

National Parliaments and the Principle of Subsidiarity - Legal Options and Practical Limits

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At the fourth joint meeting on the future of Europe of members of national parliaments and the European Parliament, on 4 and 5 December 2007, Mr. Jaime Gama, the Speaker of the Portuguese Assembleia da Republica, in its summing up of the second day's debates said that "national parliaments are the great winners of the new treaty". The chairman of the Convention on the future of Europe, Valéry Giscard d'Estaing exposed another vision in June 2003 on the draft constitutional treaty. For him, the great winner was the European Parliament. One can ask whether the differences between the Lisbon Treaty and the failed Constitutional Treaty justify these two diverging appreciations.

The declaration of President Giscard d'Estaing was based on the increased legislative role recognised to the European Parliament in the draft produced by the Convention. The co-decision procedure between the E.P. and the Council was to be the ordinary legislative procedure and this procedure was introduced in an important number of cases. On the other hand, Giscard who had promoted in vain the traditional French idea of creating a "Congress" composed by national as well as European MPs in order to counterbalance the impact of the E.P could not see in the results of the works of the Convention a significant victory for national parliaments.

The judgment of Mr. Gama reflects the latent climate of rivalry in the relationship between national and European Parliaments, although the official language underlines that there is no competition between both and that "they have different roles to play, but with the common objective of bringing the EU closer to citizens"¹

But Mr. Gama was right in underlining that the role of national parliaments has been growing through successive revisions of the treaty, from the two declarations annexed to the Maastricht Treaty to the Amsterdam Protocol on the role of national parliaments in the European Union to the Rome Constitutional Treaty of 2004, with the new Protocol on the application of the principles of subsidiarity and proportionality up to the Lisbon Treaty.

The Lisbon Treaty includes some interesting and undoubtedly important new elements, both symbolic and substantial.

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1 We quote the report of Mr. Amaral, also a Portuguese MP, at the meeting of 4-5 December 2007, following the report of the Press Service of the EP.

National Parliaments and the Principle of Subsidiarity

On the symbolic side, there is an important innovation. Title II on “*Democratic principles*” of the modified TEU, includes a new article 12 TEU* on the contribution of national parliaments to the good functioning of the Union:

“National Parliaments contribute actively to the good functioning of the Union:

(a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;

(b) 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;

(c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 61 C of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust’s activities in accordance with Articles 69 G and 69 D of that Treaty;

(d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;

(f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.”

This provision has clearly a purely indicative and thus no normative value². It includes a summing up of the different ways of intervention of national parliaments in the context of EU affairs. What is remarkable is the presence of such a provision in parallel with the role of the EU institutions and the citizens in Article 11 TEU*. In the treaty signed in Rome in October 2004, the only reference to national parliaments in Title VI on “The Democratic Life of the Union” could be found in a provision on “Representative Democracy”. It mentioned the democratic responsibilities of the heads of State or of Government, or governments, composing respectively the European Council and the Council, either to their national parliaments, or to their citizens.

2 This provision is one of the few if not the only one, where the French verbal form of “indicative present” appears in English not as a “shall” prescription. It was not so in the draft submitted to the UK Chambers of Parliament (the text was negotiated in French) and raised a constitutional debate: the new European treaty would impose obligations to the British Parliament. So the UK Government asked for clarification of the wording. See in particular, House of Commons, European Scrutiny Committee, European Union Intergovernmental Conference, 35th Report of Session 2006-2007, HC1014, N°70. The Commons raised this sensitive point in COSAC arguing “these provisions appear to impose legal duties on national parliaments and could be interpreted as constraining the ability of national parliaments to participate to EU affairs.” See COSAC report, quoted in note 43 below, p.24. The same debate was held at the House of Lords.

Article 10, paragraph 2 TEU* includes an identical provision. Articles 10 and 12 appear as complementary, the first one relates to the prerogatives of national parliaments on the Executive branch and the second one to the involvement of these parliaments in EU affairs. On the one hand, the accent is on the control of the Governments as members of the (European) Council, especially in the elaboration of EU legislation, on the other on the “active contribution” of national parliaments to Union’s affairs.

On the substance, changes could seem less spectacular: the Lisbon Treaty provides for a complement to the early warning system in the control of the application of the principle of subsidiarity and it introduces in family law with cross-border implications (Article 81, paragraph 3, subparagraph 3 TFEU*), a new possibility for national parliaments to veto the use of a so-called passerelle procedure.

We will concentrate on the prospective role of national parliaments on the application of the principle of subsidiarity while keeping in mind in this analysis the new framework in which possibly this intervention will take place. Could we see national parliaments as “a specific new ‘organ’ of the EU consisting of 27 legislatures which are in turn composed of their unicameral, bicameral or multicameral (e.g. Belgium) components parts” to quote a formulation used by a researcher³? Or should we consider that the new early alarm system is “an inherently defensive instrument... not providing national parliaments with a proactive role”, because they will find themselves overwhelmed by the complex task of forging a sufficiently broad alliance with other parliaments to block EU legislation, as it is expressed in another view⁴? In the literature, there are rather sceptical analyses putting in doubt the practical importance of the new powers on subsidiarity given to national parliaments for a number of reasons but insisting at the same time that the procedure created by the Protocol on the application of the principles of subsidiarity and proportionality is not the only way for national parliaments to make their voice heard in the Union. They see in this potential influence the indication of or the way to a shift of paradigm towards a kind of polycentric Union, underlining the risk of a kind of monopolization of the attention on the control of subsidiarity⁵. Others see in the new procedure a way of strengthening both the input and output legitimacy of the EU⁶.

3 “A new role for national parliaments in the EU “– D. Jancic, University of Utrecht, Letter to EurActiv, 17 December 2007.

4 EurActiv, 14 December 2007 quoting Sebastian Kurpas of CEPS (Brussels).

5 See Besselink, Shifts in Governance: National Parliaments and Their Governments Involvement in European Union Decision-Making, in: Barrett (ed.), National Parliaments and the European Union: The Constitutional Challenge for the Oreichtas and other Member States, indicated as forthcoming, 2006 (consulted on the web); of the same author: National Parliaments in the EU’s Composite Constitution: A Plea for a Shift in Paradigm, in: Kiiver (ed.), National and Regional Parliaments in the European Constitutional Order, 2006, 117-131; Tans, De oranje kaart: een nieuwe rol voor nationale parlementen?, SEW, 2007, 442-446; Kiiver, Implementing the Early Warning Mechanism for Subsidiarity: National Parliaments

We will in a first part analyze the new mechanism of early warning and then in a second part, make some comments, with the necessary caveat that it is always adventurous to make conjectures on new constitutional provisions that have not been put to test in the practice.

I. The mechanism of early warning.

The Lisbon Treaty takes over the early warning system to the Constitutional Treaty, adding a new element to it of which we will have to evaluate the importance. The main change concerning the principle of subsidiarity introduced by the Constitution was not one of substance⁷, but one of procedure and it implicates national parliaments. After a Protocol annexed to the Amsterdam Treaty mostly on substance, the new Protocol includes quasi exclusively the elements of a procedure.

It is not surprising that both Working Groups of the Convention in charge respectively of the role of national parliaments in the EU and of the principle of subsidiarity have agreed on the allocation of responsibility to national parliaments in this field⁸. There was a clear mention of this perspective in the so-called Laeken Declaration adopted by the European Council in December 2001 and including the mandate for the Convention in charge of preparing the new treaty. Declaration N°23

Beyond the Constitutional Treaty, Conference Paper, Fifty Years of Interparliamentary Cooperation, Berlin, 13 June 2007.

- 6 See a reaction on the Convention's draft by *Rizzuto*, The New Role of National Parliaments in the European Union, The Federal Trust, Online Paper 19/03, June 2003, 10; for a decisively optimistic view on the provision of subsidiarity in the Constitutional Treaty, and especially on the future role of national parliaments, see *Flynn*, Reformed Subsidiarity in the Constitution for Europe, Can it deliver to expectations?, IEAP, W.P. 2005/W/07. A very in-depth analysis is given by *Cooper*, The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU, JCMS, 2006, 281-304.
- 7 Although one should mention that Article 5 of the modified TEU brings some interesting elements such as the better link that is made and the differences of functions between the three principles of conferment of power, subsidiarity and proportionality, the first the 'delimitation' of competences and the two others the 'exercise' of competences. On the other hand, the definition given by the Treaty of domain of exclusive competences, to which the subsidiarity principle does not apply is of great help in order to put an end to controversies at this regard. Finally, the regional and local factor appears as a criterion to be taken into consideration when evaluating the compatibility of an act with the principle of subsidiarity. See on these points, the paper by Brendan *Flynn*, note 6 supra.
- 8 Referring to a source of the European Parliament (its White Paper on the 1996 IGC), *Rittberger*, The Politics of democratic Legitimation in the European Union, Nuffield College Working Papers in Politics, Oxford, 2004-W4, March 6 2004, 26, note (2) mentions that Alain Juppé, then French Foreign Affairs Minister expressed his hope in a speech at the Assemblée nationale on 3 February 1994, that national parliaments would be empowered to challenge EU legislation on the grounds that the subsidiarity was violated.

annexed to the Treaty of Nice already mentioned the role of national parliaments as one of the priority points for a future reform.

If a consensus has relatively easily been achieved on the new mechanism it is due to various factors, not always going into the same direction. First, it should be remembered that in the literature as well as in political circles, a lot of suggestions⁹ have been made concerning the best way to control the respect of the subsidiarity principle, considered by the ones as a mostly political principle and by others as requiring a better judicial control than the one exercised by the Court of Justice. So, if the European Parliament had expressed its favour for a preventive control by the Court of Justice, some were in favour of the creation of a special Court in charge of competence control or of a special Chamber of the Court on subsidiarity. Others, stressing the mainly political feature of the principle, proposed to confer this responsibility to a committee, composed by wise men or by national parliamentarians, to be consulted by the Council¹⁰. Some proposed the appointment of a “Mr. “ or “Mrs.” Subsidiarity who could be, for example, a vice-president of the Commission.

Some other proposals were not necessarily focused on the control of subsidiarity, but more so on the necessity of a second (third) chamber, as provided in the draft statute of the Political Community of 1953. The suggested creation of a “Congress of the Peoples of Europe” as provided in Article 19 of the first draft of “structure” for the Constitution of Europe (the so-called ‘skeleton’), presented by the Presidium of the Convention on October 2002, a proposal supported heartedly by President Giscard and already formulated in the past by President Mitterrand and other socialist leaders in France¹¹, was one of the answers to this preoccupation. For other, the second (third) chamber should be entirely composed by members of national and regional parliaments, or result from the transformation of the Committee of the regions.

In this context of conflicting ideas of which many included an institutional creation in order to increase the role of national parliaments, the early warning system appeared as a solution of compromise. Its merits were double: finding a technical response to the question of the subsidiarity control and increasing the role of national parliaments, without further complicating the institutional structure and burdening the legislative procedure¹². The need of better involving national parliaments in the EU action was an idea that has received an increasing support since the Maastricht Treaty as we have noticed. It has been explained from a theoretical standpoint

9 For a synthesis of these proposals, see *von Bogdandy/Bast*, The European Union’s vertical order of competences: the current law and proposals for its reform, *CMLRev*, 2002, 237-268 (260-261).

10 See *Pernice*, *Kompetenzabgrenzung im Europäischen Verfassungsverbund*, Öffentliche Vorlesungen, Universität Humboldt, Berlin, 6. Juli 2000. Prof. Pernice proposed the creation of a consultative Parliamentary committee on subsidiarity.

11 See the references going back to the pre-Maastricht debate in *Rittberger*, note 8 supra, 22.

12 On the twin goals of the early warning system, see *Cooper*, note 6 supra, 290-291.

as an application of a compensation process¹³: the national parliaments are the institutions having lost more from the European integration. They are not involved in the adoption of acts they are asked to implement with a small to inexistent margin of discretion¹⁴. The process of “incorporation” of directives was the revelator of the loss of competences for national parliaments. The row in the French Parliament when the VAT directive was to be implemented by a French Statute that has only more or less to copy the text of the directive in French law, causes at medium term the introduction in the French Constitution of the obligation for the Government to send proposals of legislative acts to the Parliament. The French Parliament has got the right to adopt a resolution on a proposal, an amendment adopted, as article 88-4 of the Constitution of 1958, together with the ratification of the Maastricht Treaty. The question of compliance with the principle of subsidiarity that consists in determining if “the objectives of the proposed action cannot be sufficiently achieved by Member States’ action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community” (Amsterdam Protocol, article 5) seemed to be one that could be of interest for national parliaments. Furthermore, there was a perceived need to associate more closely public opinion, a concern expressed by the IGC in Nice and reflected in the declaration N°23. Strengthening the influence of national parliaments appeared to be, together with the increase of transparency of the decision-making process, a way of increasing the legitimacy of the Union and so alleviating its alleged democratic deficit¹⁵. And, last but not least, national parliaments in the Convention of 2002-2003 were better represented than the EP. Their voice has been heard. If the early warning system was (marginally) developed by the 2007 IGC, despite the intransparent and purely intergovernmental negotiating process, it is due to the fact that this point was one of the “red lines” of the Netherlands, one of the two countries where the citizens said no by referendum to the Constitutional Treaty.

Our intention in these short comments is not to analyse in details the Protocol on the application of the principles of subsidiarity and proportionality. Studies we have

13 See *Cartabia*, Prospects for national parliaments in EU affairs, in: *Amato/Bribosia/de Witte* (eds.), *Genèse et destinée de la Constitution européenne*, 2007, 1081-1103 (1096); *Tans*, note 5 supra, 444; without using the term “compensation”; *Cooper* expresses the same idea, note 6 supra, 292.

14 The sense of “frustration” of national parliaments go back to well before the Single European Act, as *Rittberger*, note 8 supra, 28 seems to suggest. But, of course, the increase in the powers of the E.P. in legislative matters has played a role in incrementing this reflex. Both the primacy of the national executive branch of power in European affairs and the increased role of the European Parliament contributed to create the sense of “frustration”. See also the developments in *Sleath*, The role of national parliaments in European affairs, in: *Amato/Bribosia/de Witte*, note 13 supra, 545-564, 546 and the reference to the important work done by *Mauer* (Stiftung Europäische Politik, Berlin) alone or with *Wessels* on national parliaments.

15 On this, among others, *Rittberger*, note 8 supra, 27.

Louis

quoted before and others¹⁶ have proposed in depth analysis of the provisions of the Constitutional Treaty and the so-called “orange card” mechanism added by the Lisbon Treaty does not deserve long explanations. But we will have to start with Protocol N°1 on the role of national parliaments in the European Union that substituted and substantially modified the Amsterdam Protocol N° 13 with the same title.

The two Protocols on the role of national parliaments and on subsidiarity establish a dual system.

The first one organises the *general transmission* to national parliaments *at the same time*¹⁷ as to the European Parliament and the Council, of both so-called “*consultation documents*” (green and white papers as well as the annual legislative programme of the Commission and other “instruments of legislative planning or policy”) and “*draft legislative acts*” (articles 1 and 2) and provides the possibility for unlimited scrutiny. Draft legislative acts are directly transmitted to national parliaments by the responsible authority (the Commission and in the very specific cases provided by the Treaty, the European Parliament, a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank). Transmission was left to the respective governments under the Amsterdam Protocol. The agenda and the outcome of meetings of the Council “including the minutes of meetings where the Council is deliberating on draft legislative acts” (article 5) are also forwarded to national parliaments. Another progress in terms of transparency: “the Court of Auditors shall forward its annual reports to national parliaments, for information, at the same time as to the European Parliament and the Council” (Article 7). Article 3 makes the link with the Protocol on subsidiarity. Article 4 takes over and completes articles 2 and 3 of the Amsterdam Protocol. It extends to eight weeks (in lieu of six in the Constitutional Treaty) the period that shall elapse between a draft legislative act is being made available to national parliaments in the official languages of the Union and the date when it is placed on the provisional agenda of the Council for its adoption or for the adoption of a position under the legislative procedure. A ten-day period shall elapse between the placing of a draft legislative act on the provisional agenda of the Council and the adoption of a position. Exceptions are possible in cases of urgency.

Article 6 provides for the information of national parliaments at least six months in advance on the initiatives of the European Council concerning the use of simplified revision procedures under article 48 (7) TEU*.

Articles 9 and 10 are related to interparliamentary cooperation between national parliaments and between them and national parliaments. We will come back on this.

Second, the Protocol on the *application of the principles of subsidiarity and proportionality* essentially regards the application by legislative acts of these principles

¹⁶ See in particular, *Sleath*, note 14 *supra*.

¹⁷ Italics are ours. The Amsterdam Protocol N° 13 provides for a “rapid” transmission. Hence, the new wording constitutes a progress for national parliaments.

and mostly, the *control of compliance* with the first one. Its originality consists in the introduction of the early warning system in the hands of national parliaments. Other provisions are article 1 on the obligation for each institution to ensure the respect of the two principles, article 2 on the obligation of large consultations, article 5 on the statement that will be joined to the proposals and article 9 on the annual report on the application of Article 5 TEU to be also submitted, and not just forwarded, to national parliaments.

Articles 3 and 4 have the same content as article 2 of the first Protocol. They define the concept of legislative acts and provide for their transmission to national parliaments. The limitation to legislative acts has been criticised because it excludes some regulations that are not adopted by a legislative procedure as defined by the treaty, and the acts of implementation, in particular those adopted under the comitology procedure.¹⁸

Article 5 bears on the requirement and the content of a statement (“*fiche*”) “making it possible to appraise compliance with the principles of subsidiarity and proportionality”. The statement will contain an assessment of the proposal’s financial impact and if it is a directive proposal, “its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation.” Qualitative as well as, wherever possible, quantitative indicators will substantiate the reasons for concluding that a Union objective can better be achieved at Union level. The last requirement relates specifically to the proportionality requirement: “Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional and local authorities, economic operators and citizens, to be minimised and commensurate with the objectives to be achieved.” The necessity of a “statement” was already included in article 4 of the Amsterdam Protocol that required a “*Déclaration*” (in English, a “statement”) but the content has been reworked. The elements included in article 5 are picked up in the Amsterdam Protocol, except for a somewhat greater focus on regional authorities, but the 1997 Protocol was much more elaborate and more balanced as far as the concept of subsidiarity is concerned. We will come back on this later on.

If the statement and more generally article 5 are related to both subsidiarity and proportionality, the rest of the Protocol is limited to the respect of the subsidiarity principle. Indeed, despite the requests of national parliaments for a more compre-

18 See *Bribosia*, La répartition des compétences entre l’Union et ses Etats membres, in: *Dony/Bribosia* (eds.), *Commentaire de la Constitution de l’Union européenne*, 2005, 47-82 (74), who criticizes the exclusion of some regulations and “National Parliaments and the Subsidiarity Principle”, Joint Study CEPS, EGMONT, EPC, November 2007, 83-88 (84) for a more general criticism of this limitation. We find that the extension of the early warning system to acts adopted under the comitology procedure would put at risk the advantages in flexibility and rapidity inherent to these procedures, now under the tutorship of both the EP and the Council.

hensive possibility of control¹⁹, their intervention under the early warning system cannot, in principle, exceed the question of compliance with this principle.

The mechanism provided by articles 6 and 7, includes the possibility for each national parliament or each chamber of national parliaments, in case of bicameral systems²⁰, to send a “reasoned opinion “stating why it considers that the draft in question does not comply with the principle of subsidiarity”²¹. It will be for national parliament to consult, “if appropriate” (“*le cas échéant*”), regional parliaments with legislative powers²². Belgium made a declaration at this respect recording that the Belgian parliamentary system includes national (federal) chambers as well as regional ones. The authors of the draft legislative acts, i.e. most frequently the Commission, “shall *take into account* of the reasoned opinions issued by national parliaments or by a chamber of national parliaments” (italics ours). Each parliament has two votes. In case of a bicameral system, each chamber shall have one vote.

When reasoned opinions represent at least one third of the votes allocated to national parliaments (i.e. in a Union of 27, 18 votes), “the draft *must be reviewed*”. The threshold shall be a quarter (i.e. in a Union of 27, 14 votes) in case of a draft legislative act submitted on the basis of article 61.1 of the TFUE on the area of freedom, security and justice. But the authors of the legislative initiative are still not bound by the reasoned opinions. They can decide “*to maintain, amend or withdraw*” the act. Reasons must be given for this decision.

Because the opinions are not binding, the mechanism is called, by analogy with football jargon, a “yellow” and not a “red” card system. Some members of the Con-

19 Some have seen in this limitation the risk that the review by national parliaments would be reduced to a crude “thumbs-up” or “thumbs down”. *Cooper*, note 6 supra, 302. This remark ignores the content of proportionality necessarily included in the subsidiarity test under article 5 of the Treaty. We will come back on this argument.

20 In a report of the president of the French Senate Delegation for the EU, Mr. Hubert Haenel, on “Dialogue avec la Commission européenne sur le principe de subsidiarité”, *Les Rapports du Sénat*, N°88, 2007-2008, 21 November 2007, p. 16, the following figures are given: there are in the Union, 13 bicameral parliaments and 14 unicameral parliaments.

21 As recalled by *Cooper*, note 6 supra, p. 289, in a draft version of the protocol, national parliaments would have had the possibility to issue reasoned opinions when the conciliation committee in the codecision procedure would meet, if the thought that either the Council’s position or the amendments of the EP are not in compliance with the principle of subsidiarity. This “two stage approach” was dropped because it was found that it made the already heavy procedure too complicated but the Council’s position and the amendments of the EP shall be forwarded to national parliaments (article 4, last subparagraph).

22 *Pérez Trems*, *La incidencia de la Constitución Europea en la organización territorial del Estado*, in: *Montero/Sola* (eds.), *La Constitución de la Unión Europea*, Centro de Estudios Políticos y Constitucionales, 2005, 199-215 (212) points out that “this rule, coherently with the principle of institutional autonomy, cannot be interpreted as an “enabling clause” that would leave to national parliaments the discretion of deciding to hear regional parliaments, but as a “remittance”, in a way that such forwarding can consist, if appropriate, in a constitutional obligation.”.

vention had preferred the establishment of a red card system but this idea was discarded essentially in order to avoid infringing the monopoly of initiative of the Commission that the Constitutional Treaty maintained as a principle. The Lisbon Treaty, as before the Constitutional Treaty, preserves the constitutional prerogatives of the Commission and, in particular, the principle of the necessity for the Council to be unanimous in order to amend a proposal of the Commission.

The Lisbon Treaty takes over the system we have described but added as far as the legislative proposals of the Commission are concerned, a mechanism that immediately received the nickname of “orange card”. This time the analogy is made with traffic lights but the denomination also refers to the Dutch origin of the complementary mechanism. What is important in legal terms is that by themselves the opinions of national parliaments are not sufficient in order to block the proposal.

Paragraph 3 of Article 7 includes this additional guarantee for the respect of subsidiarity provided in the mandate for the IGC 2007. It only relates to acts to be adopted under the “ordinary legislative procedure”, i.e. by codecision of both the European Parliament and the Council. It applies when reasoned opinions on the non-compliance with the principle of subsidiarity represents at least a *simple majority* of the votes of national parliaments (i.e., in a Union at 27, 28 votes). In this case, the Commission can still decide to “*maintain, amend or withdraw*” the proposal. If it chooses to maintain its text, it has ‘in a reasoned opinion, to justify why it considers that the proposal complies with the principle of subsidiarity. This reasoned opinion as well as the reasoned opinions of national parliaments will have to be submitted to the Union legislator, “for consideration in the procedure” and we quote also literally the remaining subparagraphs of article 7, paragraph 3:

“(a) before concluding the first reading, the legislator (the European Parliament and the Council) shall consider whether the legislative proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national Parliaments as well as the reasoned opinion of the Commission;

(b) if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration.”

This complementary mechanism is a compromise between those among the Member States that were happy with the system as it was in the Constitutional Treaty and those who had preferred to see a “red card” mechanism inserted in the Protocol. It has been said that this novelty did not increase the influence of national parliaments, because a proposal that would have against it thirty percent of the votes of national parliaments should be considered as dead anyway²³. We do not share this appreciation and consider that it is very important for both theoretical and practical reasons

23 See *Tans*, note 5 supra, 442, 443.

Louis

that the Commission could preserve its independence of judgment that would have been lost in a red card system.

Under the orange card system, the scrutiny of compliance with the principle of subsidiarity will take place in isolation of the examination of the substance of the proposal. The new formula derogates to the rule included in article 11 of the Amsterdam Protocol in virtue of which

“While fully observing the procedures applicable, the European Parliament and the Council shall, *as an integral part of the overall examination of Commission proposals*, consider their consistency with Article 5 of the Treaty. This concerns the original Commission proposal as well as amendments which the European Parliament and the Council envisage making to the proposal.”²⁴

Before leaving the analysis of the Protocol, we should focus on article 8 that relates to the ex-post jurisdictional control of the application of the principle of subsidiarity.

We will quote the full text of this provision:

“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 230 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.

In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted.”

This provision first includes a confirmation of the competence of the Court of Justice to decide, in the framework of appeals for annulment, on the violation of the principle of subsidiarity²⁵. It is a confirmation because the Court has repeatedly stated that it has jurisdiction to judge possible violations of the principle of subsidiarity. And this cannot be limited to appeals for annulment: for example, preliminary rulings are also possible in this field²⁶ but of course if the appeal has its origin in the action of a national parliament, only appeals for annulment seem to be possible. Article 8 does not introduce a new kind of appeal. That is the meaning of the reference to the fact that it has to be “brought in accordance with the rules laid down in Article 263 of the TFEU*²⁷”. The new element in article 8 is the possibility for the Court to rule on appeals “notified” (in French “*transmis*”) by Member States (i.e.

24 Italics ours. *Cooper*, note 6 supra, p. 293 observes that “more holistic deliberations on the merits of the Commission proposal” impedes to sharpen the review of the proposal for its fidelity to subsidiarity. It is one of the merits he finds in the early warning system.

25 See the case law quoted by the Court of First Instance in its judgment of 12 July 2006, T-253/02, *Ayadi*, Rec. II-2139, point 107.

26 See *Michell/De La Riga*, Les compétences dans le traité établissant la Constitution européenne, in: *Constantinesco/Gauthier/Michel* (eds.), *Le traité établissant une Constitution pour l’Europe. Analyse et Commentaires*, 2005, 281-310 (304).

Governments) “in accordance with their legal order on behalf of their national parliaments or a chamber of them”. There is a controversy among the authors on the role of the Government: has it just to forward the appeal decided by the parliament or has it some kind of discretion? For some, the article gives an independent role to national parliaments and the intervention of the Government is purely a formal one²⁷. Others, underlining that the provision is a decision of compromise between those in favour and those against direct appeals by national parliaments to the Court, conclude to the possibility for the government of exercising some discretion, arguing in particular to the reference to national law²⁸. Every parliament or chamber can use this possibility also if it did not issue a reasoned opinion, contrary to the conclusions reached in the Working Group report²⁹.

Would the Court be only able to scrutinise compliance to the subsidiarity principle? In our opinion, if the parliament in its appeal is strictly limited by the protocol, the Court can raise *ex officio* questions of public policy like the fundamental issue of competence. The possibility of annulment for other motives than subsidiarity could be a motive for the government, minorised in the Council, to adopt an active part in the appeal originated by the parliament of the country.

The second subparagraph of article 8 quoted above, concerning appeals by the Committee of the Regions includes a confirmation and a complement of a possibility open in parallel to the Committee by article 263 TFEU*. This latter provision allows to the Committee to make an appeal for annulment in case of violation of its pre-

27 See *Besselink*, *Shifts in Governance*, note 5 *supra*, p. 12. This author draws argument from article I-11 (3) of the Constitutional Treaty providing that institutions shall apply the principle of subsidiarity and that “national parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol”. In other words, it is a direct prerogative of parliaments.

28 See *Nettesheim*, *The Order of Competence within the Treaty Establishing a Constitution for Europe*, in: *Montero/Sola* (eds.), note 22 *supra*, 239- 277 (273); *Besselink*, *National Parliaments*, note 5 *supra*, point 7 writes that “National parliaments can *on the basis of national law* force their government to bring a case before the ECJ.” Hubert *Haenel*, president of the Delegation of the French Senate for the EU writes that “le protocole *ouvre la possibilité* qu’il [the appeal] soit simplement “transmis” par ce gouvernement, l’auteur véritable du recours étant le parlement national ou une chambre de celui-ci.” It is this kind of automatism that the French Constitutional law of 2005 (of which the entry into force was made conditional to the ratification of the Constitutional treaty) provided in article 88-5, paragraph 2, (a provision quoted by *Besselink* who also refers to the more elaborate German law dating of 1993). A provision providing the same kind of automatism is inserted in article 88-6, paragraph 2 of the French Constitution, as revised in 2008. The entry into force of this provision is made conditional to the entry into force of the Lisbon treaty.

29 *Cooper* underlines the negative effects of such a restriction, note 6 *supra*, p. 294 because it would encourage national parliaments to give an opinion, with the only objective of being able to preserve their right of appeal before the Court. *Cooper* considers that this possibility would have not only obstructed the scrutiny process but also given national parliaments “power without responsibility”.

Louis

rogatives. Under article 8, the Committee will not only be able to apply when it has not been consulted in a case the treaty makes the consultation compulsory, which was already possible under article 263 TFEU*, but also when the Committee considers that a legislative act is not in compliance with the principle of subsidiarity. This subparagraph is also the result of a compromise. “Constitutional regions”, i.e. regions with legislative powers have been asking for a long time to have a direct access to the ECJ and there are non negligible arguments in favour of this request. But article 8 in its two paragraphs demonstrates the resistance of (most) governments to allow access to the Court to either other “institutions” or decentralised entities.

II. Role of national parliaments in scrutinising the compliance with the subsidiarity principle

Leonard F. M. Besselink concludes one of his contributions on the role of national parliaments in the scrutiny of compliance with the principle of subsidiarity by the following sentence: “National parliaments thus become true actors in their own right in the European Union, prised away from the grip of their governments in the particular context of European Union decision-making”³⁰. Ian Cooper is more cautious: “Aside from the omission of proportionality, the Constitutional Treaty’s early warning system is a welcome reform that should enhance parliamentary scrutiny of the EU’s legislative process and may, *depending how the process unfolds*, improve the legislation itself.”³¹ Another author, Philipp Kiiver, also a supporter of a greater role for national parliaments in EU affairs, appears to be less optimistic. He focuses the attention on the information gap between parliamentary actors and the executive. When the Commission publishes its proposal it is already too late for having an impact on it. Information is often indigested and biased: parliaments should not make themselves dependent on the Commission or government monopoly on information and explanation and overload by documents is always a risk³². And for him, it is an error to centre the scrutiny on subsidiarity alone: other criteria are more interesting for the sake of politicisation³³.

We must start our comments by observing that the Lisbon Protocol is a further step in a history of, on the one hand, some kind of oversight of European Union affairs by national parliaments and on the other hand, some interparliamentary cooperation that, from 1989 onwards, takes a more or less institutionalised form in CO-SAC, officially recognised as such by the Amsterdam protocol on the role of na-

30 “Shifts in Governance...”, note 5 supra, 12.

31 Note 6 supra, 302; Italics are ours.

32 *Kiiver*, note 5 supra, 4-5.

33 *Ibid.*, 20.

tional parliaments in the EU, and its steering committee the Conference of Speakers of EU Parliaments. COSAC meets twice a year in the capital of the rotating presidency with representatives of the EP and observers of candidate countries parliaments³⁴.

Books have been dedicated to the study of national parliaments in the EU³⁵. All parliaments have created European affairs committees. In some countries, they are common to both chambers of parliament. The Danish committee is often mentioned as the most efficient one in the way it looks at the subjects on the EU Council agenda and calls the members of government for report. Both UK scrutiny committees share a good reputation in the way they deal with European affairs. Parliaments play an important role in the Netherlands and in Austria and the two “delegations” of respectively the French Senate and National Assembly for the EU that will be, as Committees for European affairs, in charge of scrutinising subsidiarity, make their best efforts but apparently like, for example in Belgium, they do not succeed in creating inside the parliament a great interest for Europe, often still regarded as part of international affairs.

In some cases the intervention of the national parliament goes hand in hand with a so-called “scrutiny reserve”, by which the Government can oppose the treatment of a subject by the Council before the issue of an opinion by its parliament. Such a system exists, for example, in the UK, in France and in the Netherlands. We have seen earlier that Article 4 of Protocol N°1 on the role of national parliaments in the Union provides a framework for such practice.

The intervention of national parliaments in EU affairs has generally been part of the scrutiny of the action of national government in the Council. It is perfectly clear in Denmark where instructions are given to the representatives of the government in the Council, who are called to report on their performance. But in other parliaments also, the interest for European affairs is part of the exercise of ministerial responsibility in a parliamentary system³⁶. We have mentioned that the Lisbon Treaty

34 See the Rules of procedure of COSAC, OJEU, C270, 4 November 2004, p. 1-6 and the Guidelines on Interparliamentary Cooperation in the EU, 3 July 2004, published on the (excellent) Website www.COSAC.eu as well as the so-called ‘Copenhagen parliamentary guidelines’ for relations between governments and parliaments on Community issues (instructive minimum standards), 27 January 2003, OJEU, C154/1, 2 July 2003. These guidelines were drafted at the invitation of the Group of the European convention on the role of national parliaments in the Union.

There also exists independently from COSAC an informal Conference of regional legislative assemblies of Europe (CARLE) that groups the chairpersons of these assemblies.

35 See *Maurer/Wessels* (eds.), *National Parliaments on their way to Europe*, 2001.

36 And if some parliaments are very positive on direct relations with the EU institutions, and especially the Commission, like the French assemblies, other, like the Finnish *Eduskunta* “stresses that parliamentary scrutiny of proposed EU legislation should first and foremost take place in the context of relations between national parliaments and their respective governments. The Estonian *Riigikogu* intends to concentrate its efforts on domestic scrutiny; it is

includes this responsibility in article 10 TEU* on representative democracy. An author has stressed that the role that national parliaments play in EU affairs depends on the constitutional balance of powers, the nature of the party system and the extent to which EU affairs are regarded as domestic as opposed to foreign affairs³⁷.

Many analysts of the role of national parliaments underline also the difference that exists between the rules and their practical impact and insist on the prominent role of the Executive branch of power that has seen its influence growing with the development of integration. Parliaments appear as less important than courts in an integration process. Will something change thanks to the early warning mechanism for the control of compliance with subsidiarity? It is obviously the hope of many but problems are on the way.

The author quoted at the beginning of this section stresses the information gap between Parliament and Executive. One could observe that it would perhaps be the first time that parliamentary assemblies have to deliberate without the (physical) presence of representatives of the institution in charge of the proposal on the table. Commission members or higher officials could not possibly appear before each national parliament for defending 'their' draft. Commission's written answers will, most of the time, come late. The deadline for issuing a reasoned opinion has increased from six weeks to eight weeks but it is still not much for preparing and submitting on time the reasoned opinion³⁸. There are also parliaments that have shorter sessions than others and all of them do not have adopted the same provisions as in the new article 88 of the French Constitution allowing for the vote of resolutions outside the period of session. In the UK there were protests against the during the summer holidays on the draft Lisbon Treaty in order to have a chance to influence the government position... There are also advantages and inconvenients of centralising the adoption of the opinion on subsidiarity in the hands of a European affairs committee. On the one hand, for coherence sake, it is better to have a single doctrine on subsidiarity in the parliament that only the committee in charge of EU affairs can warrant, but, on the other hand, proposals are often technical and the collaboration of the sectoral committee(s) concerned is required. Of course, members of other committees can join for the debate the generalist committee, but it is not always possible due to the busy agenda of national parliaments where often many committees seat in parallel. And sectoral committees will not be keen to delegate their say

not planning to seek direct access to EU institutions, and expects 'business as usual' in its handling of EU affaires". We quote a report of COSAC mentioned in note 43 below.

37 *Rizzuto*, The New Role of National Parliaments in the European Union, The Federal Trust, Online Paper 19/03, June 2003, 10.

38 In order to quote surely an extreme example, due to the intricacy of the allocation of competences in Belgium between the federation, the Communities and the Regions, an assembly like the Senate will need to get first a legal advice on its competence to look at the matter covered by the draft proposal. It is foreseen that this check will last from day one to day seven.

National Parliaments and the Principle of Subsidiarity

on a matter of their competence. On the other hand, it would not always be possible for European affairs committees to wait for a technical advice of the committee(s) concerned by the substance, always taking into account the necessary respect of the deadline.

In order to give to the opinions the weight conferred by the Protocol, an international cooperation among parliaments is necessary. For the external observer, it seems to be agreed that an important role could and should be given to COSAC in this context. But things are more complex.

In order to get a better view on the role of COSAC and of national parliaments, it may be useful to start with comparing the articles on COSAC in the respective Amsterdam and Lisbon Protocols on the role of national parliaments in the EU. First, articles 4 to 6 of the Amsterdam Protocol, state that

“4. The Conference of European Affairs Committees, hereinafter referred to as COSAC, established in Paris on 16-17 November 1989, may make any contribution it deems appropriate for the attention of the institutions of the European Union, in particular on the basis of draft legal texts which representatives of governments of the Member States may decide by common accord to forward to it, in view of the nature of their subject matter.

5. COSAC may examine any legislative proposal or initiative in relation to the establishment of an area of freedom, security and justice, which might have a direct bearing on the rights and freedoms of individuals. The European Parliament, the Council and the Commission shall be informed of any contribution made by COSAC under this point.

6. COSAC may address to the European Parliament, the Council and the Commission any contribution which it deems appropriate on the legislative activities of the Union, notably in relation to the application of the principle of subsidiarity, the area of freedom, security and justice as well as questions regarding fundamental rights.

7. Contributions made by COSAC shall in no way bind national parliaments or prejudice their position.”

Articles 9 and 10, under Title II on ‘Interparliamentary Cooperation’ of the Lisbon Protocol provide as follows:

“Article 9

The European Parliament and national Parliaments shall together determine the organisation and promotion of effective and regular interparliamentary cooperation within the Union.

Article 10

A conference of Parliamentary Committees for Union Affairs may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission. That conference shall in addition promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees. It may also organise interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy. Contributions from the conference shall not bind national Parliaments and shall not prejudice their positions.”

There are important differences in the two texts. First, article 9 of the new Protocol calls for the EP and national parliaments to organise and promote effective cooperation within the Union. There is no mention of the assizes but joint meetings, as the ones “on the future of Europe”, are surely not excluded³⁹. It is important to stress the need of such a cooperation taking into account the kind of rivalry that exists at least in the minds of some parliamentarians. Some national MPs would consider that the EP, like the Commission, is deliberately acting in favour of more competences and more rules at Union’s level, in order to increase their influence which is far from certain if we look for example to the recent case of the directive on services, largely amended by the EP in a sense of devolving more powers to national authorities. On the one hand, the Commission, encouraged by the European Council, has been for a number of years now guided by the policy of “better regulation” that for sure is not necessarily leading to “less regulation” but, in practice, has drastically reduced the number of initiatives⁴⁰. On the other hand, it would be an error to present the EP as an unconditional supporter of EU competences and rules. Not only, all MEPs are not enthusiastic integrationists but also among those adopting a European minded attitude, positions differ concerning the respective field of action of the Union, the States and the social partners, varying from so-called ultra liberal to strongly defensive “à la française”.

Second, it is interesting to observe that article 10 of the Lisbon Protocol does not refer to COSAC but to “a conference”⁴¹. This perhaps illustrates the lack of enthusiasm of many national parliaments towards the way COSAC works. If one looks at the reports especially on finances, the cost of the bi-annual meetings appear as a problem, considering especially the needs of interpretation. It also, more importantly, reflects the preoccupation of many parliaments to preserve their autonomy and traditions, which leads them to be cautious about a leading role to COSAC. The

39 The EP is represented at COSAC meetings.

40 That leads to relativise the arguments based on the « enormous additional workload floating from extensive legislative activity » [Rittzer/Ruttlof/Linhart, How to Sharpen a Dull Sword – The Principle of Subsidiarity and its Control, German Law Journal, vol. 7, September 2006, 1-27 (15)]. If the number of “consultative documents” is increasing, it is not the case for (important) legislative acts.

41 Anne Levade in its commentary of the Protocol on the role of national parliaments gives both technical and political possible explanations of this difference between Amsterdam and Lisbon texts. First, it was difficult for a Treaty that substitute the Union for the Community to refer itself to a Conference of Committees specialised in European and *Community* affairs and it could not change the denomination of a body that was not within the institutional sphere of the Union. The other possible reasons are political. Members of the Group of the Convention wished to privilege the cooperation between the two levels of parliamentary assemblies (as the title of Title II and article 9 reveal) and they had reservation against an institutionalisation of the ‘horizontal’ coordination, see *Traité établissant une Constitution pour l’Europe*, Commentaire article par article, *Burgogue-Larsen/Levade/Picod* (eds.), 2007, 869-894, (893), para. 47-48.

term “Conference” for designating the body in charge of the cooperation and the use of the term “contribution” for its resolutions are meaningful at this regard. And it is interesting to read the last sentence of article 10 that in a better style repeats the principle, already stressed by the Amsterdam Protocol, that “Contributions from the Conference shall not bind national Parliaments and shall not prejudice their positions.”

Third, if the Lisbon Protocol reaffirms the right of COSAC to submit, “any contributions it deems appropriate to the institutions”, the reference to subsidiarity, present in article 6 of the Amsterdam Protocol, disappears as well as the allusion to the area for freedom, security and justice. The Lisbon Protocol does not include (but doesn’t exclude them) specific tasks for COSAC in relation with the Protocol on the application of subsidiarity and proportionality. But the accent is on exchange of information and best practice that may help the exercise by national parliaments of their responsibility in the scrutiny of subsidiarity. For some parliaments, the establishment of a network of like-minded assemblies⁴² seems a better solution at least in a first period than giving a central role to COSAC in this matter.

During the reflection period after the signing of the Treaty of Rome in October 2004, COSAC decided to select some cases in order to check the feasibility of subsidiarity scrutiny by national parliaments. Some parliaments were somewhat reluctant to possibly giving the impression of cherry picking in the Constitutional Treaty. A number of parliaments, varying in each case, took part to three “pilot experiences”⁴³ that were in principle considered as positive but that revealed a certain number of difficulties. First many parliaments had problems in respecting the deadlines for submitting an opinion. The motivation of the proposals of the Commission was criticized as not sufficient. Responses of the Commission were often considered as not adequate because they were repetitive of the (standard) motivation. The diffi-

42 See French Senate, Delegation for the EU, *Deuxième Rencontre avec la Commission des Affaires européennes du Bundesrat*, 4-5 October 2007, p. 29-30 on political cooperation among parliaments. The president of the BR Committee declares in answer to a suggestion made by two French colleagues: « Je pense qu’il ne serait pas opportun de solliciter les parlements des vingt-sept Etats membres. Il faudrait plutôt créer une petite “force de frappe” dans le domaine de l’examen de la subsidiarité et de la proportionnalité » and President Haenel evokes parliaments having « a particular sensitivity to the theme of subsidiarity ». Mr. Stachele mentions Austria, and may be Italy or Spain and a new Member State, underlining that they need overall partners that have the will of building the Community mechanism and not of destroying it; Mr. Haenel quotes the names of the Czech Republic, the Netherlands, the House of Lords but considers that neither Italy nor Spain are ready.

43 See on the COSAC Website, the reports of these experiences. See for example, the *Eight bi-annual report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny* presented at the XXXVIII COSAC, Estoril, Portugal, 14-15 October 2007.

culty to distinguish between subsidiarity and proportionality was also mentioned as well as the insufficient reciprocal information among national parliaments⁴⁴.

One thing most national assemblies seem to have in common is the promotion of the negative approach of subsidiarity⁴⁵. For Mr. Haenel, a former member of the Convention and the president of the Delegation of the French Senate for the EU, “all the requirements of both subsidiarity and proportionality proceed from the same spirit: the action of the Union has to be limited to what is necessary *in order to compensate insufficiencies*”⁴⁶. With these ideas in mind, the scrutiny could neglect that apparently local issues, like the safeguard of migratory birds, as an element in the preservation of bio-diversity, the safety of road infrastructures, that concerns not necessarily big European ways of communication, or the quality of surface waters, three actions considered as not in compliance with subsidiarity by the French Senate pertain to the “public goods” of the Union⁴⁷. But Mr. Haenel is right when he stressed the link between subsidiarity and proportionality. It clearly derives from the Amsterdam Protocol as well as from the case law that the subsidiarity check includes a test of necessity, i.e. an element of proportionality. Some authors write: “There is...an overlap between the examination of subsidiarity and proportionality: for example the suitability of the measures is in principle relevant to both.”⁴⁸ And it is why it is difficult to separate the scrutiny of the three principles of article 5 TEU*: attribution, subsidiarity and proportionality. President Skouris stressed in his speech at Sankt Pölten a “*sachlichen Zusammenhang*” between these three principles⁴⁹. But there is something specific in the proportionality test. The Court will not only look if the measure is appropriate and necessary to achieve the objective pursued by it but also if the inconvenients occasioned by the measure are not disproportionate in relation with the objectives⁵⁰ because they would excessively limit citizens’ rights and

44 There is an electronic platform for communications among parliaments called IPEX.

45 See the Communication of Mr. Hubert Haenel on the Conference on subsidiarity hold at Sankt Pölten, on 18 and 19 April 2006, Sénat français, Actualités de la Délégation pour l’Union européenne, N°119, 17 avril au 21 mai 2006, p. 15 et s., p. 16 : “ce n’est qu’en fonction du libellé qui figure dans les traités que ce principe est justiciable. Et ce libellé ne concerne que la limitation de l’action de l’Union et ne joue que pour les compétences non exclusives de celle-ci.”

46 Les rapports du Sénat N° 88, 2007-2008, Dialogue avec la Commission européenne sur la subsidiarité, 19.

47 Another example would be the EU action against floods that should be limited for some to the situation of transnational rivers.

48 See *Ritzer* et al., *Europäisches öffentliches Recht*, Ausgewählte Beiträge, 2006, 14.

49 “The role of the principle of subsidiarity in the case law of the European Court of Justice”, European Conference on Subsidiarity, Sankt Pölten, 19 April 2004. We quote from the “Thesen” in German of the Impulsreferat of *Vassilios Skouris*.

50 Court of Justice, 7 September 2006, case C-310/04, *Spain v Council*, ECR. I- 7285, points 96 and 97.

freedoms. The former check is inherent to a subsidiarity scrutiny; the latter check is typical of a proportionality control.

Some parliaments want to make the best of the direct dialogue with the Commission but they are at the same time frustrated to be limited to the question of subsidiarity. A direct dialogue that has been organized at the invitation of President Barroso who proposed at the interparliamentary meeting on the future of Europe, on 8 and 9 May to open a direct dialogue with national parliaments centred on the application of the principle of subsidiarity *and proportionality*. The European Council approved this initiative at its meeting of 15 and 16 June 2006. It noted in point 37 of its conclusions the

“interdependence of the European and national legislative processes. It therefore welcomes the Commission's commitment to make all new proposals and consultation papers directly available to national parliaments, inviting them to react so as to improve the process of policy formulation. The Commission is asked to duly consider comments by national parliaments – in particular with regard to the subsidiarity *and proportionality* principles. National parliaments are encouraged to strengthen cooperation within the framework of the Conference of European Affairs Committees (COSAC) when monitoring subsidiarity.”

The initiative of the Commission was in anticipation to the entry into force of the Constitutional Treaty. Direct transmission of both consultative documents and proposals of legislative acts will continue after the entry into force of the Lisbon Treaty⁵¹. National Parliaments will be able to issue opinions on all these texts but only reasoned opinions on subsidiarity of draft legislative acts will follow the regime of the early warning system.

There is an evident risk that the mechanism will take the advantage on other possibilities of impact of national parliaments in EU affairs. Furthermore, when no consequence was attached to it, some European affairs committees could establish direct links with the Commission without involving in the process either the plenary or the Government; it is difficult to imagine that the practice could continue unchanged. In the words of William Sleath,

“A greater role for national parliaments would never be acceptable if it appears to jeopardise a more efficient Union. One of the core inputs to the Union' institutional system is the position taken by each Member State, communicated by government representatives in the Council. Introducing a parallel – and potentially divergent – channel to voice the national position would risk confusion. It could also lead to the European Union being used as a political football in a domestic dispute between government and parliament.”⁵²

51 The Delegation of the French Senate has practiced very actively this dialogue and it approved an interesting report on the lessons drawn from this experience. See Dialogue avec la Commission européenne sur la subsidiarité, Les rapports du Sénat, N°88, 2007-2008. They have asked for a continuation of this direct dialogue after the entry into force of the Lisbon Treaty.

52 *Sleath*, note 14 supra, 563.

III. Conclusion

The early warning system is one among other ways for national parliaments to intervene in EU affairs. Article 12 TEU* quoted at the beginning of this report lists more. The specific objectives of the new system were to provide for a direct intervention in the legislative process and to involve national public opinions in the debate on legislative proposals⁵³.

Opinions vary on the new mechanism from sceptical comments to enthusiastic analyses. Will parliaments be proactive or express their views in a kind of routine way on the proposals submitted to them⁵⁴? We believe it is anyway too early to speak in terms of a “change in paradigm”. The way national parliaments’ collaboration among each others worked in the last twenty years, something important in the present context, has demonstrated the weight of traditions for older institutions and the attachment to autonomy in others. Let us wait for how things will evolve.

It is also remarkable that the Lisbon Treaty gives different signals concerning its conception of representative democracy. If it tends to favour collective action on the part of national parliaments in the early warning system, it confirms and extends to a new subject the so-called “extra constitutional brake⁵⁵”, created by the Constitutional Treaty, that allows to a single national parliament to block the use of “passerelles” from unanimity to qualified majority voting or from special legislative procedure to the ordinary one (Article 48, paragraph 7, subparagraph 3, TEU*) by adding the sectoral passerelle on family law (Article 81, paragraph 3, subparagraph 3, TFEU*) . This veto power conferred to one parliament in the Union is based on the idea that the “framework of reference of the democratic principle is not a European people globalising the populations of the Member States” and seems to legitimate the view that there is no question of exercising the principle of democracy at the scale of the EU⁵⁶, an idea that is at the basis of the necessity of unanimity of the Member States for any revision of primary law.

We have pointed out the negative approach of subsidiarity that inevitably dominates the views expressed by most of national parliaments. It is remarkable that this

53 See European Convention, Point N° 1. Subsidiarity. This paper inaugurated a series of short notes presenting the main points of the reports submitted to the Convention by working groups.

54 See *Bengston*, National parliaments in European decision-making. A real prospect or wishful thinking?, The Federal Trust, Online Paper 29/03, 5. For a reaction against the skeptical attitude, see *Flynn*, note 6 supra, 5.

55 See *Sleath*, note 14 supra, 558-559.

56 See *Vahlas*, Appartenance à l’Union européenne, in *Constantinesco/Gauthier/Michel* (eds.), *Le traité établissant une Constitution pour l’Europe. Analyses et Commentaires*, 2005, 239-278 (277-278). The views of this author are referring to the right of secession that the new treaty recognises to the Member States but these words can be applied to the “constitutional brake”. For a positive view of this mechanism because it offers “a wider democratic basis for the fundamental decisions of the Union”, see *Cartabia*, note 13 supra, 1089-1090.

approach is adopted now when the EU could be more criticised for the legislation it does not adopt than for an excess of regulation. The Amsterdam Protocol defined subsidiarity as a dynamic concept. National parliaments view the mechanism as a weapon to defend their prerogatives against both the Commission and the EP. To confer the subsidiarity check to an assembly or a committee composed by national and European parliamentarians would have surely burdened the procedure and the Convention was right in avoiding any institutional creation but it would have allowed for more balanced views on subsidiarity. More modestly Andreas Maurer proposed in his hearing by the Working Group "Subsidiarity" a strengthening of the cooperation of national parliaments and EP on the control of the application of subsidiarity through the examination of the legislative programme of the Commission. But Commissioner Barnier was probably right when he told to the Group on the role of national parliaments "that the subsidiarity and proportionality implications of proposals would only become fully clear once they were adopted by the Commission"⁵⁷. Nevertheless, a first joint examination would help future in depth scrutiny.

William Sleath puts the early warning mechanism in perspective in stressing by contrast "one major development which brought national parliaments right into the heart of Europe decision-making - the cementing of the Convention method"⁵⁸. The Convention had a pedagogical and democratic value. It could have had more if Governments had decided to establish a dialogue between the IGC and the Convention. The paradox in this step forward to the transparency of the ordinary procedure of revision is that at the first occasion, as it was not compulsory under the Nice Treaty presently in force, it has not been used. For understandable reasons, the Lisbon Treaty has been negotiated behind closed doors on the basis of a mandate that has been kept secret up to the last days before its adoption. And observers tell that one will have to wait for some time in order to see another convention taking part to a revision process. The EP will have to give its approval under Article 48, paragraph 3, subparagraph 2, TEU* to a procedure of revision without a convention but one can imagine that it will not be easy for it to oppose a revision for this motive.

Would the intervention of national parliaments confirm the Court of Justice in its approach of self-restraint on subsidiarity, a principle that has to be seen in the context of article 5 of the TEU* in its totality? For some, the strengthening of political scrutiny *ex ante* will confirm the Court in its position consisting in exercising a mostly formal control bearing mainly on the motivation, that was not necessarily expressed in the preamble of the act⁵⁹. For others, the "greater pressure to give reasons" and the reasoned opinions allow the parliaments to influence the considera-

57 See the final report of the Group that "noted" this observation.

58 See *Sleath*, note 14 *supra*, 562.

59 *MichellDe La Riva*, note 26 *supra*, 304. See also *Flynn*, note 6 *supra*, 22, who defends the idea that if the subsidiarity principle may prove "legally operable", that is as a "procedural rule" that ought to be followed, rather than a "substantive test" and plead for a "manifest error" approach.

Louis

tions of a judgment and “can thereby lead to a confident departure from the earlier jurisprudence” that these authors qualify with the motto ‘*in dubio pro Communitate*’⁶⁰. It could well be possible that both the parties and the Court will find in the motivation and the opinions on subsidiarity elements useful for their reasoning but we would be surprised if the Court would fundamentally change its approach.

60 *Ritzer et al.*, note 48 *supra*, 15.

National Parliaments and Subsidiarity: An Outsider's View

*George A. Bermann**

The Treaty of Lisbon continues, among other things, the long march to ever greater opportunities for national parliaments to exert political influence over the fate and fortunes of the subsidiarity principle in EU lawmaking. In his contribution, Jean-Victor Louis has clearly and accurately described what the Lisbon Treaty seeks to do in this regard, with particular reference to the Protocol on the Role of National Parliaments in the European Union¹ and the Protocol on the Application of the Principles of Subsidiarity and Proportionality.² My role is to view the Treaty's objectives for the national parliaments from a distinctly comparative perspective.

The comparative viewpoint I have adopted raises three broad questions: First, and most simply, how does what Jean-Victor Louis describes look from a U.S. perspective? Second, what might we learn from the U.S.'s own experience in seeking to enlist the state legislatures in the vindication of federalism principles. Third, what special challenges does the system contemplated by the Lisbon Treaty pose?

I. What does it look like from abroad?

The drafters of the Lisbon Treaty, and its predecessors, could certainly have devised more ambitious institutions than they did for safeguarding subsidiarity and other values of federalism. At least some consideration had been given to creating specialized chambers of the Community courts (or maybe even a separate EU-level court) charged with enforcing the subsidiarity principle. Even something more modest could be imagined, such as a special committee of national parliamentarians or a member of the Commission charged with ensuring respect for subsidiarity. As for means and mechanisms, more energetic ones could likewise have been devised, such as a true "red-light" or veto system in the hands of the national parliaments.

And yet, while the Lisbon Treaty could have been more aggressive in this regard, it is difficult to imagine the U.S. putting into place institutions or means that even

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1 O.J. C 306/148 (Dec. 17, 2007).

2 O.J. C 306/150 (Dec. 17, 2007).

begin to resemble what has emerged in the Treaty. To do so would presuppose a more or less firm understanding of what federalism means, a set of institutions that may plausibly be entrusted with ensuring respect for the relevant principles and a set of reliable mechanisms at the disposal of those institutions.

We do not in the U.S. have even a working definition of federalism, much less a working definition of a federalism-driven proposition such as subsidiarity. However rudimentary European observers may find the Treaty's definition of subsidiarity to be, it offers a good deal more than U.S. decisionmakers have at their disposal. It posits a requirement that the necessity for EU-level action be demonstrated, and does so in terms of efficacy and relative efficiency. By contrast, it is safe to say that we in the U.S. have merely a generalized sense – even an intuition – as to the matters that are somehow, by their nature, inherently “local” and those that are not. In place of what Europeans can present as a “subsidiarity analysis,” we have only a “federalism impulse” to offer. Indeed, federalism values have tended simply to be folded into the policymaking process at the federal level, inextricably mixed in with the merits of the legislative or regulatory proposal at hand (as if, in European parlance, subsidiarity and proportionality could simply not be dissociated).³ It would be necessary to go back well before the Civil War – perhaps to the era of John C. Calhoun and the doctrine of “state nullification of federal law” to find a rigorous and principled defense of federalism put into operation.

Turning to institutions, Europe has looked to the national parliaments for a defense of subsidiarity, to the extent, that is, that the EU institutions themselves may have failed to exercise the requisite self-restraint. What institution or institutions on the U.S. political landscape might be the natural guardians of federalism? It was at one time argued that the American system contained, by its very nature and workings, “political” safeguards of federalism, notably the United States Senate.⁴ This is because the States were meant, at least originally, to be represented as such in Congress. The proposition that senators perform that role has proven, however, to be essentially unverifiable and has become largely discredited.⁵ But I also seriously doubt that any knowledgeable observer would put the state legislatures on the “short list” of candidates for being the natural institutional guardians of federalism. I am not sure there is any institution on the federal or state scene that would be seen as “naturally” performing that function.

Perhaps it is thought less urgent that localism be specifically protected in the American system, and its “natural” advocates may be less easy to identify. Perhaps

3 See *Bermann*, *Regulatory Federalism: European Union and United States*, in 263 *Recueil des cours* (Hague Academy of International Law 1997).

4 See *Wechsler*, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, (1954) 54 *Colum. L. Rev.*, 543.

5 See *Rapaczynski*, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, (1985) *Sup. Ct. Rev.* 341, 419; *Kaden*, *Politics, Money and State Sovereignty*, (1979) 79 *Colum. L. Rev.* 847, 897.

state legislators have few electoral or other incentives to vigorously champion state and local policy prerogatives. They will almost certainly be busier promoting the policies in which they happen to believe, or those on the basis of which they hope to be re-elected.

The contrast with the European Union is palpable. While the choice of national parliaments as the agents of subsidiarity may not have been inevitable, it was nevertheless highly attractive because not only are national parliaments presumably sensitive to subsidiarity values, but they also do “double duty” in that, while advancing subsidiarity, they also – being, for the most part, directly elected representative bodies – advance democratic legitimacy.

Let me turn then to the question of mechanisms. If the U.S. lacks a working or operational definition of federalism (even one as rudimentary as subsidiarity), and if we have no evident institutional champion for that cause, then it should occasion little surprise that the U.S. also has not developed discrete legislative process techniques or mechanisms for promoting local governance.⁶ Viewed from the United States, the current situation in the EU is remarkable for the evident commitment to finding means as well as principles.

I would suggest that the EU experience shows how investment in things like subsidiarity tends to produce still further investments. Not only has the EU established a working principle of federalism, but it has established a serious and rule-bound monitoring system (let us call it “early warning,” for short) to measure its success. But there is more. Now the EU appears to be developing a serious system for monitoring the subsidiarity monitoring system itself (something I would call “subsidiarity-monitoring monitoring”), whereby one studies, one compares, one benchmarks, one develops “best practices” and maybe even forms of “soft law” essentially on how to monitor both subsidiarity and the monitoring of subsidiarity. This is precisely the vocation of COSAC’s bi-annual reports on “Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny.”⁷

Such further investment is by no means irrational. The incentive to benchmark, information-share and monitor the monitoring is great, since the very utility of the early warning system depends on its effectiveness. Essentially, the “yellow light”⁸

6 See *Bermann, Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, (1994) 94 Colum. L. Rev., 331.

7 Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC), Eighth bi-annual report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny (October 2007).

8 The “yellow light” procedure is set out in Articles 6 and 7 of the new Protocol on the Application of the Principles of Subsidiarity and Proportionality:
“Art. 6. Any national Parliament or any chamber of a national parliament may, within eight weeks from the date of transmission of a draft legislative act ... 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...”

and “orange light”⁹ procedures on which that system relies enable a national parliament not only to influence and possibly mandate its *own* government, but also to target the European institutions themselves. In order to accomplish that, the national parliaments must act collectively so as to attain the necessary threshold number of national parliaments or national parliamentary chambers. The very existence of these mechanisms furnishes yet additional incentives to invest substantially (as in monitoring the monitoring), in the interest of protecting the Member States from overreach by the European institutions. The contrast with the relatively low level of investment in federalism-protecting institutions and mechanisms in the U.S. – based in turn on a relative absence of systematic thinking about federalism doctrine – is striking.

II. What does U.S. experience show?

What, we may ask, is the consequence of having, as the U.S. tends to, a vacuum – rhetorically rich but analytically weak – where the EU has an elaborate protocol based on a system of national parliamentary scrutiny of EU-level measures from a

“Art. 7. The European Parliament, the Council and the Commission ... shall take account of the reasoned opinions issued by national Parliaments or by a chamber of a national Parliament.”

- 9 The more potent “orange light” procedure is set out in Article 7(2) and 7(3) of the same Protocol:

“ Art. 7(2). Where reasoned opinions on a draft legislative act’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments ..., the draft must be reviewed....”

“After such review, the Commission ... may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.”

“Art. 7(3). Furthermore, under the ordinary legislative procedure, where reasoned opinions on the non-compliance of a proposal for a legislative act with the principle of subsidiarity represent at least a simple majority of the votes allocated to the national parliaments..., the proposal must be reviewed. After such review, the Commission may decide to maintain, amend or withdraw the proposal.

“If it chooses to maintain the proposal, the Commission will have, in a reasoned opinion, to justify why it considers that the proposal complies with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinions of the national parliaments, will have to be submitted to the Union legislator, for consideration in the procedure:

(a) before concluding the first reading, the legislator (the European Parliament and the Council) shall consider whether the legislative proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national Parliaments as well as the reasoned opinion of the Commission;

(b) if, by a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration.”

subsidiarity perspective? The consequence in the U.S. has been a vigorous re-entry of the federal courts onto the scene, facilitated by the appointment of a majority of Supreme Court justices for whom states' rights and state political autonomy appear to represent compelling values. Indeed one reason why the Rehnquist and Roberts Courts have done so much on the federalism front is precisely because they discern a profoundly weak set of political safeguards of federalism. The result includes reinvigoration of the notion that Congress may not act legislatively under the interstate commerce clause unless interstate commerce is demonstrably implicated,¹⁰ that Congress may not enact federal legislation pursuant to the Fourteenth Amendment in the absence of an underlying problem to which such legislation represents a "congruent" and "proportionate" response,¹¹ and that Congress may not legislate so as to "commandeer" the States into the business of carrying out the application of federal law.¹²

Herein lies some possible learning for the EU. The question has been raised as to whether strengthening the national parliamentary instruments to advance subsidiarity may cause the European Court of Justice to do more – or, conversely, to do less – by way of direct judicial enforcement of the principle of subsidiarity as compared to what it has thus far done.¹³ It may be argued that a vigorous national parliamentary scrutiny will lighten the pressure on the Court to "do something". On the other hand, the subsidiarity review called for by the Protocols will leave an analytic and documentary trail that could be of great use and value to the Court of Justice if it were inclined to take a "harder look" at compliance with the subsidiarity principle. The U.S. experience lends some support to the former thesis. A widespread belief in the failure of federalism's political safeguards – coupled with a disbelief that they could effectively be constructed – operated as a stimulus to greater judicial activism on the federalism front, fueling the further belief that if federalism matters, the courts must take up the challenge since few other realistic safeguards of federalism exist and the difficulty and unlikelihood of creating them are so great.

III. What Challenges does the Early Warning System Face?

That creation of political safeguards of federalism in the EU, in the shape of the Subsidiarity Protocol and the Protocol on the National Parliaments, is peculiarly possible within the Union does not mean that those safeguards will necessarily achieve their purpose. Numerous difficulties remain, having to do, notably, with

10 See e.g., *United States v. Lopez*, 514 U.S. 549 (1995).

11 See e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997).

12 See e.g., *Printz v. United States*, 521 U.S. 98 (1997).

13 The leading judgments thus far are *Germany v. Parliament and Council*, Case C-233/94, [1997] ECR I-2405; *United Kingdom v. Council*, Case C-84/94, [1996] ECR I-5755.

timing, with materials, with mechanics and with the challenge of coordination among the Member State polities.

As to timing, the move from six to eight weeks for subsidiarity scrutiny¹⁴ may simply be insufficient in light of the need to consult sectoral parliamentary committees and regional parliaments, not to mention stakeholders and, of course, parliamentarians in other States. The solution may lie in beginning the process of scrutiny in the pre-legislative period, that is to say, in the period of green papers, white papers, communications and consultation documents, all of which precede the formal making of legislative and regulatory proposals.

A further question relates to the adequacy of the materials furnished by the Commission as the basis for national parliaments to conduct their subsidiarity scrutiny. The materials must not merely address policy aspects of the measure proposed – including but not limited to their proportionality, their conformity to the treaties and general principles of law, or to their wisdom and opportuneness as a matter of public policy – but specifically address the “level of government” issues that subsidiarity implicates.

There is also a question of mechanics. It is fair to ask whether 50% of national parliamentary votes¹⁵ represents the right threshold for triggering the “orange light” device, for if 50% of them object, it is very likely that the majority of government votes needed in the Council to enact legislation at the EU level is already lacking.

Finally, it may prove difficult within this single eight-week period for parliamentarians in any one Member State to know in sufficient time the results of the subsidiarity scrutiny taking place in the other Member States, and yet such coordination may be critical to the success of any “yellow light” or “orange light” strategy. In the pilot project conducted by COSAC on the Third Railway Package, parliamentarians in different Member States objected to different instruments within the legislative package. Significantly, though opposition based on subsidiarity was widespread, there was not one single instrument within the package as to which the required threshold for disapproval was met.¹⁶ The “collective action” problem may be considerable.

Despite the challenges, I would argue that a system of subsidiarity policing based on national parliamentary scrutiny is not only an appropriate one, but one that it would be a major and real lost opportunity to fail to harness and exploit. This is not only because of the aptness of a mechanism that is built upon structures, like national parliaments, that constitute truly plausible guardians of subsidiarity, but also

14 Protocol on the Application of the Principles of Subsidiarity and Proportionality, Art. 6.

15 *Id.*, Art. 7.3.

16 Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC), Eighth bi-annual report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny (October 2007).

National Parliaments and Subsidiarity: An Outsider's View

because these same institutions have at the same time a unique potential for mitigating the perceived democratic deficit against which the EU continues to struggle.

