals as uncontroversial. At the same time, it fails to create the necessary space for the re-politicisation of the horizontal and vertical dimensions of democracy in the EU. The recent involvement of national parliaments in the control of subsidiarity could, however, potentially bring a gust of fresh air. Even though the so-called 'early-warning' procedure is far from an optimal legal tool to remedying the *substantive democratic deficit*, national parliaments may use, and indeed already have started using the subsidiarity framework in a rather 'creative' manner.³

In what follows, I explore the relation between the EU functional legacy, the *substantive democratic deficit* and the subsidiarity principle. Drawing on a recent exchange between Paul Craig and Gareth Davies, in the second section of the paper I discuss why we must consider the political legitimacy of *goals* when interpreting the principle of subsidiarity. The third section of the paper reconstructs the political

entirely from this functionalist legacy, which remains imprinted in some of the original institutional choices. For instance, the institutional design of the EU 'government' (the European Commission) is premised on the possibility of uncontroversial common goals, insofar as these are established through expertise. A similar functionalist fallacy underlines the principle of subsidiarity discussed in this paper, or the institutionalisation of EU competences, as recently discussed by Gareth Davies. However, this is not to say that this functionalist conditioning determines EU action in any exhaustive way. Rather, we need to avoid the trap of essentialism when investigating whether and how this functionalist heritage may influence EU governance today.

² G. Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence,' *European Law Journal*, (forthcoming 2014). For instance, the regulation of the *internal market* can (in principle) be subject to the democratic political processes in the EU, while the social benefits to unemployed less so.

³ This has taken place, for instance, in the case of the first successful 'yellow card' (Monti II Regulation), where national parliaments 'sabotaged' the functionalist understanding of subsidiarity, problematising the *goals* that this proposal aimed to pursue. The reasoned opinions to the Common European Sales Law, arguably less political than the cross-border right to strike, show however more clearly the limits of the current legal-institutional framework of subsidiarity.

debate in European private law, investigating how medium range goals⁴ are set in the EU. After identifying the relevant features of the EU political processes, in the fourth section of the paper I elaborate on the theoretical framework of the substantive democratic deficit. Finally, I draw some lessons for the interpretation of subsidiarity principle.

As a substantive field of inquiry, this paper investigates the development of European private law. Since this area of law has undergone significant transformation in recent years, the political processes that surrounded this fundamental change will offer fruitful ground for examining the mechanisms of the substantive democratic deficit and the role of the principle of subsidiarity. Furthermore, the harmonisation of European private law reveals the permeability of the boundaries between the legal provisions on competence and those on subsidiarity. As some national parliaments have noted in their reasoned opinions regarding the Common European Sales Law, in practical terms it makes little sense to dissociate the question of subsidiarity from questions related to competence.⁵ Being in compliance with either hinges on how problems are constructed and how goals are articulated in the EU.⁶ The institutional framework of subsidiarity thus may be a part of the solution to the ‘problem’ of legal basis.

II Subsidiarity and the Politicisation of EU Goals: The Davies—Craig Exchange

Subsidiarity is said to encompass two types of concerns. On the one hand, it consists of an economic dimension (‘comparative efficiency’),⁷ which determines the choice of the most efficient level of government for accomplishing a particular task. On the other hand, subsidiarity also possesses a democratic dimension, which captures concerns related to the proximity of decision making and the right to self-government.⁸

These two sets of normative concerns have enjoyed unequal legal status. The economic dimension became hard law through the inclusion into (today’s) Article 5 TEU and Protocol 2 to the TFEU. In contrast, the democratic dimension was assigned a ‘softer’, aspirational, place among the recitals of the EU constitutional documents. This imbalance between the two sides of the principle reflects a deeper hermeneutic struggle over the normative underpinnings of European integration. Granting harder (legal) status to ‘comparative efficiency’ depends on a functional understanding of the EU. In a functional entity, goals and objectives are considered

⁴ The concept of medium range goals refers to those goals that may be perceived as *internal* to the main EU objectives (eg the internal market), yet they present their major interpretations. More generally, this paper departs from essentialising understanding of EU objectives. The ‘internal market’ on its own mandates little. What I aim to uncover however is whether and how the functionalist design of the EU influences the way in which those general goals, such as the internal market, are interpreted.

⁵ The German Parliament, in its reasoned opinion to the CESL, cites a host of German scholarship on the topic. See ‘Reasoned opinion by the Bundestag of the Federal Republic of Germany on the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law’ (COM(2011)0635—C7-0329/2011—2011/0284(COD)). See also G. De Búrca, ‘Re-Appraising Subsidiarity’s Significance after Amsterdam’, (1999).

⁶ See Craig and De Búrca, ‘EU Law’, 100.

⁷ A. Follesdal, ‘Survey Article: Subsidiarity’, (1998) 6 *Journal of Political Philosophy*; D. Chalmers, *European Union Law: Cases and Materials* (CUP, 2010); P.P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials* (OUP, USA, 2008).

⁸ *ibid.*

fixed, and the only possible realm of disagreement concerns the choice of the most efficient level for accomplishing predetermined tasks. In contrast, the democratic dimension of subsidiarity is concerned with the citizens' political self-determination. It calls for a *democratic* and *proximate* decision making,⁹ in which the members of a community *politically* shape goals and objectives, and thereby determine their collective destiny.

In a way, the institutional history of subsidiarity reproduces the EU's democratic conundrum. The initial institutional design of the European Communities separated the 'economic' and the 'democratic', which were perceived as ruling on different levels of governance and in different fields of public action. This division, however, proved porous: the functional delineation of EU competences cuts diagonally.¹⁰ It permits the expansive definition of the 'economic' (the internal market),¹¹ often accompanied by the marketisation of the fields of competence acquired by the EU. This extension of EU powers has called in turn into question the legitimacy of the initial separation.

The growing criticism of the emergent democratic deficit has been met by attempts to improve the democratic credentials of EU governance—for example, by strengthening the European Parliament or introducing mechanisms of participatory democracy.¹² One of the tools used to try to meet the democratic challenge has been the introduction of the principle of subsidiarity.¹³ Startlingly, however, the legal framework of subsidiarity—centred as it is on comparative efficiency—reproduces the functional understanding of the EU, the very effects of which it was designed to control.

The resulting impotence of subsidiarity saw the need for numerous Treaty revisions. These efforts have culminated in the Treaty of Lisbon, which turns national parliaments into the main guardians of the subsidiarity principle.¹⁴ The last revision has met with considerable enthusiasm: the academic commentary praises the Treaty for giving national parliaments an active role in EU policy-making processes, something which could serve to mitigate its democratic deficit.¹⁵ This democratic progress ought to take place even if the legal mechanisms of subsidiarity ('yellow' and 'orange' card) were

⁹ While subsidiarity establishes a 'rebuttable presumption' in favour of taking action at lower levels of governance (A. Follesdal, on file with the author), the democratic argument may also militate for moving the decision-making level upwards in order to counter 'democratic externalities' and honour the principle of inclusiveness/representativeness.

¹⁰ C. Joerges, 'Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline', (2004) 14 *Duke Journal of Comparative & International Law*.

¹¹ See also G. Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence', (2014) *European Law Journal*; A. Follesdal and S. Hix, 'Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', (2006) 44 *JCMS: Journal of Common Market Studies*, 533–562; S. Weatherill, 'Competence Creep and Competence Control,' *Yearbook of European Law* 23, 1 (1 Jan 2004).

¹² Chalmers, *European Union Law*, 125 ff.

¹³ *ibid.*

¹⁴ If national parliaments object to the proposal by more than one third ('yellow' card), or a majority ('orange' card) of the votes assigned to them, the proposal has to be reviewed by its author, and stricter conditions apply as to its justification. Treaty on the Functioning of the European Union, Protocol 2.

¹⁵ To name a few: C. Fasone, 'Competing Concepts of Subsidiarity in the Early Warning Mechanism' (SOG-WP4, 2013); P. Craig, 'Subsidiarity, a Political and Legal Analysis', SSRN Scholarly Paper (SSRN, March 26, 2012); Ph. Kiiiver, 'Treaty of Lisbon, The National Parliaments and the Principle of Subsidiarity', (2008) 15 *Maastricht Journal of European and Comparative Law*; B. Guastaferro, 'Reframing Subsidiarity Inquiry Form: From an "EU Value-Added" to an "EU Non Encroachment Test?": Some Insights from National Parliaments Reasoned Opinion' (LUISS Report/Paper, 2013).

not triggered, since they should result from an increased engagement between various levels of governance.¹⁶

This belief in the democratic relevance of ‘dialogue’ between the various levels of governance expounds, however, on a simplified understanding of the problem that subsidiarity should address. In particular, it underestimates the constraining effect of the EU functional design on democratic politics. The apprehension of this constraint should inform both the interpretation of subsidiarity that we need to seek and the kind of ‘dialogue’ we need to bolster in order to remove the EU democratic deficit.

To elucidate the controversy underlying the functionalist understanding of subsidiarity, let us look at a recent exchange between Professors Paul Craig and Gareth Davies, who disagreed on the proper role of subsidiarity and whether the EU’s goals should be subject to subsidiarity scrutiny. In a seminal article, ‘*Subsidiarity: The Wrong Idea, in the Wrong place, at the Wrong Time*’, Davies argues that the reason why the subsidiarity principle fails to curb the competence creep is that:

Subsidiarity misses the point. Its central flaw is that instead of providing a method to balance between Member State and Community interests, which is what is needed, it assumes the Community goals, privileges their achievement absolutely, and simply asks who should be the one to do the **implementing** work.¹⁷ [emphasis added]

The principle of subsidiarity, according to Davies, fails to create a framework for the scrutiny of *goals* behind a particular legislative intervention. If an issue is already configured as a European (usually ‘internal market’) problem, the analysis is automatically predisposed to designate the EU as the only appropriate level of governance.¹⁸ Moreover, such a construction of the problem sets the internal market ahead of other normative concerns in the field. Yet, these conclusions should be a result—rather than a starting point—of the subsidiarity analysis.

While acknowledging the strength of Davies’s argument, in a recent contribution Craig dismisses his critique. Craig considers Davies’s account to be unrealistic since it misunderstands the character of the political process in which the goals and objectives in the EU are set.

The EU ‘objective’ will be determined by the **interplay of political forces** that shape particular legislative initiatives in the light of the Treaty provisions. There will be discussion as to whether the EU should act and if so how it should do so. These discussions will involve issues concerning the form, content and nature of the proposed measure. Discourse on Commission proposals with the EP and the Council will therefore take cognizance of what the Member States are willing to accept in terms of impact on their national values and autonomy, and this will be embodied in the resulting EU ‘objective.’¹⁹ [emphasis added]

Craig suggests that goal setting in the EU enjoys considerable *political* legitimacy: EU actors (member states, the European parliament, the Council, the Commission etc.) negotiate these goals on the basis of their interests, values and concerns, and their agreements are then built into the objectives of the EU. The EU goals and objectives

¹⁶ Fasone, ‘Competing Concepts of Subsidiarity in the Early Warning Mechanism’; Guastafarro, ‘Reframing Subsidiarity Inquiry Form’.

¹⁷ G. Davies, ‘Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong time’, (2006) 43 *Common Market Law Review*, 67–68.

¹⁸ M. Goldoni, ‘The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation,’ (2014) *European Constitutional Law Review (EuConst)* 10.

¹⁹ Craig, ‘Subsidiarity, a Political and Legal Analysis’, 21.

are legitimised through the political process—and thus they need not be subject to subsidiarity analysis.

However, some of the examples that Craig mentions in his contribution fail to defy the Davies's critique conclusively. Thus for instance, the liberalisation of services of general economic interest demonstrates how the EU legal–institutional framework has increasingly constrained the political space left to both national governments and the EU institutions in order to shape 'what ought to be done' in the EU.

The liberalisation of public utilities was launched into the EU regulatory orbit by the Court of Justice's case-law in the early 1990s.²⁰ Relying on the competition provisions of the EU Treaties, the court interpreted the EU primary law in a manner that paved the way for the liberalisation of services of general economic interest.²¹ The Court's endeavours were seconded by the European Commission's relentless effort to produce knowledge exalting the benefits of liberalisation and affirming a need for action at EU level. This constellation left the Council, the European Parliament and the Member States with significantly less room to shape their preferences or politically negotiate the agenda.²² Ironically, the problems ensuing from legal diversity, which Craig ascribes to the enforcement of the subsidiarity principle,²³ would never have emerged had the EU not engaged in such market making in the first place.

The Craig–Davies exchange highlights two fundamental questions for the interpretation of the subsidiarity principle. First, how and by whom is the question of 'what we ought to do' set in the EU? How much political legitimacy does this process enjoy?²⁴ Second, does the EU political process lend enough political legitimacy to the EU medium range goals or should they be subject to scrutiny under the subsidiarity principle?

The response to these questions pivots on the level of politicisation of *goals* and *objectives* in the EU. The more political legitimacy can be drawn from the involvement of Member States' governments, European Parliament, the Council etc, the less need there is arguably for a rigorous subsidiarity analysis (including a smaller role for the national parliaments). If, however, the democratic politics does not lend sufficient political legitimacy to the process, the subsidiarity analysis becomes an urgent matter.

I will analyse the level of politicisation in the EU by examining how an important goal of European private law—the *online internal market*—has come into being. What has been the role of the EU 'political' institutions (consultations, the European Parliament and the Council) in the construction and problematisation of this goal? How 'mechanical' or 'political' is the goal setting in the EU?

²⁰ H.-W. Micklitz and J. Keßler, *Kundenschutz Auf Den Liberalisierten Märkten-Energie, Vergleich Der Konzepte, Maßnahmen Und Wirkungen in Europa* (Baden-Baden: Nomos, 2008).

²¹ *ibid.*

²² Aiming to expand to the provision of water in the EU. See European Commission's *Water Blueprint*, see <http://ec.europa.eu/environment/water/blueprint/>. The prevention of the further privatisation of water management has also been one of the first successful (in terms of signatures) European Citizens Initiatives. See B. Kohler Koch, *Colliding visions of representation and participation*, a paper presented at the Third ACELG Annual Conference in Amsterdam, 22 Nov 2013.

²³ Craig, "Subsidiarity, a Political and Legal Analysis," 7.

²⁴ Legitimacy here is understood to cover what we may call the procedural democratic deficit, concerned with the deficiencies of the EU democratic institutions, as well as the substantive democratic deficit, which brings into the picture the substantive limitation of the democratic debate in the EU. In other words, that which cannot become part of democratic political process also cannot draw legitimacy from the democratic political process.

III Reconstructing the Political Debate in European Private Law

In the aftermath of the Lisbon Strategy, a renewed enthusiasm for the ‘market’ and competitiveness brought a fresh impetus to bear on the harmonisation of national systems of private law. The European Commission began portraying the multitude of national private legal orders as ‘legal fragmentation’ that spawns the obstacles to the internal market. The fragmentation of private law creates transaction costs, legal uncertainty and contributes to the lack of consumer confidence in the internal market.²⁵ It also discourages market participants from cross-border trade and hinders economic growth.²⁶ According to the Commission, these problems are particularly tangible in online shopping. As the last Consumer Agenda states:

Consumer expenditure accounts for 56% of EU GDP and is essential to meeting the Europe 2020 objective of smart, inclusive and sustainable growth. Stimulating this demand can play a major role in bringing the EU out of the crisis. **To make this possible, the potential of the Single Market must be realised.** Data show that consumers shopping online across the EU have up to 16 times more products from which to choose, but 60% of consumers do not yet use this retail channel. As a result of this reluctance, they do not fully benefit from the variety of choice and price differences available in the Single Market. **Improving consumer confidence in cross-border shopping online by taking appropriate policy action could provide a major boost to economic growth in Europe.** Empowered and confident consumers can drive forward the European economy.²⁷

The rationale for the ‘online internal market’ is quite straightforward: the creation of economic growth needs the realisation of a ‘single’ market, which in turn depends on the realisation of the online internal market. The ‘online internal market’ has served to support calls for a ‘fully harmonising’ horizontal Consumer Rights Directive.²⁸ Today, the same goal justifies the Common European Sales Law.²⁹

Both initiatives are of constitutional significance for European private law, and the EU more generally. The concept of full harmonisation entails a deepening of the EU regulatory intervention and a shift from a genuinely shared competence to an exclusive European competence in a given field. This empowerment of the EU raises a number of concerns—most notably from a social justice perspective.³⁰ These changes become ever more critical in a world where impending privatisations and

²⁵ European Commission, *Green Paper from the Commission on Policy Options for Progress towards a European Contract Law for Consumers and Businesses*, COM/2010/0348 final, 2.

²⁶ *ibid.*

²⁷ European Commission, *A European Consumer Agenda—Boosting Confidence and Growth*, COM(2012) 225 final.

²⁸ ‘The discrepancy between the growth in domestic and cross-border sales is particularly significant for Internet sales for which the potential of further growth is high. This proposal could therefore be one of the main tangible results of the business-to-consumer internal market.’ European Commission, Proposal for a Directive on Consumer Rights, COM(2008) 614 final, p 8.

²⁹ The CESL is a general contract (sales) law instrument, which shall become an optional private legal order along national contract laws of the EU member states. Proposal for a Regulation on a Common European Sales Law, COM(2011) 635 final, 19. For the Commission’s informative promotion video see https://www.youtube.com/watch?v=_uTTE0rMU3c (accessed 1 December 2014).

³⁰ M.B.M. Loos, ‘Full Harmonisation as a Regulatory Concept and Its Consequences for the National Legal Orders. The Example of the Consumer Rights Directive’, *European Review of Private Law 1* (2010); H.W. Micklitz, ‘The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic’ (EUI Legal Working Paper Series 2012).

liberalisations entrust private law with a task of ensuring a socially acceptable manner of providing services which were previously public.³¹

Following Craig's argument, and given the economic, social and constitutional significance of the harmonisation efforts, one should expect that the goal driving the great transformation of European private law would be subject to a broader political debate. What are the implications of the online internal market? What is its impact on the environment, health or employment? Why shall we invest public support (and money) into this goal—rather than, for instance, promoting more environmentally sustainable local consumption? The extent to which similar questions have been debated and politicised in the EU institutions will be examined in the following sections.

A Consultations

Public consultations accompanied both of the major proposals in European private law (Consumer Rights Directive and Common European Sales Law). The Green Papers of 2007 and 2010 were complemented by separately organised workshops, conferences, meetings, etc. Many stakeholders, such as governments, consumers, academics, experts, members of industry took part in these consultations.³²

The question is, however, what role these consultations had in the politicisation of the goal of promoting the online internal market. In the consultation documents, the goal was not presented as an issue *for* debate, but rather as the starting point *of* the debate.³³ The Commission asked solely for input with regard to the successful implementation of the online internal market, such as how to balance the interests of businesses and consumers in proposed harmonisation measures, or how best to write certain rules.³⁴ The consultations were framed in a *narrow* way,³⁵ with regard both to the constituency they addressed (they were soliciting the input of direct interests, such as consumers and businesses) and to the breadth of the issues submitted for consultation (they were very field specific and technical).³⁶

To the contrary, the Commission did not inquire into the implications of an online internal market for other normative concerns (environment, social, employment, etc) or other possible interests involved (employees, public interest-minded citizens, etc). The consultations were thus not designed to stir a debate regarding goals or to listen to voices beyond the narrow constituency of direct interests. Instead, they served to

³¹ H. Collins, *The European Civil Code: The Way Forward* (Cambridge University Press, 2008); H. Collins, 'The European Economic Constitution and the Constitutional Dimension of Private Law', (2009) 5 *European Review of Contract Law*.

³² For an overview of consultations, see the proposals to each instrument, see n 27, 28 *supra*.

³³ European Commission, 'Green Paper on the Review of the Consumer Acquis', COM (2006) 744 Final.' or 'Green Paper of the Commission on Policy Options for Progress towards a European Contract Law for Consumers and Businesses', COM (2010) 348 final.

³⁴ *ibid.*

³⁵ Bartl, 'Legitimacy and European Private Law', PhD Thesis, European University Institute, See <http://cadmus.eui.eu/handle/1814/22455> (accessed 1 Dec 2014).

³⁶ Questions posed by the consultations are for instance: *how to review and improve the existing EC legislation in the area of contract law?* (COM(2001)0398) or *how to deal with the instrument?* (COM(2010)543). These questions however presuppose an internal perspective on the European private law, and do not encourage public debate beyond those already participating (ie 'direct interests', such as businesses and consumers and their advocates).

legitimise the goal quietly by claiming a degree of participatory legitimacy for the particulars of its proposals.

B European Parliament

The follow-up question is whether the political institutions, such as the European Parliament, provided a space for the democratic politicisation of the *online internal market*. In fact, the European Parliament had successfully opposed the first draft of the Consumer Rights Directive, finally adopting a considerably narrower variant.

The initial Consumer Rights Directive was deemed unacceptable by the European Left and Right alike. The Left opposed the draft by pointing to the danger of full harmonisation leading to the lowering of the level of consumer protection in a number of countries.³⁷ For the Right, the Directive was considered as badly drafted and failing to furnish enough evidence to support the full harmonisation of consumer law.³⁸

The debate in the European Parliament revolved around the preference for minimum as opposed to full harmonisation, the level of protection and the scope of the Directive. In this debate, not only does the goal of 'online' internal market remain unproblematised, but it is even presented as a *proxy* for 'European added value'.³⁹ It becomes thus an expression of the internal market itself, rendering any assumptions that buttress this goal unproblematic.⁴⁰ Citizens are equated with consumers and businesses even by the European left,⁴¹ whereas other categories, such as employees or publicly minded citizens (concerned with environmental, social or ethical consequences of the online internal market) are not considered at all. In this constellation, *Les Verts* are concerned about the length of the withdrawal period, while not drawing any attention to the possible environmental consequences of the online internal market. The single issue that transgressed the narrow framework set by the Commission was the question of the inclusion of social, health and gambling services within the scope of the directive.⁴²

The debate surrounding the Common European Sales Law offers even fewer grounds for confidence. The proposal was first discussed by two Parliamentary committees, both of which recommended it for adoption (with amendments).⁴³ The Legal Affairs Committee, which was responsible for the proposal, organised several workshops in order to discuss various substantive elements of the proposal. It engaged with numerous European private law scholars, representatives of businesses and consumers

³⁷ The Plenary Debate in the European Parliament on the Consumer Rights, 21 March 2011. See: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=%2F%2fEP%2F%2fTEXT%2bCRE%2b20110323%2bITEM-020%2bDOC%2bXML%2bV0%2F%2fEN&language=EN> (accessed 1 Dec 2014). (Speeches: Evelyne Gebhardt (on behalf of S&D group, Bernadette Vergnaud (S&D) or Olga Sehnalová (S&D), Kyriacos Triantaphyllides (on behalf of the GUE/NGL Group), Emilie Turunen (on behalf of the Verts/ALE Group))

³⁸ *ibid.* (Speeches of Kurt Lechner (PPE) and Oreste Rossi, on behalf of the EFD Group)).

³⁹ *ibid.* (Speech of Raffaele Baldassarre, on behalf of the PPE Group)

⁴⁰ *ibid.*

⁴¹ *ibid.* (Speech of Emilie Turunen, on behalf of the Verts/ALE Group).

⁴² *ibid.* (Speech of Kyriacos Triantaphyllides (on behalf of the GUE/NGL Group)).

⁴³ European Parliament Legal Affairs Committee, Minutes JURI_PV(2013)0916; European Parliament Internal Market and Consumers Committee, Minutes IMCO_PV(2013)07-08-1.

as well as representatives of the European Commission.⁴⁴ Whereas the Committee replicated the Commission's 'direct interests' consultation and the disciplinary narrowness of consulted scholars (mainly private lawyers), its final report left entirely aside broader impacts of the goal pursued (environmental, social or economic) or the constituencies beyond consumers and (small) businesses.⁴⁵

In contrast, the Internal Market and Consumers Committee was more sceptical about the proposal, only approving it with a relatively tight vote.⁴⁶ The two main objections were, first, the 'optionality' of the Common European Sales Law (CESL), which is not suitable for consumer affairs, and second, the quality of the Commission's Impact Assessment.⁴⁷ The Committee criticised the methodology used for the calculation of transaction costs, 'which seriously detract from the meaningfulness of the impact assessment and call into question its value'.⁴⁸ Yet, at the same time, the Committee did not politicise the implications of this methodological choice. Nor did the Committee question the broader social or economic consequences of the goal that propels this proposal or the interests of constituencies beyond the 'direct interest' representation.⁴⁹

In February 2014, the Parliament finally accepted the amended proposal for the Common European Sales Law, as drafted by the Committee on Legal Affairs. The general debate has brought little new: the discussion remains limited to whether the proposal is able to achieve the online internal market, and how advantageous (or not) it is to consumers.⁵⁰ Until the very end, the Parliament has mechanically accepted the framing of the issue: the lack of online internal market was regarded as an obstacle to the completion of the Internal Market and to economic growth, and action was needed to remedy this impediment. The sole concern was whether the Commission had devised *proper means* to achieve what it had set out to achieve and whether the correct balance between consumers, businesses and small and medium size enterprises (SMEs) had been struck. The online internal market itself was perceived as a natural continuation of the internal market or, to cite the Economic and Social Committee, as the *consolidation* of the internal market.⁵¹

C Council of the EU

The 'policy debate' in the Council regarding the Consumer Rights Directive has focused on the balance of interests between traders and consumers in the online

⁴⁴ European Parliament, Committee on Legal Affairs, Minutes: JURI_PV(2012)03-01-1, JURI_PV(2012)05-30-1 or JURI_PV(2012)07-09-1.

⁴⁵ European Parliament, Committee on Legal Affairs, Report on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)0635—C7-0329/2011—2011/0284(COD)).

⁴⁶ The decision was taken by 22 votes in favour, 17 votes against and one abstention. See the Internal Market and Consumers Committee, Minutes, IMCO_PV(2013)07-08-1.

⁴⁷ European Parliament, *Internal Market and Consumers Committee, Opinion on the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* (Brussels, 2013) IMCO_AD(2013)505986.

⁴⁸ *ibid.*

⁴⁹ *ibid.*

⁵⁰ The Parliamentary debate is see: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20140226+ITEM-004+DOC+XML+V0//EN&language=EN> (accessed 24 Jun 2014).

⁵¹ European Economic and Social Committee, *Opinion on the Common European Sales Law*, CESE 800/2012—INT/600.

internal market.⁵² The online internal market, seen by the Commission as a tool to boost economic growth, seems to have been understood by the Council as an unavoidable consequence of technological progress. Puzzlingly for an outsider, despite being the seemingly inescapable endpoint of this technological trajectory, the online internal market still deserved to be legislatively assisted by nothing less than the full harmonisation of contract law.⁵³

In the case of the Common European Sales Law, the Council was ‘invited’ to consider the legal basis, the capacity of the proposed Common European Sales Law to achieve the internal market objectives and the scope of the measure.⁵⁴ In the policy debate, meanwhile, the Council omitted to investigate broader implications of the online internal market—how it impacts on other EU goals, interests and concerns, or the constituencies beyond consumers (such as employees, or citizens with their environmental, social and ethical concerns).

Moreover, it seems that the online internal market is not intended to be the order of the day also in the future discussion: the Council has turned to discuss the content of the proposal, leaving the more contentious question of legal basis for a later date.⁵⁵ While the anticipated debate on the legal basis is meant to test the effectiveness of the proposal to achieve the (online) internal market, the shifting of the Council’s attention to the particulars of the proposal may well further narrow down the discussion, effectively placing the goal of the online internal market itself beyond reproach.

Is this uncritical acceptance of the ‘online internal market’ as a goal of European private law by both the EP and the Council a sign of a deep political consensus between the EU institutions? Or is there something else at play? In the following part we will analyse the blind spots of this political process and draw some normative consequences for the interpretation of the subsidiarity principle in the EU.

IV The Way We Do Europe: Subsidiarity and Substantive Democratic Deficit

A The Substantive Democratic Deficit

The EU emerged as a functional entity oriented towards the creation of the common market.⁵⁶ At the same time, the member states were to remain a main locus of democratic self-determination for a vast range of ‘other’ issues.⁵⁷ Assigning a limited

⁵² Council of the European Union, 2982nd Council meeting, Brussels, 3–4 December 2009, Press release, 9. See http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/111732.pdf (accessed 1 Dec 2014).

⁵³ *ibid.* In its ‘general approach’, Council has endorsed the introduction of full harmonisation for distance and off premises contracts.

⁵⁴ Council of the European Union, 3172nd Council meeting, Brussels, 7–8 June 2012, Press release, 20. See http://europa.eu/rapid/press-release_PRES-12-241_en.htm?locale=en (accessed 1 Dec 2014).

⁵⁵ *ibid.*

⁵⁶ The concept of common market has mutated since its introduction in the Treaties of Paris and Rome (1951 and 1957, respectively), gradually morphing from the common market into the single or internal market. The concept itself has no definite meaning, being shaped both by discourses but also particular actors. Compare for instance J.H. Haahr and W. Walters, *Governing Europe: Discourse, Governmentality and European Integration*, vol. 24 (Routledge, 2005) and N. Jabko, *Playing the Market: A Political Strategy for Uniting Europe, 1985–2005* (Cornell University Press, 2006).

⁵⁷ Within the EU, the market-making function has been constrained, but also further legitimated, by the unanimity voting in the Council, which was the rule until the Single European Act.

function to the Communities had been a condition for its political support, the base for establishing its legitimacy as well as a key tool in constraining its powers.⁵⁸

It soon became clear, however, that instead of constraining the space for political action in the Communities, the functional delineation of competences would become a means for expanding the EU's powers.⁵⁹ The key mechanism for this expansion was suggestively captured by Christian Joerges's concept of 'diagonal conflicts'.⁶⁰ Diagonal conflicts denote situations where the EU has competence to regulate one aspect of a particular field/issue (usually internal market), while the member states retain the competence (and responsibility) for the 'rest'. In turn, to make new domains amenable to EU competence and regulation, the EU has to reinterpret various social problems in line with its functional objective.⁶¹ This reinterpretation infuses a different axiology in a particular field of action, thereby devaluing any other residual normative concerns relevant to the issue.

The concept of '*substantive* democratic deficit' aims to capture the democratically relevant consequences of establishing the EU as a functional entity. It is '*substantive*' since it mirrors the material limitation of the political process in the EU. Moreover, it is '*substantive*' in that it underlines that we cannot think about the EU democratic deficit in purely procedural terms—democracy is as much about the substance as about the procedure when it comes to the kind of choices that political bodies can make.⁶² More broadly, it is '*substantive*' since it aims to problematise the thinking about the post-national democracy that remains oblivious to the processes of post-national juridification, which cripple the democratisation by removing basic substantive choices from the political discussion.⁶³

Substantive democratic deficits epitomised, as already alluded to in the introduction, by a twofold material constraint on the 'political' in Europe. On the one hand, the *horizontal dimension* of the substantive democratic deficit denotes that only a limited array of competences, objectives and normative concerns are assigned to the EU. This constraint restricts the pool of issues possibly open to democratic debate in the EU.⁶⁴ The outstanding normative concerns remain concealed or suppressed in the political process—even if they may be affected by EU action.

On the other hand, a less discussed but equally important aspect is the *vertical dimension* of the substantive democratic deficit. Gradually, the *depth* of the political debate in the EU has been shrinking due to the peculiar way in which the EU frames its goals and produces knowledge to support them. In particular, the scarce politicisation of EU objectives has *over time* given rise to an increasing number of 'assumptions' in its policy making, which take the place of a real political debate on various

⁵⁸ The same structure underpins the principle of subsidiarity, where the 'comparative efficiency' only encourages discussion regarding the means, thus reinforcing the functional understanding of the EU.

⁵⁹ For an excellent discussion see De Búrca, 'Re-appraising Subsidiarity's Significance after Amsterdam'.

⁶⁰ C. Joerges, 'Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline', (2004) 14 *Duke Journal of Comparative & International Law*.

⁶¹ One has to bear in mind that in the first decades of the EU integration, the main drivers of the integration process were the EU member states, which often used the contemporary version of the Article 308 TFEU, preventing to certain extent the 'radiation' of the functional conditioning.

⁶² Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence'.

⁶³ T.S. Veitch, 'Juridification, Integration and Depoliticisation,' in D. Augenstein (ed.), '*Integration through Law*' Revisited: *The Making of the European Polity*, (Ashgate, 2012), at 85–97. (accessed 13 July 2013).

⁶⁴ For instance, the regulation of the *internal market* can (in principle) be subject to the democratic political processes in the EU, while the European unemployment benefits less so.

politically salient matters. This trend is most visible with regard to the interpretation of the main EU function: what the internal market *is* and what it *needs*. This pressure on the space allotted to the political in the EU will continue to increase with each and every political issue that goes unproblematised in the EU political process. Every such omission progressively shoves the debate about ‘what ought to be done in the EU’ to ever-lower levels of generality.⁶⁵

In the following sections I elaborate on the two dimensions of the substantive democratic deficit using the example of the online internal market. Before that, however, let me position the substantive democratic deficit in a broader academic debate regarding the political legitimacy of the EU.

The concept of *substantive* democratic deficit aims to contribute to the debate on the ‘democratic’ and ‘social’⁶⁶ deficits in the European legal discourse. While not primarily concerned with these discussions, it offers a vantage point for their critique. The debates on the EU (democratic) legitimacy—such as constitutional pluralism,⁶⁷ democratic deficit⁶⁸ or deliberative democracy⁶⁹—understand the EU democratic deficit mainly in procedural terms—focusing on the deficiencies of the (EU) democratic institutions. These debates took little interest in the substantive limitations of the EU political processes, or its democratic consequences, and did not engage conceptually with the parallel discussion on the EU social deficit.⁷⁰ The same gap is discernible in the unqualified belief in the democratising potential of the dialogue between national parliaments and the EU institutions in the subsidiarity debate.

In contrast, the legal debate on the imbalance between the ‘economic’ and the ‘non-economic’ has not encompassed the full breadth of consequences that ensue from the EU institutional design.⁷¹ Here, the social deficit has been conceptualised as the *lack* of particular competences, objectives or normative concerns, which results in

⁶⁵ The juridification ensures further entrenching of these unpoliticised assumptions. Compare the excellent contribution by T.S. Veitch, ‘Juridification, Integration and Depoliticisation’, in D. Augenstein (ed.), *‘Integration through Law’ Revisited: The Making of the European Polity* (Ashgate, Surrey, 2012), at 85–97.

⁶⁶ The concept of the EU ‘social deficit’ has been ascribed to Fritz Scharpf, who criticises the neo-liberal consequences of the EU constitutional design for its impact on the content of EU law and policies, as well as having a constraining impact on the political choices of the EU Member States. F.W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press Oxford, 1999); F.W. Scharpf, ‘The European Social Model,’ 40 *JCMS: Journal of Common Market Studies* 4, 645–670.

⁶⁷ M. Avbelj and J. Komárek, *Four Visions of Constitutional Pluralism* (CUP, Cambridge 2008).

⁶⁸ For a discussion of various strands of the debate see for instance Follesdal and Hix, ‘Why There Is a Democratic Deficit in the EU,’ 5.

⁶⁹ Comitology and the open method of coordination have been the source of some hope. See C. Joerges and J. Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology’, (1997) 3 *European Law Journal*; C. Joerges and J. Neyer, ‘Deliberative Supranationalism “Revisited”’, (EUI Law WP 2006/20); E.O. Eriksen and J.E. Fossum, *Democracy in the European Union: Integration through Deliberation?* (Taylor & Francis, 2000).

⁷⁰ A recent edited working paper by G. de Búrca *et al.* has been an exception in this regard. This group of scholars explores the relation between social and democratic deficit by discussing substantive justice in the EU, and in particular asking to the extent to which a functioning democracy in the EU would also deliver ‘social’ (protection, legislation, etc). G. de Búrca, D. Kochenov and A. Williams, *Debating Europe’s Justice Deficit: The EU, Swabian Housewives, Rawls, and Ryanair* (EUI LAW 2013/11).

⁷¹ This body of literature incorporates the discussion of proportionality and balancing in the Internal Market, often spurred by controversial decisions of the Court of Justice such as Schmidberger, Omega, Viking or Laval. See, eg Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press, 2007), *passim*.

the neglecting of various non-economic normative concerns. This static understanding of the EU social deficit has also grounded hopes that the introduction of new competences and objectives into the existing EU treaties would counteract the economic drift of the EU.⁷² However, neglecting the dynamic component of the EU social deficit—or the gradual reification of political action through the accumulation of ‘assumptions’ that replace political debate—has vitiated these efforts.

The *substantive* democratic deficit is thus based on the premise that one cannot understand the EU democratic or social deficit in isolation from each other, or without factoring in the dynamics of the EU functional integration. By shifting the attention to the *epistemic* consequences of *functional market* design, the substantive democratic deficit suggests that it is in the space *between* the two discussions that the battle for a democratic Europe is fought.

Beyond legal discourse, the substantive democratic deficit may be perceived as a variation of the concept of ‘social deficit’, usually attributed to Fritz Scharpf. While dealing with a similar phenomenon—what Scharpf calls the constitutional asymmetry between the policies promoting economic efficiency, on the one hand, and social protection and equality, on the other⁷³—the concept of substantive democratic deficit refocuses the discussion. First, in his notable contribution to the debate on the legitimacy of the EU, Scharpf sets the criteria for the ‘input legitimacy’ of political communities in a way that the EU cannot meet.⁷⁴ In contrast, the concept of substantive democratic deficit gives serious consideration to the EU’s aspiration of being democratically legitimate and elaborates on the democratic consequences of the constitutional asymmetry in question. Second, Scharpf frames the social deficit as the incapacity of ‘positive integration’ to compensate for the consequences of ‘negative integration’, undermining thus the welfare models of the EU member states.⁷⁵ This paper suggests, however, that the social deficit is constitutive of the positive integration itself.

B The Horizontal Dimension of the Substantive Democratic Deficit

We turn now to elaborate on the horizontal and vertical dimensions of the substantive democratic deficit, referring back to the example of how the goals in the internal market are set. The concept of *horizontal* (static) substantive democratic deficit aims to capture the constraint that ensues from limiting the range of normative concerns entertained by a functional entity. The question therefore arises of which normative concerns and costs have not been considered in the EU political process when the goal of online internal market has been construed.

The European Commission, in its impact assessment regarding the Common European Sales Law, devotes one single paragraph to the ‘outstanding’ normative concerns possibly impinged by the harmonisation of European private law. The Commission

⁷² The majority of Treaty revisions were infused by the hopes of the European left: if only we add more ‘non-economic’ competences or, for that matter, more powers to the European Parliament the economic drift would disappear.

⁷³ Scharpf, ‘The European Social Model’.

⁷⁴ In his later work, Scharpf proposes concept of compound (multi-level) legitimacy, which draws on the input legitimacy of the Member States. Here, he remains critical towards the non-majoritarian institutions, which cannot rely on the input legitimacy of the EU Member States. F.W. Scharpf, *Legitimacy in the Multilevel European Polity* (Cambridge University Press, 2009).

⁷⁵ Scharpf, ‘The European Social Model’.

admits that the environment will suffer some adverse effects, since online shopping will lead to increased levels of transportation-related emissions in the EU.⁷⁶ The impact assessment however declines to expand upon this statement⁷⁷ and does not clarify whether and, if so, how this finding has impacted on the final balancing of costs and benefits. Environmental costs do not make a second appearance in either the ‘overall assessment’ in the impact assessment itself⁷⁸ nor in the executive summary of the impact assessment.⁷⁹ As we have learned already, this issue was also overlooked subsequently in the political process *stricto sensu*.

Moreover, the limited inventory of possible environmental impacts is questionable to say the least. Anyone who orders a product online cannot fail to see that such products typically come with double or triple the normal packaging, which is an immediate environmental consequence of this type of consumption. The packaging is, in turn, linked to the problem of overproduction of waste on the one hand, and the overuse of natural resources on the other (wood, fuel, water).⁸⁰ These environmental impacts, however, remain obfuscated in the construction of the EU’s internal market agenda.

Yet the environment is not the only suppressed normative concern which the players in democratic politics—perhaps most obviously, even if not exclusively, the green parties in European or national parliaments—could arguably have problematised. For instance, what impact will the online internal market have on urbanism?⁸¹ How will the public support for the online market affect our actual possibility to go to the centre of a city to visit a bookshop, sports shop, etc? Shall we invest further public funds only to speed up the ‘emptying’ of the cities? This is an issue which, it could be argued, fundamentally influences the quality of our life and our free time.

Likewise, online shopping also presupposes armchair shopping. This may not be necessarily desirable from a public health perspective. One may argue that the public support for online internal market may have negative effects on the level of physical and mental health, obesity, lack of movement or the social isolation of individuals.⁸² This social isolation is also worrisome from a democratic perspective as it impedes the interactions that are fundamental for the public sphere, including the European public sphere.

⁷⁶ The Impact Assessment admits adverse environmental impacts in particular with the preferred options 4, 5 and 6, which are the only ‘effective’ alternatives among the proposed means of harmonisation. European Commission, *the Impact Assessment on the Common European Sales Law*, SEC(2011) 1165 final, 112, 117, 121.

⁷⁷ *ibid.*

⁷⁸ *ibid.*

⁷⁹ European Commission, *Executive Summary of the Impact Assessment to the Common European Sales Law*, COM(2011) 635 final.

⁸⁰ For a discussion on the environmental impacts of online shopping in the US, see C. Weber *et al.* *Life Cycle Comparison of Traditional Retail and E-commerce Logistics for Electronic Products: A Case Study of buy.com*, (Green Design Institute, Carnegie Mellon University, 2008).

⁸¹ Granting public support to online shopping undermines the influential ‘New Urbanism’ principles. See <http://www.cnu.org/> (accessed 1 Dec 2014).

⁸² An ongoing heated debate concerns the impact of new technologies on the level of social isolation of individuals. Compare for instance the Stanford-based authors I. Stepanikova, N.H. Nie, X. He, ‘Time on the Internet at Home, Loneliness, and Life Satisfaction: Evidence from Panel Time-Diary Data’, (2010) 26 *Computers in Human Behavior*, with Pew’s Institute study by K.N. Hampton, L.F. Sessions, E. Her, L. Rainie, *How the Internet and Mobile Phones Impact Americans’ Social Networks* (Pew Institute, 2009).

None of these vital concerns is considered in the Commission's documents or in the debate of the EU institutions. *Les Verts*, for instance, remain concerned with the length of the withdrawal period while failing to raise any of the possible environmental costs of the online internal market. These 'residual' normative concerns remain obscured due to the way in which the EU's problems are constructed and how the EU's tasks are outlined in its own political process.

C *The Vertical Dimension of the Substantive Democratic Deficit*

The vertical (dynamic) dimension of the substantive democratic deficit encapsulates the lack of politicisation in the problem framing and goal setting in the EU—an absence which has allowed various assumptions to replace a political debate on controversial economic and societal questions. For example, the goal of the 'online internal market' is the result of one such set of assumptions: First, the belief that economic growth always requires an expansion of the internal market; second, the belief that the needs of the internal market automatically extend to developing the *online* internal market. Finally, there is the conclusion that economic growth will be furthered by the expansion of the *online* internal market. Yet, can we truly *assume*—without any political debate as we have seen above—that the online internal market will automatically lead to economic growth?

A number of crucial and politically salient questions should be asked before we can conclude that the online internal market will lead to economic growth.⁸³ For instance, what will be the cumulative effect of online internal market on other EU economic goals—such as economic growth, strong demand or employment? The European Commission predicts in the impact assessment that the Common European Sales Law, if adopted as a mandatory directive or regulation, shall create between 650 000 and 1.3 million new jobs.⁸⁴ This claim could have been problematised at various levels. For instance, one could object that the Commission uses an econometric analysis exhibiting an important pro-trade bias (overvaluing a trade increase).⁸⁵ At the same time, this analysis remains too simplistic, since the actual number of jobs that are created is dependent on the anticipated increase in gross domestic product.⁸⁶ The Internal Market and Consumers Committee of the European Parliament indeed did

⁸³ This is not to imply that economic growth is necessarily the best goal to be pursued in the (internal) market. It is used an example here, first, because of the broad public support that this goal currently enjoys, and second, as a demonstration that the critique put forth here has a validity across the political spectrum.

⁸⁴ European Commission, the Impact Assessment on the Common European Sales Law, SEC(2011) 1165 final, 47.

⁸⁵ The Commission uses Global Trade Analysis Project (GTAP) analysis, based on the Computable General Equilibrium analysis and supported by the GTAP database. This econometric methodology has been widely criticised for its pro-trade bias as both overestimating actual increase in trade as well as neglecting or downgrading other societal impacts. For an excellent critique, see L. Taylor and R. von Arnim, *Modelling the Impact of Trade Liberalisation: A Critique of Computable General Equilibrium Models* (Oxfam, 2006). Further, see also Euromemorandum Report 2014, see http://www.euromemo.eu/euromemorandum/euromemorandum_2014/index.html (accessed 1 Dec 2014).

⁸⁶ The controversial character of this assumption becomes clear when we consider that the latest symptom of the current crisis is perhaps that of a 'job-less recovery'. See EU Employment Commissioner László Andor (accessed 31 Jan 2011) <http://www.euractiv.com/socialeurope/eu-faces-jobless-recovery-admits-news-501633>, or more recently Olli Rehn (accessed 5 Nov 2013) <http://www.bbc.co.uk/news/world-europe-24821783> (thanks for this point goes to Candida Leone).

question the impact assessment—but its critique was merely general and was not exactly political: it simply raised a question of methodology.⁸⁷

The *politicisation* however could have gone further in problematising the economic assumptions behind the goal of the online internal market. Eventual political opposition could credibly argue that online shopping is in fact less labour intensive than its high-street alternative, and more jobs may be lost than are created through the public support of the online internal market. Thus, investing public funds into retail ‘economies of scale’ (such as Amazon), which rely extensively on technology and less on people, may undermine *the EU economic objective* to spark a recovery of economic growth and reinforce strong demand.⁸⁸

These core economic-political uncertainties, however, have not stirred up any noticeable political controversy in the EU. None of the political factions in the European Parliament had anything to say about the desirability of the goal of the online internal market in the EU: a phenomenon which reveals a disturbing level of automatism in setting the goals in the EU. The kind of de-politicisation that is captured by the vertical constraint is thus ‘internal’ rather than ‘external’ to the Internal Market.

A full discussion of the reasons for, and mechanisms of, de-politicisation of the EU project as a whole exceeds the scope of this paper. Two such mechanisms, however, deserve specific mention. A first serious problem that impacts on any functional polity is the threat of presenting certain (medium range) goals and objectives as a natural continuation of *the function* of the polity—as is well exemplified by the ‘online *internal market*’ in the EU. In such a set-up, any discussion regarding these medium range goals may well appear unwarranted, since the EU is already constitutionally committed to the ‘internal market’.

Over time, a growing body of such apolitically established interpretations of ‘what the internal market needs’ may *accumulate* and *settle* into a set of assumptions, which replace the political debate on salient political questions. For instance, the assumption that economic growth always requires *more* internal market obscures the need for a vital political discussion on whether this is indeed always the case and, if so, under which conditions.

A second problematic feature of the EU political process is the particular position of the European Commission in the EU institutional framework, which buttresses the de-politicising tendency.⁸⁹ The Commission is seen as an ‘independent’ and ‘expert’ institution, and the guardian of the ‘EU interests’, which shields the knowledge it produces from political challenge.⁹⁰ This constellation aggravates both epistemic and

⁸⁷ ‘The analysis highlights methodological failings which seriously detract from the meaningfulness of the impact assessment and call into question its value, even taking into account that there is as yet no generally accepted model for calculating transaction costs.’ European Parliament, Internal Market and Consumers Committee, Opinion on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (Brussels, 11 July 2013) IMCO_AD(2013)505986, 3.

⁸⁸ For a recent report on the ‘quality’ of jobs offered by the companies such as Amazon, see <http://euobserver.com/economic/119074> (accessed 24 Jan 2014).

⁸⁹ While in the traditional European and internal market law the Commission remains the main mover, in the *new* economic governance it seems that the European Council has taken over this position. At the same time however, the new instruments of the EU economic governance empower the Commission to an unprecedented degree. See ‘Euromemorandum 2014’.

⁹⁰ See for instance M.A. Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (Oxford University Press, 2003).

democratic problems in EU governance. To the extent that the knowledge produced by the European Commission is not free from bias, the lack of problematisation may lead to inappropriate policies. The fact that the Commission effectively determines what the internal market needs (such as the online internal market in the case of European private law), however, is also a problem of democracy: the reluctance to politicise goals deprives European citizens and their democratically elected representatives of a chance to shape ‘what we ought to do’ in the internal market. Needless to say, this critique applies *a fortiori* to other EU technocratic institutions, such as the European Central Bank.

D Normative Implications for the Principle of Subsidiarity

Studying the substantive democratic deficit is essential for both the analysis and the normative appraisal of subsidiarity. The functional design of the EU underscores subsidiarity’s legal framework: whereas ‘comparative efficiency’ is assigned a hard legal status in the EU treaties, the democratic concern with the right of ‘self-government’ has remained barely an aspiration. Such an interpretation of subsidiarity reinforces the substantive democratic deficit. As Davies has observed, subsidiarity does not encourage the debate regarding medium range goals in the EU. Rather, it ‘assumes the Community goals, privileges their achievement absolutely, and simply asks who should be the one to do the implementing work.’⁹¹

The Treaty of Lisbon has, nonetheless, introduced an institutional innovation, which could contribute to lowering the substantive democratic deficit. Linked to the more political national democratic processes, national parliaments are institutionally well endowed to re-politicise the normative concerns, which have been functionally suppressed in the EU policy-making process. First, ‘bottom up’ the rationality of the EU action will not be all that self-evident. The assumed goals, such as that of the online internal market, may be the subject of more questions outside the EU institutional framework *stricto sensu*. Second, national parliaments are more accustomed to the politicisation of fundamental choices on the left–right axis. Thus, they may not be as inclined to accept the construction of conflicts as being between the EU interests (represented by the Commission) and member states’ interests. Such an attitude may contribute to stirring the politicisation also at the EU level.

The ‘early-warning’ procedure is far from an optimal institutional framework for the re-politicisation of the substantive democratic deficit. First, the procedure is part of the functionalist understanding of subsidiarity, concerned only with the question of effective realisation of uncontroversial goals. As some commentators rightly note, in purely formal terms such understanding entails that the national parliaments should not engage with the content of legislative measures,⁹² and even less with the goals that motivate them. Second, as Goldoni convincingly argues, the early-warning procedure does not provide an institutional setting where the political agency of national parliaments can be realised—it does not give a binding (veto) power to opposing national parliaments and fails to institutionalise the space for the coordination of their action.⁹³

⁹¹ G. Davies, ‘Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time’, (2006) 43 *Common Market Law Review*, 67–68.

⁹² Fabbrini and Granat, ‘Yellow card, but no foul’.

⁹³ M. Goldoni, ‘The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation,’ (2014) *European Constitutional Law Review*.

Notwithstanding those legal constraints, some of the potential of the early-warning procedure came to light in the proposal for the Monti II Regulation, where the Commission sought to regulate the right to strike in cross-border situations. This politically explosive proposal was also the first ever to reach the ‘yellow card’ threshold. Moving well beyond the disciplines imposed by the functional understanding of subsidiarity,⁹⁴ the national parliaments have questioned here both the horizontal and vertical constraint of the substantive democratic deficit.⁹⁵

We have seen far less fireworks in the case of Common European Sales Law, which is admittedly less ‘salient’. Only seven national parliaments objected to this proposal.⁹⁶ While the majority of national parliaments concurred in questioning the legal basis, they generally struggled to overcome the functionalist legal framework of subsidiarity. One reasoned opinion however stands out for it suggests what could be the possible lines of politicisation in similar cases. The Austrian parliament has first questioned the EU ‘consumer protection’ measures that aim to do little more than hide the lack of attention paid to consumers’ real problems. The parliament stresses (as many consumer advocates do) the need to focus on the real problems of consumers, and expresses the fear that similar initiatives (such as Common European Sales Law) risk causing harmonisation to grind to a standstill in the areas where the EU action is urgently needed.⁹⁷

More importantly, however, the Austrian parliament has suggested that the focus of the EU action in private law should be at times primarily directed towards goals and objectives different to those pursued thus far. The parliament suggests that ‘instead of creating an optional instrument, effort should be made to promote confidence-building measures at the European level in order to help eliminate the real obstacles impeding cross-border transactions.’⁹⁸ The parliament does not specify what exactly the real problems are. And indeed, the real issues should be established in democratic debate regarding ‘what ought to be done’ in the EU. It is exactly that debate that has been missing in the making of European private law.⁹⁹ While it is too

⁹⁴ For critique of the action of national parliaments, see F. Fabbrini and K. Granat, ‘Yellow Card, but No Foul’: The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike’, (2013) *Common Market Law Review*. For the critique of the critique, see M. Goldoni, ‘The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation’, (2014) *European Constitutional Law Review*.

⁹⁵ While failing to find a ‘clear’ violation of functionalist subsidiarity, national parliaments objected to the construction of the internal market (goals), which had not taken sufficiently into account the operation of the (national) systems of labour relations. See M. Goldoni, ‘The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation’, (2014) 9 *European Constitutional Law Review* 98.

⁹⁶ Opinions of the national parliaments are available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20140226+ITEM-004+DOC+XML+V0//EN&language=EN> (accessed 24 Jun 2014).

⁹⁷ Reasoned opinion by the Bundesrat of the Republic of Austria on the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)0635—C7-0329/2011–2011/0284(COD)), 3.

⁹⁸ *ibid.*, 4.

⁹⁹ The substantive democratic deficit may be the root cause of the missing democratic mobilisation in the EU. Green-Pedersen has recently argued that the politicisation in the EU is taking place at the extremes of the political spectrum (both the left and the right), while mainstream political parties remain uninterested in the EU. According to Green-Pedersen, this is the case for two reasons—the lack of a left-right distinction in the EU decision making as well as the peculiar way in which the EU issues are framed. This article suggests that the de-politicisation of ‘casual’ issues in the internal market may

early to draw any positive conclusions from these rare instances of institutional discontent, the theoretical framework proposed here may offer some guidance as to the kind of substantive engagement required from the national parliaments if they are to contribute to lowering the EU substantive democratic deficit.

V Conclusion

Subsidiarity, the ‘word that saves Maastricht’¹⁰⁰ was introduced as means to counter the ‘creeping’ expansion of the EU powers. Yet this principle has remained largely impotent since its interpretation was based on an inadequate understanding of the problem it should address. Subsidiarity failed to account for a central problem in the EU governance, which underpins its introduction in the first place: the ‘diagonal’ expansion of EU powers, frequently accompanied by the marketisation of fields acquired by the EU.

This paper has argued that subsidiarity should be interpreted as an institutional and legal response to the *substantive* democratic deficit. Two lines cut across the space of democratic politics in Europe. The *breadth* of issues left open to democratic debate in the EU is limited (*horizontal* substantive democratic deficit). Simultaneously, the *depth* of political debate in the EU has been progressively compressed through the lack of politicisation at the level of problem framing and goal setting in the EU (vertical substantive democratic deficit). Subsidiarity may become a forum where these two dimensions of the substantive democratic deficit are challenged. National parliaments, importantly less caught up in the EU functional rationality, could re-politicise the ‘forgotten’ normative concerns as well as the numerous ‘assumptions’ which have taken the place of a political debate on societally salient matters.

More broadly, this paper has suggested that we need to think differently about subsidiarity in functionalist entities, as opposed to statist federal entities.¹⁰¹ While the latter assume a more generalist outlook in which the democratic concerns can be sufficiently captured by the concern for the proximity of decision making, the former need a more sophisticated interpretation of subsidiarity.¹⁰² Functionalism engenders a particular substantive bias in the way normative concerns are valued, goals are articulated and knowledge is produced. The democratic concern of subsidiarity thus requires countering the bias in functionalist entities through the problematisation of both knowledge production and the perception of ‘obviousness’ of their goals and

buttress the reductionist politicisation of the EU at the extreme sides of the political spectrum, such as immigration issues (Polish plumbers or Bulgarian social service abusers). See C. Green-Pedersen, ‘A Giant Fast Asleep? Party Incentives and the Politicisation of European Integration’, (2012) 60 *Political Studies*. See also D. Kukovec, ‘A Critique of the Rhetoric of Common Interest in the EU Legal Discourse’, *European Law Journal*.

¹⁰⁰ D.Z. Cass, ‘The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community’, (1992) 29 *Common Market Law Review*.

¹⁰¹ Compare R. Howse and K. Nicolaidis, ‘Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?’, (2003) 16 *Governance*. Howse and Nicolaidis discuss ‘horizontal’ subsidiarity (or the deference towards other international institutions and regimes) as a tool to mitigate the negative impact of the WTO functional conditioning.

¹⁰² Compare K. Lenaerts, ‘Federalism: Essential Concepts in Evolution—The Case of European Union’, (1997) 21 *Fordham International Law Journal*.

purposes. The critique raised here applies *a fortiori* to many institutions of international governance, which follow the functionalist design even more faithfully. If the principle of subsidiarity is to support (democratic) legitimacy beyond the state,¹⁰³ it has to target the substantive bias engendered by such institutional design.

First submission: March 2014

Final draft accepted: September 2014

¹⁰³ 'Subsidiarity in global governance' has attracted recently considerable scholarly interest, including publications (for instance M. Evans and A. Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer, 2014)) and academic conferences (such as 'Subsidiarity in Global Governance', Hertie School of Governance, 19th–20th June 2014).