The need for structural reforms in the European Union

Over the past several years, we have experienced growing dissatisfaction with the current model of European integration.

While the most notable example of this trend was the Brexit referendum, at the moment it took place the UK was not the most strongly anti-EU country. The authors of the European Commission's working paper on "The Geography of EU discontent" aptly point out that, according to the Eurobarometer, "in seven Member States more people tended not to trust the EU than in the UK."[1] The general dissatisfaction with the European Union in the overall population of 15 of the member states jumped from 28% in 2004 to 39% in 2018.[2]

Unfortunately, the authors of the study fail to draw substantial conclusions from these basic observations. Their approach is typical for the ongoing debate – most explanations of the disenchantment with the direction of the EU reduce it simply to growing dissatisfaction with the modern economy and an increasingly multicultural society. Authors analyzing this topic usually haughtily proclaim that opposition to further EU integration would be typical for "less educated people" and "the older generation."

The "Commission's White Paper on the Future of Europe and Beyond" cites only one ideological source of future EU development – the Ventotene Manifesto authored by Altiero Spinelli and Ernesto Rossi, which depicts a vision of a federal European state.[3] According to Spinelli and Rossi, the member states of such a federal structure should be reduced to no more than autonomous provinces with limited competences.[4] The intellectual heritage of Schuman, De Gasperi and Adenauer was entirely absent.

Still, does the federalist model of EU integration really have no alternative? What if the radical federalist idea is a root cause of the problems the EU is currently facing? What if opponents of the current direction of EU integration actually have substantial arguments and do not just advocate bias? What if the European project fails if we do not carefully consider its direction?

If we look at a more detailed analysis of the attitudes towards the EU, such as the Pew Research Center survey conducted in 2018, we will see that while the overwhelming majority of Europeans value the role of the EU as an institution safeguarding peace (74%), at the same time a

[1] L. Dijkstra, H. Poelman, A. Rodriguez-Pose, *The Geography of EU Discontent*, Working Papers 12/2018, Publications Office of the European Union, Luxembourg 2018, p. 2.
[2] *Ibidem.*
[3] European Commission, *White Paper on the future of Europe. Reflections and scenarios concerning the future of the EU-27 until 2025*, Brussels 2017, p. 6.
[4] See: *Altiero Spinelli - Eugenio Rossi. Manifest z Ventotene. Tekst - tłumaczenie - komentarz,* (eng.: *Altiero Spinelli - Eugenio Rossi. Ventotene Manifesto. Text - translation - commentary*), [ed.] T. Zych, Brussels 2019.

significant majority would claim that the EU is intrusive (51%) and ineffective (54%).[5] It should be thoroughly examined whether the current inefficiency is directly correlated with the increasing centralization of the EU structure and in particular with the centralization of the lawmaking process. It is common knowledge that in general it is more efficient to make and enforce laws when one is close to the people.

What if we actually need more **subsidiarity** and more **transparency** to make the EU more efficient and restore the trust of citizens? Both these principles are too often treated just as a threat to the future of the EU, but in fact both can help it survive.

1. The principle of subsidiarity in the institutional framework of the European Union

The principle of subsidiarity in its general sense means that higher level communities can interfere in the functioning of lower level communities only in special cases.

In the EU context, the application of this principle means that in areas which do not fall within the exclusive competence of the European Union, the EU takes actions only if and insofar as the aims of the proposed action cannot be sufficiently achieved by member states and at the same time can be better achieved at the EU level. It is anchored in Article 5 of the Treaty on the European Union, which refers to Protocol no. 2 on the application of the principles of subsidiarity and proportionality. The preamble to the Treaty on the European Union also mentions this principle.

The subsidiarity principle strengthens both the smaller communities and the European Union as a whole. Local, regional and national communities can solve their important problems in a way that is most appropriate to the existing, sometimes very specific conditions. Decision-making autonomy also strengthens the community's identity and brings benefits to citizens. Thanks to it, legal norms are more understandable and better suited to meeting local needs.

From the point of view of the EU as a whole, the significant benefits are also obvious. It is not necessary to involve large resources to deal with issues not relevant from the point of view of the whole community. Therefore, both the number of legal acts and their overall volume are limited. At the same time, EU institutions can show greater involvement in the most important and particularly complex issues. Therefore, both democracy and effective management are guaranteed by the principle of subsidiarity.[6]

[5] See: R. Wike, J. Fetterolf, M. Fagan, *Europeans Credit EU With Promoting Peace and Prosperity, but Say Brussels Is Out of Touch With Its Citizens Many worried about long-term economic forecast, impact of immigration*, Pew Research Center, March 2019, p. 18.

[6] See T.T. Grosse, *W stronę Lewiatana? O naruszeniach zasady subsydiarności w Unii Europejskiej*, Raport 02/2019, s. 14-15.

The key procedural issue from the point of view of subsidiarity is the way to guarantee strict compliance by European Union institutions with the scope of the entrusted competences determined in the relevant treaties. As the Court of Justice of the EU (the "**Court**") stated in one of its judgments, a measure will be proportionate only if it is consistent with the principle of subsidiarity.[7] What is more, the EU legislature is obliged to consider, on the basis of a detailed statement, if the objective of a proposed action could be better achieved at the EU level. Subsidiarity could be the subject of court review[8], but in fact the case law on the subsidiarity principle is scarce. In the first twenty years after the Maastricht Treaty entered into force, no more than ten cases submitted to the court were in fact related to subsidiarity.

There is also the process which involves the role of national legislatures. According to Protocol no. 2 to the Treaty, a national parliament or chamber of a national legislature has eight weeks from the date of receiving a draft legislative act to send to the presidents of the European Parliament, the Council and the Commission a "reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity", which creates a kind of "early warning" procedure.[9]

Currently, if reasoned opinions represent at least one-third of the votes allocated to the national parliaments, the draft must be reviewed ("yellow card"), and the institution which produced the legislative proposal may decide to maintain, amend or withdraw it, giving reasons for its decision.[10] If, in the context of the ordinary legislative procedure, at least a simple majority of the votes allocated to national parliaments challenge the compliance of a draft legislative act with the principle of subsidiarity and the European Commission nonetheless decides to support the proposed draft, the matter is referred to the EU legislature (the European Parliament and Council), which makes a decision at the first reading. If the EU legislature considers that the legislative proposal is not compatible with the principle of subsidiarity, it may reject it with a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament ("orange card").[11] Still, the current "yellow card" and "orange card" procedures are neither clear nor efficient since in both cases the national legislatures acting alone have no binding force to block the proposal. The thresholds for

[7] Judgment of the Court of Justice of 12 November 1996 in the case C-84/94, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, § 54.
[8] Judgment of the Court of Justice of 4 May 2016 in the case C-547/14, *Philip Morris Brands SARL and others v Secretary of State for Health*, § 218.
[9] European Parliament, *The Principle of Subsidiarity*, text available at: https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf, p. 3.
[10] In this procedure, there is one vote per chamber for a bicameral parliamentary system and two votes for a unicameral system - *ibidem.*
[11] *Ibidem.*

commencing blocking procedures are very high[12] and, as of 2019, those procedures have been started just three times.

In general, one could say that the principle of subsidiarity is formally in force, but it is rarely enforced in practice.

2. Strengthening the principle of subsidiarity

The existing situation should change. The role of national parliaments in the lawmaking process should be strengthened. In order to enforce the subsidiarity principle, new, more effective control mechanisms must be established which would prevent the European Union institutions from exceeding the scope of its competence when working on a given legal act.

Consideration should be given to the idea of replacing the current "yellow card" and "orange card" procedures with much simpler "red card" procedure, which was developed in 2016. The proposed "red card" procedure was meant to be applied in the event that reasoned opinions on the non-compliance of a draft legislative act with the principle of subsidiarity constituted more than 55% of the votes allocated to national parliaments[13]. In this regard, this threshold should be lowered and the time for expressing the position of the national parliaments should be extended.[14] Still, it should be underlined that this procedure is time-consuming and requires the commitment of significant financial and human resources.

There is additional solution, however, to wit, strengthening the competences of the Committee on Legal Affairs (JURI). Presently, the JURI committee is responsible for verifying the compliance of EU acts with primary law, and especially with the principle of subsidiarity. If any doubt arises, the President of the European Parliament should be entitled to send a proposal to the JURI Committee.

JURI should be allowed to adopt a position on the compliance of a draft law with competences of the EU even before its first reading. The Committee's position should be binding, i.e., if it was negative, it would prevent further works on the draft act. Only after this initial assessment of the Committee would the legal act be submitted to the national parliaments. This would contribute to strengthening the principle of subsidiarity and, moreover, would exclude the unnecessary involvement of funds in proceeding with acts obviously violating this principle. In addition, it should also be considered, whether, if a significant group of Members of the European Parliament, e.g. 20% of the Chamber, files a motion raising doubts regarding the compliance of a document with the principle of subsidiarity, the President could be formally obliged to ask JURI for the assessment.

[12] *Ibidem.*
[13] 31 out of 56 votes in accordance with Protocol 2 TEU - T.T. Grosse, *op. cit.*, p. 53.
[14] See: *ibidem*, p. 56. The author proposed lowering the threshold to 25% of votes allocated to national parliaments and extending the time up to 6 months.

This model is already in force in a number of EU member states, including Poland, allowing for a more substantial debate based on clear arguments. For instance, the Polish Parliament (Sejm) has a Legislative Committee (*Komisja Ustawodawcza* - UST) with special competences. The Marshal of the Sejm may refer to this Committee if any bills or draft resolutions raise doubts regarding compliance with the Constitution, or the law of the European Union. The Committee may, by a 3/5 majority vote, declare a bill or draft resolution legally invalid. The Marshal of the Sejm is free not to initiate proceedings in relation to any such bill or draft resolution.

An analogous mechanism could be applied to other legislative procedures, with the reservation that a binding resolution on possible lack of grounds for competences in the Treaties would be adopted by the Parliament as a whole (under the so-called consultation procedure). The only exception should be the legislative procedure carried out without the participation of the Parliament, which by definition gives a key role to Member States.

It could be also considered to legitimate a group of members of European Parliament or members of national parliaments to request control of compliance of draft law with Treaties by the Court of Justice. Alternatively, this right can be granted to a group of Member States. Such a solution is known as prior constitutional review. In some countries constitutional courts are even obliged to control the drafts of particular legal acts *ex officio,* before the entry into force. It is the case in France, where organic bills need to be assessed by the Constitutional Council (*Conseil constitutionnel*) before they are considered ratified. According to Article 61 of French Constitution of 1958, acts of Parliament (other than organic bills) may be referred to the Constitutional Council before their promulgation by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators.

On the other hand, in Germany such prior review is the competence of President of the Federal Republic. President can refuse to sign an act, which rises serious doubts about its constitutionality, which is not the same as the vetoing the draft act.[15] The French solution seems to be easier to accept in the realities of the European Union. Thus *ex officio* (compulsory) prior review of regulations and prior review at the request (by submitting draft law for examination) in cases of directives and other acts may be recommended to strengthening the principle of subsidiarity.

3. Strengthening the rule of law principle

[15] See: T. Schmitz, *The Constitutional Review of Laws - German Experiences*, 2014, p. 3, http://www.iuspublicum-thomas-schmitz.uni-goettingen.de/Downloads/Schmitz_Constitutional-review-of-laws_Jakarta-2014.pdf (access: 22.12.19).

The principle of subsidiarity is closely linked to the notion of sovereignty of Member States. We need clearer institutional solutions regarding relationship between national constitutions (constitutional laws) and the European Union law. Secondary law of the EU is embedded in basic treaties.[16] The general principle of the precedence of Community law has been developed in the case law of the Court of Justice and does not have a solid basis in treaties.[17]

The case law of the Court of Justice has developed in a way not which does not stem from the treaties – that the Court even recognizes the precedence of EU (Community) law over national constitutional norms (e.g. *Internationale Handelsgesellschaft* case).[18] In this regard, the case law of the Court of Justice conflicts with the case law of numerous national constitutional courts, in particular the German Federal Constitutional Court (*Bundesverfassungsgericht*) [19], as well as Constitutional Court of Czech Republic[20] and Danish Supreme Court.[21] Just to give one example of the practical problems, even[22] now the EU has entered the process of ratification of an international convention although it was deemed unconstitutional by the constitutional court in one of the member states.

Declaration 17 concerning primacy to the Treaty on the Functioning of the European Union[23], which only vaguely refers to ever changing case law, can hardly ensure legal certainty. It is necessary to introduce a more efficient and precise control mechanism, which would help deal with problems undermining the basic rule of law principle. Clear statement regarding relationship between the EU law and national constitutions should be made. At the same time, the role of member states constitutional courts in case when the EU secondary law breaches constitutional provisions, should be acknowledged.

4. Reform of the European Parliament aimed at strengthening the principle of the procedural rule of law and transparency

[16] Compare A. Łazowski, *op. cit.*, p. 227.
[17] Compare p. 203; D. Chalmers, G. Davies, G. Monti, *European Union Law. Cases and Materials*, Cambridge 2010, p. 203; E. Całka, *Zasada pierwszeństwa w prawie Unii Europejskiej. Wybrane problemy*, "Studia Iuridica Lublinensia" 25/1 (2016), pp. 49-50.
[18] Judgment of the Court of Justice of 17 December 1970 in case no. 11/70 *Internationale Handelsgesellschaft mbH against Einfuhr- und Vorratsstelle für Getreide und Futtermittel*.
[19] See: judgment of the Second Senate of the Federal Constitutional Court of 29 May 1974, BvL 52/71 (BVerfGE 37, 271 - Solange I); judgment of the Second Senate of the Federal Constitutional Court of 22 October 1986, 2 BvR 197/83 (BVerfGE 73, 339 - Solange II).
[20] See: judgment of the Constitutional Court of Czech Republic of 8 March 2006, Pl. US 50/04.
[21] See: judgment of Supreme Court of Denmark of 6 April 1998 in case 1361/1997, *Carlsen et al. v. Prime Minister Rasmussen*, U.1998.800H.
[22] December 2019.
[23] Consolidated version of the Treaty on the Functioning of the European Union, 17. Declaration concerning primacy (Official Journal of the European Union, C 202/344).

The European Parliament remains the only EU body which is directly granted democratic legitimacy. Therefore, its activities should meet the highest standards of the procedural rule of law.

Primarily, voting by a show of hands and the chairperson's visual assessment of the result can sometimes diverge from these standards. It leads to the situation in which the result of many votes can be mistaken. Our research covering a period of twelve months proves that this happened at least 57 times in this timeframe (in all those cases the votes were repeated)[24]. Another important issue is conducting votes at a pace which makes it almost impossible to follow with the correct translation and, in a number of cases, to let the members of the European Parliament vote according to their will.[25]

In this context, it is necessary to call for a limitation on visual assessments of voting results. On the basis of technical solutions adopted in parliaments of the European Union member states, for example in Germany, Austria, Czech Republic, Hungary or Poland, it is recommended to apply electronic voting more extensively.[26]

It should also be noted that regulations regarding access to public information in EU institutions can be improved based on the best practices of member states. In particular, we need clearly enforceable sanctions for non-compliance. This issue is currently covered by Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJEC 31.5.2001 L 145/43). European Union institutions should be required to issue reasoned decisions for refusing to provide access to a document. An institution's failure to reply within the prescribed time limit should be considered as a denial and entitle the applicant to institute court proceedings against the institution and/or file a complaint to the Ombudsman under the relevant provisions of the EC Treaty. However, a citizen cannot verify whether a given institution's position was justified and whether it is justified to file a complaint at all.

In conclusion, it should be stated that subsidiarity, transparency and the procedural rule of law will not weaken the EU. On the contrary, actual enforcement of these principles, which have a solid basis in EU primary law, can help the EU survive. The EU can successfully overcome problems by rediscovering its founding principles.

Dr Tymoteusz Zych (Polish Non-governmental Initiatives Confederacy, Ordo Iuris Institute for Legal Culture). Collaboration: Bartosz Zalewski, attorney

[24] K. Dyda, [in:] *Procedural Rule of Law in the European Parliament. Report*, [ed.] T. Zych, Brussels 2018, p. 23.
[25] See K. Dyda, *op. cit.*, p. 21.
[26] Cf. K. Dyda, *op. cit.*, p. 31-32. See also § 73-74 of Act no. 90/1995 Coll. of April 19, 1995 on the Rules of Procedure of the Chamber of Deputies of Czech Republic and section 5 of Act XXXVI of 2012 on the Hungarian National Assembly.