

# The European Committee of the Regions as a watchdog of the principle of subsidiarity

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## Abstract

In a resolution adopted on 1 February 2018, the European Committee of the Regions noted that a legislative proposal of the European Commission concerning a Regulation that changes the rules governing the EU regional funds for 2014–2020 did not comply with the principle of subsidiarity. Accordingly, the Committee considered challenging the legislative proposal before the Court of Justice if the proposal was formally agreed upon. Although at a later stage the European Commission decided to take into account the Committee's argument and amended the proposal accordingly, such a context offers the chance to investigate more in detail the role of the Committee of the Regions in the legislative process of the EU and, more in particular, its role as a watchdog of the principle of subsidiarity. This paper aims to shed light on a rather neglected aspect of the EU constitutional practice, such as the potential of the Committee of the Regions to contribute to the legislative process, and answer the question of whether this Committee is the right body to guarantee compliance with the principle of subsidiarity.

## Keywords

Regulation, Committee of the Regions, democratic legitimacy, quasi-institutions, regional proximity, subsidiarity

## 1. Introduction: shedding light on a neglected body

The constitutional order of the European Union incorporates a plethora of bodies and committees which contribute to policy-making in an advisory capacity.<sup>1</sup> Amongst these, the EU treaties assign

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1. The role of committees has been especially explored in political science and governance studies, for a broader analysis see in particular T. Christiansen and T. Larsson (eds.), *The Role of Committees in the Policy-process of the European*

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a privileged role to the two main consultative organs, the Economic and Social Committee (ESC) and the Committee of the Regions (CoR). Pursuant to Article 13(4) of the TEU, these Committees assist in an advisory capacity the three main EU political institutions, namely the European Commission, the European Parliament and the Council, particularly as regards the legislative process.<sup>2</sup>

While the ESC has been investigated more in depth, especially because it was already established by the 1957 Treaties of Rome<sup>3</sup> to involve economic and social interest groups in the establishment of the common market,<sup>4</sup> little attention has been paid to the CoR from an EU constitutional law perspective.<sup>5</sup> Established by the Maastricht Treaty in 1992,<sup>6</sup> ‘to reinforce the democratic legitimacy of the Union’<sup>7</sup> by connecting with the enormous heterogeneity of sub-national governments in the Member States, the CoR is the youngest EU constitutional organ. It is composed of locally and regionally elected representatives from all Member States<sup>8</sup> and can be involved in the law-making process by forming mandatory, requested and own-initiative opinions, when the three main EU institutions draft legislation on matters concerning local and regional government.<sup>9</sup> Due to this advisory capacity, the CoR has access to the decision-making arenas without formal voting powers, as its opinions are not binding in character. Since the entry into force of the Maastricht Treaty in 1993, the CoR has participated in many supranational policy areas, most notably by giving advice to the Council and the European Parliament.<sup>10</sup>

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*Union: legislation, implementation and deliberation* (Edward Elgar, 2007); R. van Schendelen (ed.), *EU Committees as Influential Policymakers* (Ashgate, 1998). From a legal perspective, see in particular M. Savino, *I comitati dell’Unione Europea. La collegialità amministrativa negli ordinamenti composti*, (Giuffrè, 2005).

2. Article 13(4) Consolidated version of the Treaty on European Union (TEU), [2016] OJ C 202/1. For references see in particular C. Jeffery and C. Rowe, ‘Social and Regional Interests: The Economic and Social Committee and the Committee of the Regions’, in J. Peterson and M. Shackleton (eds.), *The Institutions of the European Union* (OUP, 2012), p. 359-381.
3. The Economic and Social Committee (ESC) is regulated by Articles 301-304 of the Treaty on the Functioning of the EU (TFEU), Consolidated version, [2016] OJ C 202/1.
4. On the ESC, see extensively M. Westlake, *The European Economic and Social Committee – the House of European Organised Civil Society* (John Harper Publishing, 2016); see also R.P. Morgan, *The consultative function of the Economic and Social Committee of the European Community* (European University Institute, 1991); N. Bernard, C. Laval and A. Nys, *Le Comité économique et social* (Éditions de l’Université de Bruxelles, 1972).
5. Most existing studies on the Committee of the Regions are in the field of EU governance, see especially, S. Piattoni and J. Schönlaue, *Shaping EU Policy from Below: EU Democracy and the Committee of the Regions* (Edward Elgar, 2015); A. Warleigh, *The Committee of Regions: Institutionalising Multi-level Governance?* (Kogan Page, 1999); P.A. Feral, *Le Comité des Régions de l’Union Européenne* (Presses Universitaires de France, 1998); R. Dehousse and T. Christiansen (eds.), *What model for the Committee of the Regions?: Past Experiences and Future Perspectives* (European University Institute, 1995).
6. Article 198A of the Maastricht Treaty, Treaty on European Union, [1992] OJ C 191/1, stated: ‘A Committee consisting of representatives of regional and local bodies, hereinafter referred to as “the Committee of the Regions”, is hereby established with advisory status.’
7. J. Delors, President of the Commission at the inaugural plenary session of the Committee of the Regions in Brussels, 9 March 1994.
8. The Committee of the Regions (CoR) comprises 350 members and an equal number of alternate members who are appointed for five years. Members are representatives of regional and local bodies and are nominated by Member States. For the most recent composition, see Council Decision 2014/930/EU of 16 December 2014 determining the composition of the Committee of the Regions, [2014] OJ L 365/143.
9. The CoR is regulated in the Treaties by Articles 300, 305-307 TFEU.
10. The Maastricht Treaty set out five particular areas: economic and social cohesion, trans-European infrastructure networks, health, education and culture. In 1997 five more policy areas were added by the Treaty of Amsterdam:

The Treaty of Lisbon of 2007 has particularly strengthened the position of the CoR by providing it with legal standing before the CJEU for actions for annulment under Article 263 of the TFEU. This would be a new powerful instrument for a body that has been regarded as a guardian of the principle of subsidiarity,<sup>11</sup> a prerogative also shared with national parliaments.<sup>12</sup> Subsidiarity is one of the key pillars of the EU's legal and political architecture, according to which action should only be taken at EU level when it is more effective than if taken by Member States alone at national, regional or local level.<sup>13</sup> The recent practice has given the opportunity to reflect on such a new competence for the CoR vis-à-vis the respect of subsidiarity. In fact, in a resolution adopted on 1 February 2018,<sup>14</sup> the CoR noted that a legislative proposal of the European Commission concerning a Regulation that changed the rules governing EU regional funds for the period 2014-2020 did not comply with the principle of subsidiarity.<sup>15</sup> Accordingly, the CoR considered using its new competence under Article 263 TFEU by bringing an action before the CJEU if the proposal was formally agreed upon. Although at a later stage the European Commission decided to take into account the CoR's opinion and amended the proposal,<sup>16</sup> such a context offers the chance to investigate in greater detail the role of the CoR as a watchdog of the subsidiarity principle.

The potential of such a role for the CoR deserves further investigation, because it can eventually constitute a step forward toward enhancing the legitimacy of EU decision-making and the quality of policy outcomes by protecting more effectively the interests of the civil society and local or regional communities. Decisions that fundamentally affect people's lives were made increasingly by national governments without consulting their peoples, while the powers to take these decisions were progressively transferred to the EU.<sup>17</sup> This is an issue that contributes to the vexing question of the EU's democratic deficit.<sup>18</sup>

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employment policy, social policy, the environment, vocational training and transport. Under the Lisbon Treaty, the CoR's role is further enhanced as it will have the right to consult the other institutions on new policy areas.

11. Cf. e.g. C. Jeffery and J. Ziller, *The Committee of the Regions and the implementation and monitoring of the principles of subsidiarity and proportionality in the light of the Constitution for Europe* (Office for Official Publications of the European Communities, 2006). See also J. Jones, 'The Committee of the Regions, Subsidiarity and a warning', 22 *European Law Review* (1997), p. 312-326.
12. As to the role of national parliaments see especially K. Granat, *The principle of subsidiarity and its enforcement in the EU legal order: the role of national parliaments in the early warning system* (Hart Publishing, 2018).
13. Article 5(3) TEU. For references see in particular T. Van den Brink, 'The Substance of Subsidiarity: The Interpretation and Meaning of the Principle after Lisbon', in M. Trybus and L. Rubini (eds.), *The Treaty of Lisbon and the Future of European Law and Policy* (Edward Elgar, 2012), p. 160-177.
14. Draft resolution on changing the ESI funds Common Provisions Regulation to support structural reforms, 31 January-1 February 2018, RESOL-VI/29.
15. Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 as regards support to structural reforms in Member States, COM(2017) 826 final.
16. Proposal of 28 June 2018 for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1303/2013 as regards the resources for economic, social and territorial cohesion and correcting that Regulation as regards the resources for the investment for growth and jobs goal, COM(2018) 498 final.
17. W.E. Carroll, 'The Committee of the Regions: A Functional Analysis of the CoR's Institutional Capacity', 21 *Federal Studies* (2011), p. 348.
18. On the ongoing debate concerning the democratic deficit of the EU, for the purposes of this research see especially M. Bartl, 'The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit', 21 *European Law Journal* (2015), p. 23-43.

Nonetheless, in contrast with the views expressed by scholars who addressed the development of the CoR as an example of institutional activism which led to the expansion of its competence,<sup>19</sup> this paper follows a more cautious approach, suggesting that such activism remains merely symbolic if not complemented by constitutional effectiveness. The paper therefore pursues a threefold objective. Firstly, it aims to investigate how the CoR performs its institutional role in the EU legislative process by ensuring the respect for the principle of subsidiarity. This analysis will highlight that the establishment of the CoR responds to the need to foster democratic legitimacy in the EU through an institutionalized representation of local and regional actors. Secondly, and more fundamentally, in an attempt to consider the effective contribution of the CoR to better regulation in the EU, the paper assesses the relevance of the subsidiarity principle for the CoR in the EU pre-legislative and legislative phase, as well as in its relation to the judiciary. Thirdly, some strategies will be mapped out to see how the role of the Committee can be redesigned. Overall this paper aims to generate awareness on the role and potential of the CoR in the constitutional practice of EU law.

## 2. The Committee of the Regions in the EU legislative process: Between democratic legitimacy and regional proximity

Established as a political assembly of regional and local representatives, who are all holders of a regional or local mandate,<sup>20</sup> the CoR pursues the institutional role of involving representatives of sub-national governments in the EU's decision-making process and encouraging a wider participation by EU citizens. Such a role is particularly reflected by the CoR's access to the legislative process and its possibility to exercise political influence over other EU institutions, notably the legislators, while they take legal decisions.<sup>21</sup> By presenting two main arguments beyond the creation of the CoR and its involvement in the EU legislative process, this section illustrates how the role of the CoR in such process results from the twofold quest for democratic legitimacy and regional proximity.

As for the former, it is important to highlight that the growing reach of EU competences led to calls for the strengthening of those aspects which particularly connect with the democratic legitimacy of the EU polity, such as consolidating the role of the European Parliament, standardizing the electoral systems, extending the jurisdiction of the CJEU and multiplying fora for citizens' participation and representation.<sup>22</sup> Apart from an exorbitant rise in formal lobbying, there was also the need for the institutional presence of a consultative body in the structure of the EU that would

19. J. Schönlau, 'Beyond mere 'consultation': Expanding the European Committee of the Regions' role', 13 *Journal of Contemporary European Research* (2017), p. 1166-1184.

20. M. Tatham, 'Regional Voices in the European Union: Subnational Influence in Multilevel Politics', 59 *International Studies Quarterly* (2015), p. 387. See also T. Cole, 'The Committee of the Regions and Subnational Representation to the European Union', 12 *Maastricht Journal of European and Comparative Law* (2005), p. 49-72.

21. Influence can be defined as the ability to shape positions of EU decision-makers as well as EU directives and regulations as policy outcomes in line with the CoR' opinions, see D. Panke, C. Hönnige and J. Gollub, *Consultative Committees in the European Union: No Vote – No Influence?* (European Consortium for Political Research Press 2015), p. 9. See also R.E. McCarthy, 'The Committee of the Regions: an advisory body's tortuous path to influence', 4 *Journal of European Public Policy* (1997), p. 439-454.

22. For a broader discussion see in particular S. Piattoni (ed.), *The European Union: democratic principles and institutional architectures in times of crisis* (OUP, 2015).

represent regional interests on the EU level.<sup>23</sup> The creation of the CoR is thus one of the responses to this challenge.<sup>24</sup>

As to regional proximity, it is worth recalling that the CoR was established after prolonged debate at the Intergovernmental Conference for the Maastricht Treaty, which provided for the creation of such a consultative body by the adoption of a protocol annexed to the Treaty<sup>25</sup> to expand the role of the Consultative Council of Regional and Local Authorities set up by the Commission in 1988.<sup>26</sup> From this perspective, the CoR was established to assist in the development of EU integration by raising awareness on regional matters and thus act as an access channel to EU decision-making for sub-national or local realities.<sup>27</sup> Since then, the CoR has been providing regional actors with an additional level of representation that could be more effective than previous alternatives.<sup>28</sup> This aimed to provide a 'third level' into the deliberation of legislation, since the European Parliament, the Council or the European Commission are required to consult the CoR 'where the Treaties so provide and in all other cases, in particular those which concern cross-border cooperation.'<sup>29</sup> Furthermore, the CoR has the right to forward its opinions when it considers such an action appropriate.<sup>30</sup>

The quest for democratic legitimacy is visible in the participation of the CoR in the legislative process, while the need to foster regional or territorial proximity is particularly reflected in the origins of the Committee and the substantive areas in which it is involved. Pursuant to Article 307 TFEU, the CoR has merely advisory powers. These can be exercised throughout different stages of the decision-making process, including the pre-legislative phase of the European Commission. In this connection, the CoR receives and can react to White Papers and Green Papers before the Commission submits a legislative proposal. The CoR is also involved during the consultation period, in which it might provide a test board for the European Commission with regard to policy design.<sup>31</sup> Furthermore, the CoR is involved in the formal legislative process in the ordinary

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23. T. Christiansen, 'Second Thoughts – The Committee of the Regions after its First Year', in R. Dehousse and T. Christiansen (eds.), *What model for the Committee of the Regions?: Past Experiences and Future Perspectives* (European University Institute, 1995), p. 34.

24. W.E. Carroll, 21 *Federal Studies* (2011), p. 348-349.

25. Protocol on the Economic and Social Committee and the Committee of the Regions, annexed to the Treaty of Maastricht on the European Union, 7 February 1992. This protocol was repealed by the Treaty of Amsterdam of 2 October 1997.

26. See Commission Decision 88/487/EEC of 24 June 1988 setting up a Consultative Council of Regional and Local Authorities, OJ L 247/23, 6 September 1988. The Consultative Council of Regional and Local Authorities (CCRLA) had been attached by the European Commission to its Directorate General for Regional Policy (DG XVI) in 1988. The members were appointed by two EU-wide subnational associations, the Assembly of EU Regions (AER) and the Council for EU Municipalities and Regions (CEMR). The Council was expected to give greater legitimacy to the Commission's role in the reform of the cohesion policy. In reality, the Council lacked independence, as the agenda was set by the Commission, and played an unassuming role until it was abolished in 1993.

27. R. Sturm, 'Participation and Representation: The Experience of Second Chambers and the Committee of the Regions', in R. Dehousse and T. Christiansen (eds.), *What model for the Committee of the Regions?: Past Experiences and Future Perspectives* (European University Institute, 1995), p. 119.

28. L. Hooghe and M. Keating, 'The Politics of EU Regional Policy', 1 *Journal of European Public Policy* (1994), p. 367-393.

29. Article 307 TFEU.

30. *Ibid.*

31. M. Tatham, 59 *International Studies Quarterly* (2015), p. 501.

legislative procedure under Article 294 TFEU by providing opinions on the proposals submitted by the European Commission to the European Parliament and the Council.<sup>32</sup>

The quest for proximity is especially confirmed by the origins of the Committee, which was established to tackle the many concerns raised at the sub-national levels regarding the increasing implications of the European integration process.<sup>33</sup> The entry into force of the Single European Act,<sup>34</sup> in fact, raised several challenges of law implementation for regional and local actors within the Member States. Further, another element which illustrates the special quest for proximity is in the fact that, in terms of constitutional relevance, mandatory consultation is required by the Treaty in a number of market-creating and market-correcting policies, therefore, in policies that have more direct 'territorial' relevance.<sup>35</sup> Nevertheless, the fact that no mandatory consultation is required in areas such as the common agricultural policy, which has a strong regional significance, is a considerable lacuna. By and large, the lack of consultation in one of the specific policy areas in which this is required constitutes a ground to review the legality of an act as infringing an essential procedural requirement under Article 263 TFEU. However, it must be stressed that, even though mandatory consultation is required, there is no obligation for the political institutions to abide by the opinion of the CoR.

As is known, the CoR's opinions are not binding on the European Commission, the Council and the European Parliament, and none of these institutions has to discuss them or take a formal vote on them. This is true regardless of whether the CoR was involved based upon a mandatory, requested or self-initiated procedure.<sup>36</sup> As a consequence, the CoR has been regarded as an *organe paradoxal* in the institutional landscape of the EU, as it constitutes an advisory body composed of elected politicians with an official function without a real effective power to influence the legislative process.<sup>37</sup> This made the creation of the CoR very attractive for the supranational institutions, since it carried the advantage of adding legitimacy at the EU level without creating potential for obstructing the decision-making process, due to the advisory role of the CoR.<sup>38</sup>

Nonetheless, it is essential to assess what weight the European Commission or the two legislative institutions give to the CoR's advisory opinions. This is an aspect that has been especially explored in political science, but the main findings can also be meaningful from an EU constitutional law perspective, especially if this consultative role is used to ensure the respect of the principle of subsidiarity, which is inherently connected with the quest for proximity beyond the creation of the CoR.

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32. For references see C. Hönnige and D. Panke, 'Is anybody listening? The Committee of the Regions and the European Economic and Social Committee and their quest for awareness', 23 *Journal of European Public Policy* (2016), p. 626.

33. See more extensively A. Warleigh, *The Committee of Regions: Institutionalising Multi-level Governance?*.

34. The Single European Act (SEA), [1987] OJ L 169/1.

35. See in the TEU: Articles 91 (transport), 100 (rail, road and inland waterway), 148 (employment), 149 (cooperation between member states), 153 (social policy), 164 (implementation of the European Social Fund), 165 (programmes related to youth and education), 166 (vocational training), 167 (culture), 168 (health), 172 (transport and energy), 175 (programmes related to the European Fund for Regional Development), 177 (structures of the Fund for Regional Development), 178 (implementation of the European Fund for Regional Development), 192 (environment), and 194 (energy).

36. D. Panke, C. Hönnige and J. Gollub, *Consultative Committees in the European Union: No Vote – No Influence?*, p. 9.

37. L. Guilloud, 'Le Comité des régions, un organe paradoxal de l'Union européenne', 532 *Revue du Marché commun et de l'Union Européenne* (2009), p. 582-586.

38. T. Christiansen, in R. Dehousse and T. Christiansen (eds.), *What model for the Committee of the Regions?: Past Experiences and Future Perspectives*, p. 36.

### 3. Subsidiarity through the lens of the Committee of the Regions: A contribution to better regulation?

Over the years, the understanding of subsidiarity has triggered academic debates, especially as regards the actions and guidelines that can be considered as benchmarks for the respect of such a principle.<sup>39</sup> Initially, these guidelines were developed in the European Council's Conclusions of 1992.<sup>40</sup> Protocol No. 2 on the application of the principles of subsidiarity and proportionality annexed to the Treaty of Lisbon no longer contains any substantive interpretation of the subsidiarity principle. The only reference to a substantive interpretation is the novel obligation to take into account regional and local dimensions of any envisaged action under Article 2 of the Protocol.<sup>41</sup> This is a significant feature as it directly connects with the consolidated CoR's role of oversight of the principle of subsidiarity.

This section critically assesses the relevance of the subsidiarity principle for the CoR in the EU pre-legislative and legislative phase, as well as in its relation to the judiciary, to see whether the Committee's role can contribute to better EU regulation, for which observance of subsidiarity is key, as confirmed by the Mandelkern report. The report defines better regulation as '[t]he policy of seeking to improve and simplify the regulatory environment'; in fact, it clarified that '[r]egulation should be used only when necessary and be appropriate and proportionate to the task. It should be transparent and accessible to all and as simple as possible. It should be enforceable and at European level should obey the principle of subsidiarity.'<sup>42</sup>

#### 3.1 Pre-legislative phase

The CoR has been playing an increasingly stronger role in the legislative process, as confirmed by the proposal to transform the CoR into a 'Second Chamber' representative of European regions and with legislative powers that could scrutinize the respect of the principle of subsidiarity.<sup>43</sup> The Committee, however, dropped the proposal, partly in light of the European Parliament's contrary opinion, and decided instead to strengthen its consultative role.<sup>44</sup>

In connection with this decision, the European Commission called for the CoR to contribute to the implementation of the White Paper on European Governance<sup>45</sup> in its Action Plan for Better Regulation.<sup>46</sup> Likewise, in a Protocol of cooperation with the CoR, the Commission stressed the importance of the CoR's involvement in an earlier phase of the legislative process by allowing for hearings, conferences or consultations that may be necessary for the CoR to form its own-initiative

39. W.E. Carroll, 21 *Federal Studies* (2011), p. 349; S.S. Nagel (ed), *Critical Issues in Cross-National Public Administration: Privatization, Democratization, Decentralization* (Quorum Books, 2000), p. 188-189.

40. European Council, Conclusions of the Presidency, Edinburgh, 12 December 1992.

41. T. Van den Brink, in M. Trybus and L. Rubini (eds.), *The Treaty of Lisbon and the Future of European Law and Policy*, p. 160.

42. D. Mandelkern, Final Report, Mandelkern Group on Better Regulation, Final Report, p. 81.

43. For further references in this regard see T. Cole, 12 *Maastricht Journal of European and Comparative Law* (2005), p. 68.

44. A.W. Pankiewicz, *Realtà Regionali ed Unione Europea: Il Comitato delle Regioni* (Giuffrè, 2001), p. 110.

45. European governance - A White Paper, COM(2001) 428 final.

46. Commission Communication Action plan 'Simplifying and improving the regulatory environment', COM(2002) 278 final.



opinions.<sup>47</sup> This should be viewed in connection with the institutional activism that characterized the Committee's early life: in 1996, '18 out of 43 CoR opinions were own-initiative ones, and in 1999, the number was 30 own initiative opinions out of 70.'<sup>48</sup>

Admittedly, such a *modus operandi* can contribute to influence the quality of EU legislation, as the CoR is able to gather information from regional realities throughout the EU and therefore contribute to a better accommodation of regional or local interests in the legislation, without waiting for a formal consultation request from the European Commission. This was recently the case with the CoR's Opinion on the Transatlantic Trade and Investment Partnership (TTIP), in which the Committee emphasized the impact of the agreement on many areas of regional competence.<sup>49</sup>

The importance of consultation is also underscored by the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Lisbon Treaty, in which it is clearly stressed that 'before proposing legislative acts, the Commission shall consult widely' and that 'such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged.'<sup>50</sup> In addition, the Protocol requires that '(...) any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality.'<sup>51</sup> This statement should include an assessment of the proposal's financial impact that also takes into account the possible implications at the regional level. It is therefore clear how territorial proximity emerges as a clear component of the principle of subsidiarity, as confirmed by the CoR in its Opinion on the European Commission's Green Paper on Territorial Cohesion.<sup>52</sup> On that occasion, the Committee advised the European Commission to elaborate more clearly the concept of territorial cohesion in the context of a White Paper.<sup>53</sup>

The involvement of the CoR in the pre-legislative phase entails that the Committee plays a key role in the impact assessment of the European Commission's proposals.<sup>54</sup> Such an impact assessment aims to examine whether there is a need for action at the EU level and it analyses the possible impact of the available solutions. Impact assessments are carried out during the preparatory phase, before the Commission finalizes a proposal for a new legislative act, and function as evidence to support the decision-making process.

Impact assessments constitute an essential element of the Commission's agenda on better regulation,<sup>55</sup> since they evaluate EU law and policies so that they achieve their objectives in the most efficient and effective way. The Commission's initial analysis of the problem and different solutions and of their expected impact are set out in inception impact assessments on which

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47. Protocol governing arrangements for cooperation between the European Commission and the Committee of the Regions, DI CdR 81/2001 rev. 2.

48. J. Schönlau, 13 *Journal of Contemporary European Research* (2017), p. 1173.

49. CoR Opinion CDR 5385/2014, 13 February 2015.

50. Article 2 Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality.

51. *Ibid.*, Article 5.

52. Green paper on territorial cohesion: Turning territorial diversity into strength, COM(2008) 616 final.

53. CoR, Opinion CDR 274/2008, 12 February 2009.

54. A. Alemanno and A.C.M. Meuwese, 'Impact Assessment of EU Non-Legislative Rulemaking: The Missing Link in New Comitology', 19 *European Law Journal* (2013), p. 76-92.

55. See the Commission's Better Regulation Toolbox and Guidelines setting out the principles that the European Commission follows when preparing new initiatives and proposals and when managing and evaluating existing legislation, available at: [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en).



stakeholders can give feedback. Since subsidiarity is one of the core principles addressed in this context,<sup>56</sup> it appears sensible to argue in favour of the involvement of the CoR. When such a procedure was being discussed in 2005, it was welcomed by the Committee itself as this was hoping that ‘would lead to an increasingly systematic use of the new impact assessment method for the European Commission’s major initiatives, and its involvement in the Impact Assessment method’.<sup>57</sup> This is a valid expectation, as the impact assessment would need a more in-depth analysis of the regional impact. The three main political institutions also agreed that such a method would lead towards the realization of the better lawmaking objectives, ‘including simplicity, clarity and consistency in the drafting of laws and the utmost transparency of the legislative process’.<sup>58</sup> The Committee, on the other hand, saw access to the European Commission’s Impact Assessment procedure as a possibility to increase its influence on the process of policy development and asked the Commission to introduce a new Impact Assessment method, whereby the local and regional dimension had to be taken into account *ex ante*.<sup>59</sup>

Despite the great potential of contributing to better regulation, the Committee’s expectations as to its involvement in the Impact Assessment procedure have not been fully met.<sup>60</sup> The Committee has undertaken a number of assessments of the territorial impact of Commission’s proposals in many policy areas,<sup>61</sup> but it currently has only a general role in the impact assessment and the CoR is mentioned once in the Guidelines on Better Regulation. Chapter VII of the Stakeholder consultation namely mentions that the CoR could be a tool to reach particular groups such as small to medium enterprises (SMEs).<sup>62</sup> It is striking that the CoR is not mentioned at all in the impact assessment guidelines, nor is it in one of the impact assessment toolboxes. This is a missed opportunity, because the involvement of the CoR in the Impact Assessment procedure could certainly strengthen regional proximity as a component of the principle of subsidiarity,<sup>63</sup> allowing for the participation of regional entities in the EU law-making dynamics, a role at present absorbed by the national parliaments.

Taking a closer look at the impact assessment that accompanied the Commission’s proposal to amend the rules governing EU regional funds for 2014–2020, which would divert resources from the EU’s cohesion policy to support structural reforms in the EU Member States,<sup>64</sup> and for which

56. *Ibid.*, p. 164

57. A.C.M. Meuwese, *Impact Assessment in EU Lawmaking* (Kluwer, 2008), p. 160; Resolution of the Committee of the Regions on the European Commission’s Work Programme and the Committee of the Regions’ Priorities for 2006, Brussels, 23 November 2005.

58. European Parliament, Council, Commission, Inter-institutional agreement of 2003 on better law-making, [2003] OJ C 321/1.

59. CoR Report on Better Regulation for Growth and Jobs (2005), p. 8-9.

60. In its resolution on the Commission’s Work Programme (2005), the CoR regrets that the European Commission in its annual planning document did not consider the added value provided by a preventive consultation of local and regional governments regarding respect of subsidiarity

61. See more extensively in this regard, S. Piattoni and J. Schönlaui, *Shaping EU Policy from Below: EU Democracy and the Committee of the Regions*, p. 101-102.

62. Guidelines on Stakeholder Consultation, European Commission (available at: [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en)).

63. See in particular P. Fois, ‘Il principio di prossimità nel diritto dell’Unione e il suo controverso rapporto con quello di sussidiarietà’, 10 *Studi sull’integrazione europea* (2015), p. 9-22.

64. As to the role of the CoR, see extensively S. Piattoni and J. Schönlaui, *Shaping EU Policy from Below: EU Democracy and the Committee of the Regions*, p. 106 ff.

the CoR – for the second time in all so far<sup>65</sup> – considered recourse to the CJEU under Article 263 TFEU, the situation looks different. It is interesting to underscore that no ex-post evaluation or fitness check was conducted on the existing legislation, there was not consultation of existing stakeholders, the use of external expertise had not been considered necessary and an impact assessment was not applicable. This is a major lacuna, which clearly reflects an underestimation of the role that the CoR can play in an area of law which is considered as one of the most important for the CoR.

### 3.2 Legislative phase

The European Commission's focus on better regulation is also reflected in the legislative phase, for instance by promoting consultation once legislative proposals are agreed upon. This is significant for many stakeholders, including the CoR. As is known, the CoR has privileged access to the formal legislative process, especially under Article 294 TFEU, but is this in practice truly adding up to better rulemaking? In other words, are the opinions of the CoR taken on board? To assess the influence and impact of the CoR in the legislative phase, it is useful to measure the impact on the final policy outcome of the legislative process.

As explained above, in Section 2, the CoR can be involved in the EU law-making process by adopting mandatory, requested and own-initiative opinions. While the CoR has often issued own-initiative opinions, particularly in the past, a report showed that the Commission is not in the habit of ignoring or rejecting CoR opinions submitted to it.<sup>66</sup> Therefore, it is also likely that own-initiative opinions are most influential since the CoR members have high stakes in a specific legislative proposal. One reason for this is that the CoR gets a right to autonomous intervention in the political and institutional debates within the legislative process without having to wait for the legislators or the Commission to consult it.<sup>67</sup> In this regard, the Committee has a large power of intervention and political influence that can be relevant to protect the regional interests and monitor the respect for the principle of subsidiarity.<sup>68</sup> Another reason is that the Committee's involvement in the pre-legislative phase can be more influential than real participation in the legislative phase, where a few institutional obstacles can undermine the effectiveness of the Committee's consultation. In the legislative phase, a first practical problem is that the European Parliament and the Council start deliberating at the same time as the CoR starts developing its opinion. In this regard, Hönnige and Panke analysed the influence of the CoR Opinions and concluded that the Committee's role improves when opinions are delivered quickly to the Members of the European Parliament and the staff of the Permanent Representations.<sup>69</sup> It is therefore crucial that the CoR submit its opinion faster, as a delayed opinion could be less influential in the decision-making processes within the two legislative institutions.

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65. The first time the CoR intended to use such a tool was in its Opinion on the 'Monti II package', see Opinion 332/2011, 15 February 2012.

66. Committee of the Regions, 184th meeting of the CoR's Bureau – Item 9a) CoR activities in 2017 report on the impact of CoR opinions, 3 July 2018.

67. P.A. Feral, 'Retour en force du principe de subsidiarité dans le traité constitutionnel: de nouvelles responsabilités pour les parlements nationaux et pour le Comité des Régions?', 481 *Revue du marché commun et de l'Union Européenne* (2004), p. 422.

68. For references see A.W. Pankiewicz, *Realtà Regionali ed Unione Europea: Il Comitato delle Regioni*, p. 97.

69. C. Hönnige and D. Panke, 23 *Journal of European Public Policy* (2016).

Regarding the impact of the CoR's opinions, it might be expected that the European Commission, the European Parliament and the Council are more interested in requested recommendations, naturally.<sup>70</sup> As to the requested opinions, it is worth stressing that Article 307 TFEU establishes that the European Parliament, the Council or the Commission consult the CoR 'where the Treaties so provide and in all other cases, in particular those which concern cross-border cooperation, in which one of these institutions considers it appropriate.' Even though Article 307 TFEU does not enshrine a legal obligation of consultation, it would constitute a relevant element especially given the paramount importance of cross-border cooperation throughout the EU.<sup>71</sup>

The likelihood of successfully influencing the EU legislative process may also vary across policy fields. The CoR is likely to possess more resources in its core policy fields such as cohesion policy than in others. Indeed, it is worth highlighting that the largest number of the CoR opinions fall in the areas where its interests are clearly recognized, namely territorial and cohesion policy, sustainable development, culture and education, and economic and social policy.<sup>72</sup> Fewer opinions are issued in the areas of constitutional affairs and EU government. In certain fields, which are those where significant change may occur, the CoR should be highly motivated to develop recommendations swiftly and it will rely on the highly policy-specific expertise of its members. Additionally, the more significant the change, the more the CoR will advocate for that change, and the bigger the chance that it will influence the EU Commission.<sup>73</sup> Therefore, opinions in these important policy areas will be adopted quickly and better.<sup>74</sup>

Former studies have estimated the influence of CoR opinions on the EU legislative procedure. In particular, Neshkova concluded that the Committee exerted considerable influence on the legislation concerning regional issues, as the European Commission acted consistently with the preferences of the CoR for 45,5% of the time. This shows that the Commission values the expertise of the CoR in regional policy.<sup>75</sup> Nonetheless, from our perspective, it seems difficult to have an accurate image of the influence exercised by the Committee in the legislative phase. Neshkova analysed 60 Commission's proposals between 1996 and 2007 on which the CoR gave an opinion. However, these are only mandatory opinions adopted in just four policy areas, namely environmental protection, regional policy, trans-European infrastructural networks and cultural policy. In order to analyse the CoR's influence, Neshkova compared the initial Commission's proposal, the opinion of the Committee and follow-up reports of the Commission and, when a proposal was lacking one of the three documents, it was left out of the analysis.<sup>76</sup> Thus, the study serves mainly as an example of possible impacts of CoR opinions. The same conclusion can be drawn from a Hönnige and Panke's study in which they assessed the influence of the CoR's opinions by relying on surveys and in-depth interviews.<sup>77</sup> Again, their findings merely seem to have an explanatory

70. C. Hönnige and D. Panke, 'The Committee of the Regions and the European Economic and Social Committee: how influential are consultative committees in the European Union?', 51(3) *Journal of Common Market Studies* (2013), p. 458.

71. For a broader discussion see especially I. Ottaviano, *Gli accordi di cooperazione territoriale nell'Unione europea* (Cacucci, 2017).

72. W.E. Carroll, 21 *Federal Studies* (2011), p. 346.

73. M.I. Neshkova, 'The impact of subnational interests on supranational regulation', 17(8) *Journal of European Public Policy* (2010).

74. C. Hönnige and D. Panke, 51(3) *Journal of Common Market Studies* (2013), p. 458.

75. M.I. Neshkova, 17(8) *Journal of European Public Policy* (2010), p. 1202.

76. *Ibid.*, p. 1201.

77. C. Hönnige and D. Panke, 51(3) *Journal of Common Market Studies* (2013), p. 458.

function and serve as an indication of possible impacts. Finally, even looking at the Annual Reports on the CoR Activities, it is difficult to draw conclusions on the precise impact effected by the Committee. The CoR's impact report of 2017 shows it adopted 71 opinions,<sup>78</sup> but only 34 are addressed in the report. What is clear, as it emerges from any Annual Report, is a broader understanding of subsidiarity as relating not only to local and regional authorities, but also to the financial and administrative burdens placed on these authorities by new legislative initiatives. To this end, Rule 51 of the CoR Rules of Procedure provides that, for each document discussed, 'the main part of the Committee's text must, wherever possible, address compliance with the subsidiarity principle and the expected impact on administration and regional and local finances.'<sup>79</sup>

Such results confirm how the contribution of the CoR to the decision-making can be better appraised from an institutional perspective in terms of increased legitimization of the decision-making, rather than in terms of substantial contributions to better regulation and to the quality of the legislative outputs. This is also explained by the Committee's tendency to stretch its institutional powers that eventually resulted in its access to the judiciary, a new competence for the control of subsidiarity.<sup>80</sup>

### 3.3 Access to the judiciary

The Lisbon Treaty has provided the Committee with a locus standi before the CJEU to seek the annulment of a new legislation that the CoR considers being in breach of the principle of subsidiarity, in the policy areas where the Treaty requires prior consultation of the Committee. Such a right to bring legal action before the CJEU is to be seen as the result of a process of institutional activism carried out by the CoR for approximately fifteen years in an attempt to defend its own prerogatives and the principle of subsidiarity.

Established in Article 263 TFEU, as well as in Article 8 of Protocol No. 2 on the application of the principles of subsidiarity and proportionality, this right is to be operationalized pursuant to Rule 58 of the CoR Rules of Procedure. This rule establishes that 'an action or an action to intervene may be brought before the CJEU for an infringement of the subsidiarity principle by a legislative act on which the TFEU provides that the Committee be consulted'.<sup>81</sup> The President of the CoR, or the CoR Committee responsible for drawing up the draft opinion, may propose to bring an action before the CJEU when it considers that the principle of subsidiarity is infringed by a legislative act. If such a decision is adopted by majority of the votes within the CoR Plenary Session, the President of the CoR shall bring the action before the Court. If, on the other hand, the CoR Plenary Session does not come to an agreement within a delay of two months, as stipulated by the Treaty, the Bureau of the Committee of the Regions may decide, by a majority of the votes cast, on a proposal by the President or the CoR commission. When such a decision is adopted, the President shall bring the action on behalf of the Committee and shall ask the plenary assembly at its next session to decide whether to maintain the action.<sup>82</sup>

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78. Committee of the Regions, 184th meeting of the CoR's Bureau – Item 9a) CoR activities in 2017 report on the impact of CoR opinions, 3 July 2018.

79. W.E. Carroll, 21 *Federal Studies* (2011), p. 351.

80. In this regard see J. Schönlaue, 13 *Journal of Contemporary European Research* (2017), p. 1166-1184.

81. Committee of the Regions, Rules of Procedure on the basis of Article 306(2) TFEU, [2014] OJ L 65/41.

82. *Ibid.*

Such an additional power for the CoR is to be coordinated with the role of national parliaments, especially in the context of the early warning mechanism, which requests all national parliaments to submit reasoned opinions if they find that draft EU legislation is not in conformity with the principle of subsidiarity.<sup>83</sup> In this context, the Committee supported the position of 12 national parliaments that issued a yellow card against the ‘Monti II Regulation’, including the Commission’s Proposals for a regulation on common rules for the right to strike, arguing that the proposal could violate the principle of subsidiarity as it would have limited a right guaranteed as fundamental in many national constitutions.<sup>84</sup> This was even the first time in which the Committee considered to use its new competence under Article 263 TFEU and Article 8 of Protocol No. 2.<sup>85</sup> It is worth underscoring that such a coordinated approach has not been consistent. On another occasion,<sup>86</sup> in fact, the Committee did not support the national parliaments’ concerns as regards the alleged violation of the principle of subsidiarity in the context of the proposal for the establishment of the European Public Prosecutor Office.<sup>87</sup>

Nonetheless, as has been said, the CoR never made use of its right to request the Court to annul legislation that it considers in breach of the principle of subsidiarity, nor did it challenge the protection of its own prerogatives before the Court. Interestingly, references to the relevance of CoR opinions are also very scant in case law: whereas on a few occasions Advocate Generals refer to CoR reports in their opinions, the Court has never emphasized their added value. In particular, the Advocate General refers to opinions of the CoR when explaining the decision-making process of, for instance, the threshold of passenger movements on airports.<sup>88</sup> In any event, the Advocate General explicitly mentions that the creation of the CoR proves the increased importance of regions within the EU and sustained compliance with subsidiarity;<sup>89</sup> the Advocate General also makes reference to the CoR’s right to challenge legislation before the CJEU.<sup>90</sup> This emphasizes the crucial role that the CoR may play as regards the monitoring of subsidiarity in the context of the EU decision-making. Though the CJEU has, thus far, applied subsidiarity mostly in a procedural way and limited itself to the question of whether the EU legislative institutions have carried out a subsidiarity test and motivated legislation on that basis,<sup>91</sup> it is possible that this may change in the case of proceedings brought by the CoR.

83. See in this regard P. Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality* (Routledge, 2012).

84. 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. For further details see D. Fromage and V. Kreiling, ‘National Parliaments’ Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive’, 10 *European Journal of Legal Studies* (2017), p. 125-160.

85. CoR Opinion 332/2011, 15 February 2012, para 16.

86. CoR Draft Opinion 1778/2012, 31 January 2013.

87. European Commission, Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office, COM(2013) 534 final.

88. Opinion of Advocate General Mengozzi in Case C-176/09 *Grandy Duchy Luxembourg v. European Parliament and Council of the European Union*, EU:C:2010:776.

89. Opinion of Advocate General Trstenjak in Case C-428/07 *Mark Horvath v. Secretary of State for Environment, Food and Rural Affairs*, EU:C:2009:47, para. 94.

90. Opinion of Advocate General Wathelet in Case C-105/15 P to C-109/15 P *Mallis and Malli v. European Commission, ECB*, EU:C:2016:294, para. 64.

91. A. Von Bogdandy, ‘Founding Principles’, in A. Von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Hart Publishing, 2010), p. 37.

The fact that the CoR has never defended its own prerogatives before the supreme jurisdiction of the EU seems to contradict the institutional activism that has been a distinct feature of the CoR in the past years and that resulted, as highlighted by Schönlau, in the expansion of the Committee's prerogatives beyond mere consultation.<sup>92</sup> Nevertheless, the CoR's former President stated in 2009 that the right to initiate proceedings was an achievement in itself and that 'this new possibility will deepen [the] relations with other EU institutions and national parliaments.' He emphasized that this right will be exercised very carefully 'but with great conviction in cases where we feel it is necessary to defend the subsidiarity principle in EU law making.'<sup>93</sup>

This position was confirmed in an interview held on 30 May 2018 with Dr. Gsodam, Head of Cabinet of the Secretary-General of the CoR and expert in the EU Commission's task force on 'subsidiarity, proportionality and doing less more efficiently.'<sup>94</sup> Dr. Gsodam stressed that the CoR is indeed not eager to resort to the CJEU, as it considers itself as a political body – not a legal one – whose main interest is being part of the political negotiations within the EU.

This stance does not devalue this new competence because, as addressed above, the right to initiate proceedings before the CJEU is useful in itself, as a simple announcement of intention to recur to the CJEU can lead to changes in policy. But of course, as Dr. Gsodam emphasized, the CoR would not shy away from going to the CJEU if needed. Therefore, viewing the CoR as a political body, increasing the legitimacy of EU law-making by involving the regions closer in the legislative process remains the key function of the CoR. Its formal locus standi before the CJEU, then, should be seen as an important tool to ensure compliance as a last resort. Therefore, as confirmed by Dr. Gsodam, the CoR's access to the judiciary adds to and consolidates its existing competences as a watchdog of subsidiarity.

#### 4. Designing a more effective role for the Committee of the Regions

The fact that the CoR never decided to bring legislation that it considered in breach of the principle of subsidiarity before the CJEU raises the question of the Committee's effectiveness in contributing to better law-making by monitoring subsidiary. This question can be answered from two different perspectives which very much connect to the legitimacy and proximity theories explaining the establishment of the CoR.

On the one hand, it can be claimed that the establishment of the CoR is sufficient to contribute to enhancing the democratic legitimacy of the EU decision-making process, and thereby effectively ensuring/supervising the compliance with the principle of subsidiarity, by bringing the decision-making process to a lower level. This does not seem to be the case due to a variety of factors, but particularly due to the lack of adequate institutional awareness of the role and potential of the CoR as an institutional body.<sup>95</sup> Focusing on the relationship between the CoR and the EU legislative institutions, and especially the conditions under which the members of the European Parliament and the Council become aware of the opinions of the CoR, Hönnige and Panke highlighted that, while the two institutions often receive mandatory opinions, it is not compulsory for the members of the European Parliament and the Council to read them. This not only confirms the lack of

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92. J. Schönlau, 13 *Journal of Contemporary European Research* (2017), p. 1166-1184.

93. CoR Press Release, *Lisbon Treaty turns Committee of the Regions into subsidiarity watchdog*, 4 December 2009, COR/09/113.

94. Interview held on 30 May 2018.

95. T. Cole, 12 *Maastricht Journal of European and Comparative Law* (2005), p. 56.



awareness about the advisory role of the CoR and its potential for the quality of the EU legislation,<sup>96</sup> but it also impacts negatively the principle of territorial proximity. Regional and local authorities are only formally represented in the EU institutional landscape and their influence on the legislative process and on the monitoring of subsidiarity is very weak. Furthermore, there is an inversely proportional relationship between the Committee's institutional activism to acquire new powers and the minimal operational dynamism when it comes to using such powers, as illustrated by the CoR gaining access to the judiciary but never resorting to it.

Therefore, such a context calls into question the general configuration of the CoR and its constitutional relevance within the legal order of the EU. A specific strategy must be considered to cope with the challenge of being in a competitive environment to secure the awareness of the EU legislators. Such a strategy can be threefold and aimed at: 1) increasing awareness; 2) fostering democratic legitimacy; 3) pursuing more operational dynamism.

As for awareness, as Hönnige and Panke explain, delivering opinions upon the request of the legislative actors or based upon mandatory involvement is clearly a response-driven, reactive exercise. However, own-initiative opinions, participation in or organization of workshops, conferences, and seminars are proactive in nature – initiated by the actor in question and therefore often outreaching in character.<sup>97</sup> In general, the more proactive an actor becomes, the easier it is for the citizenry to gain awareness of its role. Accordingly, the chances that the CoR opinions are noticed increase considerably if the Committee is proactive in directly promoting its opinions, or indirectly by constructing a reputation as an authority or expert about policy regulation.<sup>98</sup> This means the CoR could raise the EU legislatures' awareness better by organizing workshops and attending hearings or conferences in addition to acting on formal procedures, rather than simply relying on the latter. The CoR could hereby compete with more specialized NGOs, lobbyists and organized interests for the European Parliament and the Council's attention.

The need for more awareness also connects with democratic legitimacy, which in turn contributes to better regulation. In this regard, the CoR can play a crucial role as a consultative body. As has been argued by scholars, in 1992 the need for wide consultation at a preparatory stage was recognized at European level as one of the key elements to ensure legislative quality.<sup>99</sup> Subsequently, in 1998 the European Commission clarified that the legislation takes into account the views of interested parties expressed in consultation.<sup>100</sup> Moreover, the Commission Communication to the European Council 'Legislate Less to Act Better: the Facts' emphasized 'the need to concentrate on policy priorities with strict application of the subsidiarity and proportionality principles (legislate less), the need for improved consultation procedures, and the need for clearer, simpler, and more accessible legislation (act better)'.<sup>101</sup> More recently, the focus shifted from legislative quality to better regulation. Legislation is seen as a tool for regulation and, since 2001, the Better Regulation Reports are limited to proportionality and subsidiarity.<sup>102</sup> This emphasis on

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96. C. Hönnige and D. Panke, 23 *Journal of European Public Policy* (2016).

97. C. Hönnige and D. Panke, 51(3) *Journal of Common Market Studies* (2013), p. 630.

98. *Ibid.*

99. H. Xanthaki, 'Emerging Trends in Legislation in Europe', in U. Karpen and H. Xanthaki, *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners* (Hart Publishing, 2017), p. 1.

100. *Ibid.*, p. 4.

101. European Commission Communication 'Legislate less to act better: the facts' COM(98) 345 final.

102. H. Xanthaki, in U. Karpen and H. Xanthaki, *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners*, p. 6.



the principle of subsidiarity only favours an increased involvement of the CoR as watchdog of such a principle.

Scrutiny over the application of the principle of subsidiarity will be also facilitated by involving the CoR in the Commission's 'Task Force on Subsidiarity and Proportionality and Doing Less More Efficiently' created on 14 November 2017.<sup>103</sup> This Task Force will make recommendations on how to better apply the principle of subsidiarity and find better ways to involve regional and local authorities in EU policy-making. The Task Force delivered its final report to the European Commission in July 2018. It concluded that a new way of working with the principle of subsidiarity is needed to allow national parliaments and regional and local authorities to make a more effective contribution to the EU law- and policy-making. This means that compliance with subsidiarity should be assessed in a more consistent way at all levels of government by means of a so-called 'model grid.' This can be seen as a subsidiarity checklist which includes the following questions:<sup>104</sup> 1) Can the Union act? What is the legal basis and competence of the Union's intended action?; 2) Why should the EU act (subsidiarity check)?; and 3) How should the EU act (proportionality check)?

As Dr. Gsodam stated, it is essential that every institution assesses the compliance with the principle of subsidiarity in the same manner. The model grid is a good step forward in structuring a better assessment of the principle. The CoR defined its role in the Task Force as a historically significant and consistent effort in the field of subsidiarity. This truly illustrates the Committee's role as a guardian of the principle of subsidiarity.<sup>105</sup> Moreover, the CoR emphasized that, together with the Commission and the European Parliament, it is directly shaping the future of Europe through the Task Force's work, since they were able to strongly advocate for a common approach to subsidiarity assessment, better understanding of the principle of subsidiarity, and a larger role for local and regional authorities in subsidiarity monitoring.<sup>106</sup>

Much remains to be done for the CoR to play a more effective role in line with its institutional activism. It seems that the power to challenge legislation before the CJEU has thus far been used merely as a factor of deterrence. The added value of this power may therefore be found on the pressure the Committee can exercise over the EU legislative institutions. However, provided that there is no obligation for the other EU institutions to actually take the CoR's opinions on board, it is also questionable whether such pressure is sufficient. In fact, the effectiveness of the Committee is based upon the willingness of other EU institutions to listen; nothing prevents the legislative bodies from simply ignoring the CoR's opinions. It is essential that the CoR considers playing more effectively its institutional role without utilizing its access to judiciary as a threat. Looking at the development of the European Parliament, its institutional transformation into a fully-fledged co-legislator is also the result of continuous wrestling with the Council in the battlefield of the Court of Justice to defend its own prerogatives.

Furthermore, as Cole argues, the CoR is mostly used as a source of useful information rather than a legitimate representative body, as its opinions only concern those areas in which the

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103. President of the European Commission, Decision C(2017)7810 of 14 November 2017 on the establishment of a Task Force on Subsidiarity, Proportionality and 'Doing Less More Efficiently'.

104. Report 'Active Subsidiarity, A New Way of Working', Task Force on Subsidiarity, Proportionality and 'Doing Less More Efficiently'.

105. Committee of the Regions, 184th meeting of the CoR's Bureau – Item 9a) CoR activities in 2017 report on the impact of CoR opinions, 3 July 2018.

106. *Ibid.*

representatives of the CoR have specific expertise.<sup>107</sup> A change in the CoR's operating procedures would perhaps increase the degree of informal involvement of its members in the creation of opinions when the Plenary Assembly of the CoR is granted the right to examine and discuss all proposed opinions before they are sent to a Commission.<sup>108</sup> Another possibility would be to increase the CoR's influence by expanding the number of areas in which the CoR is asked to adopt mandatory opinions. One could even think of a role for the CoR where it only adopts mandatory opinions. Ultimately, in the context of a future Treaty revision, a right of pre-initiative as the one established under Article 225 TFEU for the European Parliament can contribute to strengthen the institutional role of the Committee in enhancing democratic legitimacy.

## 5. Concluding remarks

The creation of the CoR was seen as a step forward in enhancing the legitimacy of the EU decision-making and the quality of the policy outcomes by protecting more effectively the interests of civil society and of local or regional communities. However, despite its institutional activism,<sup>109</sup> the CoR still remains an *organe paradoxal*.<sup>110</sup>

The *raison d'être* of the CoR was to move beyond symbolic participation into the legislative practice of EU law. This was already achieved with its very establishment, and its tendency to become a more purposeful institutional actor. However, as the role of the European Parliament itself has demonstrated throughout the whole European integration,<sup>111</sup> the usual correlation between the greater democratic legitimacy of an institution and its own influence is not a specific feature of the EU's constitutional order.<sup>112</sup>

In times of growing institutional complexity, accompanied by a considerable workload for the EU institutions, the CoR can still play a significant role especially as a watchdog of subsidiarity. Apart from acting as a 'control room' for subsidiarity, providing an indispensable source of information and help to improve the work of the EU institutions and the quality of the legislation, the CoR needs to boost its institutional role by taking advantage of all its powers and competences, including access to the judiciary when necessary.

The role of the CoR, in fact, goes beyond the representation of political interests or the submission of policy advice:<sup>113</sup> it can really bridge the legitimacy crisis of the EU with the need to improve the quality of EU legislation. By acting as a guardian of subsidiarity, the CoR is therefore called to play a role that has important legal consequences, namely contributing to keep legislation closer to citizens while explaining the importance of European integration.

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107. T. Cole, 12 *Maastricht Journal of European and Comparative Law* (2005), p. 58.

108. *Ibid.*, p. 70.

109. J. Schönlaue, 13 *Journal of Contemporary European Research* (2017), p. 1166-1184.

110. L. Guilloud, 532 *Revue du Marché commun et de l'Union Européenne* (2009), p. 582-586.

111. For further references in this regard see, *inter alia*, R. Corbett, 'The Evolving Roles of the European Parliament and of National Parliaments' in A. Biondi and P. Eeckhout (eds.), *EU Law after Lisbon* (OUP, 2012), p. 248-261. See further D. Fromage, 'Constitutional preferences and parliamentary reform: Explaining national parliaments' adaptation to European integration,' 56 *Journal of Common Market Studies* (2018), p. 198-199.

112. R. Sturm, in R. Dehousse and T. Christiansen (eds.), *What model for the Committee of the Regions?: Past Experiences and Future Perspectives*, p. 110.

113. W. Streeck and P. Schmitter, 'From National Corporatism to Transnational Pluralism: Organized Interests in the Single European Market', 19 *Politics and Society* (1991), p. 133-164.

This was confirmed by EU Commission President Delors in his opening speech at CoR's first plenary:

the task of the CoR is nothing less than to enhance the democratic legitimacy of the Union. That is why our Committee is so important: you will help to close the gap. Firstly, your involvement will bring the Union, perceived as being too distant, closer to local reality. You will be able to communicate local concerns and grass-roots reactions. The other side of the medal is that you will have the task of explaining Community policies to the people back at home.<sup>114</sup>

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114. J. Delors, President of the Commission at the inaugural plenary session of the Committee of the Regions in Brussels, 9 March 1994.