

A network diagram with several person icons connected by lines, overlaid on a blue background. Two of the icons are replaced by actual photographs of women.

What Does the Lisbon Treaty Change Regarding Subsidiarity within the EU Institutional Framework?

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13

The principle of subsidiarity refers in general to the choice of the most suitable and efficient level for taking policy action. The European Union associates subsidiarity with the way of taking decisions '*as closely as possible to the citizen*', as it is referred to in the EU treaties. Thus, ensuring the respect of subsidiarity within the EU legislative framework ensures that any EU action is justified when proposing draft legislative acts. The Lisbon Treaty establishes new mechanisms reinforcing subsidiarity control, both *ex ante* and *ex post* the EU legislative process, and by doing so, enhances mainly the role of the national parliaments (and to a lesser extent the regional parliaments) and the Committee of the Regions. But in the end, this is a way of ensuring legitimacy of the EU action as it is quite often questioned, especially in times of crisis. Years of practice will tell whether the words will join reality.

Introduction

The Lisbon Treaty reinforces provisions with regard to the subsidiarity principle and gives a new, important role to the national parliaments. This is especially highlighted by the new order of the protocols attached to the EU Treaties: Protocol No 1 on the role of national parliaments in the European Union (ex-Protocol No 9) and Protocol No 2 on the application of the principles of subsidiarity and proportionality (ex-Protocol No 30). Through the provisions of these two protocols and of other articles in the body text of the European treaties, a new approach of subsidiarity can be noted as well as a more inclusive definition of the principle since Article 5 TUE now refers explicitly to the regional and local levels. Moreover the Lisbon Treaty clearly establishes new mechanisms to control subsidiarity both *ex ante* and *ex post* the EU legislative process; it raises the profile of some actors in the European institutional arena, such as the national parliaments with the Early Warning System, and the Committee of the Regions with its new right to bring a case before the Court of Justice of the European Union (CJEU). These major novelties regarding subsidiarity, affect both the EU institutional framework and its procedural mechanisms, and may be considered as another step towards a European multilevel and multi-actor governance.

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A new inclusive approach of the subsidiarity principle for the European Union

With the Lisbon Treaty, an explicit reference has been made for the first time to the regional and local levels in the provision concerning the subsidiarity principle, which renders this new approach of subsidiarity more inclusive than it was within the former treaties. Indeed, Article 5 TEU states that *‘Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’*. The recognition of the role of the regional and local authorities in the European integration process through the new definition of the subsidiarity principle could also be examined with regard to the taking into account of the local and regional dimensions in new policy fields, these being climate change (Article 191 and 192 TFEU), energy (Article 194 TFEU) and civil protection (Article 196 TFEU).



This new inclusive approach of the subsidiarity principle is being developed and implemented by the European institutions. The recent EP Resolution¹ deserves special

mention as it emphasizes that *‘it is essential for scrutiny of the principle of subsidiarity to extend to the regional and local levels in the Member States’*. It calls on the national parliaments to consult the regional parliaments with legislative powers, and on the Commission to pay attention to the role of the latter. On the other hand the Subsidiarity Annual Report published by the Committee of the Regions and the REGPEX website² set up by the Committee assists the exchange of information and will make further improvements in the regional/local monitoring of subsidiarity.

Ex ante subsidiarity control: the early warning system

Under the Lisbon Treaty, the *ex ante* monitoring role of the national parliaments has been strengthened as regards control over the subsidiarity principle (but not the proportionality principle, which monitors that the draft legislative act does not go beyond what is necessary). Article 12 b. TEU states that *‘National parliaments shall contribute actively to the good functioning of the Union [...] by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality’*.

Article 7 of Protocol No 2 on the application of the principles of subsidiarity and proportionality describes the process of the so-called early warning system: *‘The European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, shall take account of the reasoned opinions issued by national parliaments or by a Chamber of a national parliament. Each national parliament shall have two votes, shared out on the basis of the national parliamentary system. In the case of a bicameral Parliamentary system, each of the two Chambers shall have one vote’*. This is also underlined in Article 8 of Protocol No 1 on the role of national parliaments in the European Union, *‘Where the national parliamentary system is not unicameral, Articles 1 to 7 shall apply to the component Chambers’*.

Still, according to Article 7 of Protocol No 2 on the application of the principles of subsidiarity and proportionality, a draft European legislative act must be reviewed within the eight-week time limit if one third – or one quarter in the area of freedom, security and justice – of the national parliaments oppose its subsidiarity arguments. The Commission, a group of Member States or the European institution from which the draft originates, may decide to maintain, amend or withdraw the draft and reasons must be given for each decision. This is

the 'yellow card' procedure. In 2010, a total of 211 opinions were received from national parliaments but only a small number of them (34 overall) raised subsidiarity concerns. The first yellow card case came more than three years after the entry into force of the Lisbon Treaty and is related to the EC 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 (the so-called 'Monti II-regulation') published on 21 March 2012³. On 30 May 2012, the College of the Commissioners confirmed that the one-third threshold of national parliaments/chambers from 12 Member States⁴ expressing concerns about subsidiarity infringement of the proposal had been reached. Facing the disagreement of national parliaments/chambers, trade unions and some national governments, the European Commission decided to withdraw its proposal on 11 September 2012. Yet, the spokesman of László Andor European Commissioner for Employment, Social Affairs and Inclusion, indicated that this decision was not based on the yellow card, for which it is not justified, but because the Commission knew it did not have enough political support from the European Parliament and the Council of Ministers (requiring unanimity for this EC proposal)⁵. In any case, after some doubt concerning the efficiency of such a 'heavy' mechanism to be set for each national parliament/chamber, this is the proof that the early warning system is raising awareness within national parliaments of the importance of adequate scrutiny of legislative proposals, and is essential for national parliaments to act as a counterbalance in the EU legislative process.

Furthermore, the Lisbon Treaty – contrary to the defunct Treaty establishing a Constitution for Europe (2003) – establishes another procedure called the 'orange card' which applies only to the draft European legislative acts falling under the ordinary legislative procedure (the former co-decision procedure). If more than half of the national parliaments oppose such an act on the grounds of subsidiarity arguments, the latter must be reviewed. The European Commission may then decide to maintain, amend or withdraw the proposal. If the European Commission decides to maintain its proposal, then it has to provide a reasoned opinion justifying why the Commission considers the proposal to be in compliance with the subsidiarity principle. On the basis of this reasoned opinion, and that of the national parliaments, the European legislator, by a majority of 55 per cent of the members of the Council or a majority of the votes cast in the European Parliament, shall decide whether or not to block the EC proposal.

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The provisions related to subsidiarity check brought about by the Lisbon Treaty provide national parliaments with incentives to consider draft European legislative acts at an early stage of the EU law-making process. The thresholds for the 'yellow and orange cards' have underscored the need for greater inter-parliamentary cooperation, e.g. by exchanging respective parliaments' contributions, in order to establish a common interpretation of subsidiarity in Europe. The IPEX website (Inter parliamentary EU Information Exchange)⁶ constitutes the principal source of information on the state of play of the subsidiarity check in other national parliaments. Bilateral contacts and intensive exchange of information through their permanent representatives in Brussels is also a common practice among national parliaments.

According to Article 6 of Protocol No 2 on the application of the principles of subsidiarity and proportionality, *'It will be for each national parliament or each Chamber of a national parliament to consult, where appropriate, regional parliaments with legislative powers'*. Most of the regional parliaments automatically receive all legislative proposals from the central level, thus different filtering systems have been established by some national/regional parliaments. Nevertheless, efficient involvement of the regional parliaments in subsidiarity checks can still be improved, partly due to the ongoing revisions of the existing procedures to do so in most of the countries with regional parliaments⁷. Moreover, it should also be highlighted that the resources and time for conducting subsidiarity checks for some regional parliaments is scarce, thereby expressing the

need to better evaluate the importance of the EU draft legislative proposals and be selective before embarking in a detailed subsidiarity scrutiny exercise. The European Parliament has recently called for an analysis of the time scales laid down in the treaties, to determine whether or not they are sufficient.

Due to the former general lack of involvement of regional parliaments in *ex ante* subsidiarity control, Article 6 of Protocol No 2 certainly aims to enhance their role and pushes them to be part of a new process defining the respective roles of the new key actors of the EU legislative process. The Lisbon Treaty creates awareness of the subsidiarity principle within the parliamentary systems of the EU, facilitating the establishment of a culture of European debate, which was rather absent until now in most regional assemblies. The early warning system (EWS) therefore raises awareness about the importance for national and regional parliaments to act as a counterbalance in the EU legislative process. If building upon the lessons learnt, the actors involved will open up a new path towards the efficient use of the opportunities provided by the EWS. Indeed, making use of the possibilities to

establish an early multilevel dialogue to formulate EU policy/legislation with other parliaments (regional and national), as well as with the European Commission, goes beyond the previous existing practice of legislative/executive scrutiny within the internal borders.

Ex post subsidiarity control: bringing a case to the CJEU for infringement

National parliaments also have the possibility to participate in an *ex post* subsidiarity control, as the Lisbon Treaty provides that an action might be brought to the CJEU by a Member State in the name of its parliament or one of its Chambers if it is a bicameral parliamentary system, and if the latter considers that a legislative act does not respect the subsidiarity principle. Article 8 of Protocol No 2 on the application of the principles of subsidiarity and proportionality states that *'The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national parliament or a Chamber thereof.'*

Moreover, the Lisbon Treaty brings about one of the biggest novelties concerning the Committee of the Regions since its creation by the Maastricht Treaty: the right to bring a case before the Court of Justice of the European Union for the annulment of an EU legislative act, in two cases: to protect its own prerogatives (Article 263 TFEU) and to ensure respect of the subsidiarity principle regarding legislative acts

for the adoption of which the EU treaties provide its consultation (Article 8 of the Protocol No 2 on the application of the principles of subsidiarity and proportionality). These new provisions are proof that the complaints expressed in 1995 by the CoR about how difficult it is to bring a case before the Court for any infringement of the subsidiarity principle by an EU institution, have finally been partially heard: *'In the case of annulment proceedings, Community procedures confer on the Commission, Council and Member States the general right to bring actions, whereas the Parliament [this is no longer the case] and European Central Bank may only bring actions to protect their prerogatives. Other natural or legal persons [thereby including the CoR at that time] have to demonstrate that a legal act affects them directly and individually [...]. The Committee of the Regions and its constituent members are in an extremely weak position in respect of this system. The nature of the subsidiarity principle coupled with the lack of direct effect make it impossible to appeal against an act or a failure to act of a Union institution in breach of the above principle, insofar as the plaintiff has to provide proof that he has been directly and individually affected. Consequently, the Committee and its constituent members find themselves in practice in a situation where they are unable to defend themselves – something which is contrary to the spirit of Community law'*⁸.

The former CoR President, Luc Van den Brande, declared a few months after the entry into force of the Lisbon Treaty: *'We see this new right to challenge EU laws in court more as a deterrent than an actual threat. We are convinced that this new possibility will deepen our relations with other EU institutions and national parliaments. We will exercise this right with caution, but with great conviction in cases where we feel it is necessary to defend the subsidiarity principle in EU law-making. However, we hope that swift implementation of all Lisbon Treaty provisions, which reinforce subsidiarity already in the pre-legislative stage and during the adoption of new EU laws, will ensure that it never comes to that'*⁹. In May 2012, the Bureau of the CoR revised the CoR strategy about subsidiarity monitoring. It specified that *'the CoR has already adopted rules for taking the appropriate judicial steps. Such actions may be proposed to the Plenary Assembly either by the President or by the competent commission acting in accordance with Rules 53. The Legal Service has prepared a Handbook which describes a 'modus operandi' that should be followed in the event of bringing an action before the Court of Justice on grounds of subsidiarity'*. It also reiterated its position highlighting that *'any potential action before the Court of Justice should be understood only as a last resort and the final step of a process'*¹⁰.

The Lisbon Treaty's provisions can be considered as an important step for the Committee of the Regions regarding its place in the European institutional arena. Its new, important right to bring a case before the CJEU will reinforce

its role at an early stage of the legislative process, firstly by ensuring that it is consulted by the European institutions when the EU treaties provide it, and secondly, by scrutinising EU legislative proposals and their compliance with the subsidiarity principle.

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Conclusion

The abovementioned Lisbon Treaty provisions strengthen the national parliaments' role and may also constitute a substantial breakthrough for regional parliaments with legislative powers if they become truly conscious of the importance of adequate scrutiny of legislative proposals. These novelties are the result of the political will to stimulate participation of national parliaments in EU matters and to bring Europe closer to its citizens.

Moreover, regional and local authorities across Europe will witness important progress as a result of the Lisbon Treaty, towards the recognition of multi-governance in the European Union. A more inclusive Europe seems to be favoured: better involvement of regional and local expertise in the quest for a more cohesive Europe together with a reinforced principle of subsidiarity and an increasing role granted to the national parliaments. Many concrete novelties ensure that EU governance will evolve into more advanced multi-level forms; the most general ones are of utmost interest to local and regional authorities as they could change the way of working and cooperating with the other levels of government participating in the European decision-making process.

Yet, one should bear in mind that Protocols No 1 on the role of the national parliaments and No 2 on the subsidiarity and proportionality principles apply only to the EU legislative acts, but not to the EU non-legislative acts (i.e. the delegated and implementing acts). Therefore, the determination of an EU legislative act/non-legislative act has an important impact on the right of recourse to the control mechanisms facilitated by the Lisbon Treaty's provisions regarding the national authorities and their regional and local entities.

Notes

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- ¹ European Parliament Resolution of 13 September 2012 on the 18th report on Better legislation – Application of the principles of subsidiarity and proportionality, 2010.
- ² <http://extranet.cor.europa.eu/subsidiarity/regpex/Pages/default.aspx>. REGPEX is a tool set up by the Committee of the Regions for the exchange of information among regional parliaments within the Early Warning System, mirroring the IPEX website for national parliaments.
- ³ COM (2012)130 final.
- ⁴ Belgium, Denmark, France, Finland, Latvia, Luxembourg, Malta, Poland, Portugal, Sweden, the United Kingdom and the Netherlands.
- ⁵ *Bulletin Quotidien Europe* No 10687 of Thursday 13 September 2012, p. 10.
- ⁶ See www.ipex.eu.
- ⁷ For further information on the procedures, please consult the Committee of the Regions' study on 'The role of regional Parliaments in the context of subsidiarity analysis within the Early Warning System of the Lisbon Treaty', (2011) published on <http://portal.cor.europa.eu/subsidiarity/news/Pages/StudyonRegionalParliamentsandtheEarlyWarningSystem.aspx> and written by the European Institute of Public Administration (EIPA, Barcelona), (Authors: Vara Arribas, G. and D. Bourdin). It does not represent the official views of the Committee of the Regions.
- ⁸ CdR 136/95, Opinion of the Committee of the Regions on the 'Revision of the Treaty on European Union and of the Treaty establishing the European Community', Special Commission for Institutional Affairs, 21 April 1995, Rapporteur: Mr Pujol i Soley.
- ⁹ See Article 'Regions hope to wield new powers with Lisbon Treaty', published on <http://www.euractiv.com/regional-policy/regions-hope-wield-new-powers-li-news-257928>, 10 June 2010.
- ¹⁰ R/CdR 606/2012 item 7a) rev. 1 EN/o, see point 2.3.2.