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REGIONS AND SUBSIDIARITY AFTER LISBON:  
OVERCOMING THE “REGIONAL BLINDNESS”?

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# ABSTRACT

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The Treaty of Lisbon has strengthened the territorial dimension of the European Union by calling for respect of the regional and local self-government and by recognizing, for the first time, the role of regional parliaments in the subsidiarity control mechanism. Regional chambers with legislative competences have been given the possibility to participate in the so called ‘early warning system’ (EWS) in which national parliaments scrutinize EU legislative proposals in terms of their compliance with the principle of subsidiarity. This article takes stock of the recent experience of regional parliaments under the EWS in order to determine to what extent, if at all, the new subsidiarity provisions have enhanced the regional involvement in EU policy-making. It analyzes two opportunity structures through which regions can participate in EU policy-control, i.e. the national parliamentary channel and the Subsidiarity Monitoring Network of the Committee of the Regions. The findings reveal that regional participation in the EWS is considerably limited and disproportionate both between and within the Member States, thus bringing to light new challenges for the implementation of a multilevel inter-parliamentary cooperation in European affairs.

*Keywords: regional parliaments, subsidiarity, early warning system, multilevel governance, Committee of the Regions*

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# 1. Introduction

The process of European integration has refashioned the territorial balance of power in the European Union (EU) by shifting a considerable number of competences from central states to the supranational level. Inevitably, this shift directly affected the subnational level of governance. For the regions with legislative power<sup>1</sup> it has resulted in a ‘double centralizing effect’. On the one hand, the EU has gradually taken over legislation in policy areas of subnational competence such as agriculture, trade, economic development, transport or environment. On the other hand, by accident or by design, the states have gained the possibility to intervene in the subnational sphere of competence by the specificity of the EU decision-making process (i.e. bargaining among national governments in the Council of the EU). In that context, the general commitment of EU legislators to take decisions ‘as closely as possible to the citizen’ [Article A of the Treaty on European Union (Maastricht text), 1992 O. J. C 191/1 (hereinafter Maastricht TEU)] and in accordance with the principle of subsidiarity (art. B of the Maastricht TEU) required certain institutional safeguards which would ensure regional participation in the conception of policies belonging to their sphere of competence. However, contrary to what many federalists and regionalists hoped for (Heraud, 1974; Loughlin, 1996), the concept of subsidiarity in the European institutional construction has for a long time been limited to the two-level relations between the EU and the Member States at the national level. It was only the Lisbon Treaty (2009) that changed this state of affairs through enhancing and extending the application of the principle of subsidiarity. The former meant equipping national parliaments with a tool for controlling the European legislative process through the so called ‘early warning system’ (EWS), the latter referred to engaging, for the first time, the regional legislative chambers into the very process.

While national parliaments’ engagement in subsidiarity control has recently received significant scholarly attention (Cooper, 2006; 2012; Louis, 2008; Kaczyński, 2011; Kiiver, 2008; 2012; Matarazzo and Leone, 2011 among others), not much has been said about the role of regional legislative chambers in the post-Lisbon institutional context.<sup>2</sup> This article intends to fill this gap by taking stock of the recent experience of legislative regions in the EWS. Its primary aim is to determine to what extent the Lisbon Treaty provisions have strengthened the regional level in the

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<sup>1</sup> Regions with legislative power (‘legislative regions’) are the subnational entities possessing regional parliaments which exercise their constitutionally attributed law-making competences in various fields of policy. There are 78 legislative regions in the EU belonging to eight Member States [Germany, Belgium, Austria, Italy, Spain, Portugal, Finland (Åland Islands) and the UK (Scotland, Northern Ireland and Wales)]. The legislative capacity of these regions varies from one Member State to another.

<sup>2</sup> For a preliminary overview of the process of adaptation of regional parliaments to the Early Warning System see the EIPA report “The role of regional parliaments in the process of subsidiarity monitoring within the Early Warning System of the Lisbon Treaty” published by the Committee of the Regions at the beginning of 2011.

control of the European legislative process. Should the acknowledgment of the regional parliaments with legislative powers in the provisions on subsidiarity be considered as a genuine effort of the European legislator to overcome the long-lasting ‘regional blindness’ of the EU (Weatherill, 2005:1) or should it be rather taken as a symbolic gesture without significant political implications? In the former case, the question becomes: *what should be the nature of the regional involvement in the EWS*? Based on empirical data gathered among representatives of the regional parliaments and the Committee of the Regions, this article accounts for the progress, but also identifies the obstacles, in the implementation of subsidiarity checks at the regional level.

To this end, section one of this paper provides an approximation to the very concept of subsidiarity and its practical application in the context of EU governance. It presents rationales for including the regions in the multilevel institutional dialogue. Section two evaluates the hitherto acquired regional experience in the EWS through the national parliamentary channel. Based on data gathered from questionnaires conducted among representatives of the regional parliaments of five EU Member States,<sup>3</sup> it analyzes several different aspects of the subnational parliamentary involvement such as the institutional changes occurring at the regional level, attitude of regional elites towards the EWS and the nature of the inter-parliamentary cooperation. The analysis accounts for both the ‘top-down’ institutional effects of Europeanization upon the domestic actors through application of the EWS, as well as the ‘bottom-up’ dynamics stemming from the institutional response and mobilization of the regional parliaments. Finally, section three reviews the new role of the Committee of the Regions in the context of the EWS in order to assess its potential effectiveness as an institutional interlocutor between the regions and EU institutions.<sup>4</sup>

## **2. Legislative control of *what, how and by whom*: the problematic nature of the subsidiarity principle?**

Article 6 of the ‘Protocol no. 2 on the application of the principles of subsidiarity and proportionality’ attached to the Treaty of Lisbon (hereafter ‘Protocol no. 2’) provides national parliaments of EU Member States with a tool for a systematic control of the EU legislative process

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<sup>3</sup> The survey was conducted in the period of September 2011- September 2012 among 45 regional parliaments of five EU Member States (Italy, Spain, Belgium, Finland and the UK). Questionnaires were received from 23 regional chambers (seven Spanish, eleven Italian, two Belgian, two British and one Finnish regional parliament), which gives the overall response rate of 51%. Such case selection allows this article to examine the dynamics of regional mobilization within the EWS in two regionalized (Spain, Italy), one federal (Belgium), one devolved (the UK) and one unitary system (Finland). Although primarily the questionnaires were targeted at political members of regional parliaments responsible for parliamentary EU commissions, in almost all cases they were transmitted and addressed by the legal advisers responsible for carrying out European affairs.

<sup>4</sup> The author conducted informal interviews and desk research at the Subsidiarity Monitoring Network of the CoR in the period of January-April 2011 and in March 2012.

within the so called ‘early warning system’. In its framework, national chambers have eight weeks from the date of transmission of an EU draft legislative act to scrutinize it and issue a reasoned opinion stating why they consider that the draft in question does not comply with the principle of subsidiarity. Two procedures can emerge from this process:

- a. “Yellow card”: when at least one third of national parliaments (one vote per chamber in bicameral systems) oppose to the draft legislative act on the basis of its non-compliance with subsidiarity principle, the initiator of the contested draft must review the proposal. He may then decide to maintain, amend or withdraw the draft, however reasons must be given for each decision in a form of Communication [art. 7(2) of the Protocol no. 2]
- b. “Orange card” (applying only to EU draft legislative acts under the ordinary legislative procedure): when more than half of the national parliaments oppose such an act on grounds of subsidiarity breach the latter must be reviewed. The European Commission may then decide to maintain, amend or withdraw the proposal. If the Commission decides to maintain it, it has to provide a reasoned opinion justifying why it considers the proposal to be in compliance with the subsidiarity principle. On the basis of this reasoned opinion and that of the national parliaments, the European legislator (by a majority of 55 per cent of the members of the Council or a majority of the votes cast in the European Parliament) shall decide whether or not to block the Commission's proposal. If either of them shares the opinion of the national parliaments about the subsidiarity breach the legislative proposal will not proceed [art. 7(2) of the Protocol no. 2]

Although national parliaments have not obtained the possibility to use the “red card” (i.e. to veto EU legislative project), Article 8 of Protocol no. 2 grants them the right to bring legal action before the Court of Justice of the EU (CJEU) on the basis of subsidiarity breach provided that they had previously issued a reasoned opinion within the EWS (For a comprehensive view of the role of national parliaments in the EWS see Kiiver, 2012).

Moreover, and what will constitute the essence of the further analysis, Article 6 of Protocol no. 2 recognizes the parliaments of regions with legislative powers as a separate category of institutions involved in the EWS by stating: ‘it will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers’. Although such provision leaves much scope for interpretation of the actual role that regional parliaments *might* or *should* play in the control of the EU legislative process, it unequivocally recognizes the possibility of them being consulted in the subsidiarity review, thus opening yet another channel of regional participation in EU policy-making (for a detailed analysis of regional mobilization in the EU see: Marks *et al.*, 2002; Tatham, 2008).

Yet, to be able to assess whether a particular EU legislative measure breaches or complies with a certain political or legal principle, the latter one needs to be precisely defined and delimited *a priori*. Taking into account that few legal or political concepts in the European *acquis communautaire* have provoked such degree of controversy, but also interest, as subsidiarity has, its conceptualization should to be addressed again in this article.

## 2.1 Of *what?* Definitional concerns

Anyone who comes across the question of subsidiarity while studying EU documents, be it treaties, directives, regulations, opinions, white papers or any other dossiers related to EU policy-making will be referred to the definition of the principle of subsidiarity as enshrined originally in the Article 5(3) of the Treaty on European Union (TEU), according to which ‘in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’.

As a matter of fact, Article 5(3) TEU does not define subsidiarity *per se* but rather sets a rule when the EU should intervene in order to comply with the principle (on the definition of subsidiarity see: Albertí Rovira *et al.*, 2005; Hinojosa Martínez, 2004; Louis, 2008; on the evolution of the concept in EU treaties see: Duff, 1993). And so, according to article 5(3) TEU two conditions should be fulfilled for the EU action to be justified: 1) insufficiency of Member States in performing the action at the national level (insufficiency test) and 2) added value of the same action performed at EU level (added value test). In fact, these two substantive conditions for the application of the subsidiarity principle appear quite vague and fuzzy. Firstly, from the legal point of view the question arises whether they should be considered cumulatively or alternatively. In other words, do we have to test whether the two conditions are fulfilled concurrently or would the positive test of the first one be sufficient to take a ‘subsidiarity friendly’ decision? The latter one does not seem convincing as we can imagine a situation when an action at the national level is sufficient, but at the same time the action at the EU level can be better achieved. In fact, the two tests (negative and positive) are difficult to separate, as the justification of EU action in terms of its ‘added value’ entails providing reasons for the action at the national level to be insufficient (e.g. because the issue being addressed has transnational aspects that cannot be satisfactorily regulated by Member States acting alone). This takes us directly to the second question about the scope of argumentation implied by the treaty drafters in the statement ‘by reason of the scale or effects of the proposed action, be better achieved’. Are these ‘effects’ of legal, political or economic nature?

What kind of evaluations should be employed to assess whether a certain action is in fact ‘better achieved’? For any experienced lawyer or policy-maker words ‘sufficiently’ or ‘better’ are highly contestable notions which can be interpreted using different rationales and criteria. Yet, it is commonly admitted that in this context the objective which constitutes the fundament and gives sense to the subsidiarity principle is the maximum relative efficacy of the level of governance which acts within the legal framework of the attribution of competences (Popelier and Vandenbruwaene, 2011). In this sense, the principle of subsidiarity encompasses the requirement of rationality and certain moderation in the exercise of shared competences (Endo, 2001), entailing a twofold logic of conduct: i.e. negative, expressed by the right to say ‘no’ to the unjustified (inefficient, irrational) EU intervention leading to unnecessary centralization of policy-making; and positive, according to which the EU should act to help the Member States when these are not capable to achieve the desired results by the intervention at the national level.

## **2.2. How ? Towards an application of the principle**

After having established that subsidiarity can be understood as a device for managing competing claims for the assignment of competences between different tiers of jurisdiction when the competences are shared across different levels of governance (Bermann, 1994), the practical application of the subsidiarity provision as stated in article 5(3) TEU requires taking into account two kinds of concerns: political and legal.

With respect to the first one, the already discussed two conditions of insufficiency and added value should be satisfied by the legislators. In other words, the EU action must be necessary, should bring added value over and above what could be achieved by Member States action alone, and – the former two being satisfied – the decisions should be taken as closely as possible to the citizen in accordance with the Preamble of Lisbon Treaty. In this sense, subsidiarity has a considerable normative appeal as representing ‘good’ and ‘just’ rule of governance (Burrows *et al.*, 2004). Yet, deciding about whose action (EU’s or Member States’) will be more efficient, beneficial and thus legitimate entails an eminently political interpretation and at the same time certain degree of discretionality. Subsidiarity principle becomes then not an objective criterion set *a priori* and easy to verify through legal instruments, but a dynamic concept (as laid down in Paragraph 3 of the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty of Amsterdam 1997) and changeable according to circumstances - be it political, institutional or economic. From this point of view, the final decision about the legitimization of policy intervention at the best suited level of governance is rather an outcome of politically and

economically grounded arguments rather than absolutely objective evaluation (Compare: Palomares Amat, 2011; Horsley, 2012).

As regards the legal aspect of subsidiarity, we refer to certain procedural requirements which EU legislators need to fulfill before presenting legislative drafts and which later can become subject to judicial control of the CJEU (For the role of the Court in subsidiarity control see Horsley, 2012). Here, the object of control can be threefold. Firstly, the correct exercise of competences has to be observed (it is clear that subsidiarity applies in the sphere of non-exclusive powers). Secondly, the legislator needs to include in the draft legislative proposal a justification of the planned action with regard to subsidiarity principle, but also in form of a comprehensive impact assessment of the proposed legislative measures (art. 5 of Protocol no. 2). In this respect, it should be noted that the EWS refers only to the control of subsidiarity while the Protocol no. 2 mentions also another principle which should be observed by EU legislator, namely, the principle of proportionality according to which ‘the content and form of EU action shall not exceed what is necessary to achieve the objectives of the Treaties’ [art. 5(4) TEU]. Exclusion of proportionality checks from the EWS meets with criticism among lawyers (Kiiver, 2012:22; Schütze, 2009: 532-33) and policy practitioners, as the two principles are very much interlinked and therefore difficult to be separated while assessing the efficacy and efficiency of EU legislation. As will be shown further, regional parliaments take a somehow broader scope in their analyses under the EWS, deeming it impossible to avoid references to proportionality in their opinions. Thirdly, the judicial control can also extend to the sphere of specific pre-legislative requirements imposed on the legislator by the Treaty of Lisbon such as the obligatory and ‘wide’ consultations with particular stakeholders including regional and local authorities (i.e. Committee of the Regions or the European Social and Economic Committee) (Implicit in art. 2 of Protocol no. 2; explicit in art. 307 TEU).

### **2.3. *By whom?* The regional dimension of subsidiarity**

While subsidiarity in the EU context can be defined as a concept describing the level of governance at which action should be taken, the Treaty of Lisbon adds, for the first time, the regional level to the EU tiers of jurisdiction institutionalizing it, *ipso facto*, as a distinct element of the EU system of multilevel governance. In this sense Article 4 (2) TEU specifies that the EU ‘shall respect the equality of Member States before the treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of *regional and local self-government*’. Consequently, the treaty drafters have extended the application of the principle of subsidiarity to the regional level [art. 5(3) TEU] and brought in - at least on the paper - the real multilevel dimension to subsidiarity control within the EWS (art. 6 of Protocol no. 2, see above). In

doing this, the EU has imposed on itself the obligation to respect the degree of regional autonomy in EU Member States through, *inter alia*, taking into account the legislative competences of regional authorities while drafting EU policies. In the same vein, the Commission is expected to extend its pre-legislative consultations and impact assessments to the regional and local level (respectively art. 2 and 5 of Protocol no. 2). The dialogue which takes place between the Commission and the regional stakeholders prior to the presentation of legislative proposals takes several forms such as the mandatory consultation with the CoR on key policy areas of regional concern, sectorial consultation on the specific conditions for EU intervention in various policy fields or the structured dialogue with associations representing regional interests. Through means of the so called ‘impact assessments’ the Commission assesses the potential economic, social and environmental consequences of its future legislation, as well as those regarding the regulatory burden for the private and the public sector, which is also part of the Commission’s commitment to Better Regulation [See: COM(2009) 15 final].

The extension of the principle of subsidiarity to the regional level seems not only justified, but also desirable; most of all for legitimacy-related reasons (Weatherill, 2005; Popelier and Vandenbruwaene, 2011). It has to be remembered that regional and local authorities implement over 70% of EU legislation (Christiansen and Lintner, 2005). In this respect, their legislative, administrative and fiscal capacities in dealing with specific policies are crucial in conducting not only subsidiarity, but also proportionality and policy impact analyses to estimate the territorial effects of European legislation. The increased capacity of regional authorities to influence EU policy-making through their involvement in the decision-making process should - ideally- translate into co-responsibility for governance, awareness of its costs and increase in its effectiveness (Borońska-Hryniewiecka, 2011).<sup>5</sup>

Next to efficiency-related arguments, the inclusion of the regional level into the EWS should also be considered as an enhancement of EU accountability and democratic legitimacy within the overall context of a relatively low level of public trust in political institutions. The Special Eurobarometer (307/2009) reveals that while only one third of Europeans tend to trust their national governments (34%), half of the citizens express trust towards their regional and local authorities (50%). The same survey shows also that a large majority of Europeans feel that public authorities at the regional level are not sufficiently taken into account in EU policy-making (59%). These

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<sup>5</sup> It is commonly admitted that one of the reasons behind the failure of the Lisbon Strategy was the fact that it was too much of a top-down strategy with ambitious but quite abstract indicators imposed by Brussels and objectives lacking joint frameworks for implementation feeding on the potential of the various territorial levels of government and non-state actors. In other words, the strategy suffered from the lack of multilevel and partnership oriented approach both during its design and implementation (Compare: *After Lisbon - the role of regional and local authorities in the new Strategy for Sustainable Growth and Better Jobs*, A study commissioned by the Committee of the Regions and written by Metis GmbH on the basis of interviews conducted among by the Lisbon Monitoring Platform on the CoR in 2010).

findings imply that EU citizens not only entrust regional parliaments with significant scope of political responsibility, but they also expect regional responsiveness to the possibility of ‘being consulted’ on EU related issues. In this case, the inclusion of regional parliaments – as the local representative institutions – into the scrutiny of EU legislation affecting subnational competences should enhance the ‘input-legitimacy’ of the European governance (Scharpf 1997; 1999) through linking political decisions at supranational level with citizens’ preferences on the ground. Finally, the involvement of regional assemblies in the subsidiarity control could become a useful way of accelerating Europeanization process of subnational political elites, bridging the gap between the regional politics and EU policies (Bauer *et al.*, 2010) which, in the long run, could help overcome the long-lasting ‘deparlamentarization’ at the subnational level.

### **3. Theory *versus* Reality: the regional experience under the “early warning system”**

In order to objectively assess the significance of the Protocol no. 2 for the regional empowerment one should take into consideration at least three aspects. First of all, in spite of the formal acknowledgment of the regional level in the EWS, the Protocol has not made the consultation with regional parliaments obligatory, but has left it to the discretion of the national chambers. The statement: ‘it will be for each national parliament (...) to consult, where appropriate, regional parliaments’ does neither purport the requirement of consultation nor entails any sanctions for its omission. The Protocol no. 2 also leaves to the judgment of national parliaments the selection of conditions and mechanisms of including regional chambers into the EWS and to take their opinions into account. While it is true that pre-legislative consultations with regional parliaments are informally encouraged by the Commission and recommended by the European Parliament<sup>6</sup> as a way to diminish the democratic deficit of the EU, the effectiveness of inter-parliamentary cooperation in the framework of the EWS depends on various domestic institutional variables. As regards the scrutiny rights of the regional parliaments, they have neither been equipped with the possibility to raise the ‘yellow’ or ‘orange card’ in matters belonging to the sphere of ‘shared competences’, nor have they been granted the right to bring legal action before the CJEU in case of subsidiarity breach. The latter one was however granted to the CoR which may now issue complaints against legislative acts for the adoption of which the Treaty provides that it be consulted (See below).

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<sup>6</sup> See: *European Parliament’s resolution on the 18<sup>th</sup> report on Better Legislation* (2011/2276(INI)).

### 3.1. Institutional changes and participation record

The preliminary findings gathered from surveys conducted among regional parliaments in five Member States reveal that the application of the EWS has so far been rather irregular and unsatisfactory. To date only some regional parliaments have run their own subsidiarity analyses, while others have remained silent, be it due to lack of expertise, lack of cooperation with the national level or simply disinterest in the matter.

In terms of the regional parliamentary mobilization in the framework of the EWS, the gathered findings show considerable disproportions. In Spain, majority of regional parliaments have incorporated the new provisions for subsidiarity into their legal order through either amending their statutes of autonomy, or changing the parliamentary rules of procedure. As for the participation record, parliaments of the Spanish autonomous communities appear to be the most active from the five analyzed Member States and, on the overall, conduct more analyses under the EWS than their national counterpart. For example, until August 2011 the regional parliament of the Canary Islands conducted 14 analyses out of 110 EU draft legislative proposals obtained from the EU; at the same time the regional parliament of Catalonia issued 21 opinions. The actual leader in conducting subsidiarity analyses turns out to be the Basque regional parliament which until the end of 2011 conducted over 160 checks out of 237 received EU legislative projects. In the UK, recent changes have been introduced to the parliamentary Standing Orders in Wales and Scotland regarding the scrutiny of subsidiarity. With respect to the numerical data, the National Assembly of Wales indicated that between January and May 2012 its Legal Services analyzed 29 EU draft legislative acts affecting regional competences under the EWS. Out of these, one was identified as raising subsidiarity concerns [Proposal for a Directive on Public Procurement (COM/2011/896)]. Similarly, the Åland Parliament has so far issued one opinion stating the breach of the subsidiarity principle [Proposal for a Directive on energy efficiency (COM/2011/ 370 final)].

On the other hand, in Belgium and Italy (albeit except Sardinia, Marche and Lombardy)<sup>7</sup> regional parliaments have not yet enforced any specific regulations transposing the provisions of Protocol no. 2. In case of Belgium, the reason for this delay is the institutional stalemate in the process of ratification of the cooperation agreement on the distribution of subsidiarity votes among all the seven Belgian parliaments. In Italy, the main obstacle appears to be the inherent bureaucratic sluggishness of the administrative system. Since the willingness of the regions to establish their own subsidiarity monitoring procedures depends to a great extent on the readiness of the national level to cooperate with regional chambers within the EWS, Italian regions have not yet received the necessary stimulus from Rome. Consequently, it is difficult to classify any of their activities as

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<sup>7</sup> Those regional parliaments have established procedures on the EWS without waiting for a decision of Rome.

strictly subsidiarity checks. Some regional parliaments (e.g. Sardinia, Marche, Calabria) have admitted conducting analyses of EU draft legislation, however not limited to subsidiarity assessment but in a broader political perspective, concerning the content and the impact of the potential legislation at the regional level (e.g. with respect to the Commission's proposal for a reform of the CAP after 2013).

### **3.2. Regional perception of the EWS**

While the formal setup of the EWS in the Protocol no. 2 represents a legal and institutional innovation, its efficient implementation depends on the commitment of various institutional actors to transform the law into effective political tools. The data on regional perception of the EWS and the role of regional parliaments in this procedure contributes to a better understanding of the nature of regional mobilization (or its lack) in the EWS.

With regard to the question of *whether the new prerogatives granted to national parliaments within the EWS influenced the position of the regional assemblies, and if yes, then in what way*, the opinions are quite divided. Generally, there is an increasing awareness among the members of regional parliaments (MRP) of the possibility to be consulted on EU legislation. This is significant to the extent to which regional legislatures feel responsible to respond to this new challenge *vis-a-vis* the regional executives, which historically have more experience and expertise in EU policy scrutiny. At the same time, however, only five out of 23 respondents think that granting the regions a legal base for the participation in the EU legislative process under the EWS signifies an institutional empowerment. Majority of interviewees (14) pointed out that the full exercise of this provision is constrained in a twofold way. First of all, the domestic transposition of the EWS in Spain, Italy and the UK makes the validity of the regional opinions questionable since national parliaments are not obliged to transmit them to EU institutions. Several regional chambers who have themselves invested resources in conducting subsidiarity scrutiny observed that the currently operating procedure does not really guarantee visibility of regional dimension in EU policy control, as no formal regulations have been established regarding the way in which regional input can be constructively taken into account at the national level, and further channeled up to the Commission. Secondly, majority respondents pointed to the limited scope of the consultation under the EWS (subsidiarity test), which leaves regional parliaments without the possibility to express any other observations regarding the nature and content of EU proposals (in practice it happens, see further in this article).

Yet, apart from the sceptical attitude towards the regional leverage in the EWS, there is a general agreement among the representatives of regional parliaments (19) that participation in the

EWS has a positive spill-over effect through enhancing the Europeanization process of the subnational administration and political elites, increasing their knowledge about EU legislation and responsiveness to EU affairs. The answers presented in the questionnaires reveal that regional legal advisers are increasingly aware of the fact that the current transformation of EU governance requires technocratic expertise as a resource, not only for the purpose of effective policy execution, but also for policy creation. To this end, the regional parliaments need to expand their competences into new areas.

### **3.3. The main stumbling blocks**

Participation in a complex scrutiny of EU legislative projects under the EWS entails building new technical and legal capacity at the parliamentary level. In this context, majority of the respondents point to four main obstacles in advancing the operationalization of the subsidiarity checks. These are: lack of human resources and expertise, insufficient time to conduct the scrutiny, poor cooperation with the national level and lack of political interest of the MRP.

The eight-week period given to national parliaments to issue their opinions under the EWS is reduced to seven (Belgium), six (Finland), four (Spain) and three weeks (Italy for general scrutiny of EU legislation) in case of the regional chambers. Almost all of the interviewed admitted that these deadlines are too short to prepare a profound and comprehensive analysis. Surely, the problem could be diminished if the periods of time given to the national and regional parliaments, instead of being consecutive, were parallel. Yet, what interests the regional assemblies is to influence the national position; therefore a regional report should be available before the national parliament makes a decision regarding its reasoned opinion in order to eventually include regional observations into it. Some parliaments mentioned that, due to overload of documentation coming from the EU (especially after the Treaty of Lisbon) and the relative scarcity of human resources specialized in EU affairs, it is difficult to expect that people so far responsible for other issues would acquire knowledge of sector-specific EU legislation as draft proposals arrive for analysis. Often, we speak of analyses which require simultaneous legal, technical and policy related expertise. In such circumstances, given that at the end of each year the Commission publishes its legislative forecast for the following exercise, it would be recommendable that regional parliaments know it well in advance to be able to prioritize and plan the monitoring works adequately. Moreover, having in mind the complex nature of the subsidiarity test, the EWS should guarantee the possibility of political debate within the parliaments, a debate among all the political parties that, ideally, escapes ritualization and allows for taking into account all the circumstantial parameters

and policy impact of the proposed legislation. To this end, genuine interest of the MRPs seems crucial.

However, in this context, majority of the respondents point to insufficient involvement of the political deputies in the activities related to the EWS. The reasons behind this are manifold. First of all, with limited resources at hand, participation in technical scrutiny of EU legislation does not seem appealing for the regional politicians, especially given that only a handful of EU legislative proposals will have the subsidiarity question mark raised over them, and from these only a limited number directly affects the regional competences. Furthermore, the aforementioned narrow scope of the scrutiny under the EWS (detecting the breach of subsidiarity) leaves the regional parliaments without the possibility of engaging into a broader political dialogue, such as in case of the ‘Barroso initiative’ between the Commission and national chambers. In this context, majority of informants have admitted taking a broader perspective in their analyses under the EWS and commenting not only on *who should act* in a given policy area (i.e. subsidiarity check) but also *what should be the form and nature of this action* (i.e. proportionality and the content analysis of the proposal). This shows that regional parliaments deploy resources to go beyond their task to simply assess the subsidiarity compliance and use the possibility of being consulted under the EWS to deal with issues of crucial political interest to them. Finally, in some cases issuing a reasoned opinion is simply politically unrewarding since its impact at the national, let alone EU level is not concrete.

This leads us directly to the question of inter-parliamentary cooperation which in all the analyzed cases leaves much scope for improvement. Here again, the reasons of cooperative deficits vary among the Member States. In Italy, the long-lasting absence of national level provisions for the regional engagement the EWS has been compensated by the newly approved law on domestic participation in EU affairs (*Legge 24 dicembre 2012, n. 234*). The law strengthens the role of the regions in the creation of EU law by giving the possibility to the Presidents of the regional parliaments to send their observations regarding the principle of subsidiarity to the Senate and the Chamber of Deputies (art. 25). However, while regional parliaments might present their observations regarding the contents of the analyzed EU proposals, neither the national parliament nor the government are obliged to take them into consideration. Until now, inter-parliamentary relations regarding *ex-ante* EU policy control were limited to informal exchanges of views between some more proactive Italian regions (e.g. Marche; Toscana) and the Senate, and mediated at the level of civil servants rather than MRP. The communication deficit between the national and the regional level has been partly compensated by the Conference of the Presidents of the Italian Regional Assemblies for which the new law also foresees the role of an institutional intermediary

(art. 24).<sup>8</sup> Through its established Working Group on European affairs, the Conference ensures coordination of EU-related activities at the subnational level, also regarding subsidiarity. It plays a role of an Europeanization agent by organizing EU-related seminars or providing expertise and trainings on the EWS.

In Spain, the relations between the national and regional parliaments under the EWS are formally regulated by the Law 24/2009. The organ responsible for the inter-level exercise of the EWS is the Mixed Commission of Congress-Senate for the European Union. While it is not legally bound to take into account the input of regional chambers when drafting its final reasoned opinion, it can incorporate a reference to regional opinions if they support the Commission's stance. In other words, when it comes to establishing the binding force of the opinions of *comunidades autónomas*, they will only be taken into consideration if the Commission deems it advisable to do so, i.e. if they serve to strengthen its point of view (Zarragoitia 2009:39). This happens independently of the number of regional opinions, or of the character of competences affected by an EU proposal (regional, national or shared). In this context, the question arises what happens in case if a legislative proposal deemed non-compliant with the principle of subsidiarity affects the exclusive competence of just one or only a few regions (On competence asymmetry in Spain see: Borońska-Hryniewiecka and Hryniewiecki, 2011).

In Belgium, according to the Declaration No. 51 on the national parliaments (17 Dec. 2008, PB C 306, p. 287), the two Belgian subsidiarity votes in the EWS are divided not between the Senate and the House of Representatives (as stipulated in Protocol no. 2), but between the federal and regional level. This potentially empowers regional chambers giving them possibility to cast one subsidiarity vote in the sphere of the so-called mixed affairs, and two votes in case of exclusive competences. In the exceptional cases where only one region is competent in a given policy area (e.g. fishery for Flanders) this region disposes of the two votes. Theoretically then, regional chambers function on equal footing with the national parliament under the EWS. However, since no agreement has been reached on how to effectuate the Declaration No. 51, the controlling capacities of the regional chambers remain only presumed.

In the United Kingdom, no formal cooperation mechanism between the national parliament and the devolved legislatures exist. Rather, the regional parliaments are given discretion to establish their own procedures in order to express views on legislative proposals and to notify both Houses of the UK Parliament about their concerns. Yet, the latter one is under no formal obligation to accept views expressed by the regional chambers. However, as the case of the draft Directive on Public Procurement [COM (2011) 896] has shown, devolved legislatures can indeed have real input into

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<sup>8</sup> *Conferenza dei Presidenti delle Assemblee legislative delle Regioni e delle Province autonome.*

the EWS. In March 2012, the House of Commons agreed to issue a reasoned opinion including the meaningful observations of the Welsh Parliament in relation to the abovementioned draft proposal.

In case of the Åland Islands the cooperation agreement between the national and the regional level provides that if the opinions of the Åland parliament and the Finnish parliament are in conflict regarding compliance/non-compliance with subsidiarity, the statement from the Åland parliament will be forwarded in full as an attachment to the Finnish opinion to the EU-institutions.

The abovementioned examples show that the praxis of inter-parliamentary cooperation under the EWS varies across Member States reflecting the domestic preferences for the inclusion or exclusion of the regional level. The development of the lower-order rules transposing EU treaty provisions into the national context are in this case path dependent and conditioned by the state's institutional traditions. Selection of particular instruments to transpose the EWS provisions into the domestic legal order does not have an unbiased, neutral character, but is rooted in particular political values and sustains them. Be it due to administrative sluggishness (Italy), socio-political cleavages (Belgium), prevalence of informal communication patterns (UK, Italy) or simply lack of cooperative tradition (Spain), the influence of regional opinions at the EU level will be significantly constrained. By way of another example, the Spanish institutional culture of competitive regionalism and limited trust between different levels of government caused by socio-political cleavages, resulted in a successful, long term blockade of the regional access to the Council of Ministers [provided for in Article 146 of the Maastricht Treaty (article 203 of the EC Treaty)] by the government of José Maria Aznar. The 12 year veto was only abolished after the parliamentary elections of 2004 by José Louis Rodriguez Zapatero who decided to improve the relations with the autonomous communities and facilitate their participation in European affairs. To sum up, even if the institutional context of the EU creates relevant opportunity structure, the regional action capacity can still be restrained by the frames set by the national government acting as a legitimate gatekeeper within the framework of EU institutional system.

#### **4. Subsidiarity monitoring through the Committee of the Regions: towards an enhanced cooperation?**

Apart from the national parliamentary channel, regional legislative chambers can participate in the process of subsidiarity control through the Subsidiarity Monitoring Network (SMN) of the CoR. Since its creation in 2007, the SMN has become a platform of cooperation and exchange of

experience among subnational authorities in subsidiarity related issues. Until the entry into force of the Lisbon Treaty, SMN had conducted a series of ‘pilot tests’ aimed at political and legal analyses of EU proposals with potential territorial impact (i.e. environment, health policy, education) in order to prepare the regional parliaments and governments for the participation in the EWS foreseen by the forthcoming treaty. To this end, the network elaborated a special subsidiarity and proportionality assessment grid which facilitates the conduct of legislative scrutiny by providing adequately formulated questions.<sup>9</sup>

Regional cooperation with the CoR during the pre-legislative phase of EU policy-making seems even more reasonable after the entry into force of the Lisbon Treaty for several reasons. First of all, the Treaty extended the obligatory consultation procedure in the EU legislative process, as a result of which not only the Commission, but also the Council and the European Parliament are obliged to consult the CoR in a wide number of policy areas which affect regional and local competences (i.e. economic, social and territorial cohesion; trans-European networks; transport, telecommunications and energy; public health; education and youth; culture; employment; social policy; environment; vocational training and climate change). This in turn extends the application of subsidiarity checks to these policy fields for which a greater scope of regional expertise needs to be built. Since the SMN is an expert-based unit of the CoR, its main task is to facilitate the operationalization of subsidiarity checks at EU level and to bridge gaps between the technicalities of EU legislation and its political impact. In order to make this happen, according to the revised working strategy of the CoR (May 2012), each political group of the CoR will appoint a subsidiarity coordinator who will work together with the SMN to ensure proper coordination and political follow-up of subsidiarity monitoring activities throughout the year.

In the context of the EWS, during the eight week period for conducting the parliamentary scrutiny, the SMN will work in close partnership with the national and regional parliaments to enhance mutual information exchange and to analyse the territorial impact of the Commission’s proposals. In this sense, its main task is to act as a catalyst of the regional involvement in the EWS through establishing communication mechanism among the regional parliaments and supporting them in various stages of monitoring of the EU legislative process. It does it by filtering and circulating information, as well as by strengthening the cooperation with other EU institutions.

To remedy the aforementioned inter-parliamentary communication deficit, the SMN has recently established REGPEX, an electronic database serving as information exchange platform for regional assemblies in the process of subsidiarity monitoring and impact assessment procedures.

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<sup>9</sup> The grid can be consulted at: [http://extranet.cor.europa.eu/subsidiarity/Documents/Standard%20assessment%20grid/External%20Subsidiarity%20Evaluation%20Grid%20A7798\\_enm.pdf](http://extranet.cor.europa.eu/subsidiarity/Documents/Standard%20assessment%20grid/External%20Subsidiarity%20Evaluation%20Grid%20A7798_enm.pdf), accessed 25.09.2012.

This regional equivalent of the Interparliamentary Information Exchange System (IPEX) at the national level provides access to the complete catalogue of the Commission's proposals and links to relevant websites in order to perform a proper subsidiarity scrutiny. Through REGPEX, regional parliaments have access to tailored files containing all available information related to a number of issues identified as especially relevant with regard to the EWS (i.e. working papers, impact assessments, action plans or *ad-hoc* forwarded documents from EU institutions). Furthermore, the SMN aims at creating a catalogue of thematic areas in which each regional parliament would express its interest and thus facilitate communication between particular parliamentary groups interested in conducting analyses of EU legislative proposals related to particular policy fields. This, ideally, should help regions to create groups of particular policy interest in order to better monitor EU legislative process and pursue joint and effective lobbying strategies at the EU level.

From the point of view of institutional empowerment, the most important development is surely the fact that the CoR has been finally granted the right to bring legal actions before the CJEU. According to the Lisbon Treaty provisions, this might happen in two distinct cases: firstly, to protect the CoR's own institutional prerogatives (i.e. its right to be consulted), and secondly, to request the annulment of EU legislative acts which it considers being in breach of the principle of subsidiarity, provided it falls within an area in which the CoR's consultation is mandatory (art. 8 of Protocol no. 2; see above). Such actions may be proposed to the Committee's Plenary Assembly either by the CoR President or by the competent political commission acting in accordance with the Rules of Procedure of the CoR. The Legal Service of the CoR has prepared a Handbook which describes the *modus operandi* which should be followed in the event of bringing an action before the CJEU on grounds of subsidiarity breach. So far, no such legal action was undertaken.

The last novelty regarding the inter-institutional relations in the field of subsidiarity monitoring is the renewed 'Protocol on the Cooperation between the Commission and the Committee of the Regions' (February 2012) with regard to legislative procedures and planning. The Protocol aims at making the mutual cooperation on subsidiarity and impact assessments faster and more efficient. To this end, the CoR is now taking into account the Commission's priorities and deadlines in the establishment of its annual organisation of work, which ideally should be communicated to all regional parliaments through the aforementioned REGPEX website. According to the Protocol, the Commission may now invite the CoR to issue a new opinion about the implications for regional and local authorities of an emerging result of the legislative process, taking into account the principle of subsidiarity. In this context, the CoR will share the results of its consultations within the SMN with the Commission. If during a legislative procedure, the CoR raises substantial concerns regarding the respect of the principle of subsidiarity it will immediately inform the co-legislators. In this context,

one of the questions which have not been addressed so far and still need to be raised is which EU institution should centralize the receipt of the reasoned opinions. According to the Lisbon Protocol these are sent to the Presidents of the Commission, the Council and the Parliament. Yet, to ensure transparency, the information regarding the reasoned opinions (i.e. which parliament or chamber of parliament has sent a reasoned opinion and on which EU draft legislative act) should be stored by one responsible body and more easily accessible, not only through IPEX, but also through REGPEX in order to obtain a clear, multi-level overview of the number of gathered votes.

Although undoubtedly, the CoR SMN has gained a greater presence in all stages of EU policy-making, its actual effectiveness as facilitator of the subsidiarity checks and institutional interlocutor is still difficult to assess. Its composition, similarly to the CoR, is not homogeneous and varies from regional parliaments, through governments and regional associations to local and regional authorities without legislative powers. In fact, out of 136 partners of the SMN, only 37 are subnational parliaments with legislative powers which accounts for a half of the EU regional legislative assemblies (74). At the same time, some of the parliaments registered as partners of the EWS have never effectuated its cooperation with the Network (e.g. Sardinia). Moreover, while analysing the consultation record of REGPEX, it appears that so far the SMN consultations generate responses from a handful of the most active regional entities, usually from Germany or Austria, among which not regional parliaments but governments are the main contributors. As an illustration, it might be recalled that the consultation which so far produced the highest number of regional opinions regarded the Proposal for a Directive of the European Parliament and of the Council on public procurement [COM (2011) 896] and resulted in 11 reasoned opinions, of which five were submitted by regional parliaments.<sup>10</sup>

The opinions of regional parliaments regarding the effectiveness of the cooperation with the SMN gathered from the questionnaires are mixed. While some regional assemblies evaluate it in a positive way, others admit they do not make use of the Network at all. Some chambers perceive SMN as an effective instrument for diffusing the subsidiarity culture and knowledge among regional politicians appointed by the CoR, but do not treat it as a tool for strengthening the political position of the regions in the EU legislative process. The reasons of these discrepancies of opinions might be manifold, ranging from the record of experiences with the CoR, through differing regional capacity to fully explore the potential of the SMN, to simple ignorance. Moreover, while the parliamentary procedure under the EWS is already complex and time-consuming, the additional regional involvement in the consultations carried out through the REGPEX website might be treated as unnecessary overload by some regional parliaments.

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<sup>10</sup> See: <http://extranet.cor.europa.eu/subsidiarity/regpex/Pages/default.aspx>, accessed 1.10.2012.

## 5. Conclusion

This article attempted to give account of the regional involvement in the EWS and to answer the question to what extent the new subsidiarity provisions of the Lisbon Treaty have strengthened the regions with legislative powers. In doing this, it was assumed that regional parliaments, as the local representative institutions, should feel politically responsible for the control of the EU legislative process in the fields of policy affecting their competences. Due to their proximity to citizens they would be expected to see their involvement in the EWS not only as gaining visibility at EU level but, most of all, as a way to enhance their own democratic accountability.

The presented evidence suggests that the EWS is still more of a virtual mechanism than a real tool for developing the multilevel dialogue between the EU, national and regional interests. In this sense, the Lisbon Treaty provisions on subsidiarity have empowered the regions in rather symbolic terms. Although they have made regional parliaments with legislative powers co-responsible for the control of EU legislative process *via* the inter-parliamentary scrutiny, this possibility is still far from being exhausted. The findings reveal that regional participation in the EWS is considerably limited and disproportionate both between and within the Member States. One of the main reasons for this state of affairs is that participation in the EWS requires considerable institutional adjustment through investing time, expertise and personnel in political scrutiny of multitude of EU legislative acts which applicability will ultimately be decided by the Member States in voting at the supranational level. That is why the importance of regional chambers in operationalization of the principle of subsidiarity is inextricably related to the role of national parliaments in channelling regional opinions upstream to the Commission. Moreover, the presently operating procedures illustrate that subsidiarity control is best applied as synergy effect, rather than as individual input, both at the national and subnational level. In this sense, until the collective voice at the subnational level is organised effectively, reasoned opinions of single regional chamber are of little, if at all, relevance at the national, let alone EU level. Yet, developing an effective inter-parliamentary cooperation mechanism requires significant resources and political will, both of which are still missing. Considering that in majority of cases the domestic transposition of the EWS does not guarantee the inclusion of regional observations into the national opinion, the scepticism regarding the political impact of the regional involvement in the EWS seems quite understandable. The complex technical character of subsidiarity checks and little time for conducting the analyses both add up to the general conviction that the EWS is a costly institutional adjustment entailing incomparably more effort than yielding benefits.

One significantly positive effect of the EWS is that it jostles a number of regional parliaments into action and thus enhances Europeanization process of subnational political and administrative

elites. Although this is not a sufficient argument for regional parliaments to dedicate their resources to this procedure, in a long run it might allow them to regain their controlling functions over the regional executives. In order for the EWS to make a real political difference, regional parliaments should obtain guarantees that their voice will be genuinely taken into account by their national counterparts. Another possibility, yet - as the evidence suggests - still largely unexplored, is the closer collaboration with the CoR which now has not only new possibilities to influence EU legislation, but also a legal tooth to back up regional competences before the CJEU.

While the findings presented in this paper account for the experiences of regional parliaments of five out of eight Member States possessing legislative regions (the other three are Germany, Austria and Portugal), further comparative research is needed to confront and develop the preliminary conclusions. In doing this, it would be especially interesting to examine and explain the variation in the subnational parliamentary mobilization not only in the framework of the EWS, but in the widely perceived European affairs.

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