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SUBSIDIARITY: FROM A GENERAL PRINCIPLE TO AN INSTRUMENT FOR THE IMPROVEMENT OF DEMOCRATIC LEGITIMACY IN LISBON*

1. Introduction

While the principle of subsidiarity was introduced as a general principle in the Treaty of Maastricht,[1] without any mechanism of enforcement other than its possible use as a ground for judicial review and was, in that sense, deemed to have a limited impact, in the Treaty of Lisbon it has become a means to involve national parliaments (and regions) directly in the European legislative process. This participation is envisaged to lead ultimately to the improvement of the democratic legitimacy of the European Union (EU), which has often been considered to suffer from a 'democratic deficit'.[2] In this contribution, I would like to show how this transformation has taken place in the last 20 years and in particular how subsidiarity and national parliaments have progressively become linked. Also, I suggest that the principle of subsidiarity and its review are at the heart of a more global process of change – and even of a revolution in some Member States – of the role played by parliaments in EU affairs.

2. The Principle of Subsidiarity in Maastricht: A Magic Formula?

The principle of subsidiarity is not an innovation of the Treaty of Maastricht: it was already contained in the Treaty of the European Communities – although the word subsidiarity was not mentioned – in its Article 130 R since the Single European Act

* I wish to thank Prof. Jacques Ziller for his comments.

1 Some even claimed that it was the 'word that can save Maastricht', *European Independent* newspaper as quoted by Cass 1992, p. 1136. By contrast, some have questioned the fact that it had indeed achieved the status of a general principle of law for it was not discovered by the Court of Justice: de Búrca 2000, p. 95-96.

2 Expression first used by Marquand 1979, p. 64-66.

of 1986, but its scope was strictly limited to environmental policy.[3] By contrast, in the Treaty of Maastricht, it was introduced as a general principle set out in Article 3b EC,[4] and it thus became available as a ground for judicial review of EU legal acts. As Paul Craig points out, 'first and foremost was the perceived role of subsidiarity as a mechanism for alleviating disputes concerning the division of competence between the EC and Member States.'[5] This was particularly important given that 'prior to the Lisbon Treaty there was no discrete body of treaty provisions that explicated clearly the different types of Community competence'[6] and that the achievement of the Single Market required the transfer of further competences in 1986 and 1992.[7] The extension of the scope of application of the principle of subsidiarity that operated in 1992, as compared to the Single European Act, was also strongly desired by the German *Länder* and the United Kingdom, which both considered it as an instrument which could limit the constant growth of the competences of the European Communities,[8] while Commission President Jacques Delors was personally an advocate for its inclusion in 1992.[9] However, it appears

3 Art. 130 R: '4. The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States.' Some have even claimed – rightly so in my opinion – that the essence of this principle had been at the basis of the integration process since its beginning, see European Parliament, 'Subsidiarity' (2000) <http://www.europarl.europa.eu/factsheets/1_2_2_en.htm> and Lenaerts 1993, p. 852. For a historical overview of evolution of the principle of subsidiarity in the European integration process, see Cass 1992, p. 1112 *et seq*.

4 It was also introduced as a basic principle of the European Union in Art. A and 'the idea of subsidiarity [was reflected] in the drafting of several new Treaty articles', European Council of Edinburgh 11-12 December 1992, Annex 1 to the Conclusions of the Presidency, 3 (<http://www.europarl.europa.eu/summits/edinburgh/default_en.htm>).

5 Craig 2012, p. 72.

6 *Ibid*.

7 It should be borne in mind that the Treaty of Maastricht further expanded the competences of the Communities after the European Single Act had already made a move in the same direction, it created the European Union and fostered a political Union as well. The areas of Justice and Home Affairs, traditionally linked to national sovereignty, started to be affected by the integration process for example.

8 This claim for the protection of national sovereignty was also clearly made by Margaret Thatcher in her speech in the College of Europe on 20 September 1988 (in the part on 'Europe's future'), see <http://www.margaretthatcher.org/document/107332>. As for the German *Länder*, they sought for a more active role in European matters from the beginning of the 1980s when they became fully aware of the fact that many of their competences had been transferred to Brussels by the Federal government without their consent. Among other initiatives, they threatened to reject the European Single Act if they were not closely involved in Germany's participation in the EC, see Janowski 2008, p. 316.

9 Jacques Delors was a fervent advocate of the principle of subsidiarity, mainly for three reasons according to Julien Barroche. First of all, this derived from his faith in catholic leftist values. Second, this desire to impose the respect of the principle of subsidiarity was linked to his determination to build a federalist Europe, and finally after he gathered with representatives of the German *Länder* in May 1988 he is said to have been convinced of the necessity to take the regional dimension into consideration in the European integration process, see Barroche 2007.

that the principle of subsidiarity may just have been a 'magic formula' which permitted further integration because it was capable of satisfying both eurosceptics and enemies of excessive centralization as well as proponents of a more federal kind of European integration.[10] Indeed, the principle of subsidiarity may provide Member States with a solid justification to prevent actions from being taken at the European level since the European Union should only intervene when Member States cannot achieve the objectives of an action and if, simultaneously, they can also be better achieved by the European Union. It was a 'magic formula' also because this principle had and still has no straightforward interpretation or application. Indeed, the definition contained in Article 3b TEU, newly introduced in 1992 and still in force in Article 5 TEU,[11] requires that

> [i]n areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

In other words, the principle of subsidiarity can be a means for Member States to limit the action of the Union, but it is also a way for the Union to expand its scope of intervention whenever it can act more efficiently than the Member States.[12] Its subjective dimension must not be underestimated since the criteria to determine whether an action cannot be 'sufficiently achieved' at the national level and is 'better achieved' at EU level will necessarily be of political nature, and this judgment is bound to be different from one Member State to the other. In fact, less than a year after the approval of the Treaty of Maastricht, the Council Members already felt the necessity to explain how this new provision was to be interpreted.[13]

10 See on the rationales for the inclusion of subsidiarity in the Maastricht Treaty: Craig 2012, p. 72-73.

11 Art. 5 TEU now includes the local and regional dimension.

12 This double dimension has been clearly underlined by the Council in Edinburgh: 'Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified', European Council of Edinburgh 11-12 December 1992, Annex 1 to the Conclusions of the Presidency (<http://www.europarl.europa.eu/summits/edinburgh/default_en.htm>). Additionally, the difference between the principles of proximity and of subsidiarity should be kept in mind: while the former always implies that an action should be conducted at the lowest existing level, the latter prefers the most efficient level of action.

13 For instance, in its conclusions, the Presidency established general principles and specific guidelines for the application of the principle of conferral, the principle of subsidiarity and the principle of proportionality enshrined in Art. 3. The principle of subsidiarity was defined as being equivalent to asking the question whether the Community should act, and some specific conditions were set up. For instance, the issue under consideration should have 'transnational aspects which cannot be satisfactorily regulated by action by Member States; and/or action by Member States alone would conflict with the requirements of the Treaty […] or would otherwise significantly damage Member States' interests; and/or the Council must be satisfied that action at Community level would produce clear benefits by reason of →

This definition of the principle of subsidiarity should also be interpreted in light of the other paragraphs of Article 3b.[14] Paragraph 1 which stated that 'the Community shall act within the limits of the powers conferred upon it by this Treaty and the objectives assigned to it therein' invites an interpretation in favour of the Member States rather than of the Union. Paragraph 3 contains a reference to the principle of proportionality ('Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty'). Proportionality is commonly referred to together with the principle of subsidiarity in the Treaties, although it questions which instrument is best suited for an action of the Communities rather than whether the action should be taken by the Communities in the first place.

In sum, while the Treaty of Maastricht elevated subsidiarity to the category of a general principle and placed it as a 'safety boundary' to EU's action, it did not contain any mechanism of enforcement other than the possibility of judicial review by the ECJ, nor were there any clear hints that it would acquire the importance it has gained since 1993.

3. Evolution (or Revolution?) since Maastricht

After the laborious approval of the Treaty of Maastricht, the principle of subsidiarity gained importance and attractiveness. Several documents were elaborated in order to facilitate its application and to clarify its content, as well as that of the principle of proportionality.[15] The European Commission in particular became a fervent defender of the principle of subsidiarity, which became 'a sort of pacifying principle of the relationships between the Commission and the Member States'.[16] It began to include a subsidiarity assessment of all its proposals[17] and referred with increasing frequency to the need for 'better regulation' which implies the respect of the principles of subsidiarity and proportionality.[18]

Also, the question of the 'democratic deficit' at the EU level became increasingly more pressing and the need for a greater involvement of national

its scale or effects compared with action at the level of the Member States.', *ibid.*, p. 20. This need for clarification remained present, however, and a specific protocol was annexed to the Treaty of Amsterdam.

14 As Chaltiel 2003, p. 367 points out: 'The expression of the subsidiarity is only in the second paragraph of article 5. But at the same time, the first and third paragraphs shed light on the meaning given to subsidiarity.'

15 Interinstitutional Agreements of 25 October 1993 on the procedures for implementing the principle of subsidiarity and resolution of the European Parliament of 13 May 1997.

16 Chaltiel 2003, p. 368.

17 Presidency Conclusions of the European Council of Lisbon, 26-27 June 1992, 9.

18 In its brochure 'Better regulation – simply explained' (Office for Official Publications of the European Communities, 2006), the European Commission declares that: 'In most of these areas, the European Commission is responsible for proposing the policies and laws to achieve agreed goals […]. It pays special attention to the need for its proposals to be proportionate to the problem at hand, and for actions to be taken at the right level: the principles of 'proportionality' and 'subsidiarity' — two principles cemented in the EU Treaty', p. 4.

parliaments arose.[19] This insistence on a closer involvement of national parliaments is based on the fact that, in spite of their status of democratic representatives of the European peoples, they have largely been marginalized in the integration process and were, in most cases, transformed into organs which merely rubberstamp the decisions made by their executive powers in Brussels.

In the following reform of the European Treaty, which resulted in the approval of the Treaty of Amsterdam in 1997, the interpretation of the principle of subsidiarity, defined in the Conclusions of the Summit of Edinburgh in December 1992 and in the inter-institutional agreement of 1993, was overall introduced in the form of the Protocol on the application of the principles of subsidiarity and proportionality. National parliaments too became the object of a specific protocol, but they still had no responsibility in matters of subsidiarity and were mostly guaranteed a right to information and a period of six weeks to scrutinize EU legislative proposals before the European legislature could proceed with its task.[20] Nevertheless, no direct transmission of EU documents by the European institutions was provided so that some of them still did not receive all EU documents or did not receive them soon enough to scrutinize them in due time.[21]

The reinforcement of the principle of subsidiarity operated in 1997 cannot be attributed to the European Court of Justice, although it could check whether the principle was respected, since there have been surprisingly few cases raising real subsidiarity issues: there were only ten between 1993 and 2011[22] and the Court moreover adopted a rather 'light' judicial approach to subsidiarity review in several cases.[23] [24]

The reinforcement of the principle of subsidiarity due to an expending criticism regarding the ever-growing European democratic deficit is, for all these reasons, rather the consequence of a general trend in favour of a more democratic Union, of multilevel governance and the will to act as close to the citizens as possible and to involve subnational entities in the integration process as well.[25]

19 Duff 1993, p. 12 underlines how subsidiarity became popular during the arduous ratification process of the Treaty of Maastricht and how the involvement of national parliaments started to be hoped for.

20 Art. 3 of the Protocol on the application of the principles of subsidiarity and proportionality (ToA version).

21 This is for example the case of the Italian parliament which was not properly informed until the approval of an inter-institutional agreement between the Senate, the Chamber of Deputies and the Government on 28 January 2008, so Esposito 2009, p. 1158.

22 Craig & de Búrca 2011, p. 99.

23 *Ibid.*, p. 98. The Court reviews whether there has been a manifest error and does not otherwise question the evaluation of the political power.

24 Chaltiel 2003, p. 368 underlined this point 10 years after the entry into force of the Treaty of Maastricht but this observation still holds 10 years later (result of a search on <http://curia.europa.eu>).

25 A clear example of this trend can be found in the creation of Committee of the Regions in 1994, which can be seen as part of a wider movement towards a 'multilevel governance'.

4. Subsidiarity and its Content in Lisbon

This evolution towards a reinforcement of the principle of subsidiarity finally culminated in important changes related to institutional means for its enforcement during the revision procedure prior to the approval of the Treaty of Lisbon. In its Declaration on the future of the European Union of 15 May 2001 (Laeken Declaration), the European Council insisted on the importance of the principle of subsidiarity and on the necessity to involve national parliaments. The attention given to these issues in the European Convention can be seen in the establishment of two specific working groups dedicated to these issues.

As a consequence of the preparatory work realized by the Convention, in which the European Parliament and national parliaments were strongly represented,[26] the principle of subsidiarity has been clearly reinforced in the Constitutional Treaty and in the Treaty of Lisbon, in which it is explicitly mentioned on 13 occasions and is implicit in many other provisions.[27] A specific protocol dedicated to the application of the subsidiarity principle is still annexed to the Treaties.[28] The content of Article 5 TEU in defining the principle of subsidiarity is roughly the same as it was before the reform: it currently additionally includes a reference to the regional and local dimension.[29]

However, the preference for Member State action and the implicit will to set a limit to the extent of regulatory action by the Union, rather than encouraging the latter to expand its regulatory remit, has been strengthened. Indeed, while until the Treaty of Nice Article 5 began with a first paragraph that established the principle of conferral,[30] this principle is now granted special importance in both paragraph 1 and paragraph 2 of Article 5 TEU:

26 Out of a total of 105 members of the Convention, 30 were representatives of national parliaments, 16 representatives of the European Parliament and 26 representatives of the Parliaments of the candidate countries. Additionally, the European Parliament had been in favour of subsidiarity for a long time since this principle was already contained in Art. 12 of its 1984 Draft Treaty establishing the European Union (the so-called Spinelli Plan).

27 See on this point Van Rapenbusch 2011, p. 168.

28 Its content is less precise than it was before the revision, especially regarding the assessment of the respect of the principle of subsidiarity and the use of conformity tests such as 'necessity' and 'EU added value'. However, the European Commission stated that it still applies those criteria and invites other institutions to do so in its 'Report on Subsidiarity and Proportionality (18th Report on Better Lawmaking covering the year 2010' COM(2011) 344 final, p. 2.

29 Art. 5(3) TEU: '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.' To this extent, it filled the gap left in this matter by the Protocol annexed to the Treaty of Amsterdam. For further information on the role of the Committee of the Regions in the review of subsidiarity see: Jeffery & Ziller 2006.

30 Stating that 'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.'

> 1. The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
> 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

The most important change, however, is contained in the somewhat redundant affirmation that 'competences not conferred upon the Union in the Treaties remain with the Member States'. As for the principle of proportionality, which was only implicit until the entry into force of the Treaty of Lisbon, it is now clearly mentioned in paragraph 4 ('Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.').

Nevertheless, the most noteworthy innovation introduced by the Treaty of Lisbon in matters of subsidiarity consists of the responsibility granted to national parliaments (and to some extent to regions) to monitor respect for the principle both *ex ante* via the so-called Early Warning System,[31] and *ex post* via the possibility of launching an action for annulment before the CJEU. This new role of national parliaments is mentioned in paragraph 3 (referring to subsidiarity) of Article 5 through a reference to Protocol No. 1 concerning subsidiarity.[32] The obligations of the European institutions, in terms of both subsidiarity and proportionality as they are defined in Protocol No. 1, are clearly mentioned as well and this is an innovation of the Treaty of Lisbon, although the European institutions, especially the European Commission, were already committed with the respect of subsidiarity before this Treaty entered into force.[33]

It appears in parallel that special importance has now been granted to national parliaments: in general, the provisions referring to these national institutions form a

[31] This is a well-known mechanism – already tested in the framework of COSAC before the entry into force of the Treaty of Lisbon – which allows national parliaments to assess the respect of the principle of subsidiarity of legislative proposals and transmit a reasoned opinion to the EU institution responsible for drafting the relevant legislative proposal if it finds that this principle has been breached. According to Protocol No. 2, if the threshold necessary for a 'yellow card' is reached, the proposal must be reviewed. It can be maintained, amended or withdrawn. In the event of an 'orange card' being reached, the procedure is the same but the European legislature can then separately vote on the respect of the principle of subsidiarity and veto it. Finally, national parliaments and regions (via the Committee of the Regions in the limits of its competences) are now granted the possibility to initiate an action for annulment alleging a breach of the principle of subsidiarity. Although it is still for the Member States to decide whether this decision should be left to National parliaments exclusively or whether the Executive may deny them this possibility (Art. 8, Protocol No. 2).

[32] Stating in the relevant part that 'National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol'.

[33] Stating that '3. […] 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; 4 […] the institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.'

sort of culmination of the evolution which started with the Treaty of Maastricht.[34] The most visible change is, undoubtedly, their new ability to ensure respect for the principle of subsidiarity, but they have been given special rights in terms of the passerelle clause (Article 48(7) TEU and Article 81(3) TFEU) and when Article 352 TFEU is chosen as the legal basis for a proposal.

In short, it appears that the definition of the principle of subsidiarity contained in the Treaties has undergone limited changes since its introduction in 1993: in line with the general trend in favour of a greater involvement – and even consideration – of subnational levels of governance, a reference to the regional and local levels has been added. However, the importance of this principle in terms of the number of references in the Treaty has clearly increased and now national parliaments are given an important role as guardians of the subsidiarity principle.

In light of the treatment received by this new mechanism introduced by the Treaty of Lisbon, some hints of its possible evolution and its current importance within the institutional system of the EU will next be given.

5. The Consequences of the Introduction of the Early Warning System

The introduction of the Early Warning System has provoked numerous comments, rather skeptical of its efficiency in their majority.[35] They found their justification in the fact that the threshold[36] necessary for the Commission (or the institution responsible for drawing up the relevant proposal) to be obliged to review a proposal (1/3 of the total number of votes (i.e. 19), or 1/4 if the proposal concerns the area of freedom, security and justice (i.e. 14)), not to mention the necessary involvement of the European legislature. This threshold was considered to be too high and thus unattainable. The efficiency of the Early Warning System was considered to be all the more unlikely as national parliaments have only eight weeks to conduct their review, and there is still no efficient mechanism of horizontal cooperation among national parliaments.[37]

This particular criticism can first be refuted given that the first 'yellow card' was raised by 12 parliamentary chambers in May 2012 against the 'Monti II'

34 As underlined by Maurer, 2002, p. 22, the British and the French governments and parliaments insisted on the inclusion of Declaration No. 13 on the 'The role of National Parliaments in the European Union' and 14 on 'The Conference of the Parliaments' annexed to the Maastricht Treaty. In the Amsterdam Treaty, national parliaments were addressed in a specific protocol, i.e. Protocol No. 13 on the Role of National Parliaments in the European Union.

35 As Kiiver 2011, p. 100 concludes 'It is relatively easy to dismiss the EWS on a number of practical and theoretical grounds' and he gives some of the major reasons why this is the case.

36 There are currently 28 Member States in the European Union. Each of them is entitled to two votes, one per chamber is the parliament is bi-cameral.

37 Commission, 'Annual Report 2012 on subsidiarity and proportionality' (Brussels, 30 July 2013) 4.

regulation proposal.[38] In that sense, this Early Warning System, supposedly bound to be inefficient, was activated already two and a half years after it was introduced. Nevertheless, this first success is probably not enough to prove its practicability given that the proposal in question concerned the particularly sensitive issue striking a proper balance between social rights and the internal market freedoms and in view of the fact that the legal basis chosen was not the most appropriate one.[39]

What matters above all, in my opinion, are the positive collateral effects of the introduction of the Early Warning System – and of the other prerogatives granted to national parliaments by the Treaty of Lisbon to a minor extent. Even if there is still some room for improvement, the changes these innovations have produced for national parliaments, such as an increasing will to be better informed or even better heard in EU matters, already amount to significant progress. The interest shown by National deputies for EU affairs has undoubtedly increased, even if the importance of the changes varies depending on the pre-existing political culture. It may be assumed that the introduction of the review of subsidiarity did not lead to profound changes in Member States, where parliaments were previously controlling the position of their governments and were active in EU matters, such as in Germany or especially the United Kingdom. Conversely, in Member States where the parliament was poorly involved in EU affairs by their Government, because it was not performing a systematic check on the legislative proposals for example, the Treaty of Lisbon has provided the impetus for change, the result of which can be seen, for example, in Spain.

Furthermore, the necessity for closer involvement of national parliaments in order to legitimize decision making at the EU level has also been reinforced by the ongoing financial and economic crisis. The European Union has been obliged to push for reforms in some Eurozone countries and to provide them with support to recover financial stability.[40] It can thus be affirmed that the general trend in favour

38 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 final. It is interesting to note that though only 12 parliamentary chambers forwarded a reasoned opinion (amounting to 19 votes) to the European Commission in due time, 19 chambers did check on the proposal according to the information contained in the IPEX database. The Czech assemblies also found a subsidiarity breach but sent their opinions once the delay of eight weeks was already over so that the actual number of reasoned opinions is 14 out of 40. All the contributions can be found on IPEX: <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20120130.do>.

39 This proposal was based on Art. 352 TFEU (flexibility clause) and some parliaments, such as the Danish parliament and the French senate, claimed that in view of the prohibition contained in Art. 153 TFEU the EU had no competence to legislate, with the result that the principle of subsidiarity was not thus even relevant. For more information on this first 'yellow card' and its context see Barrett 2012.

40 See for instance the decision of the German Federal Constitutional Court of 18 June 2012, BVerfG, 2 BvE 4/11. As a consequence, the Act on Cooperation between the Federal Government and the German *Bundestag* in Matters concerning the European Union (EUZBBG) was reformed on 4 July 2013 to guarantee more complete information and participation of the *Bundestag*.

of a closer involvement of national parliaments in EU affairs, in order to improve the democratic legitimacy of EU actions of all kinds, has become more necessary, once again, by the current activism in economic matters at European level.

The improvements provoked by the Treaty of Lisbon can be analyzed in three steps. The EU level will first be examined, then the changes at the horizontal level among Member States will be looked at and finally some specific examples of progress within Member States will be given.

5.1. EU Level

At the EU level, changes have affected the three main institutions, the Commission, the Parliament and the Council.

The Commission, first of all, has further reaffirmed its will to engage in a direct dialogue with national parliaments. Commission President Barroso launched a 'political dialogue' between the EU Commission and national parliaments in 2006, already before the entry into force of the Treaty of Lisbon. In this framework, the Commission expressed its wish 'to transmit directly all new proposals and consultation papers to national parliaments, inviting them to react so as to improve the process of policy formulation'.[41] Further, in spite of the introduction of the Early Warning System in December 2009, the Commission maintained its intention to include this system in the existing 'political dialogue' and its readiness to welcome any contribution from national parliaments, whether about subsidiarity or other issues, and whether received within the eight-week period or not.[42] The Commission is willing to engage in a broad dialogue with national parliaments – and this openness is surely positive – although when the comments do not address subsidiarity issues, the Commission is absolutely free to undertake the intended action without taking the received comments into account in any way.

The 'political dialogue' has been a clear success. Already after eight months of implementation (including the first four months of 2007), '83 opinions were expressed by 22 national parliaments on 44 Commission proposals', although some of them were transmitted in the framework of the pilot tests organized by COSAC (see below).[43] In 2007, this tendency was further strengthened ('168 opinions [received] regarding 82 Commission texts from 27 national parliaments in 19 Member States'[44]), and so was it in 2008 and 2009 (200 opinions issued by 24

41 Commission, 'A Citizens' Agenda: Delivering Results for Europe' (Communication) COM(2006) 211 final, 9.

42 Practical arrangements for the operation of the subsidiarity review mechanism under Protocol no 2 of the Treaty of Lisbon: Letter of President Barroso and Vice-president Wallström of 1 December 2009, p. 1, <http://ec.europa.eu/dgs/secretariat_general/-relations/relations_other/npo/docs/letter_en.pdf>. For an analysis of the political dialogue, see Jancic 2012.

43 Commission, '2006 Annual Report on the relations between the European Commission and National Parliaments' (Brussels, 8 May 2007), 4.

44 Commission, 'Annual Report 2007 on the relations between the European Commission and National Parliaments' COM(2008) 237 final, 2.

Chambers in 2008 and 250 from 30 Chambers in 2009).[45] The entry into force of the Treaty of Lisbon was welcomed by a very important increase of the number of opinions sent (55 per cent during the first year and 60 per cent again in the second year), although only 54 per cent of these concerned subsidiarity and 15 per cent of the 54 per cent were reasoned opinions in 2010. In 2011, only 10 per cent of the total number of opinions considered that there had been a breach of the principle of subsidiarity.[46]

Like the Commission stresses, 'in 2011, it became increasingly clear that, over and above the regular parliamentary scrutiny of European affairs in 40 national Chambers, there is a case for creating a structured exchange of views, between and with national parliaments, with a view to shaping a shared perspective on major European issues and challenges.'[47]

In this sense, the principle of subsidiarity has provoked a change in the relationship between the Commission and the national parliamentary chambers. It remains to be seen however whether this tendency will continue in the future.

First of all, while the European Commission has committed itself to reply to the received opinions within three months, it does not always respect this self-imposed deadline. Furthermore, it does not always provide a reply to all opinions and those given are not considered to be satisfactory by national parliaments. Additionally, at least in 2011, the European Commission had generally failed to establish a real informal political dialogue with national parliamentary chambers on the basis of the opinions sent and the answers given. It seems that, instead of a dialogue, only a one-way exchange of views has been established since national parliaments usually do not reply to the Commission's answer.[48] Finally, the little attention granted by the European Commission to the first 'yellow card' and the reasoned opinions was somewhat surprising: the Commission took note of the 'yellow card' on 30 May 2012 and simply withdrew the proposal via a letter sent to the parliamentary chambers by Vice-president Sefčovič on 12 September 2012.[49]

45 Commission, 'Annual Report 2008 on the relations between the European Commission and National Parliaments' COM(2009) 343 final, 4 and Commission 'Annual Report 2009 on the relations between the European Commission and National Parliaments' COM(2010) 291 final, 2-3.

46 Commission, 'Annual Report 2010 on the relations between the European Commission and National Parliaments' COM(2011) 345 final, 3-5 and Commission, 'Annual Report 2011 on the relations between the European Commission and National Parliaments' COM(2012) 375 final, 4.

47 *Ibid.*, 3.

48 COSAC, 'Annex to the Sixteenth Bi-annual Report on the Developments in the European Union – Procedures and Practices Relevant to Parliamentary Scrutiny: Replies of National Parliaments and the European Parliament' (2011), available at: <http://www.cosac.eu/-fr_documents/rapports-semestriels-de-la-cosac/>.

49 In its letter however, the Commission declared that it had 'not found based on this assessment [of the arguments put forward by National parliaments in their reasoned opinions] that the principle of subsidiarity [had] been breached' in its Decision to withdraw the 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 final.

Given the fact that the European Commission found no subsidiarity breach and gave only limited explanation for its withdrawal, it appears legitimate to wonder whether national parliaments will still be so willing to participate and be so active in sending their opinions to the European Commission.

A similar move towards more intensive relationships can be observed between the European Parliament and the national parliaments. As previously mentioned, the European Parliament had already been advocating a greater importance of the principle of subsidiarity long before the Treaty of Lisbon. The Parliament has been directly affected by the introduction of the Early Warning System, given that Article 6 of Protocol no. 2 states that 'Any national Parliament or any chamber of a national Parliament may […] 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.' In this sense, this provision opens 'a new channel of communication [from national parliamentary chambers] towards the representative body of the European Union.'[50] The European Parliament has further introduced an article on the 'Examination of respect for the principle of subsidiarity' and contemplates the possibility of establishing a dialogue with national parliaments in its Rules of Procedure in September 2009.[51] A procedure on how these opinions – not only limited to reasoned opinions – have to be treated has also been clearly defined.[52] Finally, the European Parliament's commitment to cooperate with the European Commission in this matter was affirmed soon after December 2009 in an inter-institutional agreement:

> The two Institutions [EP and EC] agree to cooperate in the area of relations with national parliaments. Parliament and the Commission shall cooperate on the implementation of TFEU Protocol No 2 on the application of the principles of subsidiarity and proportionality. Such cooperation shall include arrangements related to any necessary translation of reasoned opinions presented by national Parliaments.[53]

Given these changes, it seems that the principle of subsidiarity has operated as a catalyst for a stronger dialogue between the European Parliament and national parliaments.

Finally, the positions held by the representatives of national governments in the Council are now reviewed more closely by national parliaments.

As the Counsellor of the Italian Senate Davide Alberto Capuano states:

> The Lisbon Treaty has not intervened formally to regulate the internal relations between the legislative Assemblies and their respective Governments. […] However, the Treaty of Lisbon – providing to each national Chamber new powers related to their

50 Capuano 2013, p. 249.

51 Rules of Procedure of the European Parliament, Rule 30a and Rule 130. Unfortunately, little information is available on the practice.

52 See for a comment on this Common approach adopted by the Conference of Committee Chairs of the European Parliament: Capuano 2013, p. 251.

53 Framework Agreement on relations between the European Parliament and the European Commission [2010] *OJ* L304/47, Art. 18.

> direct participation in the phase of the forming of EU positions and policies – has indirectly revitalised such relations, which have been able to take advantage of a major interest of national chambers in European affairs.'[54]

The positions held by national governments in the Council, now backed by more active national parliaments provided with parliamentary reserves, might have a stronger impact during the negotiations.[55]

5.2. Horizontal Cooperation

As concerns horizontal cooperation among Member States, it has become stronger, although it does not necessarily take place at the level of Members of parliament. In its 17th bi-annual report published in April 2012, the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC),[56] pointed out that 'Whilst access to information and documentation from EU institutions has traditionally been important for parliamentary scrutiny, the exchange of information *between* Parliaments is becoming increasingly common and indeed essential, as a result of the strengthened role of Parliaments in the Treaty of Lisbon.'[57] (emphasis added)

The traditional forum for inter-parliamentary cooperation has been the COSAC since its creation in 1989. While it organized eight subsidiarity pilot tests before the entry into force of the Treaty of Lisbon, this leading coordinating role in matters of subsidiarity has not been confirmed since then and only information exchanges, concerning which documents are being selected for scrutiny by national parliaments and the stage of their scrutiny procedures, take place in this framework.[58]

54 Capuano 2013, p. 232.

55 This argument, raised by Capuano 2013, may need to be downplayed somewhat given the fact that empirical research has shown that 'parliamentary constraints play a minor role during bargaining', see Auel *et al.* 2012, p. 21. Additionally, the exercise of some of their prerogatives contained in the Treaty requires the adoption of national legislation, for example Art. 4 of the Act on the Exercise by the *Bundestag* and by the *Bundesrat* of their Responsibility for Integration in Matters concerning the European Union (Responsibility for Integration Act); Art. 11 Italian Law 234 of 24 December 2012 on general norms on the participation of Italy in the definition and the application of the norms and policies of the European Union.

56 This association brings together representatives of all the national parliaments of the Member States and the European parliament. It was created in 1989 with the aim to strengthen the role of national parliaments in European matters, and it meets twice a year since. For more information, see <http://www.cosac.eu/en/>.

57 COSAC, 'Seventeenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny' (2012), 15.

58 This is the result of the will expressed by several parliamentary chambers in COSAC's *Fourteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny* (2010), which contained a section on 'The future role of COSAC after the entry into force of the Treaty of Lisbon' in which it was stated that 'Parliaments/Chambers remain divided as to the continuation of the pre-Treaty of Lisbon practice of conducting COSAC-coordinated subsidiarity checks.' This coordination might be difficult especially given that COSAC only meets twice a year and some have criticized the →

Some further cooperation channels exist, through the Platform for EU inter-parliamentary exchange (IPEX) or the Conference of Parliamentary Speakers, although this platform is used rather for communication among parliamentary staff members than among parliamentarians.[59] Also, 'the permanent representatives of national parliaments in Brussels […] have arguably been playing a crucial role in coordination national positions since the launch of the EWS'.[60]

In this sense, horizontal exchanges on subsidiarity no longer take place within COSAC, but they have contributed to the reinforcement of the relationship among parliamentary staff members.

5.3. National Level

As for the national level, it appears for instance that in countries where the parliament used to have little say on EU affairs the Treaty of Lisbon has been an impetus to enhance their closer involvement in such affairs, both in terms of information and capacity of influence. In Spain, for example, before the adoption of the Treaty of Lisbon, the Government provided the Parliament with 'a brief report on the substantial content of those European Commission legislative proposals which have some repercussion in Spain.' and transmitted only the legislative proposals.[61] Since the approval of the law 24/2009 of 24 December, the Government may also be asked to provide the Spanish Joint Committee for the EU with a subsidiarity assessment and with all official EU documents used for the preparation of the proposal within two weeks, and it can be asked to give further information.[62] Although the terms of the law could be clearer (the notion of 'repercussion in Spain' is very vague), the Joint Committee now systematically asks for a subsidiarity assessment and it has access to preparation documents.[63]

In Germany too, following the entry into force of the Treaty of Lisbon, and most importantly the judgment of the Federal Constitutional Court on the constitutionality of the parliamentary Act assenting to that Treaty, the power of the parliamentary chambers, and especially the *Bundestag*,[64] in EU matters has increased

fact that it is not the only instrument for the cooperation among national parliaments since the European Parliament is also a full member.

59 According to a study of the COSAC, 36 out of 40 national parliamentary staff uses IPEX, whereas MPs of 25 out of 40 Chambers rarely consult it COSAC's *Seventeenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny* (2012), 11.

60 Christiansen *et al*. 2012, p. 11.

61 Art. 3b of Law 8/1994 of 19 May.

62 Art. 3j of Law 8/1994 of 19 May (2009 version).

63 Art. 6 of the Spanish law 24/2009 of 24 December 2009. However, these positive changes have not necessarily benefited regional parliaments, even if Art. 6 Protocol No. 2 sets out that they should be consulted 'where appropriate'. Bourdin & Vara Arribas 2011 have studied how regional participation takes place.

64 This difference made between the *Bundestag* and the *Bundesrat* is due to the fact that the *Bundesrat* is not a parliamentary chamber.

even further.[65] The German case however illustrates the fact that where parliamentary scrutiny was already well established, the introduction of the subsidiarity check did not provoke any radical change in the daily scrutiny tasks. In fact, the subsidiarity check is simply conducted in the framework of the general scrutiny procedure of EU documents, as an additional aspect that needs to be examined. As for the United Kingdom, the absence of change is even more evident since both parliamentary chambers were conducting subsidiarity assessments before the entry into force of the Lisbon Treaty.[66]

It follows from these clear references to four Member States that the changes brought about by the introduction of the Early Warning System on parliamentary EU scrutiny procedures vary among Member States depending on their political parliamentary culture and tradition. However, the scrutiny mechanism has, in general, contributed to the establishment of a closer relationship between parliament and government.

6. Subsidiarity Twenty Years Later: Brief Assessment and Outlook

The substance of the subsidiarity principle as introduced by the Treaty of Maastricht has not undergone any significant change through the various reforms of the Treaty carried out since.

By contrast, its review of the subsidiarity principle has undergone a revolution: while it used to be only judicial, it now is also political. This subsidiarity check operated by national parliaments seems to be far more appropriate than relying only or mainly on the Court of Justice, since their assessment will necessarily be political in nature, and the question whether a goal can best be achieved at the EU level while not being attainable at the Member State level requires a political – subjective – judgment.

Seen in a broader context, this principle and the Early Warning System have also led to the increase of parliamentary interest in EU affairs. This is where the true added-value of this mechanism should be seen.

A further step might be taken by suggesting that, in reality, the introduction of this Early Warning System will eventually permit the establishment of an active dialogue – both horizontal and vertical – between parliamentary staff members rather than between MPs and MEPs, or MPs and the EU Commission.

65 Judgment of 30 June 2009, BVerfG, 2 BE 2/08 (Lisbon).

66 COSAC, 'Annex to the Thirteenth Bi-annual Report on Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny: Replies of National Parliaments and the European Parliament' (2010) 492. The information concerning the House of Lords was provided by Alistair Dillon, Policy analyst of the EU select Committee of the House of Lords in May 2013. Some changes may however soon be put in place since the UK House of Commons is currently (March 2013) conducting an enquiry into its EU scrutiny procedure. For more information, see <http://www.parliament.uk/escom>.

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