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**REGIONAL PARLIAMENTS AND THE EARLY
WARNING SYSTEM:
AN ASSESSMENT SIX YEARS AFTER THE ENTRY
INTO FORCE OF THE LISBON TREATY**

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Diane Fromage

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LUISS School of Government

Via di Villa Emiliani, 14

00197 Rome ITALY

email: sog@luiss.it

web: www.sog.luiss.it



ABSTRACT

This paper analyses the role of regional parliaments with legislative competences in the Early Warning System (EWS) six years after the entry into force of the Lisbon Treaty. To this end, the question of the regional participation is looked at from a broad perspective including the (potential) participation of regional parliaments in the Political Dialogue with the European Commission, be it through their national counterparts or with the Commission directly. This question is particularly relevant as even national parliaments tend to be less often involved in the Political Dialogue with the Commission over the last years and as the EWS has only been activated twice since the 1 December 2009.

This analysis finds, first of all, that not all regional parliaments have the guarantee that their opinion in matters of subsidiarity, or more generally on an EU topic, will be taken into account by their national parliaments. An empirical study of 17 out of 74 regional parliaments existing in the EU further shows that, globally, regional parliaments contribute fairly little to both the EWS and the Political Dialogue and they only marginally exchange with the Commission directly.

Against this background, the present study makes some proposals for reform in closure, in particular to make the best use of the sometimes scarce regional parliamentary resources available.

Keywords: *Regional parliaments ó Early Warning System ó Political Dialogue ó Commission Annual Work Programme.*

AUTHOR INFORMATION

Diane Fromage is Assistant Professor of EU Law, Faculty of Law, University of Utrecht and she was a Max Weber Postdoctoral Fellow (2014-2015), Max Weber programme and Law Department, European University Institute, Florence. She holds a PhD in Law and in Institutions, Administrations and Regional Policies from Pompeu Fabra University of Barcelona and the University of Pavia respectively (joint degree). Previously, she was an Associate Lecturer at the Catholic University of Lille and at Pompeu Fabra University (where she also coordinated an EU ALFA project for the promotion of Human Rights in Latin America), and a Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg. Her research focuses on national and regional parliaments in the European Union and she has addressed this topic from both a national and a European perspective..

Contact Information:
d.b.fromage@uu.nl

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I. INTRODUCTION

The European integration process long neglected the existence of sub-national entities even if some of them, and in particular the German Länder, have had extensive prerogatives since the very moment of the creation of the European Communities. Indeed, during a very long time, it was mostly the national governments that were at the heart of the European decision-making process: the national parliaments of the founding States had long only restricted possibilities to be involved in this field¹ and, in fact, national parliaments were formally mentioned for the first time in the Treaty of Maastricht, though they were only the object of a non-binding declaration.² By contrast, the Lisbon Treaty devotes special importance to them: they are one of the two pillars for the guarantee of democracy in the EU,³ are deemed to contribute actively to the good functioning of the Union⁴ and are therefore attributed specific rights of participation and information in the Treaties themselves.⁵ The most visible and commonly used of these rights is their capacity to control the respect of the principle of subsidiarity taking place within the framework of the Early Warning System (EWS) whose precise functioning will be described further below and that can lead to the activation of yellow and orange cards if a certain number of parliamentary chambers considers that there is a breach.

The regional dimension too was long absent from the Treaties: This is what has been qualified as Landesblindheit (regional blindness). It was mentioned for the first time in the Single European Act in reference to cohesion policy and the Committee of the Regions was created through the Treaty of Maastricht, but it is actually the Lisbon Treaty that marks a turning point in this area as well.⁶ It devotes particular attention to sub-national entities in acknowledging for instance the importance of the regional

* I would like to express my gratitude to the *Institut d'Estudis Autonòmics* of Barcelona who financed my research stay at the Max Planck Institute of Comparative Public Law and International Law in July 2015, to the Max Planck Institute itself (and in particular to its director Prof. Armin von Bogdandy) for hosting me, and to all the administrators of the regional parliaments who took some of their precious time to answer the questionnaire I sent them. Special thanks are further owed to Cristina Fasone, Valentin Kreilinger, Kolja Raube and Florian Stöckel who helped in the design and the translation of the questions and to the anonymous reviewer for the useful comments.

¹ See further on this point: D. BOSSAERT, 'The Luxembourg Chamber of Deputies: From a toothless tiger to a critical watchdog?', in Andreas Maurer, Wolfgang Wessels (eds.) *National Parliaments on their ways to Europe: Losers or Latecomers?*, NOMOS, Baden-Baden, 2001, 201-211, D. FROMAGE, *Les Parlements dans l'Union Européenne après le Traité de Lisbonne. Les Parlements Allemands, Britanniques, Espagnols Français et Italiens*, L'Harmattan, Paris, 2015 and B. J. S. HOETJES, 'The Parliament of the Netherlands and the European Union: Early starter, slow mover', in Andreas Maurer, Wolfgang Wessels (eds.) *National Parliaments on their ways to Europe: Losers or Latecomers?*, NOMOS, Baden Baden, 2001, 337-358.

² Declaration no 13 on the role of national parliaments in the European Union.

³ The other one being the European Parliament. Art. 10 TEU.

⁴ Art. 12 TEU.

⁵ Mostly but not only in art. 12 TEU.

⁶ For a critical stance on the position granted to subnational authorities in the Lisbon Treaty see: M. FINCK, 'Challenging the Subnational Dimension of Subsidiarity in EU Law', *European Journal of Legal Studies*, vol. 18, n° 1, 2015, esp. 6 f. On the importance of the sub-national dimension: C. PANARA, *The sub-national dimension of the EU. A legal study of multilevel governance*, Springer, Heidelberg, 2015, in particular 160f.

and local dimension at the time of applying the principle of subsidiarity,⁷ in including the regional and self-government structures in the constitutional identity of the Member States⁸ or in mentioning the regional and local dimensions of an action envisaged at the time of making previous consultations.⁹

This importance granted to the sub-national dimension is also visible in the capacity attributed to regional parliaments with legislative powers (hereinafter: regional parliaments) to be consulted by their national parliaments, when the latter consider this to be appropriate, in the framework of the EWS.¹⁰ As a matter of fact, the formulation used in Protocol no 2 is far from clarifying whether it is actually an obligation for national parliaments to consult regional parliaments or whether this is left to their own judgement as article 6 Protocol no 2 simply states: 'It will be for each national Parliament or each chamber of a national Parliament to consult, *where appropriate*, regional parliaments with legislative powers' (emphasis added).¹¹ This explains why in some Member States regional parliaments with legislative competences have the capacity to trigger the control of subsidiarity by their national parliament and, in others, they remain at the mercy of one (or both) national chambers which consequently has (or have) the ability to simply disregard a regional opinion.

The question of the regional participation to the Early Warning System was the object of much academic attention in the years immediately preceding the entry into force of the Lisbon Treaty on 1 December 2009 and in the first years right after that: The Committee of the Regions in fact sponsored and published two studies in 2011 and 2013¹² and, for instance, Spanish scholars initially showed much interest for this

⁷ Art. 5-3 TEU now reads: 'Under the principle of subsidiarity, 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'. See on the evolution of the principle of subsidiarity since its introduction in the Maastricht Treaty: D. FROMAGE, 'Subsidiarity: from its introduction as a General Principle in Maastricht to an instrument for the improvement of democratic legitimacy in Lisbon', in Maartje De Visser, Ann Pieter van der Mai (eds.) *The Treaty on European Union 1993-2013: Reflections from Maastricht*, Intersentia, Maastricht, 2013, 139-158.

⁸ Art. 4-2 TEU: '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'. See on this link between sub-national entities and constitutional identity: C. FASONE, 'Regional Legislatures in the Early Warning Mechanism. When the national (constitutional) identity affects the cooperation among parliaments in EU affairs', *Federalismi.it*, n° 2, 2015.

⁹ Art. 2 Protocol no 2.

¹⁰ Art. 6 Protocol no 2 on the application of the principles of subsidiarity and proportionality.

¹¹ The other linguistic versions are not of much help in order to interpret this provision either. The French one reads: 'Il appartient à chaque parlement national ou à chaque chambre d'un parlement national de consulter, le cas échéant, les parlements régionaux possédant des pouvoirs législatifs'; the German one states 'Dabei obliegt es dem jeweiligen nationalen Parlament oder der jeweiligen Kammer eines nationalen Parlaments, gegebenenfalls die regionalen Parlamente mit Gesetzgebungsbefugnissen zu konsultieren'; the Italian one defines 'Spetta a ciascun parlamento nazionale o a ciascuna camera dei parlamenti nazionali consultare all'occorrenza i parlamenti regionali con poteri legislativi' and the Spanish one foresees: 'Incumbirá a cada Parlamento nacional o a cada cámara de un Parlamento nacional consultar, cuando proceda, a los Parlamentos regionales que posean competencias legislativas' (emphases added).

¹² D. BOURDIN; G. VARA ARRIBAS, *The Role of Regional Parliaments in the Process of Subsidiarity Analysis within the Early Warning System of the Lisbon Treaty*, Committee of the Regions, Brussels, 2011 and P. SCHMITT; T. RUYSS; A. MARX, *The Subsidiarity Early Warning System of the Lisbon Treaty ó the role of regional parliaments with legislative powers and other subnational authorities*, Committee of the Regions, Brussels, 2013. Previously, the Committee of the Regions had also published a study dedicated to its role in monitoring the principles of subsidiarity and proportionality: C. JEFFERY; J. ZILLER, *The role of the Committee of the Regions in implementing and monitoring*

question too.¹³ However, specific studies have now become much scarcer, in spite of the fact that the Early Warning System was indeed activated twice, in 2012 and in 2013, and in spite of the many changes currently undergoing in the field of the relationship between the European Commission and national (and regional) parliaments that shall be highlighted towards the end of the present study.

In this context, it aims at analyzing the current situation, in particular that of the Belgian, the British, the German, the Italian and the Spanish regions, although the reality in the other sub-national entities will occasionally be referred to as well. These five Member States have been chosen on the basis of their territorial organisation ó regionalised states for Italy, Spain and the UK, federal state for Belgium and Germany ó, because none of them has a chamber of territorial representation through which regional parliaments can participate directly in the EWS¹⁴ and because of the interest they have showed for the principle of subsidiarity ó Germany and the UK were in fact at the origin of its inclusion in the Maastricht Treaty.

This analysis will seek to observe how the regional participation in the EWS has evolved since 2009 and whether the two ‘yellow cards’ have participated to render it more attractive to regional parliaments or whether, on the contrary, their interest for this question has declined over time. Further, some regional parliaments have also begun to address their (reasoned) opinions directly to the European Commission, i.e. circumventing their national parliament. This recent evolution will also be the object of a critical analysis.

The empirical data has been collected through a survey addressed to regional legislatures. This explains why only some regional parliaments are analysed, though they are not necessarily the most representative ones.

the subsidiarity and proportionality principles in the light of the Constitution for Europe, Committee of the Regions, Brussels, 2006.

¹³ *Inter alia* : A. M. CARMONA CONTRERAS, ‘Los dictámenes autonómicos en el sistema de alerta temprana’, 2011, Fundación Giménez Abad/Cortes de Aragón, Zaragoza, available at: http://www.fundacionmgimenezabad.es/images/Documentos/2011/20110128_ot_carmona_contreras_a_es_o.pdf (last accessed: 18.4.2016), A. M. CARMONA CONTRERAS, ‘¿Hacia la europeización de los parlamentos autonómicos? Reflexiones al hilo del Mecanismo de Alerta Temprana’, *Revista de Estudios Autonómicos i Federals*, n.º. 16, 2012, 141-176, J. Á. CAMISIÓN YAGÜE, ‘La Asamblea de Extremadura y el control del principio de subsidiariedad a través del Mecanismo de Alerta Temprana’, *Revista de Estudios Autonómicos i Federals*, n.º. 14, 2011, 264-320, F. ESTEVE GARCÍA; M. ILLAMOLA DAUSA, ‘Els Mecanismes de control de la subsidiarietat per part de les Corts Generals i dels Parlaments Autonòmics’, in Andreu Olesti Rayo (ed.) *L’administració autonòmica i l’entrada en vigor del Tractat de Lisboa: un nou entorn polític per les relacions interadministratives entre la Unió Europea i les Comunitats Autònomes*, Generalitat de Catalunya, Barcelona, 2011, 69-107, J. I. NAVARRO MÉNDEZ, ‘Mitos y realidades del control del Principio de subsidiariedad por los parlamentos autonómicos españoles’, in Francesc Pau i Vila (ed.) *Parlamento y organización territorial. XVIII Jornadas de la Asociación Española de Letrados de Parlamentos*, Tecnos, Barcelona, 2012, 221-232, J. I. NAVARRO MÉNDEZ, *Parlamentos regionales europeos y principio de subsidiariedad*, Aranzadi, Madrid, 2014, J. OSÉS ABANDO, ‘Alerta Temprana y Parlamentos Autonómicos: Fin de ciclo. La Experiencia del Parlamento Vasco’, *Corts. Anuario de Derecho Parlamentario*, 27, 2013, 57-71, M. PALOMARES AMAT, ‘La participación del Parlamento de Cataluña en la aplicación y el control del principio de subsidiariedad’, *Revista de Derecho Comunitario europeo*, 38, 2011, 19-58, M. PALOMARES AMAT, ‘El Parlamento de Cataluña y la Unión Europea’, in Paz Andrés Sáenz de Santa María, Juan Ignacio Ugartemendia Eceizabarrena (eds.) *El Parlamento europeo: ¿esta vez es diferente?*, IVAP, Guipuzcoa, 2015, 265-272 and L. SESEÑA SANTOS, ‘La participación de las Cortes de Castilla y León en los asuntos europeos’, in Paz Andrés Sáenz de Santa María, Juan Ignacio Ugartemendia Eceizabarrena (eds.) *El Parlamento europeo: ¿esta vez es diferente?*, IVAP, Guipuzcoa, 2015, 273-284.

¹⁴ Though the Belgian regional assemblies can indeed make use of the national votes.

In order to duly analyse these recent evolutions, this study will first recall the legal framework within which the EWS operates at a European level (II). Then the Belgian, the British, the German, the Italian and the Spanish systems will be analysed in more detail (III). The fourth part will be dedicated to the practice of the control of subsidiarity today (IV). In closure some conclusions will be drawn and accompanied by some suggestions for reforms (V).

II. The European legal framework: the Early Warning System for the control of the respect of the principle of subsidiarity

The principle of subsidiarity is contained in article 5-3 Treaty of the European Union (TEU) since the entry into force of the Lisbon Treaty. This article defines the principle as follows:

Under the principle of subsidiarity, 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. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

The functioning of the system for the control of its respect, the Early Warning System (EWS), is detailed in Protocol no 1 and no 2 annexed to the Treaties. Protocol no 1 establishes that all Commission consultation documents, its Annual Work Programme and the legislative proposals shall be forwarded directly to national parliaments by the Commission itself.¹⁵ In the framework of the EWS, each national parliament shall have two votes, one of which is attributed to each of the chambers in the case of bi-cameral parliaments.¹⁶ National parliaments shall have eight weeks to perform their control and send their reasoned opinions to the European Commission if they consider that a proposal they have examined does not respect the principle of subsidiarity.¹⁷ If one third of the total of votes are in favour of a breach,¹⁸ a 'yellow card' is triggered. If, in turn, the total number amounts to half of the total number of the votes, it is an 'orange card'.¹⁹

¹⁵ Art. 1 and 2 Protocol no 1. In case the Commission is not the author of the proposal, the proposal is forwarded directly by the institution author of the proposal.

¹⁶ Art. 7 Protocol no 2.

¹⁷ Art. 6 Protocol no 2.

¹⁸ The threshold is lowered to one fourth in the Area of Freedom, Security and Justice.

¹⁹ Orange cards did not exist in the Treaty establishing a Constitution for Europe and were added in the Lisbon Treaty on Dutch insistence. J.-V. LOUIS, 'The Lisbon Treaty: The Irish «No». National Parliaments and the Principle of

So far, only two ‘yellow cards’ have been triggered: in 2012 regarding the ‘Monti II’ proposal²⁰ and in 2013 on the proposal for the establishment of a European Public Prosecutor’s Office.²¹ However, the number of reasoned opinions transmitted by national parliaments to the European Commission was increasing steadily between 2009 and 2013 while it diminished in 2014.²² This evolution will have to be monitored in the future as 2014 was an exceptional year characterised by elections to the European Parliament and a new European Commission.

As mentioned, the issue of the regional participation to the EWS is not clearly regulated in the Treaties. Yet another means for regional participation in this framework exists through the Committee of the regions. The Committee is indeed entitled to request the judicial review of a legislative act with regard to the respect of the principle of subsidiarity after it has been adopted if this is an act ‘for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted’²³ The Committee of the regions also created a Subsidiarity Monitoring Network in 2007 of which many regional parliaments are members alongside regional governments and associations of regional or local authorities, for example.²⁴ Given the variety in the membership of this Network and the lack of formal participation of the Committee of the regions in the EWS, regional parliaments should not have too high expectations and rather focus on trying to be heard by their national parliaments.

Subsidiarity - Legal Options and Practical Limits, *European Constitutional Law Review*, vol. 4, 3, 2008. 429-452, 435.

²⁰ Commission Proposal for a Council 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 - COM(2012) 130. See on this first yellow card: G. BARRETT, ‘Monti II: The subsidiarity review process comes of age...or then again maybe it doesn’t’, *Maastricht Journal of European and Comparative law*, vol. 19, 4, 2012, 595-600; D. FROMAGE, *Les Parlements dans l’Union Européenne après le Traité de Lisbonne. Les Parlements Allemands, Britanniques, Espagnols Français et Italiens*, cit. 359 f. ; F. FABBRINI; K. GRANAT, ‘«Yellow card, but not foul»: The role of the National parliaments under the subsidiarity Protocol and the Commission proposal for an EU Regulation on the right to strike’, *Common Market Law Review*, vol. 50, 2, 2013, 115-143 and M. GOLDONI, ‘The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation’, *European Constitutional Law Review*, vol. 10, 01, 2014, 90-108.

²¹ Commission proposal for a Council Regulation on the European Public Prosecutor's Office (also called the ‘EPPO-proposal’) - COM(2013) 534 final. See on this second yellow card: D. FROMAGE, ‘The second yellow card on the EPPO proposal: An encouraging development for Member States parliaments?’, *Yearbook of European Law*, 2016 (advanced access); D. JANCIC, ‘The Game of Cards: National Parliaments, Subsidiarity and the Future of the Early Warning Mechanism and the Political Dialogue’, *Common Market Law Review*, vol. 52, 4, 2015, 939-976 and I. WIECZOREK, ‘The EPPO Draft Regulation Passes the First Subsidiarity Test: An Analysis and Interpretation of the European Commission’s Hasty Approach to National Parliaments’ Subsidiarity Arguments’, *German Law Journal*, vol. 16, 5, 2015, 1247-1270.

²² In 2010, national parliaments transmitted 387 contributions of which 34 were reasoned opinions; in 2011 they were 622 against 64; in 2012 663 against 70; in 2013 622 against 88 and in 2014 506 against 21. European Commission, *ANNUAL REPORTS 2010, 2011, 2012, 2013 AND 2014 ON RELATIONS BETWEEN THE EUROPEAN COMMISSION AND NATIONAL PARLIAMENTS*.

In 2014, the number of reasoned opinions was therefore significantly lower than during the previous year but this could simply be an anomaly due to the elections and the change of the Presidency of the European Commission with President Juncker determined to reduce drastically the number of legislative initiatives.

In this study and for a better understanding, opinions that do not contend a breach of subsidiarity shall be referred to as ‘contributions’ following the European Parliament’s denomination whereas the term opinion shall only be used in reference to the reasoned opinions that do denounce a lack of respect of the subsidiarity principle.

²³ Art. 8 Protocol no 2.

²⁴ <https://portal.cor.europa.eu/subsidiarity/Pages/default.aspx> (last accessed on 15.4.2016).

In parallel to the EWS, Commission President Barroso launched a ‘Political Dialogue’ between the European Commission and national parliaments in 2006.²⁵ This initiative was taken in order to allow for a dialogue between these national institutions and the Commission in spite of the failure of the Treaty establishing a Constitution for Europe. Despite the fact that an agreement could finally be reached among the Member States and that the Lisbon Treaty was consequently approved and entered into force on 1 December 2009, the Commission decided to maintain this initiative which allows for a much broader exchange between the Commission and national parliaments. Indeed, contrary to the rules in place in the framework of the EWS, no limitations apply neither in terms of delay (i.e. national parliaments can send their contributions at any point in time) nor in terms of the scope (i.e. the opinion can address any aspect of the proposal and, in fact, they need not be based on any legislative proposal as national parliaments can, among others, transmit ‘own initiative opinions’). Therefore, by maintaining the Political Dialogue in parallel to the EWS, the Commission allows national parliaments to contribute widely, although its obligation towards them is strictly limited to the scope of the EWS. By contrast, in the case of the Political Dialogue, it is only bound by the commitments it itself takes on an informal basis.²⁶ As we shall see below (IV), this flexibility is to the advantage of regional legislatures – that were not directly targeted by Commission President Barroso – who can also transmit their reasoned opinions and their contributions directly to the Commission with, however, the disadvantage that due to the complete absence of any formal or informal commitment on the Commission’s side, the European institution has no obligation whatsoever. Actually, the opinions and contributions received are not even made available publicly by the Commission, and nor are its answers where provided.

III. The Belgian, the British, the German, the Italian and the Spanish examples

As highlighted above, the European legal framework leaves the choice to involve regional parliaments in the framework of the subsidiarity check open to national parliaments. This explains why in some Member States regional parliaments are systematically involved and heard, whereas in others they do not have the power to trigger the control of the respect of the principle of subsidiarity or the guarantee that their opinion is duly taken into account.

At present, eight of the twenty-eight Member States of the European Union have regions with legislative competences: Austria, Belgium, Finland, Germany, Italy, Portugal, Spain and the United Kingdom so that there exists a total of seventy-four regional parliaments potentially involved in the EWS. Only the Austrian

²⁵ European Commission, ‘The Political Dialogue’ available at : http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/political_dialogue_en.htm#politicaldialogue (last accessed on 20.9.2015) and D. JANCIC, ‘The Barroso Initiative: Window Dressing or Democracy Boost?’, *Utrecht Law Review*. 2012, 72-91.

²⁶ The Commission has for instance committed to answer to all parliaments’ opinions within three months upon receiving them – and, in fact, it does not respect this self-imposed obligation.

Länder parliaments are, nevertheless, directly represented in one of the two national parliamentary chambers so that some mechanisms had to be designed in order to allow for the participation of the other regional parliaments in the EWS. As we shall see, the situation in Belgium is complex as the regional parliaments can make use of one of the two votes attributed to the national chambers in certain cases.²⁷

Although it is not the aim here to analyse all Member States, some general information will first be provided to define the global context before the Belgian, the British, the German, the Italian and the Spanish systems are studied in depth. For instance, it appears that the issue of the actual division of competences between the federal entity and the regions is not determining at the time of defining the cases in which regions shall be able to express their opinions; only Belgium is an exception.

For example, the German Bundesrat (where representatives of the regional governments sit) always has one of the two votes independently of the fact that the proposal examined affects competences of the Länder or not. On the contrary, the Spanish regions always depend on the national parliament's will to take their opinions into account as none of the two votes Spain possesses in the framework of the EWS can ever be delegated to them. The Italian regions are in a similar position and depend on the Senate's and the Camera's openness to their opinions.²⁸ The two Portuguese regional assemblies are in a slightly better position as they can be heard by and they can transmit their opinions to the European Affairs Committee of the (unicameral) national parliament.²⁹ In case of disagreement between the regional and the national chambers, the national opinion prevails but the regional opinion is appended to the national one when it is transmitted to the European Commission. In Finland, the only regional assembly is in an extremely strong position: it can be at the origin of the beginning of the scrutiny procedure at national level and its opinion is transmitted to the European Commission even if the national parliament decides not to issue any reasoned opinion itself.³⁰ Finland and Portugal are different from the other states in that Portugal is a regionalised state with only two regions and Finland is a centralised state with one autonomous region.

As regards timing, the Spanish regional parliaments are those with the most limited amount of time to perform their subsidiarity check (four weeks) whereas the Finnish and the Portuguese regional assemblies have six weeks and the others are not actually bound by any formal deadline. The question of the definition of a formal time frame is actually a delicate one: whereas four weeks is probably too short a period (see below), the absence of any time limit has led to certain functioning problems in Italy for instance where

²⁷ See on this question: P. SCHMITT ET AL., *The Subsidiarity Early Warning System of the Lisbon Treaty ó the role of regional parliaments with legislative powers and other subnational authorities*, cit. 27f. and W. VANDENBRUWAENE; P. POPELIER, 'Belgian Parliaments and the Early Warning System', in Anna Jonsson Cornell, Marco Goldoni (eds.) *National and Regional Parliaments in the EU Legislative Procedure Post-Lisbon: The Impact of the Early Warning Mechanism*, Hart, Oxford (forthcoming).

²⁸ A constitutional reform is, nevertheless, underway at the time of writing (April 2016) and it could contribute to make the Senate a stronger territorial chamber.

²⁹ All the information on Portugal are extracted from: P. SCHMITT ET AL., *The Subsidiarity Early Warning System of the Lisbon Treaty ó the role of regional parliaments with legislative powers and other subnational authorities*, cit. 73 s.

³⁰ *Ibid.* 42.

some regional opinions arrived after the national chambers had already forwarded theirs to the European Commission.³¹ A proposal to improve this situation shall be made in the concluding remarks.

a. Subsidiarity and Belgian parliamentary system

The Belgian parliamentary system is composed of two federal chambers – the House of Representatives and the Senate – and five regional parliaments – the Flemish parliament, the Walloon parliament, the Brussels regional parliament, the parliament of the Federation Wallonia-Brussels and the parliament of the German-speaking community in Belgium.³² Following a recent reform and since 2014, the Senate is now composed of a majority of senators (50) stemming from the federated parliaments whereas the other senators (10) are designated on the basis of the elections to the House of Representatives. The Belgian case is peculiar in that it is the only Member State whose participation in the Early Warning System is the subject of a specific declaration annexed to the Treaty. Declaration no 51 by the Kingdom of Belgium on national parliaments reads as follows:

Belgium wishes to make clear that, in accordance with its constitutional law, not only the Chamber of Representatives and Senate of the Federal Parliament but also the parliamentary assemblies of the Communities and the Regions act, in terms of the competences exercised by the Union, as components of the national parliamentary system or chambers of the national Parliament.

Consequently, the regional parliaments can make use of the rights attributed to the national parliamentary chambers in the framework of the EWS.

To organise the division of the two votes between the regional and the national chambers, an inter-institutional agreement³³ was drafted and agreed upon at administrative level in 2008 and it has been applied since, although it was never formally approved. The Senate receives all the legislative proposals³⁴ which it forwards to the other parliaments. Following the 2008 Agreement, where a parliament believes that a proposal falls within its sphere of competences it should notify the other parliaments within the first two weeks of the eight-week scrutiny period so that possible controversies among the different parliaments may be solved by the Council of State.³⁵ If this parliament finds a subsidiarity breach, it has to transmit its reasoned opinion to the other parliaments, via the Secretariat of the Conferences of presidents of the seven

³¹ C. FASONE, 'Towards new Procedures between State and Regional Legislatures in Italy, Exploiting the Tool of the Early Warning System', *Perspectives on Federalism*, 2013, 122-156, 126.

³² Information on Belgium stemming from: P. SCHMITT ET AL., *The Subsidiarity Early Warning System of the Lisbon Treaty – the role of regional parliaments with legislative powers and other subnational authorities*, cit. 27.

³³ *Projet d'accord de coopération entre les Chambres législatives fédérales, les parlements des Communautés et les parlements des Régions relatif à l'exercice des compétences attribuées aux parlements nationaux par le traité de Lisbonne modifiant le traité sur l'Union européenne et le traité instituant la Communauté européenne, signé à Lisbonne le 13 décembre 2007.*

³⁴ Art. 3 inter-institutional agreement.

³⁵ Art. 4 inter-institutional agreement.

legislative assemblies, at least one week before the eight-week period expires.³⁶ A complex system then established how much the expressed opinions count, i.e. whether they should amount to one or two votes in the framework of the EWS.³⁷

The Belgian regional parliaments are therefore not dependent on the federal parliaments to see their opinion taken into account as is the case in the other parliaments analysed here; rather, the division of the two votes attributed to Belgium by Protocol no 2 are divided on the basis of the competence of each assemblies. Yet, the regional legislatures cannot transmit their opinions directly to the European institutions, although discussions regarding a change in this sense are currently being held.

b. The British system: a flexible but efficient one?

The British parliament is a bi-cameral one consisting of the House of Commons and the House of Lords. Both chambers, particularly active in EU affairs, have been attributed one vote each in the framework of the EWS. Given the fact that both chambers already checked the respect of the principle of subsidiarity of all EU legislative proposals when the Treaty of Lisbon entered into force,³⁸ it is only the modalities for the adoption of reasoned opinions that had to be defined. Before proceeding to the analysis of the procedures for the participation of regional assemblies in the EWS in the UK, it should be noted that its institutional structure is peculiar: although there exists three devolved assemblies as a result of the procedure of devolution started in the 1960s, Westminster remains free to legislate for any of the devolved regions as it sees fit. Additionally, these assemblies do not all have the same competences, the division of competences being in fact defined in statutes approved by Westminster.³⁹

In the House of Lords, the modalities for the participation in the EWS were defined in 2009 and 2010 and the responsibility of the European Union Committee in this field was institutionalised through the reform of its statute on 16 March 2010.⁴⁰ Subsidiarity checks can be triggered either during the ordinary scrutiny procedure, *ex ante* during the analysis of the Commission's annual work programme or following an alert by a regional parliament. If a breach is found, the reasoned opinion prepared by the EU Committee is appended to the ordinary report when it is transmitted to the floor of the House for debate and approval or rejection.

³⁶ Art. 5 inter-institutional agreement.

³⁷ Art. 6 inter-institutional agreement.

³⁸ The House of Commons added the element of subsidiarity to its ordinary control procedure soon after the entry into force of the Maastricht Treaty whereas the House of Lords did so shortly before the Lisbon Treaty came into force.

³⁹ On the question of the structural organisation in the UK: A. W. BRADLEY; K. D. EWING, *Constitutional & Administrative Law*, Pearson Education Limited, Harlow, 2011. 40f.

⁴⁰ HOUSE OF LORDS PROCEDURE COMMITTEE, 3rd report of session 2009-10, 2010, 3.

<http://www.publications.parliament.uk/pa/ld200910/ldselect/ldprohse/82/82.pdf> and COSAC, 6th Annex to the 13th Bi-annual Report on Developments in European Union - Procedures and Practices Relevant to Parliamentary Scrutiny, COSAC, 2010. 507.

Interestingly, the reform conducted in 2010 did not attribute any formal role to the devolved assemblies who can take the initiative to draw the Committee's attention on subsidiarity issues or be consulted by it but they do not benefit from any formal guarantee neither at the stage of consultation nor, later, that their opinion will be taken into account at all. They may be alerted [by the EU Committee] at staff level, on a case-by-case basis⁴¹ but this is not an obligation.

In the House of Commons, it is also the EU affairs committee or the European Scrutiny Committee or that is in charge of conducting the subsidiarity check while any reasoned opinion necessarily has to be approved on the floor of the House as is the case in the House of Lords.

As regards the participation of devolved assemblies, the European Scrutiny Committee considers that -Given the short timetable, [it] it would not be in a position to act on behalf of the regional parliaments spotting what for them might be objectionable proposals⁴² Therefore, it is for the regional parliaments to search for the proposals, analyse them and contact the Scrutiny Committee when they consider that there is an issue of subsidiarity and they have some objections to formulate. In spite of this, the procedure defined is quite protective of the regional assemblies as they are offered the possibility to give their opinion on the Committee's draft reasoned opinion before it is transmitted to the floor of the House when the opinion contains a reference to a subject on which they had previously raised objections. Besides, -If a regional parliament were not ready to express its views until after the reasoned opinion had been proposed to the House, or if the ESC disagreed with the views, the regional parliament should be invited to send its views to the ESC for onward transmission to the Government⁴³ The procedure designed is hence particularly flexible with the absence of any time limit for the regional parliaments to transmit their opinions for instance. Yet such flexibility is both positive and negative as it also means that it is possible that a devolved assembly will transmit an opinion in contradiction with that prepared by the Scrutiny Committee the very last day before the reasoned opinion is discussed on the floor of the House. Such a late transmission would consequently make it impossible to take the regional opinion on board.

However, although the British devolved assemblies have to mobilise themselves to participate in the EWS, they are in a better position than their Italian or their Spanish counterparts for instance as they have the guarantee that, at least, their reasoned opinions will eventually be forwarded to the Government, who then sits in the negotiations at Council level. Perhaps the shortcomings identified in the British system are not so dramatic as there are only three devolved assemblies, which all have designed procedures for their participation in the EWS, and as they do not issue very many reasoned opinions in any event. It should also be borne in mind that the existence of one single British position in Brussels is particularly anchored in the British culture: a preference will be given to defining a unitary position at home before taking part in the

⁴¹ Appendix 8 : Committee procedures for a reasoned opinion on subsidiarity. HOUSE OF LORDS EUROPEAN UNION COMMITTEE, "Twenty-third report - Annual report 2009", 2009.

⁴² COSAC, "Annex to the 13th Bi-annual Report on Developments in European Union - Procedures and Practices Relevant to Parliamentary Scrutiny", COSAC, 2010. 492.

⁴³ Id. 493.

European negotiations instead of letting discrepancies appear to the light at European level.⁴⁴ Additionally, contacts between regional and national legislatures are frequent so that a formal procedure may not be needed for them to agree on a common position.

c. The German Länder's indirect ability to participate in the EWS

Contrary to the British and the Spanish regions, the German Länder have the advantage to be represented in one of the two national parliamentary chambers, the Bundesrat, the other chamber representing the Federation being the Bundestag. However, contrary to the Austrian Bundesrat, the German one is composed of delegates of the regional executives and not of the regional legislatures.⁴⁵ Hence some procedures for cooperation and collaboration between regional parliaments and regional governments need to be designed if the parliaments want to be heard and that their opinions be taken on board by the Bundesrat.

German regional parliaments (Landtage) have been particularly active in the field of subsidiarity and were, together with the British delegation, at the origin of the recognition of the principle in the Treaties in 1992 when it was first introduced in the Maastricht Treaty. They had been concerned with the impact of the European integration process on their competences since the very moment of the approval of the Treaties of Rome in 1957, and rightly so, as until the introduction of the "Article Europe"⁴⁶ in the Basic Law on the occasion of the ratification of the Maastricht Treaty, the approval of the Bundesrat was not required in cases of Treaty change.⁴⁷ As a consequence, numerous competences of the Länder were delegated to the European Communities without their assent being even necessary. Additionally, as the Länder were not even systematically involved in the European negotiations, they were also deprived from this possibility to influence on the content of European norms they still had to apply afterwards.⁴⁸ This situation changed after 1992, though, even if the regional parliaments' position is not yet a strong one in EU affairs.

As regards the question of the participation of the German chambers to the EWS, although a constitutional reform was indeed performed on the occasion of the ratification of the Lisbon Treaty, it was not anchored

⁴⁴ David Melding, member of the Welsh Parliament stated clearly that: "Within the UK engagement with the European Union is considered part of foreign policy and as such remains a reserved competence of the UK Government. Therefore, direct relations between the UK and the EU Institutions, in theory, are the preserve of the UK Government." D. MELDING, "Role of sub-National Parliaments in the EU", 2015. Paper presented at the conference 'Parlamenti nazionali e Unione Europea nella governance multilivello' held at the Italian Chamber of deputies on 5 March 2015, available at: <http://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2016/02/MELDING-GALLES-N.3-.pdf> (last accessed on 18.4.2016), 3

⁴⁵ Art. 51-1 German Basic Law.

⁴⁶ *Europaartikel* Art. 23 Basic Law.

⁴⁷ On this original lack of participation and the origins of the German participation to the European integration process: R. STURM; H. PEHLE, *Das neue deutsche Regierungssystem. Die Europäisierung von Institutionen, Entscheidungsprozessen und Politikfeldern in der Bundesrepublik Deutschland*, Springer, Wiesbaden, 2012. 42f.

⁴⁸ On this growing awareness of regional parliaments of the increasing limitation of their competences in the 1980s, see: C. JANOWSKI, "Die Rolle von Bundestag und Bundesrat in der europäischen Rechtsetzung", in Peter-Christian Müller-Graf (ed.) *Deutschlands Rolle in der Europäischen Union*, NOMOS, Baden-Baden, 2008. 287-327, 316.

into the constitutional text.⁴⁹ It is contained in the Responsibility for integration Act⁵⁰ and detailed in the standing order of the Bundestag.⁵¹ Like in the UK, the subsidiarity check was simply incorporated into the ordinary scrutiny procedure of EU documents, although in that case the possibility exists that the approval of a reasoned opinion be delegated to the EU Affairs Committee whereas the vote of the plenary is normally required for its adoption.

In the Bundesrat which as the organ of representation of the Länder is of more acute interest for the present study the standing order has not yet been reformed. *De facto* it is the administrations of the regional governments that are in charge of the selection of all the legislative proposals received.⁵² Then the EU Committee performs the control alongside the ordinary scrutiny procedure. Interestingly, a practice has been established according to which the draft reasoned opinions are prepared by one of the regional governments in its premises and, while doing so, it is not insensitive to the opinion expressed by the federal government to which it regularly refers in its own opinion.⁵³ This custom may however not last in case the political majority happens to vary between the federal and the regional levels in the future. The Bundesrat has shown quite some interest for the question of subsidiarity and even sends a representative to the Monday Morning Meetings⁵⁴ that bring together the representatives of the national parliaments in Brussels and provide them with the opportunity to talk, among other things, about subsidiarity.

As for the regional level, the issue of the principle of subsidiarity has been at the centre of the debates of the Conference of the Presidents of the Landtage (*Landtagspräsidentenkonferenz*) since 1991⁵⁵ as it adopted, for example, a declaration titled 'Commitment to federalism and subsidiarity - Strengthening Landtage' in 2003⁵⁶ in parallel to the Convention on the future of Europe's proposals to create the EWS. From that moment on, the question of subsidiarity and of the EWS in particular was at the centre of the discussions of this Conference as is visible in the Declarations of Quedlinburg of 2004, of Innsbruck of 2005 and of Berlin of 2008. As a matter of fact, the German Länder continue to be particularly interested and proactive in this field and called for the extension of the time period to perform the control from eight weeks to twelve weeks as recently as in 2014.⁵⁷

In spite of this interest and of this early (collective) engagement however, the German regional assemblies were not all very prompt to adapt their institutional structures in order to participate in the EWS: some of

⁴⁹ In EU matters, the reform concerned the possibility for the parliamentary chambers to bring a case of non-respect of the principle of subsidiarity to the ECJ (art. 23 Basic Law) and the possibility for the EU affairs committee to act on behalf of the Bundestag in EU affairs (art. 45).

⁵⁰ Art. 11.

⁵¹ Art. 93a and c.

⁵² P. BECKER, 'Die Subsidiaritätsprüfung in Bundestag und Bundesrat – ein Rechtliches oder ein Politisches Instrument?', *Zeitschrift für Politikwissenschaft*, vol. 23, 2013. 5-37, 18.

⁵³ *Ibid.* 24.

⁵⁴ *Ibid.* 17.

⁵⁵ Three were in fact the main topics addressed in its framework: subsidiarity, the protection of the regional competences at EU and national levels and interparliamentary cooperation. G. ABELS, 'Sub-national parliaments in a multi-level parliamentary System - Reform processes in the German Länder in the Post-Lisbon Era', Paper presented at *UACES Conference, Passau 3-5 September 2012*.

⁵⁶ Declaration of Lübeck, 31 March 2003.

⁵⁷ Declaration on the European politics of the Conference of the Presidents of the Landtage 2014.

them conducted their reforms as late as 2010 and 2011.⁵⁸ Some authors had actually predicted that given their general passive attitude, it was quite unlikely that they would become closely engaged in the EWS.⁵⁹ The Responsibility for integration Act does not address the Landtage at all as it only refers to the Bundestag and the Bundesrat,⁶⁰ despite the fact that some consider that the legitimation role which has been attributed to the Bundestag should actually be transferred to the regional parliaments by analogy to the national legislature and that they would then be ensuring legitimacy at the regional level.⁶¹ Others, on the contrary, are of the opinion that the main responsibility lies with the regional governments, members of the Bundesrat who, as a consequence, should not be instructed by the Landtage.⁶² In my opinion, these regional parliaments can indeed play the same role as the federal parliament at national level in the democratic legitimation of the action of their governments in EU affairs. In the field of subsidiarity this question is nevertheless less controversial as the opinion of the Landtage is conceived as being particularly important should the regional governments decide to raise doubts through the Bundesrat.⁶³ Another particularity of the German system is the need for regional parliaments to coordinate their positions if they want a majority to be attained in the Bundesrat, although they will also eventually be dependent on their capacity to constrain their own government or not.⁶⁴ Some have indeed been granted this faculty (Baden-Württemberg, Thuringia) and the government will have to explain to the parliament why it did not follow its position⁶⁵ but this is not the case of all regional parliaments.

d. The Italian system and the growing cooperation between regions and Senate

The Italian parliament is composed of two chambers – the Chambers of deputies and the Senate – both with identical powers. In addition to this, Italy also has twenty regions (fifteen regions with ordinary status and five regions with special autonomous status) and two autonomous provinces, which each have a parliamentary assembly (regional council). So far, none of the two national chambers represent the regional interests, although the Senate is elected on a regional basis.⁶⁶

⁵⁸ *Ibid.* 13.

⁵⁹ R. UERPERMANN-WITZACK, 'Frühwarnsystem und Subsidiaritätsklage im deutschen Verfassungssystem', *EuGRZ*, 2009, 461-498, 467.

⁶⁰ Neither were they mentioned by the Federal constitutional court in its Lisbon decision 2 BvE 2/08

⁶¹ C. O. STEGER, *Stellungnahme bei der öffentlichen Anhörung des Europaausschusses des Landtags von Baden-Württemberg zum Thema 'Konsequenzen aus dem Lissabon-Urteil im Hinblick auf die Beteiligung und Mitwirkung des Landtags von Baden-Württemberg in EU-Angelegenheiten'*, Stuttgart, 2010, 2.

⁶² J. SCHWARZE, *Stellungnahme bei der öffentlichen Anhörung des Europaausschusses des Landtags von Baden-Württemberg zum Thema 'Konsequenzen aus dem Lissabon-Urteil im Hinblick auf die Beteiligung und Mitwirkung des Landtags von Baden-Württemberg in EU-Angelegenheiten'*, Stuttgart, 2010, 2.

⁶³ G. ABELS, 'Sub-national parliaments in a multi-level parliamentary System - Reform processes in the German Länder in the Post-Lisbon Era', cit.

⁶⁴ See on the Landtage's participation: A. BUZOGÁNY; J. HÄSING, 'Europäisierung des deutschen Landesparlamentarismus? Zur Rolle der Landtagsverwaltungen', *Zeitschrift für Parlamentsfragen*, 1, 2015, 128-142.

⁶⁵ G. ABELS, 'Sub-national parliaments in a multi-level parliamentary System - Reform processes in the German Länder in the Post-Lisbon Era', cit. 17.

⁶⁶ Art. 57.

In Italy, the chambers' participation in the EWS is regulated in Law 234/2012 which establishes that each of the two chambers may express a reasoned opinion following the procedures defined in their standing orders.⁶⁷ However, thus far, none of the two chambers has reformed its standing order and the participation to the EWS takes place on the basis of two opinions of the Committee on the Standing order (*Giunta per il regolamento*) in the Chamber of deputies⁶⁸ and on the basis of letters of its Speaker in the Senate.⁶⁹ Law 234/2012 further mentions the chambers' participation to the Political Dialogue.⁷⁰ Given the informal nature of this procedure, the fact that it was anchored into a national law may appear surprising although arguably this formalisation has at least guaranteed the chambers' capacity to participate in the Political Dialogue.

In both frameworks of EWS and Political Dialogue the regional dimension is mentioned in Law 234/2012: the chambers have the possibility to consult the regional assemblies when performing their subsidiarity assessment;⁷¹ note however that this is a possibility only.⁷² They are also to take into account the potential opinions and proposals expressed by the regional parliaments in their participation to the Political Dialogue.⁷³ The regional parliaments are further granted the right to transmit their observations on subsidiarity to the chambers in due time⁷⁴ so that they can both be consulted by the national parliamentary chambers or decide to transmit an opinion on their own initiative.

Given the fact that the Senate's and the Chamber's standing orders have not yet been reformed, pre-existing procedures have been used to allow the regional participation in the EWS. Furthermore, a very recent reform in the Senate could contribute to enhance the participation of regional parliaments: a sub-committee in charge of the relationship with the regions in EU affairs was introduced in September 2014.⁷⁵ The Senate has also been collaborating with regional parliaments in its scrutiny of the Commission Annual Work Programme since 2015.⁷⁶ In the Chamber by contrast no specific procedure exists: the classical instruments of hearings or formal opinions by the regional parliaments could be used but they rarely are.⁷⁷

⁶⁷ Art. 8-2.

⁶⁸ On the first opinion of 6 October 2009: A. ESPOSITO, *Il Trattato di Lisbona e il nuovo ruolo costituzionale dei parlamenti nazionali: le prospettive per il parlamento italiano*, *Ressegna parlamentare*, vol. 51, 4, 2009, 119-1173.

⁶⁹ See on this: D. A. CAPUANO, *Il Senato e l'attuazione del trattato di Lisbona, tra controllo di sussidiarietà e dialogo politico con la Commissione europea*, *Amministrazione in cammino*, 2011.

⁷⁰ Art. 9.

⁷¹ Art. 8-3.

⁷² See on the ambiguity of this consultation procedure whose features are undefined: C. FASONE, *Towards new Procedures between State and Regional Legislatures in Italy, Exploiting the Tool of the Early Warning System*, cit. 136.

⁷³ Art. 9-2.

⁷⁴ Art. 25.

⁷⁵ On this sub-committee and its attributions: L. BARTOLUCCI, *In attesa del nuovo Senato, un canale di collegamento più fluido con i Consigli regionali negli affari dell'Unione europea*, *Osservatorio sulle fonti.it*, n.º 3, 2014. 10.

⁷⁶ <http://www.osservatoriosullefonti.it/archivio-rubriche-2015/raccordi-parlamentari-italia-ue/1277-la-14o-commissione-del-senato-nellesaminare-il-programma-di-lavoro-della-commissione-europea-per-il-2015-coinvolge-per-la-prima-volta-la-conferenza-dei-presidenti-delle-assemblee-legislative-delle-regioni-e-delle-province-autonome?iij=1460764122622> (last accessed : 15.4.2016).

⁷⁷ D. FROMAGE, *Les Parlements dans l'Union Européenne après le Traité de Lisbonne. Les Parlements Allemands, Britanniques, Espagnols Français et Italiens*, cit. 324.

The Italian regional parliaments are thus in a weak position in the sense that they can be consulted by the national chambers when the latter participate in the EWS and can see their opinions and proposals taken into account in the participation in the Political Dialogue but nothing further. Nevertheless, the cooperation between the Senate and the regional parliaments has grown closer recently and shall hopefully allow regional parliaments to be heard while at the same time incentivising them to participate actively.

e. The Spanish system: little possibilities to participate for regional parliaments

In Spain, although the parliament is bi-cameral,⁷⁸ most prerogatives related to the participation of the Spanish parliament in the European integration process have been attributed to a committee common to the Senado and to the Congreso, the Joint Committee for the affairs of the European Union (*Comisión Mixta para los asuntos de la Unión Europea*) since Spain acceded to the European Communities in 1986. Additionally, despite the fact that the Senado is the 'House of territorial representation'⁷⁹ and despite the large competences attributed to the regions, it is in fact composed of a minority of representatives of the regions (Autonomous Communities).⁸⁰

In order to adapt the existing legal framework to the content of the Lisbon Treaty, and in particular to design the procedures that would allow the Spanish parliament to make full use of the prerogatives the new Treaty attributed to it, Law 8/1994 that regulates the Joint Committee for the European Union was reformed twice shortly after 1 December 2009: by Law 24/2009 of 22 December 2009 and Law 38/2010 of 20 December 2010. A Resolution was also adopted by the Board of the Congreso de los Diputados and by that of the Senado on 27 May 2010 in order to implement Law 8/1994 as reformed by Law 24/2009. Consequently the Joint Committee is attributed the exclusive competence to control the respect of the principle of subsidiarity although any MP can, alone or through its political group, propose a reasoned opinion.⁸¹ In spite of this, the plenaries of the two parliamentary chambers may request to vote on a specific reasoned opinion. In such a case, the Joint Committee shall prepare the reasoned opinion which will consequently be submitted to each of the two plenaries individually for debate and approval in the form of a vote.⁸²

For the purpose of this analysis, it is important to analyse how Law 24/2009 and Resolution of the Boards of the Congreso de los Diputados and of the Senado of 27 May 2010 regulate the regional participation to the EWS. Before the details of this procedure are studied, it should be remarked that the contemporary

⁷⁸ It is composed of the Congreso de los diputados and of the Senado.

⁷⁹ Art. 69-1 Spanish Constitution.

⁸⁰ Only 58 out of a total of 266 senators represent the Autonomous Communities.

⁸¹ In practice, this is not necessary as any proposal is analysed within the Joint Committee as soon as a spokesperson requests it. See further on the participation of the Spanish parliament in the EWS: M. DELGADO-IRIBARREN GARCÍA-CAMPERO, 'La incorporación de la Comisión Mixta para la Unión Europea de las Cortes Generales al control de la aplicación del principio de subsidiariedad y al diálogo político con las instituciones legislativas de la Unión Europea (2010-2014)', in Paz Andrés Sáenz de Santa María, Juan Ignacio Ugartemendia Eceizabarrena (eds.) *El Parlamento europeo: ¿esta vez es diferente?*, IVAP, Guipuzcoa, 2015. 250-264, 255f.

⁸² In 2014 this possibility had, however, never been used.

reform of the statutes of autonomy (i.e. regional constitutions) with the reform of the European Treaties was instrumental in the inclusion of the regional participation to the EWS in some of the statutes.⁸³ In fact, the Spanish regional parliaments adapted faster than their national counterpart in order to be able to participate in the EWS, which is a clear sign of how important they consider this matter to be.⁸⁴ The form this adaptation took was quite different with the parliaments of some Autonomous Communities foreseeing the mandatory participation of their parliaments to the EWS (among others: Navarra, Valencian Community, Catalonia, Aragon) whereas others, such as the statutes of the Balearic Islands only foresee this as a possibility. Also the question of a selective participation depending on the existence of a regional competence ó further analysed below ó was accommodated in different manners depending on the region.⁸⁵ As for the procedure for the participation of the regional parliaments in itself, it is contained in Law 24/2009. The regional parliaments receive all the legislative proposals without any filter whatsoever.⁸⁶ This leads to the fact that they must first perform a selection if they only examine the proposals affecting their sphere of competence and this can prove quite challenging given their limited resources and the period of four weeks they have to check the respect of the principle of subsidiarity.⁸⁷ Yet bearing in mind that the repartition of competences between the national and the regional levels varies from one Autonomous Community to the other ó this is hence not like in Germany where all Länder have the same competences ó it would have been difficult to design procedures following which the national level would have been responsible for the selection. The option chosen allows to avoid, in fact, any type of conflict between the regions and Madrid.⁸⁸

After the regional parliaments have transmitted their opinions to the national Joint Committee, they are taken into consideration. This means that they are not binding on the Joint Committee that is free to simply disregard them. Actually, the regional reasoned opinion(s) will only be transmitted to the European Commission if the Joint Committee considers that there is a breach too.⁸⁹ In this case, it will be appended to the national reasoned opinion. Otherwise, it simply remains devoid of any effect. This unsatisfactory situation⁹⁰ has been slightly improved since the launch of a new website for the Joint Committee in 2013:

⁸³ A. M. CARMONA CONTRERAS, *¿Hacia la europeización de los parlamentos autonómicos? Reflexiones al hilo del Mecanismo de Alerta Temprana*, cit. 153.

⁸⁴ *Ibid.* 154.

⁸⁵ See for instance on these different arrangements: *Ibid.*, F. ESTEVE GARCÍA; M. ILLAMOLA DAUSA, *El control de la subsidiariedad y de la proporcionalidad por las Cortes Generales - Comisión Mixta para la UE - y por los parlamentos autonómicos en España*, en Andreu Olesti Rayo (ed.) *La administración autonómica y el Tratado de Lisboa*, Tirant lo Blanch, Valencia, 2012. 153-222 and J. L. LÓPEZ GONZÁLEZ, *España*, en Teresa Freixes Sanjuán, Yolanda Gómez Sánchez, Antonio Rovira Viñas (eds.) *Constitucionalismo multinivel y relaciones entre Parlamentos*, Centro de Estudios Políticos y Constitucionales, Madrid, 2013, 301-361.

⁸⁶ Art. 6-1.

⁸⁷ Art. 6-2.

⁸⁸ J. I. NAVARRO MÉNDEZ, *Mitos y realidades del control del Principio de subsidiariedad por los parlamentos autonómicos españoles*, cit. 226-227.

⁸⁹ Art. 6-3.

⁹⁰ José Luis López González nevertheless considers that this limited legal value is in line with the power attributed to the Spanish State in international affairs and in the institutional and political role of Spain in the European Union while acknowledging that it is mostly the Spanish Autonomous Communities that have to implement EU legislative

since then, if the Joint Committee approves an opinion ó be it reasoned or not ó, it can be seen whether one or more regional parliament(s) had also transmitted a contribution or a reasoned opinion. But this is only a slight compensation for the parliaments of the Spanish Autonomous Communities. The position of weakness in which they have been set could be explained by the fact that they were not consulted at the time of defining the content of Law 24/2009,⁹¹ although the report prepared by the Joint Committee in view of the adaptation of the Spanish parliament for its participation in the EWS did foresee the establishment of minimum thresholds above which the Joint Committee would have been obliged to debate and vote on the proposal for a reasoned opinion. Under these circumstances, the reasoned opinion proposed by the regional parliaments would have been adopted in case of positive vote.⁹² But this proposal was never approved, and this is perhaps better as the European experience shows that too strict thresholds are not an efficient solution either. It is additionally particularly rare that the Joint Committee starts examining a proposal under the angle of subsidiarity on the invitation of a regional parliament: as of May 2013, it had only happened on one occasion following the initiative of the Parliament of Castille and Leon but eventually the Joint Committee had concluded that there was not any breach.⁹³

Therefore, the Spanish regional parliaments appear to be in a particularly weak position in this framework, also if it is compared with that of the other regional parliaments analysed here.

IV. Practice of the control of subsidiarity today

This last part will be devoted to the study of the practice of the control of the respect of the principle of subsidiarity in regional parliaments six years after the entry into force. This analysis was triggered by the fact that the participation of the Spanish regions to the Political Dialogue and to the EWS has decreased drastically after it had been so frequent and constant in the years immediately after the entry into force of the Lisbon Treaty. Indeed, the parliaments of the Autonomous Communities submitted 356 reports (*informes*) between May 2010 and December 2011 ó of which only one was a reasoned opinion ó and only 203 reports between December 2011 and May 2014 ó of which 7 were contributions in the framework of the Political Dialogue, i.e. they did not find a subsidiarity breach but contained observations and 3 were reasoned opinions.⁹⁴ The number of regional parliaments that actually transmit contributions

measures and that their involvement in the definition of the European policies has the potential to bring the EU closer to the citizens. J. L. LÓPEZ GONZÁLEZ, *δEspañã*, cit. 327 and 360-361.

⁹¹ A. M. CARMONA CONTRERAS, *δ¿Hacia la europeización de los parlamentos autonómicos? Reflexiones al hilo del Mecanismo de Alerta Temprana*, cit. 157.

⁹² *Ibid.* 161.

⁹³ COM (2012) 403 final: Proposal for a regulation of the European Parliament and of the Council on the protection of species of wild fauna and flora by regulating trade therein.

⁹⁴ M. DELGADO-IRIBARREN GARCÍA-CAMPERO, *δLa incorporación de la Comisión Mixta para la Unión Europea de las Cortes Generales al control de la aplicación del principio de subsidiariedad y al diálogo político con las instituciones legislativas de la Unión Europea (2010-2014)*, cit. 256-257.

also diminished from 9 in 2010 to 5 only in 2011 and 2012⁹⁵ and one of these five, the parliament of Extremadura is extremely active as it submitted, alone, 98 of the 203 reports received between December 2011 and May 2014.⁹⁶ Interestingly, some Autonomous Communities do not appear to react even when their competences are clearly affected.⁹⁷

The analysis of this practice shall not nevertheless remain limited to the number of reasoned opinions approved but it will take a much broader stance by looking at the overall scrutiny performed by regional parliaments in EU affairs, at whether the two ‘yellow cards’ triggered so far have attracted any attention within regional parliaments, at whether regional parliaments plan their scrutiny in advance by analysing the Annual Work Programme of the European Commission well ahead or at whether they have sought to establish direct relationships with the European Commission.

Out of the 74 regional parliaments existing in the EU, data could be obtained regarding 17 of them (three from Austria, one from Belgium, eight from Germany, one from Italy, three from Spain and one from the UK)⁹⁸ and will serve as basis to the present analysis. Before proceeding to it, I would like to thank once more the parliamentary administrators who had the kindness to answer the questionnaire I sent them during the months of September and October 2015. Their help has been absolutely instrumental to the success of this work.

a. Setting the scene: Scrutiny of EU documents and Participation in the EWS

a.1 Scrutiny of EU documents

As I have highlighted, regional parliaments are in different positions as regards their access to EU (legislative) documents: some, like the Spanish assemblies, receive them automatically from the national parliament whereas others, such as the British devolved assembly, have to search for them themselves. This may be one element explaining why the three Spanish regional assemblies analysed here declared that they scrutinised very numerous EU proposals since the entry into force of the Lisbon Treaty ó in fact, in the Basque country, all of them are still the object of a resolution ó whereas the Northern Ireland Assembly declared that it has scrutinised

⁹⁵ Data extracted from: V. NAVARRO MARCHANTE, ‘El control del principio de subsidiariedad en la práctica: la actividad de la Comisión Mixta para la Unión Europea y del Parlamento de Canarias’, in José Ignacio Navarro Méndez (ed.) *Parlamentos regionales europeos y principio de subsidiariedad*, Aranzadi, Madrid, 2014. 109-171, 114.

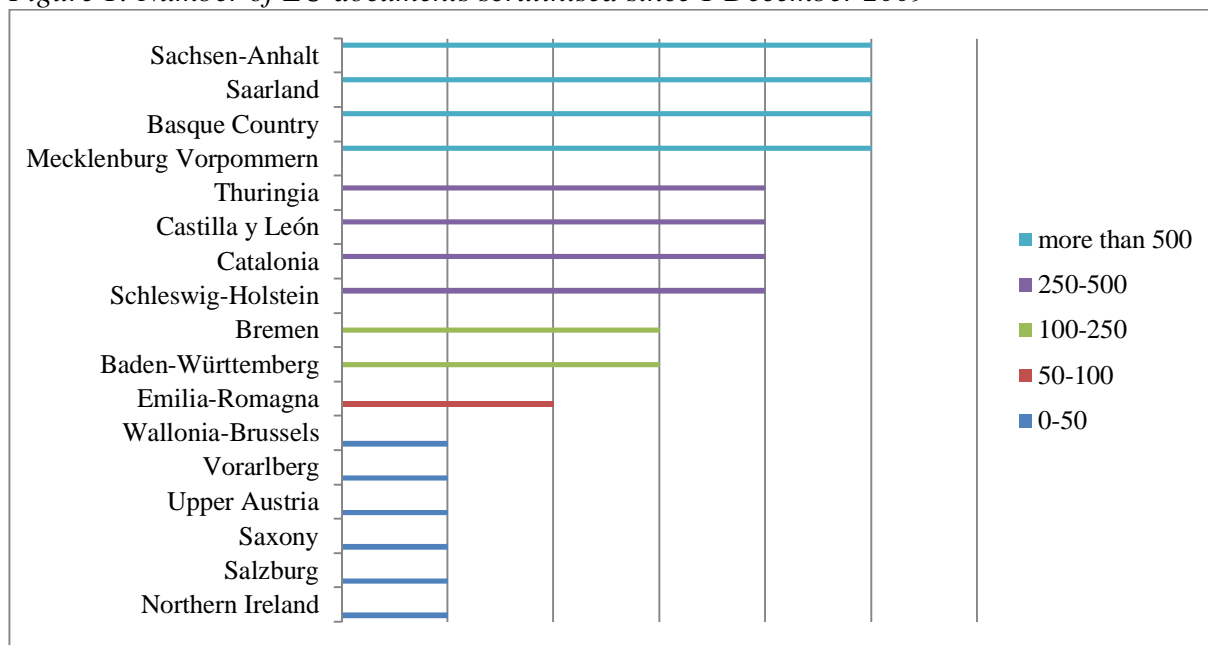
⁹⁶ M. DELGADO-IRIBARREN GARCÍA-CAMPERO, ‘La incorporación de la Comisión Mixta para la Unión Europea de las Cortes Generales al control de la aplicación del principio de subsidiariedad y al diálogo político con las instituciones legislativas de la Unión Europea (2010-2014)’, cit. 257.

⁹⁷ E. ARANDA ÁLVAREZ, ‘La Alerta Temprana en el procedimiento legislativo de la Unión Europea. Una reflexión sobre su utilidad desde la reciente experiencia española’, *Revista de Derecho Comunitario europeo*, 44, 2013. 101-153, 137.

⁹⁸ Austria: Salzburg, Upper Austria and Vorarlberg; Belgium: Wallonia-Brussels; Germany: Baden-Württemberg, Bremen, Mecklenburg-Vorpommern, Saarland, Sachsen, Sachsen-Anhalt, Schleswig-Holstein and Thuringia; Italy: Emilia-Romagna; Spain: Basque Country, Castilla y León and Catalonia; UK: Northern Ireland.

between 1 and 50 documents since 1 December 2015. Of course, another explanation in these differences visible in figure 1 below might lay in the fact that some regional parliaments have opted for a more selective but deeper scrutiny and/or participation to the Political Dialogue.

Figure 1: Number of EU documents scrutinised since 1 December 2009



Interestingly, these figures have not necessarily remained stable over time: in the German Länder of Schleswig-Holstein, Thuringia and Baden-Württemberg, 2013 was the year when the highest number of documents was scrutinised⁹⁹ whereas the two Austrian Länder of Upper Austria and Vorarlberg declared that they examine roughly the same number of documents every year. In Northern Ireland, this quantity is rising year on year whereas in the Italian region of Emilia-Romagna, 2011 was the most active year in this area.

It is somewhat hazardous to try to provide a general explanation for the variations observed over time. Four main factors may however play a role:

1. *Quantity of EU documents produced/Number of proposals made during a particular year*
Commission President Jean-Claude Juncker ó in office since 2014 ó has for example committed to legislate much less than the previous Commission led by Jose Manuel Barroso had. As a consequence, the Commission Annual Work Programme for 2015 contained 23 new legislative initiatives and so does the Work Programme for 2016.
2. *Elections*

When elections take place at regional level, the assemblies are dissolved and a period of time always elapses after the elections until the newly elected parliament functions fully.

⁹⁹ Baden-Württemberg also indicated 2012.

3. *Topics affected*

Not all EU documents necessarily affect topics of regional interest/competence.

4. *Personal interest*

The EWS is a complex mechanism. The participation to it demands resources such as a deep knowledge of EU affairs but also time and personnel. Therefore, in a context characterised by an acute lack of guarantee of effectiveness, regional members of parliaments may not be particularly attracted to it unless they are committed Europeans willing to participate at any cost. Indeed, as has been underlined above, regional parliaments do not always have the guarantee that their opinions will be taken into consideration by their national parliaments and even when this is the case, the minimum thresholds required for a 'yellow card' to be triggered is high. Besides, the question of the respect of the principle of subsidiarity is not politically salient and is hence not going to contribute to the short term goal of re-election pursued by regional deputies.

It should also be borne in mind that these EU documents are not necessarily all examined with regard to their respect of the principle of subsidiarity and to their content: in some parliaments (Saarland, Salzburg, Northern Ireland, Saxony) this is not the case for example. Additionally, merits and subsidiarity are not always examined together either: Saarland, Bremen, Salzburg and Catalonia do not scrutinize both aspects together. Other aspects, such as proportionality, competence or transparency may also be included.

The question of the inclusion of the principle of proportionality has, in fact, been the object of debates for long: whereas Protocol no 2 annexed to the Treaties addresses both principles together,¹⁰⁰ the scope of the EWS is strictly limited to the principle of subsidiarity.¹⁰¹ In spite of this, 15 national parliaments/chambers considered, in their answers to a questionnaire circulated in 2012, that subsidiarity is inextricable component of the principle of subsidiarity whereas 16 answered no to the same question.¹⁰² This question is currently the object of debate again within the framework of the Working Group on the possibility of improving the 'yellow card' procedure.¹⁰³ In fact, it has declared that '[t]he scrutiny of a draft legislative act only for its compliance with the principle of subsidiarity, without taking into account the principle of proportionality, seems ineffective and illogical, and it limits national Parliaments' competence with regard to the principle of subsidiarity itself.¹⁰⁴ 7 of the 17 regional parliaments surveyed declared specifically that the principle of proportionality is also taken into account when EU documents are scrutinised. This does not indicate that proportionality is included as a part of the principle of subsidiarity at the time of

¹⁰⁰ It is entitled Protocol on the application of the principles of subsidiarity and proportionality.

¹⁰¹ Art. 6: Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.

¹⁰² COSAC, 18th bi-annual Report: Developments in European Union Procedures and Practices relevant to Parliamentary scrutiny, COSAC, 2012. 4-5.

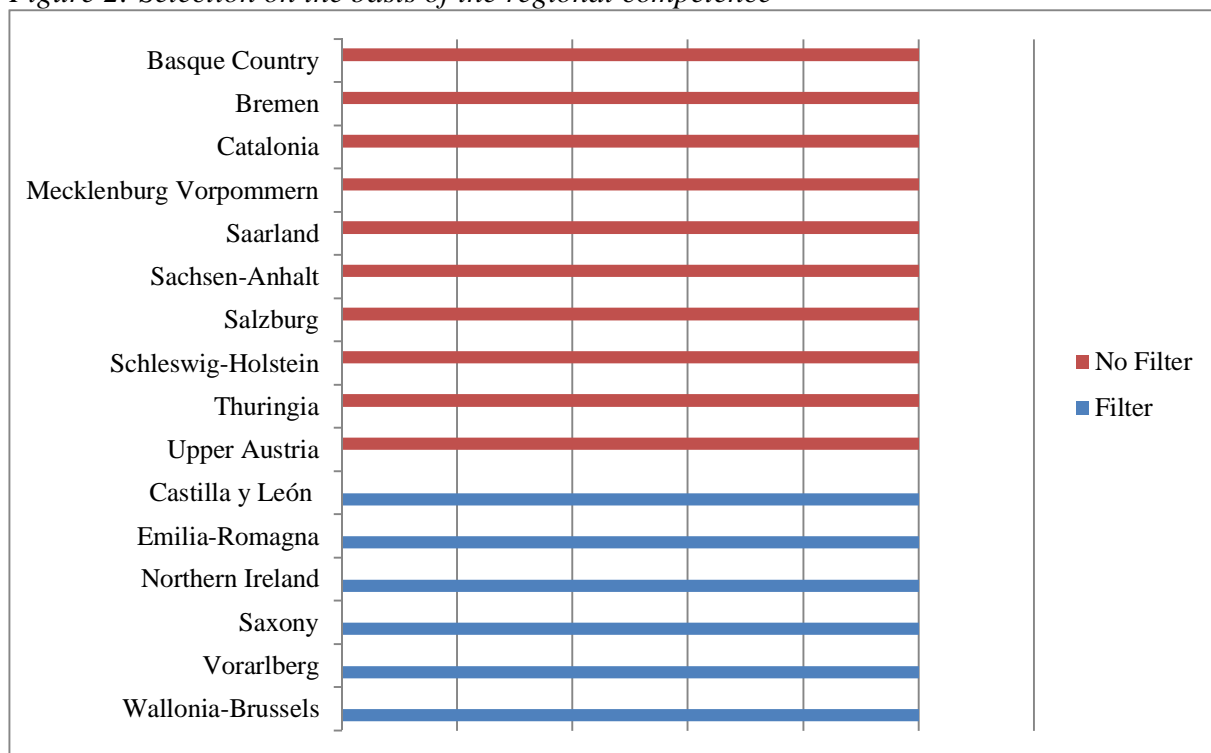
¹⁰³ Letter of the Chairwoman of the European Affairs Committee of the Polish Sejm to the Chairperson of the European Affairs Committee of the Latvian Saeima, 25 June 2015.

¹⁰⁴ Id. 6.

participating in the EWS but, at least, it reveals the importance this principle has in the scrutiny at regional level as well.

The question of the regional competence is also important. Of the 17 regional parliaments surveyed, only six declared that they first filter the proposals that affect their competences from those that do not (Figure 2). However, the question of the interest for the region also serves as a criterion for the selection of the proposals in some cases such as Baden-Württemberg or Thuringia.¹⁰⁵ These differences not necessarily result from a choice: limitations of the scope of the scrutiny have, in some of the regions, been anchored into the regional constitution. In fact, in Spain, the Statutes of autonomy of Aragon, Catalonia, Castilla y León and Navarra foresee the regional participation to the EWS when regional competences are affected only whereas that of Valencia, Andalusia and the Balearic Islands consider this faculty to be general.¹⁰⁶

Figure 2: Selection on the basis of the regional competence



a.2 Participation in the EWS

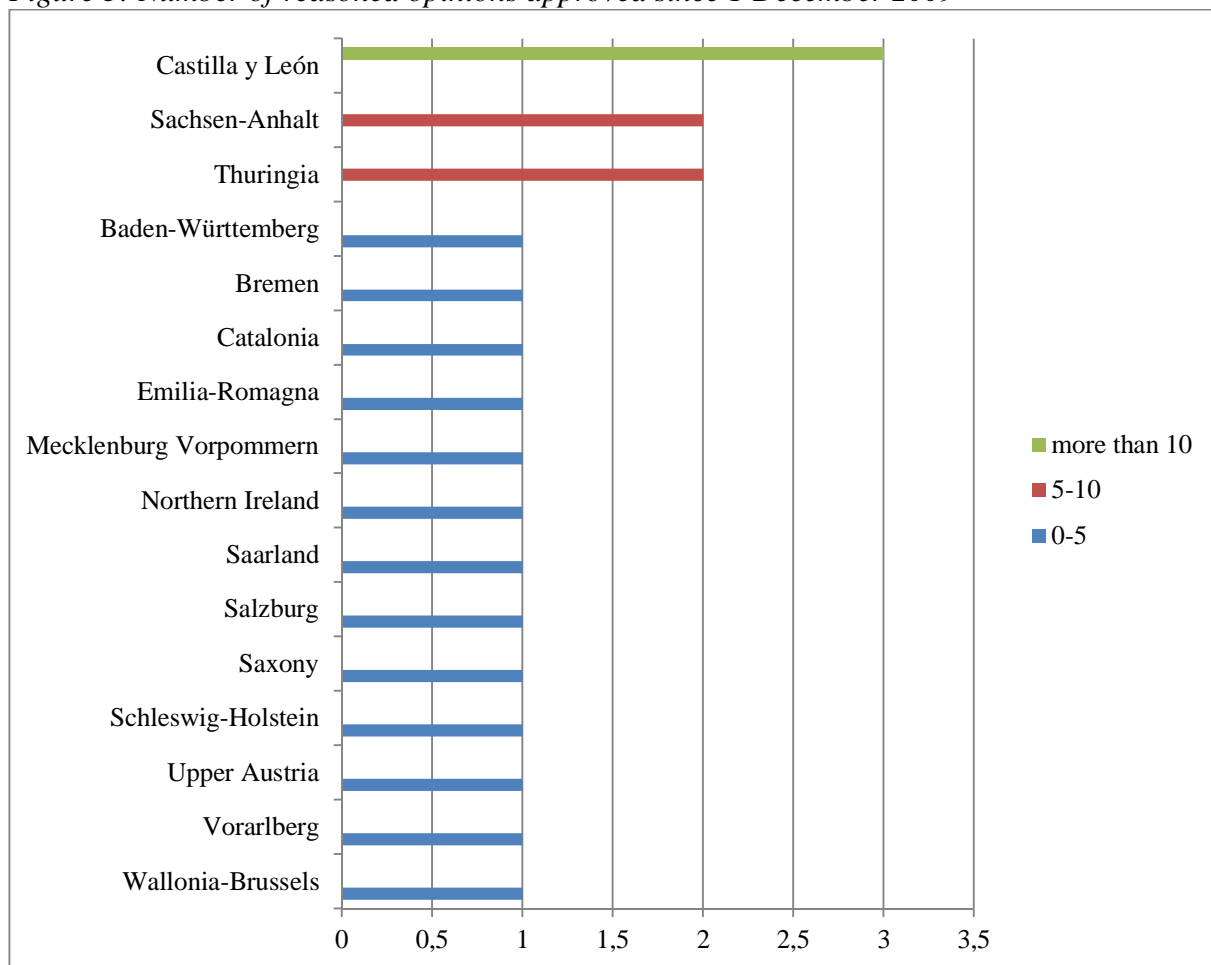
As results from the data contained in Figure 3 (below), generally speaking the number of reasoned opinions approved by regional parliaments has been particularly low since the entry into force of the Lisbon Treaty. In fact, the parliament of Saxony declared that it has approved only one of them and the parliaments of Wallonia-Brussels and of Emilia-Romagna have never adopted any reasoned opinions at

¹⁰⁵ These regions have been included into the 'no filter' category in figure 2 as competence is not the only criterion for selection.

¹⁰⁶ A. M. CARMONA CONTRERAS, *¿Hacia la europeización de los parlamentos autonómicos? Reflexiones al hilo del Mecanismo de Alerta Temprana*, cit. 155.

all.¹⁰⁷ In Baden-Württemberg, no reasoned opinions are adopted but opinions addressing subsidiarity (*subsidiaritätsrelevante Stellungnahmen*) are and they are actually quite numerous if compared to the number of reasoned opinions approved by the other regional parliaments (13 since December 2009). On the contrary, the parliament of Thuringia has approved as many as 7 reasoned opinions, that of Sachsen-Anhalt between 5 and 10, and the parliament of Upper Austria has approved only 3 but in a very short period of time as the system for its participation in the EWS was introduced as recently as 2015. The parliament of Castilla y León declared that it has adopted as many as 52 reasoned opinions.¹⁰⁸

Figure 3: Number of reasoned opinions approved since 1 December 2009



Against this background, it appears that regional parliaments have found very few breaches of the principle of subsidiarity over the period of six years that has elapsed since the entry into force of the Lisbon Treaty. These very few cases could therefore contribute to demotivate regional deputies to continue to participate and scrutinise EU proposals, especially when they have no guarantee to be heard at national level.

¹⁰⁷ The question asked in the survey offered the choice to opt for a range from 0-5 so that there might be other regional parliaments that have never adopted any reasoned opinion at all.

¹⁰⁸ This figure appears to be particularly high; perhaps contributions and reasoned opinions have been included in this count.

Additionally, the question of the information of the regional parliaments shall play a role too as not all of them can benefit from the expertise of the executives in the form of the subsidiarity assessments of their regional governments or that of the national government. As shown by Figures 4 and 5 below, there exists important differences among the regions. It results from the answers received that five regional parliaments never receive any subsidiarity assessment by their regional governments whereas only three always do.¹⁰⁹ Note that this frequency has varied over time in Thuringia as before April 2014 the regional parliament only used to receive governmental assessments from time to time. In contrast, in Baden-Württemberg the non-systematic character of the transmission is explained by the fact that the parliament will receive subsidiarity assessments if the competence of the region or its interests are affected. The parliament of Emilia-Romagna indicated on the other hand that the subsidiarity check is the responsibility of the regional parliament and, hence, the government will provide an assessment and support if requested to do so by the regional parliament. As national parliaments, regional parliaments should not simply adopt as their own the subsidiarity assessment prepared by the regional or the state government but they may gain from them. More information can only be positive, especially given the limited time frame provided for the national and regional participation in the EWS.

Figure 5 mirrors both the transmission of subsidiarity assessments by the regional government and by the national government. Four regional parliaments have declared that they always receive it whereas nine never do. These results are particularly appealing in the case of the three responding Austrian Länder ó that are represented in one of the two national chambers ó: one regional parliament declared it always receives the subsidiarity assessment of the national government, another one that it often does whereas the third one stated that it sometimes does. In Italy, on the other hand, the parliament of Emilia Romagna will receive the assessment of the national government if the proposal affects its competences.

It results that the parliaments of Upper Austria and Thuringia are the best informed ones whereas the parliaments of Sachsen-Anhalt, Schleswig-Holstein and the Basque country are mostly informed by their regional governments. On the contrary, the parliaments of Northern Ireland, Salzburg and Mecklenburg Vorpommern mostly benefit from the expertise of the national government. The parliament of Wallonia-Brussels is the only one that declared that it never receives either the assessment of its regional parliament nor that of its national parliament.

¹⁰⁹ The parliament of Castilla y León almost never does.

Figure 4: Subsidiarity assessment transmitted by the regional government

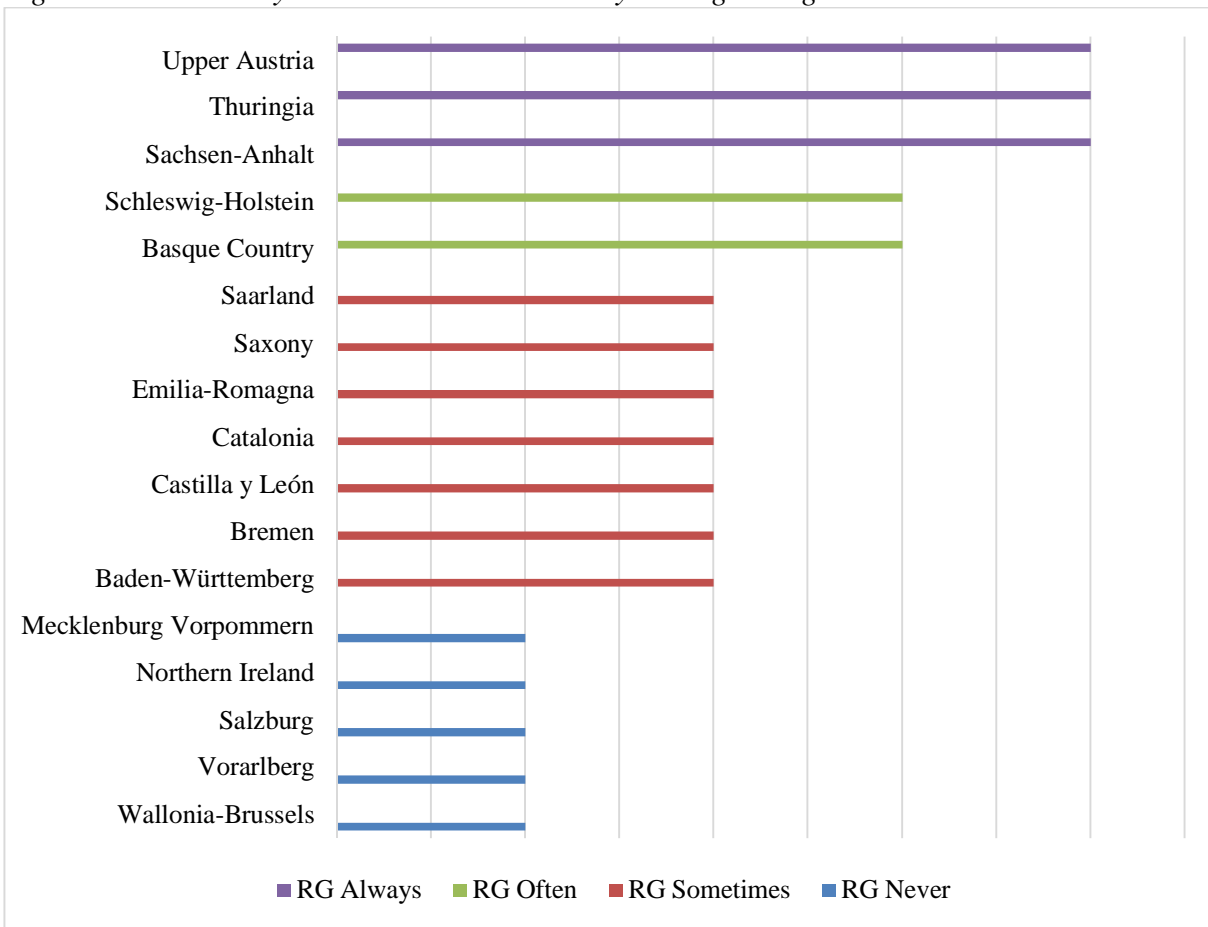
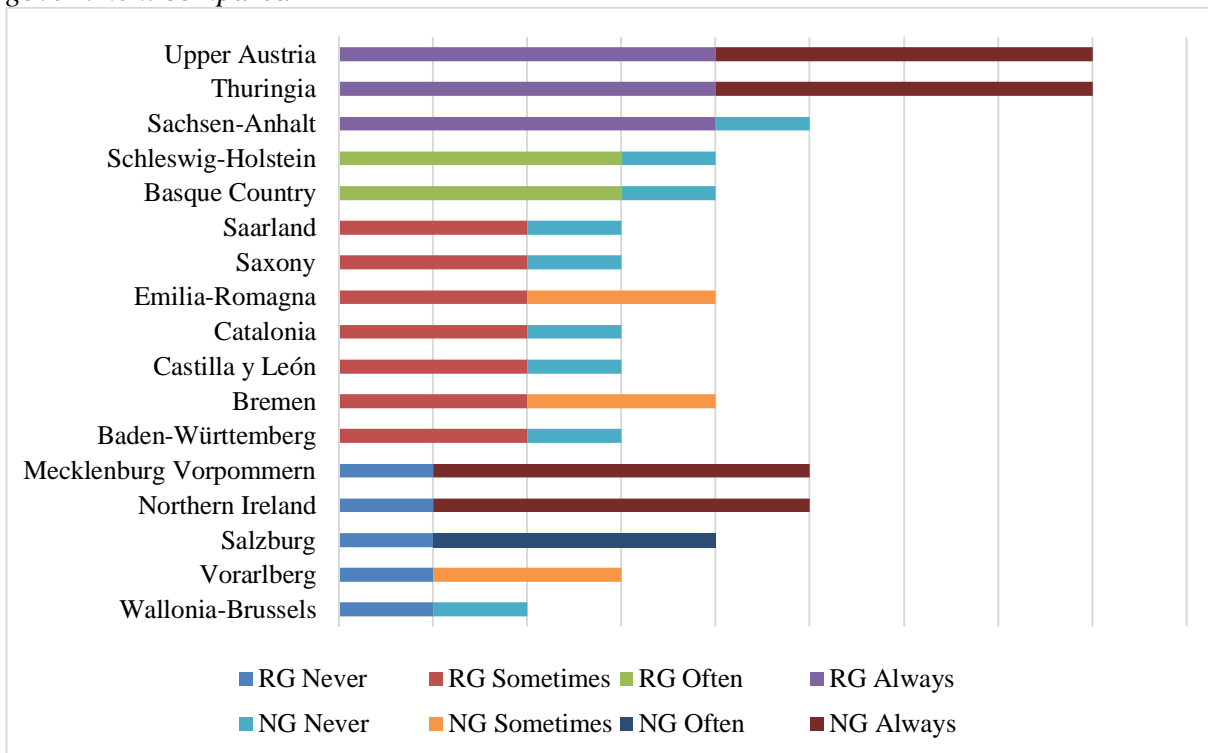


Figure 5: Subsidiarity assessment transmitted by the national government and the regional government compared



RG: Regional Government
 NG: National Government

Against this background characterised by a very limited number of reasoned opinions, the following sections shall examine whether the two ‘yellow cards’ triggered so far have been incentives for the participation of regional parliaments in the EWS and whether regional parliaments may participate in the broader and more open Political Dialogue with the European Commission.

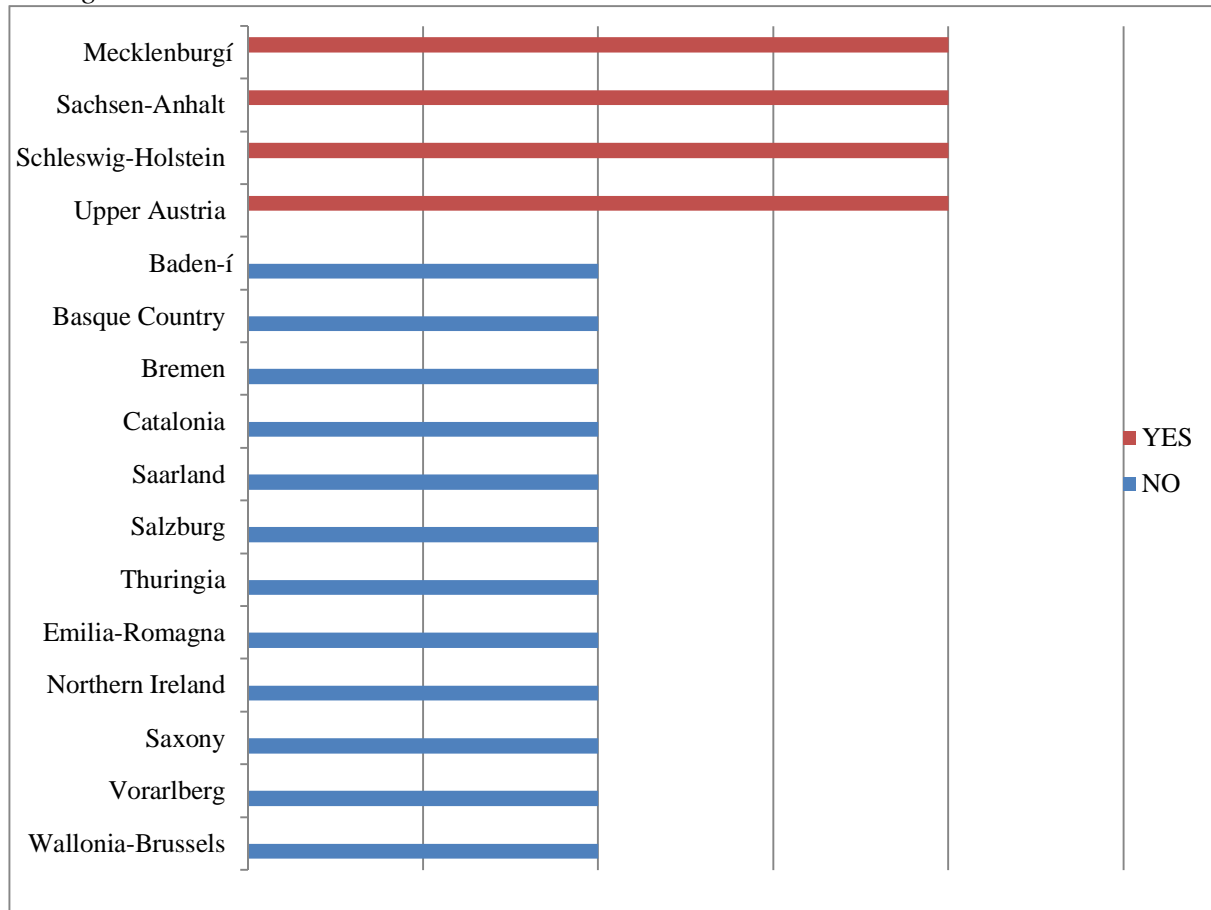
b. The yellow cards: limited source of interest for regional parliaments?

As mentioned in Part II, so far, only two ‘yellow cards’ have been triggered in 2012 and 2013. In the case of the second ‘yellow card’ the attitude of the European Commission did show some more consideration towards national parliament as compared to its attitude after the EWS was activated for the first time. Indeed, in the first case the Commission simply withdrew its proposal by sending a general communication whereas in the second case the Commission provided each and every parliamentary chamber with an individual answer as well. But on a more global level the choice made by the Commission to maintain its proposal identical in the second case despite the numerous and vigorous comments transmitted by national parliaments provoked their ire.

In this context, the question can be asked: How did regional parliaments react on their side and were the two ‘yellow cards’ the object of any debate at all?

When asked whether the two ‘yellow cards’ had been an incentive for more participation in the EWS and the Political Dialogue, 12 of 16 regional parliaments answered no, whereas 4 answered yes (Figure 4).

Figure 6: The two ‘yellow cards’ as incentives for more participation to the EWS and the Political Dialogue



This does not mean that the two ‘yellow cards’ have not been the object of any attention however: They were debated in five of the surveyed parliaments and in an additional one indirectly. But they did not represent the proof of the efficiency of the EWS that could have been awaited in the light of the shortcomings inherent to the system itself. Perhaps the European Commission’s attitude in both cases characterised by a clear dismissal of the national parliaments’ objections in the first case and the *de facto* ignorance of their arguments in the second also contributed to this (lack of) reaction at regional level.

c. Direct relationship between regional parliaments and the Commission: The Political Dialogue

In this context, some regional parliaments have sought to establish contacts directly with the European Commission in submitting it their opinions and contributions as well, i.e. in parallel to their national procedure. As has been underlined in the introduction, this development in fact raises several problems. First of all, the European Commission is already facing difficulties at the

time of answering the contributions submitted by national parliaments in the framework of the Political Dialogue: it often provides standardised answers and does not always react within the time frame of three months it committed to respect. In fact, this question is currently debated within the framework of the Working Group on the possibility of improving the ‘yellow card’ procedure – composed of national parliaments’ representatives – that considered that ‘there is a strong need to improve the cooperation with the European Commission regarding its replies to reasoned opinions of national parliaments’¹¹⁰ It is also one of the topics addressed in the current renegotiation process with the United Kingdom. Furthermore, when regional parliaments transmit their contributions directly to the Commission, given the fact that this takes place outside of the established framework, the lack of transparency is patent: neither the regional contributions nor the answers provided to them by the Commission are made easily and publicly accessible. This is certainly problematic in a context characterised by raising Eurosceptic tendencies and, more generally, in an already particularly complex Euro-national institutional system. On the other hand, however, it is of course understandable that regional parliaments who are, in some cases, limited to the participation in the EWS, who cannot always participate in the Political Dialogue and have no guarantee to see their reasoned opinion taken into account by their national parliaments will seek to gain influence in some other way.

It would therefore be rather desirable that regional parliaments be allowed to participate in both the EWS and the Political Dialogue, with certain guarantees that their opinions will be heard, through their national parliaments so that both means of communication with the European Commission – EWS and Political Dialogue – remain sustainable in the long term.

The possibilities for regional parliaments to participate in the Political Dialogue at a national level and the direct relationships they have established with the European Commission will now be examined in order to provide an overview of the current situation.

c.1 Possibilities to participate in the Political Dialogue at national level

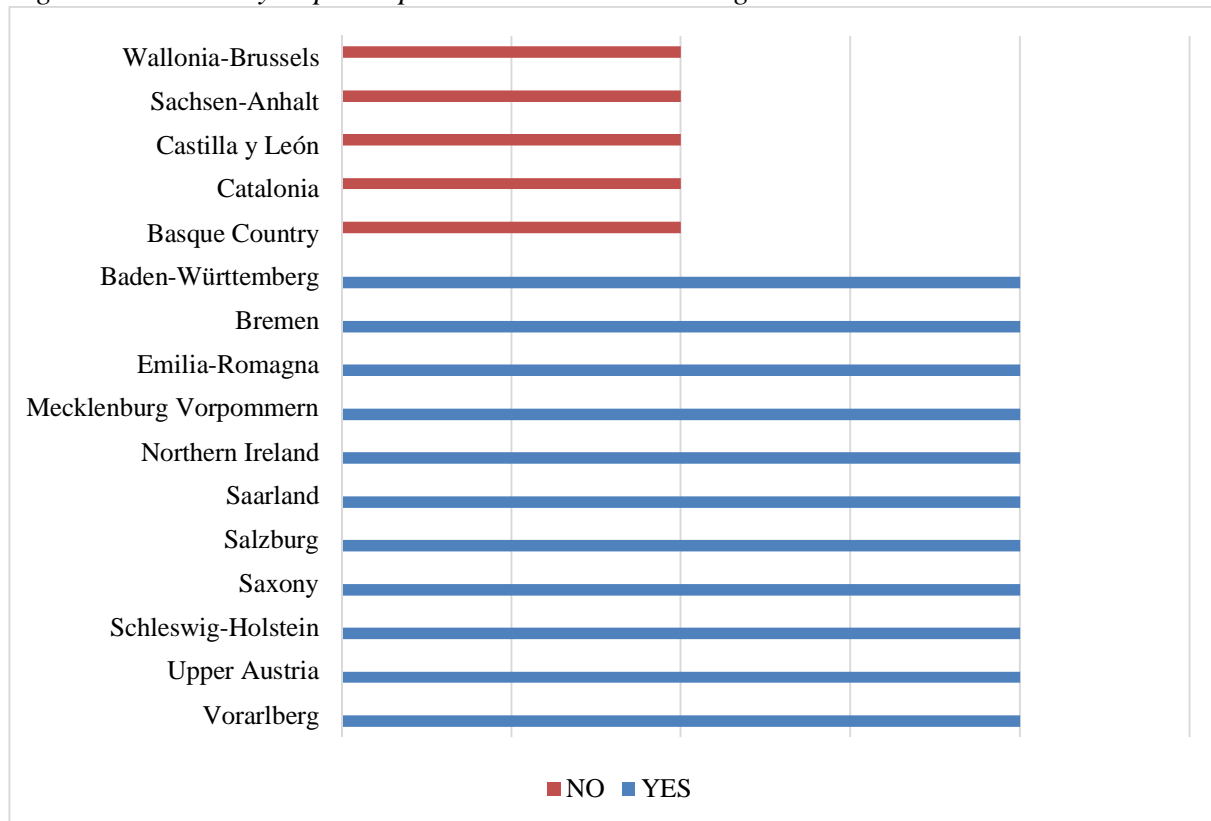
In this field, the Austrian regional parliaments, whose delegates are the members of the Bundesrat, are in a better position than the other regional parliaments. So are the Italian regional parliaments whose possibility to participate in the Political Dialogue has been anchored in the Law adopted for the participation of Italy to the creation and the application of the laws and the policies of the European Union.¹¹¹ As previously stated, its article 9-2 defines that the contributions

¹¹⁰ Letter of the Chairwoman of the European Affairs Committee of the Polish Sejm to the Chairperson of the European Affairs Committee of the Latvian Saeima, 25 June 2015.9.

¹¹¹ Law 234/2012 of 24 December 2012.

addressed by the chambers to the European institutions shall take into account any observation or proposal made by the regional parliaments. On the other hand, the Belgian and the Spanish parliaments have declared that they may not participate in the Political Dialogue through their national parliament whereas the Northern Ireland Assembly can.¹¹² As for the German Landtage, all of them but that of Sachsen-Anhalt declared that they could participate.

Figure 7: Possibility to participate in the Political Dialogue at national level



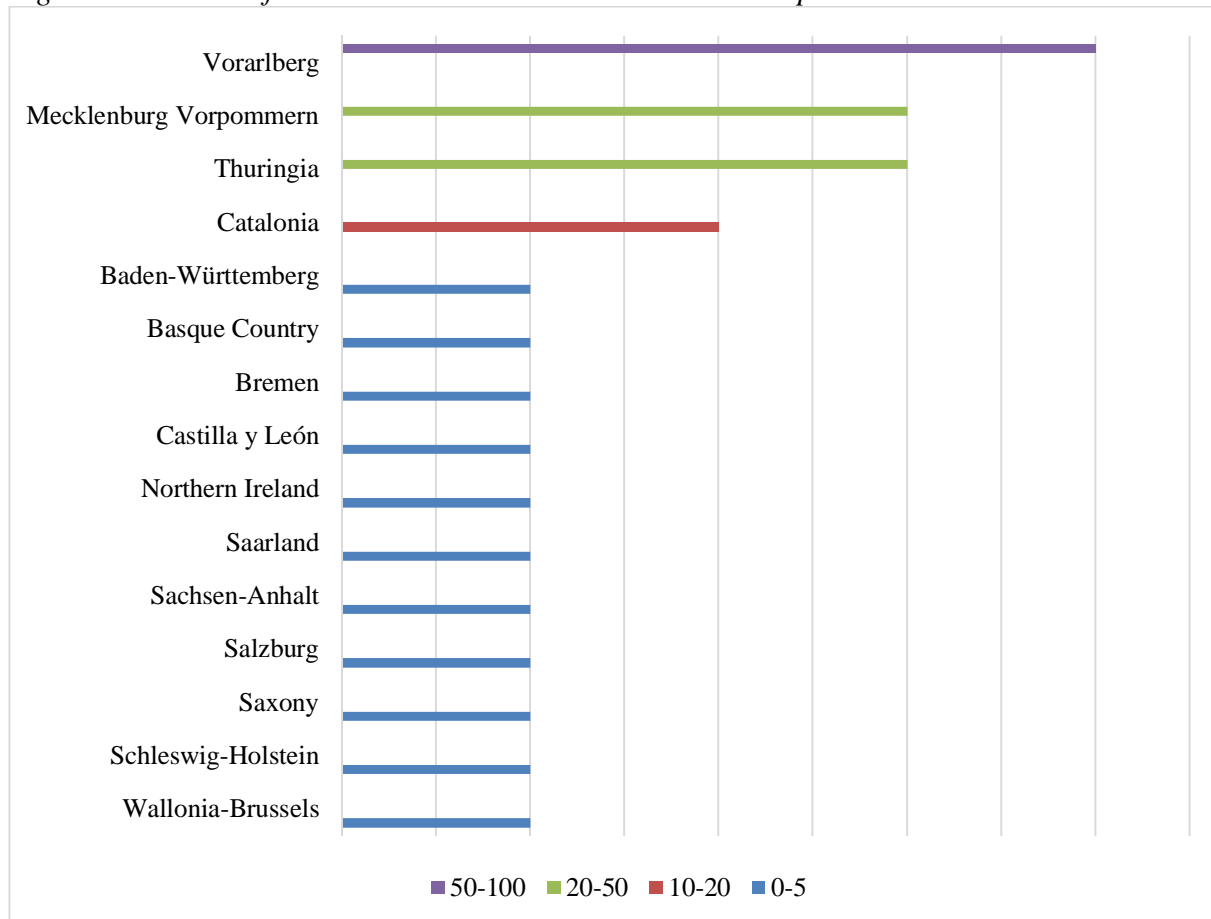
Just like the possibility to adopt reasoned opinions, this ability to approve contributions (i.e. not linked to subsidiarity) and transmit them to the national parliamentary chambers is not often used by regional parliaments and the number of contributions each of them has adopted varies from one region to the other (Figure 8). Indeed, the German parliaments of Baden-Württemberg, Bremen, Saarland, Sachsen-Anhalt, Saxony and Schleswig-Holstein,¹¹³ the Austrian Landtag of Salzburg, the Parliament of the Basque Country, of Castilla y León and that of Northern Ireland declared that they transmitted between 0 and 5 contributions to their national parliaments whereas the parliament of Wallonia-Brussels did not transmit any at all to its national counterpart. On the other hand, the parliament of Catalonia was more active with 10 to 20 contributions, that of Thuringia as well with 26 contributions. The parliaments of Mecklenburg-

¹¹² The question was deliberately formulated in an open manner: Can your parliament de facto or de iure participate in the Political Dialogue with the EU Commission through your national parliament?

¹¹³ Note that the German system is peculiar however: in transmitting their opinions to their regional governments, regional parliaments *de facto* transmit them (indirectly) to the Bundesrat, i.e. to a national parliamentary chamber.

Vorpommern and of Vorarlberg were the most active ones with between 20 and 50 contributions and between 50 and 100 respectively.¹¹⁴

Figure 8: Number of contribution transmitted to the national parliament



c.2 Direct relationships existing with the European Commission

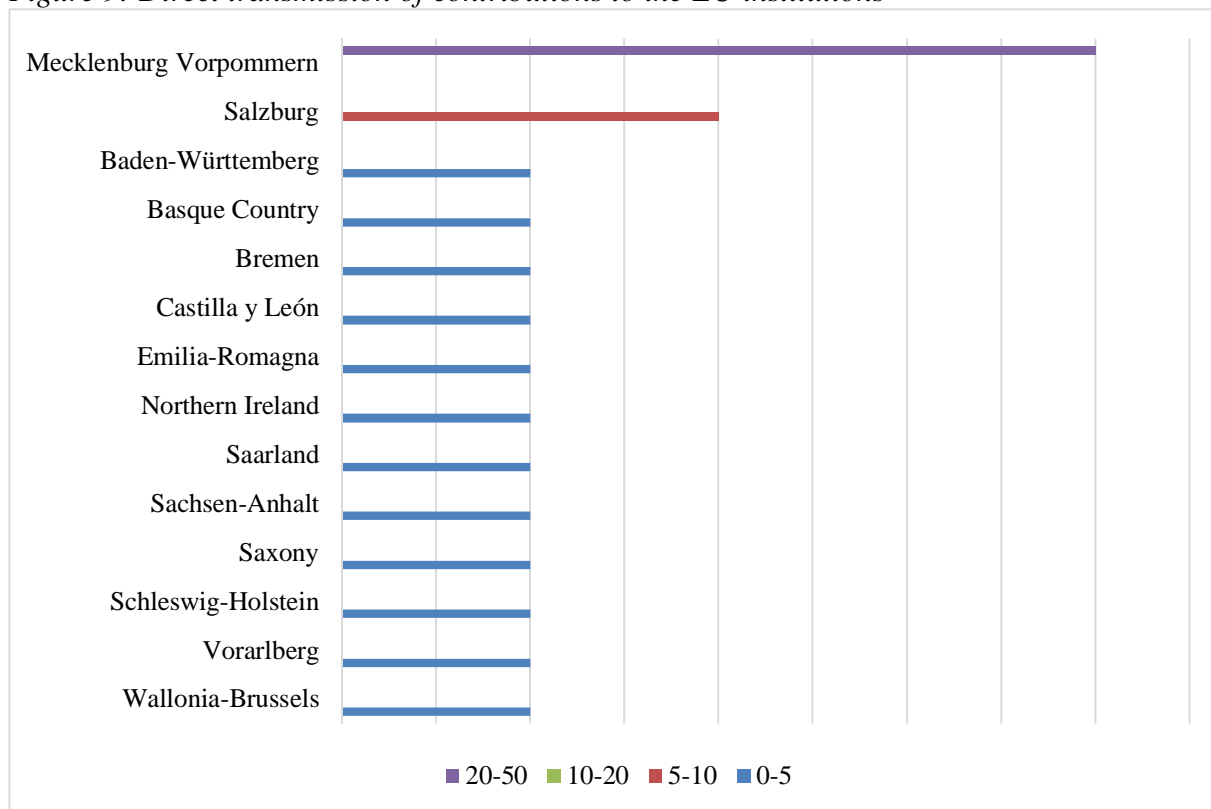
In this context, some regional parliaments have begun to transmit their contributions to the European Commission directly, for instance the parliament of Thuringia sends them all since September 2012. As of July 2014, this practice was however still marginal, amounting to roughly 10 contributions per year received by the Commission.

This low participation is visible in the answers received to the survey (Figure 9): most regional parliaments declared that they have transmitted between 0 and 5 contributions to the EU institutions directly. The parliament of Mecklenburg-Vorpommern is an exception here, as it has transmitted between 20 and 50

¹¹⁴ The exact number of contributions transmitted was not indicated by the Upper Austrian parliament; however, it approves approximately 5 contributions per year.

contributions to the EU institutions directly since December 2009.¹¹⁵ On the other hand, the European Commission is not the only EU institution that receives the regional opinions: for example, the parliament of Emilia-Romagna forwards its contribution via RegPEX,¹¹⁶ via the Subsidiarity Monitoring Network of the Committee of the Regions, to the members of its region sitting in the Committee of the Regions and in the European Parliament.

Figure 9: Direct transmission of contributions to the EU institutions



d. The Annual Work Programme

Given the high number of documents produced by the EU institutions every year and given the fact that analysing them all within the limited time frame of eight weeks available for the subsidiarity check may be a real challenge, it is submitted here that especially as regional parliaments have limited resources (for some of them at least) they should examine the Annual Work Programme of the European Commission well in advance. In this way, they could pre-select the proposals that might be of interest for them, both in terms of subsidiarity and of content and consequently focus on these proposals only.

¹¹⁵ The Upper Austrian parliament did not indicate how many contributions it has transmitted to the EU institutions but it stated that it is approximately 5 per year.

¹¹⁶ This is an online platform designed to support the participation of regions with legislative powers in the early phase of the EU legislative procedure, the Early Warning System: <https://portal.cor.europa.eu/subsidiarity/regpex/Pages/default.aspx>

When asked if they examine the Commission Annual Work Programme, a large majority of the Austrian and the German parliaments surveyed declared that they do, so did the parliaments of Emilia-Romagna and Northern Ireland. By contrast, the parliament of Salzburg does not whereas the parliament of Saxony does upon request by one political group. In the assembly of Wallonia-Brussels, this happens on an irregular basis too. In Spain on the other hand, the parliaments of the Basque Country, Castilla y León and that of Catalonia answered that they do not examine the Work Programme.

Interestingly, this does not necessarily mean that proposals are selected neither on the basis of the subsidiarity issues they are expected to raise (Figure 10) nor on their political importance (Figure 11). Indeed, out of the 13 regional parliaments that stated that they examine the Annual Work Programme (at least occasionally), only 7 of them pre-select proposals on the basis of a potential subsidiarity issue. This difference is due to the fact that the region of Emilia-Romagna, that of Salzburg and five German regions (Baden-Württemberg, Saarland, Sachsen-Anhalt, Saxony and Thuringia) do not conduct any pre-selection. On the other hand, 8 of them pre-select the proposals on the basis of their political importance whereas 5 do not. As is visible on Figure 11, it is not necessarily the same regional parliaments that pre-select on the basis of both criteria though.

Figure 10: Pre-selection of proposals likely to raise subsidiarity issues

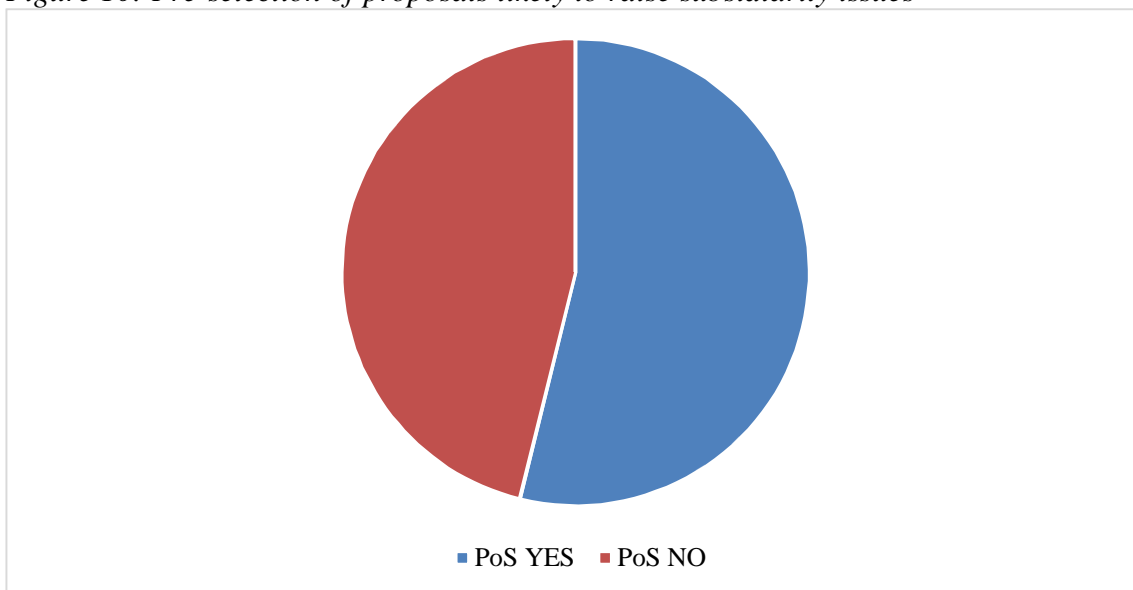
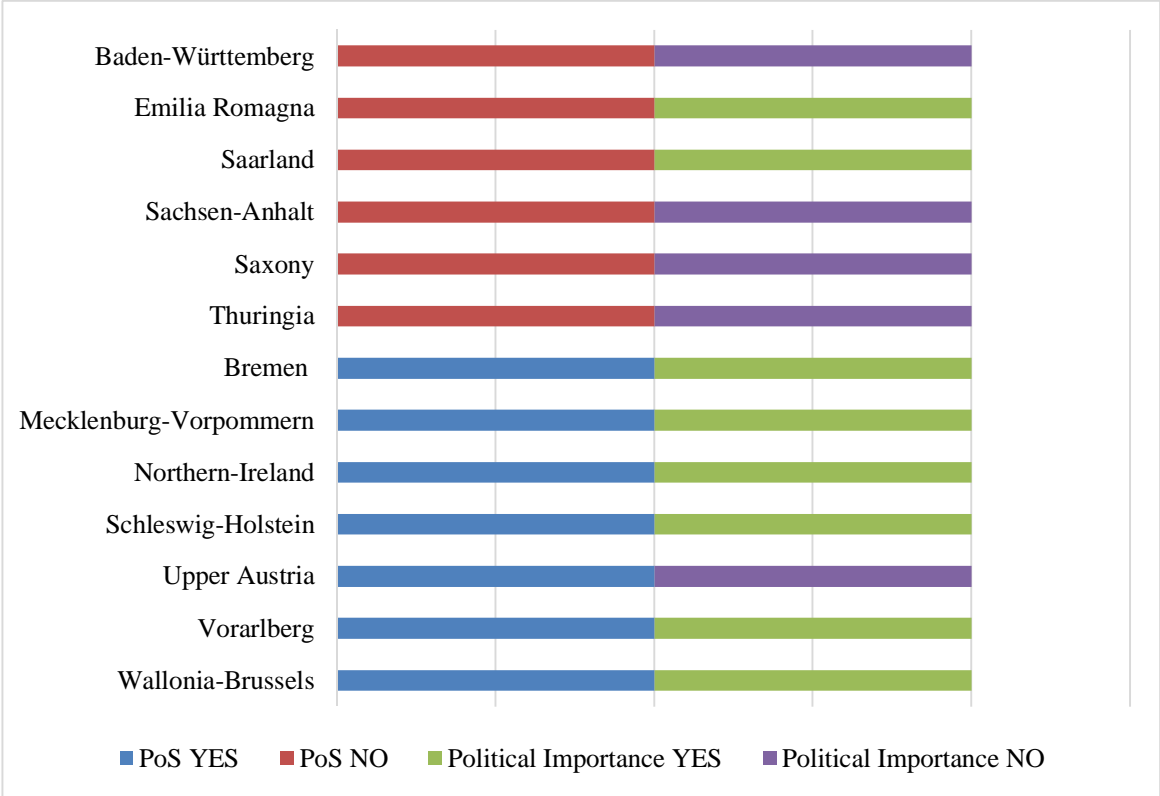


Figure 11: Pre-selection of EU proposals for potential subsidiarity breach and political importance



V. Conclusion and proposals for reform

Several are the points that merit attention at the time of drawing conclusions regarding the regional participation in the EWS six years after the entry into force of the Lisbon Treaty.

First and foremost, it results from the preceding analysis that this participation is rather limited, both within the EWS and within the broader framework of the Political Dialogue with the European Commission. Additionally, the participation of some regional parliaments has varied over time whereas in others it is more stable and the degree of information they receive from their regional and/or their national parliaments is unequal. Besides, the 'yellow cards' did not constitute an incentive for regional parliaments. Their use of the Commission Annual Work Programme as a planning document to help them make the best out of their sometimes limited resources can and should still be reinforced and improved. With the same purpose of optimising resources, regional parliaments could still take advantage more frequently of the expertise of their regional and national governments.

In closure, some proposals for reform aiming at guaranteeing the sustainability of the involvement of regional parliaments in this framework shall be made on the basis of the preceding analysis.

a. Information

In order to be able to perform their control effectively, regional parliaments need to have enough information and they do not always have the expertise required (this is especially true of the smaller assemblies) nor are they necessarily represented in Brussels (a minority of the 74 regional parliaments are). By contrast, the regional governments are usually better represented and informed and/or better staffed.¹¹⁷ As has been shown, the relationship between the regional assemblies and their governments, and between them and the national government, varies very much.

Recommendation 1: Regional parliaments should be more systematically provided with the subsidiarity assessment of their regional governments and with that of the national government.

b. Better horizontal and vertical cooperation

Further, the establishment of efficient cooperation channels both in a horizontal and in a vertical dynamic (where they do not already exist) is critical. This implies that the regional assemblies of a same Member State should at least exchange information on the proposals they are scrutinising, that regional and national assemblies should keep each other informed too and that regional parliaments with legislative competences could also cooperate on a more regular basis on a supranational level.

¹¹⁷ See, on this executive predominance in EU matters at regional levels: D. FROMAGE, *Les Parlements dans l'Union Européenne après le Traité de Lisbonne. Les Parlements Allemands, Britanniques, Espagnols Français et Italiens*, cit.

Recommendation 2.1.: Where this is not the case, regional parliaments should inform each other about the proposals they are scrutinising both with regard to a potential subsidiarity breach and beyond. It goes beyond any doubt that in a State where the different regions have different competences and traditions it will be very difficult for them to truly cooperate and collaborate regularly. But, for instance, efforts to at least inform the other parliaments of the other Autonomous Communities could be made in Spain. In this sense, the best practice developed by some Austrian and German Länder of a mailing list could serve as a model.

Recommendation 2.2.: Because the EWS only leaves eight weeks to parliaments to perform their subsidiarity check, and with the aim to allow for the largest flexibility possible without imposing too strict constraints on regional parliaments, it would be best to make sure that regional and national parliaments regularly inform each other of the status of their scrutiny instead of defining a rigid time frame for the transmission of regional opinions or instead of not having any time frame at all. In the Member States where there are numerous regional parliaments, it might perhaps be best to have an internal platform, similar to the IPEX one, for such purpose.

Recommendation 2.3.: Although the Conference of European Regional Legislative Assemblies (CALRE)¹¹⁸ certainly does not have the capacity to articulate the opinions of all regional parliaments in the field of subsidiarity, if it served as a platform for the exchange of information and best practices it would already have a tremendous added-value. As is currently envisaged in COSAC,¹¹⁹ regional parliaments could also use this platform to exchange on their priorities on the basis of the Annual Work Programme of the European Commission and, on a more basic level, they could discuss on how they deal with the high number of EU proposals, what their relationships with the other regional parliaments of their Member State are etc. CALRE could additionally send its priorities and its conclusions to COSAC but it should not seek to establish a much closer relationship to COSAC as that association only meets four times per year and it already has its own internal functioning difficulties.¹²⁰

Further to this, if national parliaments were to establish the system of alert they have envisaged during the IPEX users meeting of January 2015¹²¹ according to which an automatic email alert would be sent to all national parliaments as soon as eight parliaments or chambers declare that they have concerns regarding the respect of the principle of subsidiarity in one same proposal, regional parliaments should be included too.

¹¹⁸ <http://www.calrenet.eu/>

¹¹⁹ Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union. <http://www.cosac.eu/en/>

¹²⁰ See on COSAC the dedicated part contained in C. FASONE; N. LUPO, *Interparliamentary cooperation in the composite European Constitution*, Hart, Oxford, 2016.

¹²¹ Idea brought forward by M. J. Costa, permanent representative of the Portuguese Assembly of the Republic in Brussels during the first IPEX users Conference held in Copenhagen in January 2015. IPEX users Conference report, 2.

c. Early mobilisation and selection

Like national parliaments, regional parliaments should conduct a targeted scrutiny of the EU documents they receive. This is absolutely necessary to make the best use possible of time and parliamentary resources and in order to avoid that regional deputies lose interest for this question as this begins to be the case in some regions where the number of contributions keeps diminishing. Regional parliaments should therefore pre-select a reduced number of proposals on the basis of the Commission Annual Work Programme and concentrate their energy on them instead of seeking to scrutinise each and every single EU legislative proposal published. By the same token, this would avoid the production of standardised assessments as they have existed on the side of the Basque government,¹²² as the number of assessments to be prepared would diminish.

Recommendation 3: Regional parliaments should thoroughly examine the Annual Work Programme of the European Commission and select a limited number of topics/proposals which they shall scrutinise during the following year. The regional parliaments of a same Member State may consider dividing this task among each other, as is currently done by the Austrian regional governments for example. Another possibility would be to limit more strictly the scope of the scrutiny to those proposals that affect competences or interests of the regions, apart perhaps for the German regions as the Bundesrat has one of the two national votes within the EWS in any event. The common exercise performed by the Italian Senate and the Italian regions could serve as an example to follow.

d. Larger Scope of scrutiny

It has been shown that the question of the scope of the regional (and national) scrutiny limited to the sole principle of subsidiarity is an issue.

Recommendation 4.1.: All regional parliaments should be entitled to participate in the Political Dialogue in addition to their participation in the EWS but this should always take place through their national parliament so as not to set an even heavier burden on the European Commission. This also means that regional parliaments should participate during the consultation phase or when national parliaments send their opinions on the Annual Work Programme as has been the case in the Italian Senate in 2015.

¹²² J. OSÉS ABANDO, *Alerta Temprana y Parlamentos Autonómicos: Fin de ciclo. La Experiencia del Parlamento Vasco*, cit. 58.

Recommendation 4.2.: Furthermore, the aspirations for reform currently existing among national parliaments should duly involve regional parliaments. This is to say that if national parliaments agree on some guidelines on how to draft reasoned opinions as has been recently wished for by 21 out of 29 responding parliaments/chambers,¹²³ regional parliaments should benefit from this improvement too. They should also have the possibility to have a say in the ‘green card’ procedure if it is finally put into place. National parliaments are, at present, seeking to go beyond the mostly negative and reactive role that the Treaty of Lisbon attributed to them by allowing them to, among others, reject a proposal on the ground of a subsidiarity breach.¹²⁴ If their attempt to have the right to make suggestions for future legislative proposals to the European Commission in the framework of an ‘enhanced Political Dialogue’ is successful, regional parliaments could and should be associated, but always via their national parliament so as not to multiply the already numerous interlocutors.

e. Above all: Better targeted actions to a larger number of European actors

Notwithstanding what precedes, if a regional parliament were to identify a legislative proposal or an EU document that affects its interests in an acute manner, it should not limit its action to the European Commission.

Recommendation 5.: In the exceptional case that a crucial regional interest is affected, regional parliaments should seek to be heard by the Commission but also by other European actors such as the Committee of the Regions or the European Parliament via the representatives of the affected regions in these instances. Such actions should however remain limited so as not to use too many parliamentary resources too regularly.

In sum, regional parliaments should pursue planned targeted action on a reduced and strategic number of proposals and/or in a limited number of areas which would allow them to use a larger number of means of influence going beyond the sole EWS. To this end, they should be granted access to the expertise of their regional government as well as to that of their national parliament and government. Further to this, if the role of national parliaments in the EU were to be enhanced, regional parliaments should also benefit from these improvements in being involved through their national parliaments.

¹²³ COSAC, 623rd bi-annual Report: Developments in European Union Procedures and Practices relevant to Parliamentary scrutiny, 2015. 29f.

¹²⁴ See further on the current move of national parliaments from veto-players to agenda-setters: C. FASONE; D. FROMAGE, ‘National parliaments and the EU Commission’s agenda: Limits and recent developments of a difficult partnership’, *EUI Working Paper*, 18, 2015.

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