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COMPETING CONCEPTS OF SUBSIDIARITY IN THE
EARLY WARNING MECHANISM

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ABSTRACT

The essay aims at analysing how the relationship between parliaments in the European Union (EU) – the European, the national and the regional parliaments – are shaped after the coming into force of the Treaty of Lisbon and how the early warning mechanism can contribute to promoting their participation in the EU decision-making. Indeed, the control of compliance of draft legislative acts with the principle of subsidiarity appears as a key-element for enhancing the parliamentary involvement in EU affairs, as it is the opportunity to develop new institutional mechanisms, like the ‘political dialogue’, in spite of the political nature and function of this control. This essay is based on Neil MacCormick’s theory on the subsidiarity principle and, in particular, on the assumptions that what is called ‘democratic deficit’ in the EU is in reality a ‘subsidiarity deficit’. Here it is argued that the ‘subsidiarity deficit’ can be contrasted by the early warning mechanism introduced by the Treaty of Lisbon and by the cooperation among the Parliaments of the EU.

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Keywords: European Union, principle of subsidiarity, early warning mechanism, national parliaments, ‘political dialogue’

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1. Introduction

Throughout the years the European Union has become a legal entity with unique features on the international scene. Likewise its parliaments, from the regional to the European levels, now enjoy a place and a role that are not easily comparable to those they have been acknowledged in any other international organisation or process of regional integration.

According to Neil MacCormick, possibly the most prominent Scottish legal philosopher of the twentieth century,¹ the European Union is a ‘polyglot, multinational and trans- or supra-national commonwealth committed both to democracy and subsidiarity’, a ‘non-sovereign confederal commonwealth constituted by post-sovereign Member States’ (MacCormick 1999; Fossum 2011: 281). Thus one of the main features of this multinational democracy is the cohabitation and the interdependence between national (including also the regional and the local levels) and European institutions, neither of them entitled to absolute sovereign powers.

In later years many scholars relied on MacCormick’s theory on the EU’s legal nature, either those who have taken the doctrine(s) of ‘constitutional pluralism’² directly from the work of the Scottish thinker or those who, although sharing the standpoint of the European legal construction as a highly complex system (Martinico 2012: 105-176), have then described it in different legal terms.³

One of the features most underlined by MacCormick with regard to this European commonwealth, which is also the general assumption of this essay, is the preservation of powers of

¹ As legal philosopher, Neil MacCormick was a renowned exponent of the neo-institutionalism (Pallante 2008: 208-224; Blichner 2011: 27-53). He was also a high profile politician: for example, as member of the EP, he served also as member of the Convention that drafted the Constitutional Treaty, the Convention on the future of Europe.

² The foundation of the doctrine of ‘constitutional pluralism’ can be based in an article published by MacCormick in 1995 on the judgment of the German Constitutional Court on the constitutionality of the Treaty of Maastricht, although the denomination of ‘constitutional pluralism’ was not given to the theory by the Scottish legal philosopher himself, but was assigned later on by other legal scholars (MacCormick 1995: 259; Maduro 2003: 501-537; Avbelj and Komarek 2012). Moreover, throughout the years, the theory of constitutional pluralism has been subject to a process of diversification. According to Avbelj and Komarek (2012: 4-6), there are six most prominent and influential concepts of ‘constitutional pluralism’: socio-teleological constitutionalism by Joseph H.H. Weiler; epistemic meta-constitutionalism by Neil Walker; universal or cosmopolitan constitutionalism by Mattias Kumm; harmonious discursive constitutionalism by Miguel Poiares Maduro; multilevel constitutionalism by Ingolf Pernice; and pragmatic constitutionalism by Oliver Gerstenberg and Charles F. Sabel. Finally, also Neil MacCormick, who is considered the first theorist of ‘constitutional pluralism’, has shifted his original conception of ‘radical pluralism’, where ‘there are no legal criteria at all for resolving conflicts’ between the EU and its Member States (Borowski 2011: 199), to a more moderate understanding of pluralism as ‘pluralism under international law’ (Borowski 2011: 200). The latter concept developed by MacCormick in the new century (see MacCormick 2004: 853-863) is based on the ‘co-existence of at least two master rules’ (Menéndez 2011: 224), i.e. the Member States and the EU, and on the fact that the EU can be reconstructed from at least two equally-valid stand-points, the national one and the European one, which are complementary. Menéndez (2011: 225) names it the ‘plural but equal standpoint thesis’.

³ See, for example, the theory of multilevel constitutionalism (Pernice 2002: 511-529), the theory that looks at the EU as a compound democracy (Héritier 1999: 275-277; Fabbrini 2010), the theory that considers the EU as deriving from a process of ‘institutional incorporation’ (Walker 2008: 379), and finally the theory that describes the EU as a ‘polycentric constitutional settlement’ (Lindseth 2010: 255).

all levels of government and the need for their fruitful cooperation (MacCormick 1999: 155; Lindseth 2010: 277). Contrary to what is argued, for instance, by some theories of cosmopolitanism that see in a global government directly elected by citizens the key-point for the development of a peaceful and fair legal order (Kant [1795] 1991: 93-130; Hurrell 1990: 183-205; Held 2002: 1-44, and 2010: 143-180),⁴ MacCormick argues that an over-empowerment of the supranational institutions is actually the main problem that could affect the legitimacy of that order. By contrast, in order to understand what the European Union is, not only the existence of a multilevel system of government but also the unique features of the relationship among institutions located in different Member States and between these institutions and the European ones have to be taken into consideration.

The essay deals with the involvement of parliamentary institutions in the European Union and, in particular, in controlling compliance with the principle of subsidiarity. Relying on MacCormick's theory of the principle of subsidiarity and thus on the assumption that what is called the 'democratic deficit' of the EU is in reality a 'subsidiarity deficit', the analysis focuses on how the parliaments of the Union – the European Parliament, national and regional parliaments – contribute to filling this democratic-subsidiarity gap in the EU institutional framework, as designed by the Treaty of Lisbon. The gap originated from the fact that more and more crucial decisions in the EU have been taken at supranational level without effective involvement of national and sub-national parliamentary institutions and lacking the engagement of the public in any transnational deliberations. Therefore, under these conditions a detachment of the EU decision-making process from the standards of representative democracy and from a real consideration of the needs of citizens, according to the national and the local scenarios where they live, is likely to occur.

Indeed, using MacCormick's phraseology, coined at the end of the 1990s and thus a dozen years before the Treaty of Lisbon, this Treaty has further enhanced the 'rational legislative' dimension of subsidiarity by allowing national (and regional) parliaments to intervene in most European decision-making processes and, in particular, in the so-called 'early warning mechanism': according to this procedure, national (and through the latter also regional) legislatures can send their opinions on the compliance of EU draft legislative acts with the principle of subsidiarity.⁵ When some thresholds of

⁴ Nonetheless, other theories of cosmopolitanism, sometimes collected under the label of 'new cosmopolitanism', share the view of MacCormick about the existence of a diffuse system of sovereignty and stress the importance of maintaining and protecting the powers of states and of sub-national authorities (Pogge 1992: 48-75; Archibugi 1998: 198-230; Habermas 2001).

⁵ As is clarified in section 2, while national parliaments can now participate directly in the European legislative process, although their opinions are not binding, regional parliaments can take part in this process only by means of the relevant national parliament, which can consult them during the early warning mechanism.

reasoned – i.e. negative – opinions are reached,⁶ the European Commission is bound to re-examine the proposal and then to decide to maintain, amend or withdraw it up to the hypothesis to stop the ordinary legislative procedure on the part of the European Parliament or the Council, in contrast with the Commission’s position and in support of the standpoints of most national Parliaments or Chambers thereof.

However, the essay shows that the notion of subsidiarity, as adopted by MacCormick, is substantially different from the principle of subsidiarity embedded in Article 5(3) TEU, the former being a more inclusive but a less elusive concept: in other words, according to the legal philosopher’s understanding of subsidiarity, this is a broader concept able to grasp the complexity and the actual functioning of the EU legal system better than the current provisions on the subsidiarity principle in the TEU. MacCormick’s notion of subsidiarity is not limited simply to the definition of the most suitable level of government for regulating issues falling outside the exclusive competences of the Union. ‘Rational legislative subsidiarity’ (MacCormick 1999: 155), in particular, deals with the effectiveness of European representative democracy, which is considered to be found in the direct and indirect involvement of legislatures at all European levels (regional, State level and European).

After the analysis of the interplay between the European and national parliaments in the multilevel parliamentary field of the Union and the critique of the democratic deficit thesis, MacCormick’s theory on subsidiarity is examined in depth, considering the question of the ‘subsidiarity deficit’ and the four dimensions of the principle. Then the traditional reconstruction of subsidiarity, drawing on the text of the Treaties and on the jurisprudence of the ECJ, is challenged in the light of MacCormick’s theory, which also becomes the starting point for analysing the early warning mechanism. It is argued that the control of compliance with the principle of subsidiarity by parliaments and in particular one of its outcomes, the ‘political dialogue’, is able to produce positive externalities in order to contrast the subsidiarity deficit and to enhance democracy in the EU. Both the rational legislative subsidiarity and the comprehensive subsidiarity – the latter dealing with the engagement of citizens in an effective transnational public discourse – are likely to be strengthened by this mechanism, provided that an effective cooperation amongst parliaments exists. Finally two case studies showing the cooperative attitude of the European legislatures and its potential effects

⁶ According to Protocol No. 2 on the application of the principle of subsidiarity and proportionality in the EU, annexed to the Treaty of Lisbon, and in particular to Article 6, ‘reasoned opinions’ are those which find a draft legislative act in contrast with the principle of subsidiarity. Then Article 7 fixes the thresholds for triggering the actual operation of the early warning mechanism: on draft legislative acts falling within the shared competences of the EU the first thresholds are given by a number of reasoned opinions that count for at least one third of the total votes cast by parliaments or at least a quarter of these votes, when police and judicial cooperation in criminal matters are concerned. The second threshold, that is a number of reasoned opinions equal to the majority of the votes cast by parliaments (see *infra*, section 5, note 33)

on subsidiarity are examined. These case studies show quite clearly the implicit tendency of national parliaments and European institutions, like the Commission, to move, in practice, from the traditional understanding of the principle of subsidiarity towards a more comprehensive notion of subsidiarity, as framed by MacCormick.

2. The Myth of the Democratic Deficit and the Multilevel Parliamentary Field of the European Union

Since 1979, when it was first highlighted by scholars (Marquard 1979), the problem of the democratic deficit has probably been one of the most debated in the European Union. The democratic deficit is thought to arise from the removal of ‘certain crucial economic and security decisions from parliamentary control at the national level without (...) establishing effective forms of accountability at supra-national level’ (Bellamy 2003: 179). Indeed, in terms of powers achieved, the executives, both at national and supranational level, have been the institutions that have “gained” most from the process of European integration, while national parliaments’ powers have been severely compromised (Weiler 1991: 2430; Craig 1998: 115-120; Bellamy and Kröger 2012).

However, nowadays we can consider the solution proposed by Marquand as fully implemented, in the wake of the first direct elections of the European Parliament (EP), to defeat the democratic deficit by means of a significant increase of powers of this newly directly elected assembly. Particularly since the Single European Act (1987) the EP’s powers have been extended in the legislative process to reach the current stage where, after the Treaty of Lisbon, the EP is the ‘ordinary co-legislator’ with the Council on 83 out of 115 legal bases laid down by the Treaties (Douglas Scott 2007; Corbett, Jacobs and Shackleton 2011).⁷ Moreover, throughout the years other prerogatives, in terms of the oversight powers and budgetary authority, have been granted to the EP.⁸

Not only has the European Parliament always tried to increase its powers and it has indeed been effectively empowered (Costa 2001; Rittberger 2005), but also the role of national parliaments, after years of marginalisation at European level, has been enhanced since the Treaty of Maastricht

⁷ Indeed the Treaty of Lisbon has made codecision, where the European Parliament has the same power as the Council, the ordinary legislative procedure in the European Union (Article 294 TFEU). After the Treaty of Lisbon, contrary to the past, the European Parliament is the first institution that takes a position in the first reading.

⁸ It suffices to say that the European Parliament approves both compulsory and non-compulsory expenditures in the EU budget (Article 314 TFEU); jointly with the Council, it can authorise the Commission to adopt delegated legislation and can revoke this authorization at any moment (Article 290 TFEU); as a general rule, the European Parliament’s consent is required before the conclusion of an international treaty by the EU (Article 218(6) TFEU); and the European Commission is collectively responsible before the European Parliament (Article 17(8) TEU).

and the experience of the two Conventions (Kiiver 2006: 9-112).⁹ After the Treaty of Lisbon they can even participate directly in the European procedures (Cartabia 2007: 1081-1104). Since 1 December 2009, for instance, they have acquired the right to take part in the procedures for the revision of the Treaties (Article 48 TEU); to be informed about the application for the accession to the Union, about the enforcement of the flexibility clause (Article 352 TFEU), to obtain directly from the Commission all legislative proposals and working documents, to adopt reasoned opinions on the compliance of some proposals with the principle of subsidiarity and to challenge the infringement of this principle by a legislative act before the European Court of Justice. By the same token, even before the Treaty of Lisbon was conceived, an informal but prominent channel of participation of national parliaments in the EU policy-making was introduced by the European Commission on its own initiative in 2006: the so-called ‘Barroso initiative’ that was somewhat codified as ‘political dialogue’ between the Parliaments and the Commission in a letter sent by the President of the latter institution to the Speakers of the national legislatures (Corbett 2012: 258-259; Olivetti 2012: 529-531). ‘Political dialogue’ is a tool placed next to the early warning mechanism at the disposal of national parliaments. It enables them to send their opinions on draft legislative acts, even when the deadline has expired and potentially on every aspect concerning the proposal (thus it is not limited to subsidiarity), with a legitimate expectation to receive a reply from the Commission. The early warning mechanism and its successful complementing procedure, the ‘political dialogue’, have possibly become among the most effective instruments for strengthening democratic participation in EU affairs.

Moreover a more stable cooperation amongst the parliaments of the EU has been promoted (Bengston 2007: 46-65; Corbett 2012: 260), aiming at reinforcing the democratic control on certain policies. In fact the EP, on one side, and the parliaments of the Member States, on the other, should not be regarded as separate and independent democratic institutions, but rather as closely interwoven, likewise the constitutional orders of the EU and of its Member States (MacCormick 1995: 259; Pernice 2002: 511-529; Maduro 2003: 501-537; Walker 2008: 379; Fabbrini 2010; Lindseth 2010: 255). With this regard, the Treaty of Lisbon has promoted the involvement of national (and also regional) parliaments in the European Union in close relation with the EP, even though their reciprocal relationship has not always been collaborative (Kiiver 2006: 47). The EP has been jealous of its new prerogatives and in search for institutional autonomy, while national parliaments, aware of the reduction of their competence, have seen the EP as a point of reference amongst the European institutions.

⁹ Both the EP and national parliaments participated in the work of the Convention summoned in 1999 and were in charge of drafting a first text of the then Charter of fundamental rights and freedoms of the EU and the Convention on the Future of Europe, which drafted the Treaty establishing a Constitution for Europe in 2002 and 2003.

Step by step a multilevel parliamentary field, meaning a European parliamentary system where the European, national and regional parliaments are equipped with powers and prerogatives of a different nature but coordinated (Lupo *in this volume*), has been built up in the European Union (Crum and Fossum 2009). The roles of national parliaments and the European Parliament can be seen as complementary, as was highlighted also by the German Constitutional Court in the *Maastricht Urteil*, when it was affirmed that any decreasing of the powers of national parliaments has to be counterbalanced by a proportional increasing of those of the European Parliament.¹⁰

The fact that the Treaty of Lisbon enhances the cooperation between the European Parliament and national parliaments seems consistent with this interpretation, especially in areas like Europol, Eurojust, and Common Foreign and Security Policy (CFSP),¹¹ where rights and freedoms, on the one hand, and States' sovereignty, on the other hand, are particularly affected. Moreover, a new form of cooperation between the European Parliament and (at least most of) the parliaments of the Member States will be established regarding the implementation of the Treaty on Stability, Coordination and Governance (TSCG) as a conference of parliamentary committees on economic and monetary affairs (Manzella 2012; Fasone 2012: 15-16).¹²

Also with regard to the ordinary scrutiny of European draft legislative acts by national parliaments, the European Parliament is seen as one of the main interlocutors. Interestingly in some Member States (e.g. Belgium, Germany and Ireland) MEPs are components of or attend the meetings of the committees on European affairs in the national parliaments, and, conversely, national MPs, whatever the Member State, may be invited to participate (without voting rights) at the meetings of the European Parliament's committees.

¹⁰ In the *Lissabon Urteil* (BverfG, 2BvE 2/08, 30 June 2009), however, the German Constitutional Court took a different position, considering the European Parliament as not democratic enough and consequently stating that democratic representation still finds its guarantee in national parliaments. On the decision of the German constitutional Court on the Treaty of Lisbon, see the Special Issue on the 'The Lisbon Judgment of the German Federal Constitutional Court' in *German Law Journal* (2009), vol. 10, No. 8. Also in its following decisions the German Constitutional Court seems to maintain the same approach (Lindseth 2012): see the judgment of the second senate of the German Constitutional Court, 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10, 7 September 2011, on the constitutionality of the European stability mechanism and its implementing measures at national level; the judgment on the constitutionality of the European Financial Stability Facility's Panel set up within the Bundestag, BVerfG, 2 BvE 8/11, 28 February 2012, and the latest judgment issued on 12 September 2012 on the Treaty on the European Stability Mechanism and the Treaty on Stability, Coordination and Governance, 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12.

¹¹ See Articles 12 TEU, 85.1 (3) and 88.2 (2) TFEU, and 10 Protocol No. 1 on the role of national parliaments in the European Union, annexed to the Treaty of Lisbon. Lastly, after a long negotiation between the European Parliament and national parliaments, on 20-21 April 2012 the Conference of the EU Speakers (the Speakers of the European Parliament and of the Parliaments of the EU Member States) agreed, in accordance with Article 10 Protocol No. 1, on the establishment of an Inter-Parliamentary Conference for CFSP and CSDP, composed of a delegation of 16 MEPs and national delegations of 6 MPs each, to be held every six months and chaired by the Speakers of the Member State holding the rotating Presidency of the Council. This Conference, although devoid of the power to adopt binding resolutions, is entitled to oversee how the CFSP and the CSDP are carried out and the Representative for Foreign Affairs and Security Policy is invited to attend the meetings.

¹² Article 13 TSCG, which was signed in March 2012 by 25 out of 27 Member States and entered into force on 1 January 2013, introduces the obligation to set up this inter-parliamentary Conference.

In this scenario, regional parliaments have probably been the latecomers (Maurer and Wessels 2001). Although they have been excluded from enjoying direct ties with the EP – with the exception of the opening days in Brussels and the visits of the delegations of regional parliaments to the EP –, Protocol No. 2 on the application of the principle of subsidiarity and proportionality confers a special recognition to them: the participation in the early warning mechanism through the consultation of the relevant national parliament and according to the national procedure, which however may vary a lot from one country to another (Woelk and Bußjäger 2010; Guastaferrò 2012: 308). Thus Protocol No. 2 acknowledges the need for cooperation between regional and national parliaments during the EU legislative process and supports a better coordination within the multilevel parliamentary field.

However, has the empowerment and the cooperation of parliaments in the European Union been sufficient to fill the gap of the democratic deficit? The question seems misleading, since the deficit of the Union, particularly after the Treaty of Lisbon, does not deal primarily with institutional problems (MacCormick 1999: 148; Héritier 1999: 274-276). Indeed, the democratic institutions of the European Commonwealth – as MacCormick named the European Union – have been sufficiently empowered, the Council is composed of Ministers accountable before their respective national parliaments and even the Commission is now subject ‘to a double tier of indirect election’. By the same token, the position of the parliaments of the Union has been strengthened. However, if not affected by a proper democratic deficit,¹³ given the enhanced position of the democratic institutions and particularly of the EP, the EU is rather hit by what MacCormick has named the *subsidiarity deficit*, because of the trend to displace the decisions at supranational level without allowing an effective participation of citizens in the European-wide public discourse and of the levels of government closer to them. This observation appears as the key point for understanding the ratio behind the involvement of parliaments in the early warning mechanism and the objectives pursued through their scrutiny and participation.

3. MacCormick’s Theory on the Subsidiarity Deficit and the Four Dimensions of Subsidiarity

The principle of subsidiarity, according to MacCormick’s theory, has to be conceived within the framework of the European commonwealth, where at least two entities or sets of entities coexist,

¹³ Other authors deny the existence of a democratic deficit as well, but on a different ground: on the fact that the EU institutions are quite weak and that the real powers and the accountability cycle is still in the hands of the nation-states (see Moravcsik 2008: 317).

‘the States of Europe, now not-fully-sovereign States, and the European Union, still a non-sovereign Union’ (MacCormick 1999: 141). Once a European commonwealth based on sharing powers exists, ‘one can ask the question where it is the best for the common good that a particular power be exercised’ (MacCormick 1999: 141). This is exactly what MacCormick meant by subsidiarity, as ‘as the key organising principle that can help to make this system [i.e. the EU] legitimate’ (Fossum 2011: 281). Of course, understood in such a way, the principle of subsidiarity in the European Union is not linked to the rigid distinction, among exclusive, shared and supplementing competences and thus can hardly be enforceable before a judge. When considerations like those on the best level of government for the achievement of the common good are at stake, the issue becomes essentially political and involves the balancing between different ideas of the common good: this entails a process of justification that is not so widespread in the legal reasoning of the courts.¹⁴ In this regard parliaments, in the light of the powers acquired after the Treaty of Lisbon, could become major players.

The concept of subsidiarity in MacCormick also deals with the principle of proximity, first developed in the field of environmental law and postulating that decisions must be taken as openly and as closely as possible to citizens. MacCormick considers that normally it is desirable ‘for people to be masters of their own destiny at the level of individual and local-community life’, even though it is always possible to exploit the opportunity arising from the ‘large-scale economy’ assured by the supranational level of government. The prevalence of the logic of the self-government is perfectly consistent with MacCormick’s idea of preserving national, regional and local institutions against the over-empowerment of the European Union, leading to the creation of all-European institutions that annihilate the other levels of government (see above, Section 1).

According to MacCormick, there are four dimensions of subsidiarity, that can be ordered from the least to the most inclusive one. Indeed, one can argue that the common good is guaranteed when public authorities, regardless of the level of government (whether European, national, regional or local), are able to pose the institutional premises for a free and fair market, where each rational individual can pursue his/her self-interest (MacCormick 1999: 155). The satisfaction of each individual for the choices made in the market, by aggregation, will lead to the common good (*market subsidiarity*). But not all goods can be found on the market, since they are not for sale. Here comes the *communal subsidiarity*, that is the need to have as references a variety of different institutions at local level that can supply public goods directly to the citizens or that can orient them in creating private associations for the achievement of the common good. These institutions, like the family, belong more to the sphere of the civil society than to that of the state. The third dimension

¹⁴ This kind of reasoning can pose problems of legitimation of the courts, in particular it can be argued that judges try to play a political role (Bickel 1986).

of subsidiarity, the *rational legislative subsidiarity*, ‘is the sense of “subsidiarity” most strongly written into the Union Treaty’ and concerns primarily parliaments at all levels of government (MacCormick 1999: 155). This kind of subsidiarity deals with the construction of the rational will expressed in general and durable norms through some form of representative democracy. The decision-making should be collective, open to all and on an equal footing and should aim to establish the legal conditions which are the basis of human activity. According to MacCormick, rational legislative subsidiarity can be described as the need for effective representative democracy assured through local assemblies, regional and national legislatures and the European Parliament as counterbalances against the risk of creating all-European institutions ‘that would unduly overshadow more local ones’ (MacCormick 1999: 155). The fourth dimension of subsidiarity, the *comprehensive subsidiarity*, finally entails the adoption of deliberation processes where responsibilities can clearly be attributed, where the question of responsiveness is taken into account and where a public discourse is addressed towards issues of European-wide concern. Comprehensive subsidiarity and rational legislative subsidiarity regards the conduct of institutions, but while the latter is referred to institutions that assure democratic representation, thus above all parliaments, the former can also concern the activity of ‘great constitutional courts’, like the German Constitutional Court and its contribution to the European public debate.¹⁵

The subsidiarity deficit, which according to MacCormick is the real challenge to the European commonwealth, depends mainly on the weakness of the rational legislative subsidiarity and of the comprehensive subsidiarity so far. On the one hand, the risk that the process of European integration would be accomplished transferring powers to the supranational institutions *ad libitum* and to the detriment of the democratic and representative institutions which stand much closer to the citizens; on the other hand, the lack of a public and transparent debate on European issues.

However, the Treaty of Lisbon could probably help in filling the gap of the subsidiarity deficit: the empowerment of national and regional parliaments in participating directly in the European decision-making process in coordination with the EP, irrespective of the control over the principle of subsidiarity as stated in the Treaties, and as the ‘political dialogue’ shows, could endorse a public discourse on issues of common interest for the European citizens.

¹⁵ Likewise, J. Habermas (1996: 158-168 and then 296-297) has argued that the rational-will formation, through a process that complies with specific procedural requirements and involves also parliaments and courts, improves the quality of the public discourse and is a form of strong legitimation in a democratic system.

4. The Ambiguity of the Principle of Subsidiarity in the European Treaties and in the Jurisprudence of the Court of Justice

Contrary to what is argued plainly by MacCormick when dealing with his flexible but inclusive concept of subsidiarity, this principle has been depicted in strict but at the same time ambiguous terms in the EU law (de Búrca 1998: 223-224; Davies 2006: 67-68; Schütze 2009b: 525-536; Horsley 2011: 1-16; Martinico 2011: 649-660; Craig 2012: 72-87; Biondi 2012: 267-282; Guastafarro 2012: 305-308).

The principle of subsidiarity is relatively new in the EU context (Barber 2005: 308-325). When it was first mentioned in an official document of the then European Community (Schütze 2009a: 144), in the Report of the Commission on the European Union (25 June 1975), the principle of subsidiarity was given a meaning quite different from that of Article 5(3) TEU in force today. In its formulation it was reminiscent of the Latin concept of subsidiarity, like *subsidium*, aid to perform a function (Schütze 2009a: 249): indeed, the Report stated that, according to this principle ‘The Union shall be given responsibility only for those matters which the Member States are no longer capable of dealing with efficiently’. Mentioned also in the Draft Treaty establishing the European Union, by the European Parliament in 1984, and in the Single European Act with regard to the environmental policy, the principle of subsidiarity was finally entrenched as a general principle of Community law by the Treaty of Maastricht.

Being formally applicable only to matters of shared competences of the EU, it was conceived as a principle of cooperative federalism, providing a federal safeguard ‘in overlapping spheres of competences’ (Schütze 2009a: 249). In the end the principle was designed to assure that the activity of the different levels of government had been complementary. Compared to the definition of the principle contained in the Report of 1975, in the Treaty of Maastricht (Art. 5(2)TEC) the emphasis was not given primarily to the role of ‘assistance’ – i.e. of support or *subsidium* – to the Community *vis à vis* the Member States¹⁶.

Two logics arose from the formulation of this principle: On the one hand, there was the ‘logic of self-government’ (Chalmers, Davies and Monti 2010: 363-364) or ‘the negative concept of subsidiarity’ (Endo 1994: 553-562). On the other hand, there was the ‘logic of comparative federalism’ (Chalmers, Davies and Monti 2010: 363-364) or ‘the positive concept of subsidiarity’ (Endo 1994: 553-562). On the basis of the self-government logic and of the negative concept, in the

¹⁶ Article 5(2) TEC affirmed that ‘In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.’

name of the principle of subsidiarity, supranational institutions should avoid legislating when the regulation arising from the Member States can be deemed to be sufficient for the achievement of the objectives of the action. This logic aims at limiting the intrusion of the EU in the national spheres of self-government. By contrast, the comparative federalism logic and the positive concept postulate that the supranational organization can intervene if national authorities are not able to satisfactorily and efficiently accomplish their tasks, of course in areas of shared competences. This logic aims at allowing the intervention of the EU when a sort of cost-benefit analysis demonstrates the lack of the ability of the Member States to perform their action effectively.

Moreover, the Preamble to the Treaty of the European Union guarantees that *in accordance with the principle of subsidiarity*, decisions are taken as closely as possible to citizens, thus presenting a further concept of subsidiarity as a principle of proximity, that should foster a regulatory intervention at national or, better, sub-national levels.

Even though they should be considered as complementary, all these concepts of the principle of subsidiarity can hardly be conceived in such a way, because the concrete application requires a balance and, in the end, the prevalence of one of them upon the others, then allowing the European or the national intervention.¹⁷

Subsequently, the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty of Amsterdam has made an attempt to clarify how the “test of subsidiarity” must be carried out (Biondi 2012: 214).¹⁸

‘The following guidelines should be used in examining whether the abovementioned condition is fulfilled:

- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by actions by Member States;
- actions by Member States alone or the lack of Community action would come into conflict with the requirements of the Treaty (such as the need for the correct distortion of competition or to avoid disguised restrictions on trade or to strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;
- action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States’.

¹⁷ Of course, the decision to adopt a regulation or a directive poses different constraints on the States, because the first excludes any room for their regulation, while the second allows them to intervene to some extent.

¹⁸ The European Council of Edinburgh, on 11-12 December 1992, had already tried to set out some guidelines on the application of the principle of subsidiarity and an Inter-institutional Agreement on subsidiarity (OJ C 329) was finalised on December 1993.

As formulated in the body of the Treaties and in the protocols, the notion of subsidiarity seems misleading and easy to confuse with that of proportionality, a principle concerning the extent to which the EU can regulate a matter without requiring an excessive intrusion in the Member States' sphere of autonomy (Estella 2003).¹⁹

The formulation of the principle of subsidiarity is ambiguous also after the Treaty of Amsterdam, firstly, because it fails to specify which one of the two tests has to prevail: the one based on the logic of self-government or the one based on comparative efficiency? In other words, it is not self-evident what happens, for instance, when the action of the Member States would be sufficient to achieve the fixed objectives, but the Community would probably be able to cope better with a certain problem (Schütze 2009a: 250).

Secondly, it remains unsolved whether a collective and coordinated national action, when the Member States alone are not able to reach the objectives properly, could substitute the EU action, that is an action led by the European institutions (Schütze 2009a: 250).

The third and perhaps most challenging critique concerns the distinction between the principle of subsidiarity and that of proportionality. Indeed, when the abovementioned protocol needs to check the compliance of a draft legislative act with the principle of subsidiarity by considering whether the Community action can be better 'by *reason of its scale* or effects' and because of the support of qualitative and quantitative indicators it seems that there is some involvement in the assessment of the proportionality of the action rather than the subsidiarity (Chalmers, Davies, and Monti 2010: 362). In fact the principles of subsidiarity and proportionality are often conflated in practice. This is also apparent in the jurisprudence of the European Court of Justice (ECJ), which has sometimes 'incorporated a proportionality analysis into subsidiarity *lato sensu*' (Schütze 2009a: 253; Lindseth 2010: 198; Craig 2011: 425-427; Horsley 2011: 1-16; Biondi 2012: 213-227; Vandenbruwaene 2012).

In one of the few judgments addressing the issue of subsidiarity, *United Kingdom v. Council Working Time*,²⁰ the applicants challenged the Working Time Directive²¹ on different grounds related to the principle of subsidiarity. Amongst them they claimed the lack of substantive reasons that could explain why the adoption of the directive would have led to an improvement of the workers' health and safety conditions much more significantly than what was laid down in the national legislation. Even though the challenge was brought on the ground of the principle of

¹⁹ In particular, the 'necessity test' to be applied when enforcing the principle of subsidiarity, is somewhat required also with regard to the principle of proportionality, although in rather different terms. Indeed, while the former principle is referred only to the shared competences of the EU, the latter concerns the exercise of any competence, even the exclusive one. Article 5 (4) TEU affirms that 'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'.

²⁰ See case C-84/94, *United Kingdom v. Council Working Time*, decided on 12 November 1996, ECR I- 05755.

²¹ See Directive No. 93/104, of 23 November 1993, concerning certain aspects of the organisation of working time.

subsidiarity, the Court addressed this aspect on the basis of the principle of proportionality. In addition to this, the Court affirmed that the scrutiny of the principle of subsidiarity should have been limited to the case of ‘manifest error or misuse of powers’, granting great discretion to the EU institutions (de Búrca 1998).

Indeed, the Court finds itself in trouble when judging particularly on the principle of subsidiarity (EU norms have never been annulled for an alleged violation of this principle). The ECJ feels uncomfortable in controverting the results of the political scrutiny on the principle of subsidiarity accomplished by the Commission, the Council and the European Parliament before the enactment of the legislation.²² It would mean to engage in the questioning of the discretion at the disposal of these political institutions, even though the Treaties empower the ECJ to do so. After the decision in *Germany v. European Parliament and Council*,²³ it has become clear that in the judgments where the principle of subsidiarity is invoked the ECJ only considers the respect of this principle on the basis of the formal-procedural requirements, like the presence of reasons for the adoption of the legal measure at European level, avoiding having to deal with the issue on a substantive ground (Lindseth 2010; 1995; Alemanno 2011: 498-502). *De facto* this principle has never been interpreted to limit EU action (Weatherill 2005: 131-137; Davies 2006):²⁴ ‘No European institution is in reality willing to comply with the principle of subsidiarity’.²⁵

²² See also case C-377/98 *Netherlands v. European Parliament and Council*, decided on 9 October 2001, ECR I-7079, case C-491/01, *British American Tobacco*, decided on 10 December 2002, ECR I-11453 and joined case C-154/04 and 155/04 *R. v. Secretary of State for Health and National Assembly for Wales*, decided on 12 July 2005, ECR I-6451. In one of the most recent cases affecting the interpretation of the principle of subsidiarity, case C-58/08, *Vodafone Ltd and Others v. Secretary of the State*, decided on 8 June 2010, according to a legal basis (Article 95 TEC) in force before the Treaty of Lisbon, the self-restraint of the Court on this issue has been confirmed, albeit the position taken by the Advocate General Maduro.

²³ See case C-233/94 *Germany v. European Parliament and Council*, decided on 13 May 1997, ECR I-2405.

²⁴ The fact that the principle of subsidiarity has been interpreted extensively in favour of the European Community does not mean that the provisions of the Treaties support such an interpretation. Rather, the formulation of the provisions on the order of competences after the last few reforms of the European Treaties, including the Treaty of Lisbon, has had the purpose of preserving the Member States’ competences mainly because there are clauses that prevent further enlargements on the European competences to the detriment of the States (von Bogdandy and Bast 2010: 36). Indeed, a possible limitation to the ‘expansive nature’ of the principle of subsidiarity in favour of the EU could come from the interpretation of Article 5(3) TEU together with Article 4(2) TEU that poses upon the EU institutions the duty to respect the national constitutional identities of the Member States (Guastaferrro 2012: 307): ‘The Union 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’ (Art. 4(2) TEU). *Contra* to this hypothesis, see Biondi 2012: 223, according to whom there is a misconception in ‘identifying subsidiarity with the idea that European integration should be able to incorporate and respect constitutional diversities and the allocation of competences to different national systems’. Other authors, who dealt with the constitutional identity clause, have not put such clause in relation to the enforcement of the principle of subsidiarity: see, for example, von Bogdandy and Schill 2011: 1417-1454.

²⁵ See A. Lamassoure (MEP) in the evidence given during the hearing of 30 October 2001 before the European standing committee of the Scottish Parliament., when underlining the lack of political commitment in complying with this principle.

5. Interpreting the Early Warning Mechanism Through the Lens of MacCormick's Theory

5.1. The Principle of Subsidiarity and the Parliaments of the European Union after the Treaty of Lisbon: The Positive Externalities of the Early Warning Mechanism

The Treaty of Lisbon has listed the competences by type, if exclusive (Article 3 TFEU), shared (Article 4 TFEU) or aimed at supporting, coordinating and supplementing the action of the Member States (Article 5 and 6 TFEU). Although the categorisation of the different types of competences has been somewhat clarified by the Treaty of Lisbon, doubts about the interpretation and on how to cope with the principle of subsidiarity still remain. Even the Commission has admitted that, as formulated in the Treaties, the principle of subsidiarity is definitely difficult to assess: 'Subsidiarity cannot be easily validated by operational criteria'.²⁶

Rather, if possible, the Treaty of Lisbon has brought more confusion about the real nature of this principle: should the principle of subsidiarity be considered as a political or as a legal principle?²⁷ Indeed, the political side of the control has been particularly reinforced through the involvement of national parliaments in the early warning mechanism. Given the traditional caution of the ECJ in substituting its role for that of the European political institutions and annulling EU legislative acts (Biondi 2012: 213), particularly on the grounds of subsidiarity, the Treaty of Lisbon has made an attempt to stress the importance of the political control of this principle, as already happens in other decentralised systems of government (Dehousse 1992), such as Germany, by allowing parliaments to step in and have a say in the decision-making process. In fact, the direction provided for by the Treaty of Lisbon seems to point at both: political and legal control on this principle should proceed in parallel.

From the several proposals made to improve the control on the principle of subsidiarity,²⁸ the Constitutional treaty, first, and the Treaty of Lisbon, afterwards, took up the idea to involve national

²⁶ See European Commission (2011) *Report from the Commission on subsidiarity and proportionality (18th report on Better Lawmaking covering the year 2010)*, COM (2011) 344 final, Brussels, 6 October, 2. However, although the Commission recognises this difficulty, it recommends continuing to use the 'necessity' and the 'EU added-value' tests.

²⁷ S. Hix has provocatively argued that, according to a purely legal definition of subsidiarity, essentially all policies should be regulated by the European institutions, even defense policy, because of 'scale effects, a collective defense, public goods would be provided more cheaply at central level'. Therefore Hix has affirmed that dealing with the principle of subsidiarity is ultimately a political question. See House of Commons, European Scrutiny Committee, *Subsidiarity, National Parliaments and the Lisbon Treaty, Thirty-third Report of Session 2007-08*, 21 October 2008.

²⁸ To empower the ECJ with an *ex ante* review of the European legislation on the ground of the principle of subsidiarity (Jacqué and Weiler 1990: 204-206), to create a third chamber of the European Community, in addition to the Council and the European Parliament, composed of national parliamentarians (MPs) and entitled to assess the compliance of draft legislative acts with the principle of subsidiarity (Brittan 1994 and Kiiver 2011: 98-108); to strengthen the authority of the judicial body having the power to judge *ex post* on the validity of the European legislation in relation to

parliaments, but excluding the establishment of a third chamber of the Union. In this regard, even though the decision to reinforce the role of national parliaments in the EU could have been predictable because national MPs were the largest component sitting in the Convention that drafted the Constitutional treaty,²⁹ the link created between national parliaments and the principle of subsidiarity could have not been taken for granted. For instance, national parliaments could have been associated with the scrutiny of the principle of proportionality, thus opposing disproportionate intrusions in the autonomy of the Member States, or with the scrutiny of the legal basis of acts. However, the choice for subsidiarity and the early warning mechanism was probably made because of the ambivalent nature of the principle of subsidiarity itself. Indeed, this principle entails both the relationship between levels of government and their competences – if the competence is exercised by the European Legislator, it cannot be exercised by national parliaments – and the democratic nature of the decisions taken – as the Preamble of the TEU underlines indirectly when it refers to the principle of proximity.

According to the text of the Treaties, national parliaments should be the guardians of the principle of subsidiarity or, better, of the order of competences between the European Union and the States (Cooper 2006: 281-304), both before and after the enactment of the European legislation. Indeed, besides the control carried out by the Commission, the Council and the European Parliament during the legislative process and by the ECJ, if requested, once the legislative acts are in force, national parliaments can express their opinions on the compliance with the principle of subsidiarity by the draft legislative acts falling within the shared competences of the EU³⁰ and can challenge their validity before the ECJ after their enactment (the action has to be brought before the ECJ according to national norms).³¹

Within eight weeks since the direct transmission by the Commission of a draft legislative act in a matter regarding the shared competences of the Union, each national parliament or chamber thereof can adopt (and transmit to the Commission, the Council and the European Parliament) a reasoned opinion on that proposal, challenging the respect of the subsidiarity principle (Louis 2008: 429-452; Olivetti 2012: 525-529). These reasoned opinions alone cannot block the legislative process.³² If

the principle of subsidiarity through a newly established European Constitutional Court composed of the President of the ECJ plus some Justices of the national constitutional courts (Weiler 1997: 155-156).

²⁹ MPs were 56 out of 105 members of the Convention. After the “defeat” of the constitutional Treaty at the French and Dutch referenda, the strengthening of the role of national parliaments in the Treaty of Lisbon has also been seen as a reply to the discontent expressed by the citizens of the two founding Member States (Manzella 2009: 257-270).

³⁰ This power is acknowledged by Article 12 TEU and by Article 6 and 7 of protocol No. 2 on the application of the principle of subsidiarity and proportionality.

³¹ See Article 8 of Protocol No. 2 on the application of the principle of subsidiarity and proportionality. In principle, also a chamber can promote such an action for annulment before the ECJ.

³² The Danish proposal presented during the Convention on the Constitutional Treaty to grant veto powers directly to national parliaments in the European legislative process was rejected because of the risk of altering the balance of

they reach the thresholds fixed by Protocol n. 2 to the Treaty of Lisbon,³³ the Commission (or the Council or other institutions, depending on whoever initiated the legislation) has to review the proposal, deciding to maintain, amend or withdraw it, but in any case giving reasons for this decision. Only when the threshold of the majority of reasoned opinions is reached (28 out of 54 votes) and the procedure provided for by the legal basis is the ordinary one (the former codecision procedure) the decision of the Commission to maintain the proposal, notwithstanding the opposition of most Parliaments or Chambers, can be thwarted by the Council and the European Parliament and the codecision procedure can be stopped at that stage (before the end of the first reading). It has been observed that while the European Parliament does not encounter specific problems in vetoing a draft legislative act on the grounds of subsidiarity, the majority required in the Council in order to block a proposal (55% of its members) for alleged violations of this principle is more difficult to reach than the one needed???????? to block it owing to ‘lack of substantive merit’ (Schütze 2009a: 260; Barrett 2008: 80). Therefore, if all the previous procedural requirements of the early warning mechanism are matched, it is more likely that the blocking of the legislative process will depend on a decision of the European Parliament than that of the Council.

Thirdly, the Treaty of Lisbon has enhanced the dimension of the principle of subsidiarity linked to the principle of proximity (Loughlin 2005: 157-170). Indeed, in Article 5(3) TEU, a reference to the regional and local levels has been inserted, and it has to be taken into account when the sufficiency of the action of the Member States – the logic of the self-government – is assessed.³⁴ Moreover, Article 6 of Protocol No. 2, annexed to the Treaty of Lisbon, provides that regional parliaments with legislative powers can be consulted by their relevant national parliament within the early warning mechanism (Weatherill 2005: 148-155; Olivetti 2012: 543-552). This provision is particularly significant because for the first time also the sub-national assemblies of the eight Member States that recognize legislative powers to all or to some regional parliaments can be consulted during the European legislative process.³⁵ As mentioned above (Section 2), this confirms that the cooperation amongst legislatures located at different levels of government is enhanced within the EU and implies the strengthening of both the communal and the rational legislative dimensions of subsidiarity.

powers between the European Union and the Member States (and, to some extent, also within each State between the Parliament and the Executive).

³³ According to Article 7 of Protocol No. 2, each Parliament is entitled to two votes, one per chamber in the case of bicameral systems (so that the two Houses of a Parliament could issue different opinions on the same proposal). The quorum is, generally, one third of the total number of votes (18 out of 54) and a quarter (14 out of 54 votes) when the draft legislative acts have been submitted with regard to the area of freedom, security and justice, where the democratic control over the European measures has been traditionally weak.

³⁴ The reference to the regional and local levels in Article 5(3) TEU has to be interpreted together with the already mentioned clause on the respect of the constitutional identity of Member States, since within the national constitutional structures the regional and the local self-government are also included (Article 4 (2) TEU).

³⁵ These States are Austria, Belgium, Finland, Germany, Italy, Portugal, Spain, United Kingdom.

Having said this, the results of the first years of the early warning mechanism give, on the one hand, a picture which is significantly different from a certain interpretation of the principle of subsidiarity in the TEU and from the need to interpret its substance and purpose only in strictly legal terms (Kiiver 2012: 126-132), but, on the other, support the MacCormickian's understanding of subsidiarity.³⁶

Indeed, so far national parliaments have not used the early warning mechanism with the intention of obstructing the European legislative process, since they have rarely found draft legislative acts in breach of the principle of subsidiarity, but they have sent a considerable amount of opinions to the Commission, in particular within the 'political dialogue', as a cooperative tool.³⁷ According to the Commission,³⁸ in 2011 seventeen legislative proposals out of about one hundred draft legislative acts transmitted within the early warning mechanism received more than one reasoned opinion (however a higher figure than the 2010 one when only five proposals received more than one reasoned opinion), and in 2012 for the first time ever the threshold of one third of reasoned opinions was reached (see Section 5.3.).

Therefore, what is probably more important than the strictly legal assessment of subsidiarity accomplished by legislatures is that national and regional parliaments participate actively in scrutinising legislative proposals and they send the opinions regardless of the existence of an improper intrusion in the field of national competences.³⁹ In fact the enforcement of the provisions on national parliaments and on the principle of subsidiarity demonstrates that parliaments understand this principle according to a broad concept very similar to the one introduced by MacCormick and closer to the idea of democratic participation in the European decision-making

³⁶ However, national parliaments are not new to this kind of 'exercise'. Through the Conference of their committees on Community and European affairs (plus a delegation from the European Parliament), COSAC, since 2005 they have accomplished, in close coordination, eight 'subsidiarity scrutiny' of draft legislative acts and most parliaments had already carried out these scrutinies of their own accord before the coming into force of the Treaty of Lisbon.

³⁷ 'In 2011, the Commission received 64 reasoned opinions from national parliaments, an increase of almost 75% in comparison with 2010, the first year of functioning of the subsidiarity control mechanism. Despite this increase, these 64 reasoned opinions still represent only about 10% of the total number of 622 opinions received by the Commission in 2011 as part of its broader political dialogue with national parliaments'. See European Commission (2011) *Report from the Commission on subsidiarity and proportionality*, cit., 4.

³⁸ The highest number of reasoned opinions received on a proposal was 19, on the draft Regulation regarding the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM (2012) 130, thus overtaking the threshold for triggering the procedure of the early warning mechanism. Apart from this case, the maximum number of reasoned opinions collected on a draft legislative act, i.e. 9, concerned, in 2010, the draft Directive on Seasonal Workers, COM (2010) 379 and, in 2011, the draft Directive on a Common Consolidated Corporate Tax Base, COM (2011) 121. Reasoned opinions are usually almost always approved by the same parliaments: the Austrian, British, Danish, German, Polish and the Swedish Parliaments.

³⁹ In Austria, Finland, Portugal, Spain and United Kingdom the regional parliaments are usually consulted or send their opinions to the national parliament, when the draft legislative act affects their competences. In Belgium the opinions of the regional parliaments when their competences are concerned substitute the opinion of the federal parliament on that proposal. In Italy the consultation of regional parliaments is gradually starting, but it has not been regulated yet, while at present in Germany regional governments and the *Bundesrat* only leave little room for the participation of regional parliaments.

process than if they were arbiters of the correct exercise of the shared competence by the EU (Kiiver 2012: 103-124; Fabbrini and Granat 2013: 115-144).

Interestingly many reasoned opinions approved by national parliaments challenge the merit of the proposal, that is its political substance, as well as the violation of the principle of proportionality and the legal basis chosen by the Commission. It really seems that this mechanism for assessing the compliance with the principle of subsidiarity is used by parliaments to have a say in the European legislative process, considering the content of draft legislative acts in the light national and regional legislation, rather than for evaluating the respect of the order of competence.

The positive externalities, as unintended consequences, of the early warning mechanism range from a more active involvement of Parliaments of the Member States on EU matters (Cooper 2006); their ‘close attention to the shaping of European policy in their country, and on the substance, rather than just on subsidiarity’ (Corbett 2012: 258); a ‘greater flow of information back and forth, both among national parliaments and between them and the European institutions’ (Corbett 2012: 258); and finally ‘a more open process of deliberation about the reasons and techniques of EU rule-making’ (Weatherill 2005: 147).⁴⁰ This last point shows that the early warning mechanism could also enhance the weakest dimension of subsidiarity to date, which is, according to MacCormick, comprehensive subsidiarity. Also the European Commission has recently recognised the positive externalities of the early warning mechanism by stating that ‘the subsidiarity control mechanism has served to make the process more transparent and has clearly helped to bring EU policies into the public debate in Member States and thus to raise public awareness on these issues.’⁴¹ In fact, as they are now involved into the EU decision-making process, national parliaments try to exploit the early warning mechanism to the utmost: since they are committed to scrutinising the highest possible level of EU draft legislative acts and documents dealing with a national interest in order to react promptly to the European Commission, national politics and public opinions are becoming accustomed to debates on prospective European decisions just as if they were national. Moreover the debate on the suitability of and the motivations for endorsing an EU draft legislative act is also turning transnational to some extent, because of the systematic exchange of information among the parliaments of the Union, thus fostering the growth of a more European-oriented public opinion.

Considering that the principle of subsidiarity, as stated in the Treaties, is not easy to put under scrutiny neither in the pre-legislative stage nor before the ECJ, perhaps it can be useful to refer to the notion of subsidiarity as defined by MacCormick (MacCormick 1999: 137-156), that does not

⁴⁰ However, it has to be clarified that the early warning mechanism has also been subject to negative assessment by scholars, highlighting it as a useless tool to reinforce parliamentary participation in EU affairs and to solve the democratic problems of the Union. See, for example, Fossum 2011: 282; Bellamy and Kröger 2012; de Wilde 2012.

⁴¹ See European Commission, *Report from the Commission on Subsidiarity and Proportionality (19th report on Better Lawmaking covering the year 2011)*, COM (2012) 373 final, Brussels, 10 July, 10.

affect primarily the division of competence between the Union and the Member States, but rather the principle of proximity, how decisions are taken in the European Union and to what extent they can be justified (Kiiver 2012: 71-100).

5.2. ‘Political Dialogue’ as Tool for Filling the Subsidiarity Deficit

The notion of rational legislative subsidiarity coined by MacCormick is strictly related to what has been affirmed above about the European Union as a multilevel parliamentary field. There are several and nowadays interdependent parliamentary institutions acting as legislators in the European commonwealth: one supranational parliament, the European Parliament, 27 national Parliaments (40 chambers) and 72 regional Parliaments (in a minority of Member States, 8). Each of them gives its contribution to the democratic representation and to the law-making process in the European Union.⁴²

As observed above (Section 5.1.), the protection of this “parliamentary pluralism” is valuable also in terms of comprehensive subsidiarity for promoting a European public debate, beyond the functions formally assigned to parliaments (especially the national and regional ones) by the Treaties. This seems to be one of the results, probably not completely intentional, of the early warning mechanism that, thanks to the ‘political dialogue’ initiated by the European Commission and because of the ambiguity of the formulation of the principle of subsidiarity, has turned into something partially different.

Indeed, during the ‘period of reflection’ between the refusal of the Constitutional Treaty and the adoption of the Treaty of Lisbon, in 2006 the European Commission started by sending all draft legislative acts and working documents to national parliaments which replied with their opinions and contributions to this transmission. The letter sent in 2009 by the President of the European Commission to the Speakers of the national parliaments clarified that their dialogue, far from being interrupted, would have been enhanced by the decision to accept the transmission of parliamentary opinions also on the merit, on the proportionality of the proposal and on draft legislative acts falling outside the shared competences of the Union, even when the deadline of eight weeks from the transmission had expired. This decision has allowed parliaments to broaden the spectrum of their activity in the European Union.

⁴² Of course, according to Article 10(2)TEU, also national governments are democratic and representative institutions, directly elected or responsible before their respective parliaments.

The ‘political dialogue’ has intensified year after year and only in 2011 was it subject to an increase of 60%, from 387 opinions sent by parliaments in 2010 to 622 in 2011.⁴³ Thus the greatest majority of parliamentary opinions transmitted to the Commission is referred to the ‘political dialogue’, while reasoned opinions reach only 10% of the total number. The Commission, furthermore, has been committed to replying to all these opinions, often raising very different issues one from another, aiming at improving its relationship with parliamentary institutions as well as the legitimacy of its action.

Not only do parliaments have the opportunity to take a position – albeit devoid of any legal effect when adopted beyond the scope of the early warning mechanism – on all draft legislative acts of the European Union, regardless of the nature of competences, and on working documents, but they are free to comment on several aspects of the proposal: the merit, the respect of the principle of proportionality, the legal basis chosen by the Commission, but also the lack or the insufficiency of subsidiarity justification of the proposals in the explanatory memorandum.⁴⁴ In particular, most opinions of national parliaments deal with the substance of the policy concerned. To some extent such outcome is inherent to the nature of the institutions involved in the mechanism: parliaments, as political actors, cannot be deemed to assess legal texts as if they were courts or technical bodies, and thus probably they are not in the best position to engage in a strict scrutiny of subsidiarity in legal terms. The broadening of the scope of the parliamentary control and of the concept of subsidiarity at stake, which the Commission has perfectly foreseen and fostered by means of the ‘political dialogue’, is thus consistent with possibly the ultimate aim of the early warning mechanism, that is to make national public opinions aware of the rationale behind the EU proposal and its prospective impact on the Member States and to foster a Europe-wide debate on the suitability to having that proposal adopted. Thus, according to MacCormick’s terminology, strengthening rational legislative subsidiarity can also affect the comprehensive subsidiarity.

The chance of developing a Europe-wide debate starting from the early warning mechanism depends on the relationship existing among the several democratic institutions involved in the process: national parliaments and their governments, regional parliaments and the European Parliament as well. A network of parliaments and opinions is assured by mechanisms that are partially regulated at national level and partially at European level. On the EU scene national

⁴³ The figure further increased in the first six months of 2012: by the end of June the European Commission had received over 400 opinions from national parliaments. All these data are contained in the European Commission’s (2011) *Annual Report 2011 of the European Commission on Relations Between the European Commission and National Parliaments*, COM (2012) 375 final, Brussels, 10 July, 4. The number of opinions increased although some parliaments, like the two Houses of the British Parliament, send only reasoned opinions.

⁴⁴ Sometimes parliamentary opinions have concerned the use of delegated acts through which the Commission is empowered on matters that should be regulated by the Member States: see European Commission (2011) *Annual Report 2010 of the European Commission on Relations Between the European Commission and National Parliaments*, COM(2011)345 final, Brussels, 10 June, 4.

parliaments cooperate and exchange views and information through a variety of channels, from inter-parliamentary conferences to administrative cooperation. In the countries where regions enjoy legislative powers national parliaments consult regional parliaments and take or should take into account their positions in the national opinions, in particular in matters falling within the remit of regions. The opinions of each national parliament should be agreed with the Executive, then represented in the Council where the measure will be examined and then approved, with or without amendments. The opinions of national parliaments are sent also to the EP, which analyses them according to the procedure laid down in Protocol No. 2 and to the EP's rules of procedure.⁴⁵ A further confirmation of the importance of inter-parliamentary cooperation also for the enhancement of comprehensive subsidiarity and to foster the encounter of the European and national public opinions through their parliaments, is given by the fact that, starting from 2011, the EP examines all the contributions transmitted by national legislatures and not only reasoned opinions. This can be considered as an extension of 'political dialogue' – which is normally referred to the relationship between the Commission and national parliaments – on the part of the EP. Moreover, national parliaments are used to exert pressure, sometimes successfully (Section 5.3.), on the EP Rapporteur or on the shadow rapporteurs in order to promote amendments to the draft legislative act.

5.3. Case Studies of Cooperation Amongst Parliaments of the European Union and the Effects on Subsidiarity

Two recent case studies seem particularly instructive for the purpose of demonstrating the engagement of parliaments in filling the 'subsidiarity deficit' and in supporting the existence, also in the institutional life of the Union, of an approach to subsidiarity resembling the broad concept encompassed by MacCormick's theory. The case studies are those of the draft Regulation on the European citizens' initiative⁴⁶ and the draft Regulation on the right to take collective action with regard to the freedom of establishment and the freedom to provide services.⁴⁷

Starting from the first case, according to the provisions on the early warning mechanism, national parliaments are entitled to send their opinions directly to the European institutions only on proposals covering areas of shared competences. For example, 82 draft legislative acts fell under this regime in 2010, but in the same year the total amount of legislative proposals presented by the European Commission was 400.⁴⁸ Thus, from a legal point of view, – and without affecting the

⁴⁵ See Article 38a of the EP Rules of procedure as modified in 2009.

⁴⁶ See COM (2010) 119.

⁴⁷ See COM (2012) 130.

⁴⁸ Source: Pre-lex database, ec.europa.eu/prelex/; and IPEX database, www.ipex.eu.

enforcement of national provisions possibly regarding the parliamentary scrutiny of all these acts in relation to the activity of the Executives in the Council – national parliaments should have been excluded from a direct dialogue with European institutions on more than 300 proposals. Fortunately this was not the case. Indeed, thanks to the initiative of the Commission, through the ‘political dialogue’ all these documents were sent to national parliaments that transmitted their opinions and received the reply from the Commission.

This has also been the case of a very significant Proposal for a Regulation, granting the enforcement of a provision of the Treaties which assigns the (exclusive) competence to act to the European institutions. Indeed, Article 11(4) TEU provides the adoption of a Regulation, under a codecision procedure, that gives effect to the European citizens’ initiative: in matters of the European Union’s competences, at least one million citizens coming from a ‘significant’ number of Member States can present an initiative for a legislative proposal. The issue is highly important for the improvement of democratic participation in Europe and is directly relevant to the question of the comprehensive subsidiarity, in order to foster a real European public discourse.

The cases of the Green paper⁴⁹ and then of the Proposal for a Regulation on the European citizens’ initiative are significant for at least three reasons. They show, firstly, how far the ‘political dialogue’ – that indirectly depends on the provisions on the early warning mechanism – has broadened the range of intervention of national parliaments; secondly, that, when national parliaments and the European Parliament cooperate effectively, defining a common position, they are really able to influence the legislative process and the content of the proposals; thirdly, that the active role of the parliaments in the European decision-making process, thus the element of rational legislative subsidiarity, can produce positive effects also on the weakest dimension of subsidiarity in Europe, the comprehensive subsidiarity.

In fact on 7 May 2009, before the coming into force of the Treaty of Lisbon, the European Parliament adopted a resolution pointing out the risk of substantially jeopardising the effectiveness of the new Article 11 TEU on the European citizens’ initiative, if the requirements for its exercise had been too restrictive. National parliaments, expressing and transmitting their opinions on the Green Paper and afterwards on the Proposal for a Regulation, extended the warning of the European Parliament, which subsequently collected these opinions and “transposed” most of them in its legislative resolution⁵⁰ approved at the first reading of the codecision procedure on that draft legislative act (de Witte *et al* 2010: 4-18). The text of Regulation No. 211/2011 finally approved in March 2011 essentially relies on that resolution, which is the expression of the common will of the

⁴⁹ See COM (2009) 662.

⁵⁰ See the legislative resolution adopted by the European Parliament on 15 December 2010 (A7-0350/2010).

European Union's parliaments to strengthen the tool of the citizens' initiative. The original proposal of the Commission, that posed strict rules upon the citizens' initiative, was overturned.

Most of the remarks of the parliaments were accepted: to drop the minimum number of Member States from which the citizens come, from one third to one fourth; to fix the deadline for the collection of the signatures to one year; to provide a six-month time limit for the Commission to examine the initiative, against any attempt of unjustified delay; to merge the moment of the authorisation of the Commission to enroll the initiative and that of the assessment of its admissibility, in order to reduce the number of evaluations and steps to put in place.

From what has been highlighted it is evident that the mechanism provided to control the compliance with the principle of subsidiarity has not been used against the European legislative process to veto the proposal, but has rather enhanced the opportunity of parliaments to have a say in these procedures regardless of the distribution of competences between the Union and the Member States.

However, a remarkable example of cooperation among national parliaments that has contributed to block the legislative process and that likewise supports the thesis of this essay concerns the second case study, which is that of the draft Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services. This proposal, aiming at regulating a subject-matter which had been previously referred to and considered by the ECJ,⁵¹ found its legal basis in Article 352 TFEU, the so-called 'flexibility clause'. Twelve parliaments, issuing 19 reasoned opinions on the whole, objected to the compliance of such proposal with the principle of subsidiarity in May 2012 and thus the European Commission was obliged to re-examine it. The complaints of parliaments, in principle addressed to the breach of the principle of subsidiarity, were actually based on: the lack of necessity to regulate the matter at EU level and of clear evidence in favour of this regulation; on the incompatibility with the constitutional identity of some Member States; on the violation of international treaties protecting social rights (Fabbrini and Granat 2013: 125 ff.). Although these concerns were not directly connected to the strict definition of subsidiarity set down in Article 5(3) TEU – while matching, by contrast, the broader definition of subsidiarity by MacCormick – and the Commission itself affirmed that no breach of subsidiarity had occurred, it decided to withdraw the proposal in September 2012.

Even though national parliaments express their reasoned opinions individually, the existence of a coordination among them cannot be denied. It is not by chance that these reasoned opinions were issued by parliaments of Member States that traditionally have some concerns about the social

⁵¹ See the decisions of the ECJ in *International Transport Workers' Federation v. Viking*, Case C-438/05, [2007] ECR I-10779, and in *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundets*, Case C-341/05, *Laval*, ECR I-11767.

policy of the EU (Czech Republic, Denmark, Finland, Latvia, the UK, Sweden). The political pressure exerted on the Commission by the positions taken by several parliaments and chambers on such a sensitive and highly debated issue, has led the Commission to embrace in practice an understanding of the principle of subsidiarity which is very close to the one conceptualised by MacCormick and argued in the essay. Although the Commission has denied that a violation of the principle *stricto sensu* occurred, however the withdrawal of the proposal is a recognition of the fact that the adoption of a legislative act cannot be pursued regardless of the widespread discontent of national public opinions represented through their parliaments. On this occasion, the tool of the early warning mechanism has helped to merge national public opinions into the European public opinion. In contrast with the interpretation of the role of parliaments as guardians of a strictly legal notion of subsidiarity (Kiiver 2012: 126-132; Fabbrini and Granat 2013: 114 ff.), such outcome, in particular the position taken by the European Commission, can be explained only in the light of a broader understanding of subsidiarity where the process of will-formation at the EU level cannot disregard the national public opinions, represented by parliaments, and where the decision is the result of merging concurring European, national and sub-national rationales.

Although the case studies originated from different premises and led to rather opposite results with regard to the legislative process concerned, in both circumstances the existence of the early warning mechanism and the cooperation amongst parliaments has enhanced democratic participation in the adoption of European decisions and the acknowledgement of a more comprehensive notion of subsidiarity.

6. Conclusions

Over the years the process of European integration has shaped a unique legal order, highly complex in its architecture and functioning, based on complementary constitutional layers ‘closely interwoven and interdependent’ (Pernice 2002: 514). According to MacCormick, any attempt to simplify this complexity, over-empowering the institutions of the European commonwealth at the expense of those placed at the other levels of government (including also the regional and the local levels) should be avoided.

In a legal order like that of the European Union, founded on the mixed or shared sovereignty between the Union and its units, the institutions as well are conditioned by this peculiar relationship between levels of government. In this regard, also the parliaments of the Union (the EP, the national

and regional parliaments) should be regarded as acting in a multilevel parliamentary field (Crum and Fossum 2009). The Treaty of Lisbon seems to further confirm this assumption by enhancing inter-parliamentary cooperation and by assigning 'shared competences' to the parliaments of Europe: in the ordinary revision of the Treaty and on the democratic control of Europol and Eurojust, for instance.

Moreover the Treaty of Lisbon assigned to national parliaments (in close relations with regional parliaments) also the role of guardians of the correct exercise of the shared competences. In particular, through the early warning mechanism national parliaments are asked to verify the compliance of draft legislative acts with the principle of subsidiarity. However, several problems have arisen with regard to the interpretation of this principle since its introduction in the Treaty. Because of the ambiguous formulation of this principle within the Treaties and the Protocols, also the ECJ has abstained from deciding on the respect of the principle of subsidiarity on a substantive ground, sometimes addressing issues of subsidiarity as if they were issues of proportionality. The political control on the principle of subsidiarity by the national parliaments has encountered more or less the same problem. What does subsidiarity really mean? Indeed in the reasoned opinions of the parliaments the principle is frequently associated with challenges brought on the grounds of the principle of proportionality, of the legal basis of the act, on merit.

For these reasons, it could be probably useful to move from the traditional concept of subsidiarity as *criterium* regulating the vertical distinction of the competences, more precisely the shared ones, towards the concept of subsidiarity proposed by MacCormick. Indeed, if properly addressed, the issue of subsidiarity can help to contain or to solve the main deficit of the Union. In fact MacCormick maintains that what is called democratic deficit is instead a subsidiarity deficit. Across the four dimensions of subsidiarity elaborated by MacCormick, the market-oriented one, the community-oriented one, the one oriented to a rational legislative production and finally the one oriented towards the build up of a European public discourse, the activity of regional, national and European Parliaments affect in particular what is considered as rational legislative subsidiarity.

Before the coming into force of the Treaty of Lisbon, the functioning of rational legislative subsidiarity had been tested within the Conventions which drafted the Charter of fundamental rights of the European Union and the constitutional Treaty. Since 2006, drawing inspiration from the early warning mechanism, rational legislative subsidiarity has also been used within the 'political dialogue' with the Commission. This procedure has further enhanced parliamentary participation in the European decision-making process often beyond the Treaty provisions, also showing great influence on the outputs when the EP and the Parliaments of the Member States, placed at different levels of government, actively cooperate. This has been demonstrated, for example, by the case of

the draft legislative act on the European citizens' initiative, whose contents, finally more favourable to the citizens if compared to the original version presented by the Commission, has been redefined thanks to the 'parliamentary axis' of national and European Parliaments. When particularly sensitive issues are at stake, like social rights and democratic accountability on austerity measures, this close interaction amongst the parliaments of Europe can also help to foster the development of other dimensions of subsidiarity, like the comprehensive one and the construction of a European public debate. In this regard, national parliaments can finally contribute to filling the gap of the subsidiarity deficit observed by MacCormick.

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