STUDY

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European Parliament

Controlling Subsidiarity in Today's EU: the Role of the European Parliament and the National Parliaments

Policy Department for Citizens' Rights and Constitutional Affairs
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Controlling Subsidiarity in Today's EU: the Role of the European Parliament and the National Parliaments

Abstract

Since the entry into force of the Lisbon Treaty (2009), the EU national parliaments have had the right to control the principle of subsidiarity through the Early Warning System (EWS). This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, examines how the EWS has worked over the past 12 years. It also looks into the interaction of the European Commission, local and regional entities, the Committee of the Regions and the Court of Justice of the EU with national parliaments to this end.

This document was requested by the European Parliament's Committee on Legal Affairs.

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LIST OF ABBREVIATIONS

CALRE	Conference of European Regional Legislative Assemblies
CEMR	Council of European Municipalities and Regions
Commission	European Commission
CoR	Committee of the Regions
Council	Council of the European Union
COSAC	Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union
CJEU	Court of Justice of the EU
ECPRD	European Center for Parliamentary Research and Documentation
EU	European Union
EWS	Early Warning System
IPEX	Platform for Interparliamentary EU Information Exchange
JURI Committee	Parliament's Committee on Legal Affairs
Parliament	European Parliament
REFIT Programme	(Commission's) Regulatory Fitness and Performance Programme
REGPEX	REGional Parliamentary EXchange
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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EXECUTIVE SUMMARY

Since 1992, the principle of subsidiarity, a general principle of European Union (EU) law, has played a key role in the EU as it functions today. This principle determines which player in the EU or from its Member States should act to reach a specific objective, whereby the lowest level of governance should always be favoured when possible.

As a general principle of EU law, the principle of subsidiarity has been liable for judicial review by the Court of Justice of the EU since the Maastricht Treaty. However, the Lisbon Treaty added the possibility of a political control mechanism by national parliaments in the framework of the Early Warning System (EWS). If a national parliament/chamber considers that a legislative proposal does not respect the principle of subsidiarity, it may adopt a reasoned opinion. National parliaments should consult regional parliaments with legislative powers 'where appropriate'.

The Political Dialogue has been much more frequently used than the EWS, which has only been activated on three occasions since 2009, leading to its effectiveness being repeatedly questioned. National and regional parliaments' interest in this System appears to have decreased over the past decade, and several initiatives including the creation by the European Commission of the Task Force on subsidiarity, proportionality and 'doing less more efficiently' have been launched over the years to improve its functioning.

As a follow up to the recommendations issued by the Task Force, which also devoted specific attention to the need to duly consider and involve the local and the regional levels of governance, several reforms have been implemented. For instance, a subsidiarity grid is now used by the European Commission in its legislative proposals. The Committee of the Regions has also sought to improve the procedures in place to promote the respect of the principle of subsidiarity even further.

In general, the European Parliament has devoted increased attention to national parliaments' reasoned opinions and contributions since the Lisbon Treaty entered into force in 2009, and the European Commission has, too, become increasingly committed to guarantee the respect of the principle of subsidiarity and to engage in a dialogue with national and regional parliaments.

This notwithstanding, discussions on potential future reforms are still on-going, for instance in the framework of COSAC, and the possibility to create a green card for national parliaments is being intensively debated. Parliaments are keen to play a more active and positive role, as opposed to being limited to the negative and proactive role, which the EWS allows them to play.

The Lisbon Treaty, furthermore, acknowledged the possibility for national parliaments to ask their governments to launch an action for annulment on the ground of a subsidiarity breach, and the Committee of the Regions may, too, avail itself of the same right. These changes are in line with the increased importance devoted to the local and the regional levels in the control and the implementation of the principle of subsidiarity which is evident from the explicit mention of the local and the regional dimensions.

To date, neither national parliaments nor the Committee of the Regions have availed themselves of this possibility. This and the limited number of yellow cards raised to date point towards the fact that there has not been any subsidiarity issue. In this sense, a reform of the EWS system that would consist in lowering the thresholds applicable or in extending the eight week-deadline to raise reasoned opinions is unlikely to have a significant impact, and other possible reforms should be preferred.

To improve the existing situation, the following **recommendations** are thus made:

- The **existing thresholds within the EWS should be applied in a flexible manner**. The **established eight-week deadline should be applied in the most flexible manner possible**.

- The **European Commission should provide detailed and individual answers to all the reasoned opinions it receives**, and it should, along with the EU legislator, **outline the impact of reasoned opinions (and contributions) on a given legislative proposal.**

- National parliaments should be attributed a **more positive and proactive role** by, for instance, **creating a green card** that would operate with thresholds that are both reachable and not so low as to trigger very numerous green cards. In any case, the **European Commission should consider all the input** it receives as potential ideas to take on board its policy agenda, regardless of the number of chambers supporting it.

- National parliaments should **always provide an English translation of the contributions** they submit in the framework of the Political Dialogue.

- **IPEX should be used as the sole platform of interparliamentary exchange**, and it should be improved further by, for instance, setting up automatic notifications also for regional parliaments where a certain number of parliaments/chambers (for instance: 4) indicate that they are scrutinizing a specific proposal.

- **Parliaments should be invited to participate at an earlier stage**, more specifically, when consultations take place.

- **Parliaments should play a role in the REFIT initiatives** of the European Commission as they are the best placed to identify the existing shortcomings and resulting needs.

- **Parliaments' specific importance as (national) organs of democratic representation** should be recognised and they should be attributed an enhanced status in the framework of Better Regulation.

- **The links between the IPEX and the REGPEX Platforms** should be improved.

- **A single 'subsidiarity hub'** should be created based on IPEX where reasoned opinions as well as contributions, CoR opinions, answers by the Commission, resolutions of the European Parliament etc. would be collected.

1. INTRODUCTION

1.1. Introducing the principle of subsidiarity within the EU

The **principle of subsidiarity is one of the principles that guides the actions of the European Union** (EU) today. According to this principle enshrined in Article 5(3) TEU, in areas of non-exclusive competence, the EU shall only act if Member States are unable to reach a defined objective and where the EU is better able to reach said objective by reason of the scale or effects of the proposed action (insufficiency and EU added-value tests, respectively). Both requirements are cumulative, meaning that EU action is justified only if both conditions are fulfilled:[1]

Article 5 (3) TEU

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

As detailed further in Sub-section 2.2. on the evolution of the principle of subsidiarity within the EU legal order, this principle has been included in the Treaties since the Single European Act (1987), and it has been a general principle of EU law since the Treaty of Maastricht (1993). **This principle**, however, **has been more salient within the EU since the Treaty of Lisbon** entered into force in 2009, as **this Treaty specifically entrusted national parliaments with the task of guaranteeing the respect of subsidiarity**. In the framework of the **Early Warning System (EWS)**, national parliaments assess whether an EU legislative proposal breaches subsidiarity. The functioning of the EWS is defined in Articles 6 and 7 of Protocol No 2 on the application of the principles of subsidiarity and proportionality[2]:

Article 6 of Protocol No 2

> Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.
>
> If the draft legislative act originates from a group of Member States, the President of the Council shall forward the opinion to the governments of those Member States.
>
> If the draft legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the opinion to the institution or body concerned.

[1] Subsidiarity may both justify and hinder EU action, or as it used to be put in the Amsterdam Treaty, it is a "dynamic concept' allowing 'Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified'. Article 3, Protocol (No 30) on the application of the principles of subsidiarity and proportionality, OJ C 340, 10.11.1997, p. 173–306.

[2] Protocol (No 2) on the application of the principles of subsidiarity and proportionality, Consolidated version of the Treaty on the Functioning of the European Union, OJ C 115, 9.5.2008, p. 206–209.

Article 7 of Protocol No 2

1. 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.

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 in accordance with the second subparagraph of paragraph 1, the draft must be reviewed. This threshold shall be a quarter in the case of a draft legislative act submitted on the basis of Article 76 of the Treaty on the Functioning of the European Union on the area of freedom, security and justice.

After such review, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.

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 in accordance with the second subparagraph of paragraph 1, 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.

According to Article 6 of Protocol No 2, following the publication of a legislative proposal in all official languages, **national parliaments have eight weeks to submit reasoned opinions if they consider that the proposal in question breaches the principle of subsidiarity**. Each national parliament has two votes, whereby each chamber has one vote in bicameral parliaments. Where the total number of votes expressed in favour of a subsidiarity breach within the defined eight-week period equals one-third (one-fourth in the area of Freedom, Security and Justice), a so-called **yellow card** is triggered (Article 7(2) of Protocol No 2) and the institution which is the author of the proposal – in most cases, the European Commission (the Commission) – must review it. That institution may decide to maintain, amend or withdraw the legislative proposal at stake (and must explain its decision).

In the framework of the ordinary legislative procedure, where the total number of votes equals one-half (**orange card** procedure; Article 7(3) of Protocol No 2), the Commission must also review the

proposal, which it can maintain, amend or withdraw. In the case of an orange card however, the Commission must justify in a reasoned opinion why the principle of subsidiarity is respected, and the EU legislators – the European Parliament (Parliament) and the Council of the European Union (the Council) – are, too, called to individually assess whether a breach exists.

The EWS has only been activated on three occasions since 2009. In addition to having been rare, these yellow cards were all triggered under exceptional circumstances, either because of the legal basis used, or because of the political context in which they were presented to the Commission.[3] In none of these three occasions did the yellow card push the Commission to withdraw its proposal: in the first case, it decided to withdraw the proposal despite considering that no subsidiarity breach had occurred, and in the other two cases, it simply maintained its proposal as it was originally submitted. These decisions disappointed (some) national parliaments,[4] especially considering that reaching the threshold necessary to trigger a yellow card is very demanding in terms of resources, requires anticipation and important coordination efforts.

It is interesting to note that parliaments managed to have an impact on the piece of legislation finally adopted in some of the cases in which half of the number of votes required to trigger a yellow card was reached.[5] In other words, the reasoned opinions adopted by national parliaments over the past twelve years have had an impact, even if only three yellow cards have been reached.

The **importance of the sub-national dimension** in assessing the respect of the subsidiarity principle is now expressly recognised in the Lisbon Treaty: the local and regional levels should be duly taken into account when assessing whether the Member States are unable to reach the objective defined, while the Lisbon Treaty also foresees that regional parliaments with legislative powers be consulted by their national parliaments 'where appropriate' (Article 6 of Protocol No 2).

Additionally, alongside the possibility for national parliaments to control the respect of the principle of subsidiarity *ex ante*, a **possibility for them to launch a procedure in front of the Court of Justice of**

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[3] The first yellow card reached in 2012 concerned the Proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services also known as the Monti II Proposal (COM(2012) 130). This proposal was adopted on the basis of the flexibility clause (Article 352 TFEU) despite the fact that article 153(5) TFEU explicitly prohibits any Union intervention in the right to take collective action. The second yellow card triggered in 2013 concerned the proposal to establish a European Public Prosecutor's Office (Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final). A new legal basis (Article 86 TFEU) was introduced to this end in the Lisbon Treaty, and it foresees the possibility to resort to enhanced cooperation if all Member States fail to agree. The third yellow card dates back to 2016 and was raised on the ground of the Commission's proposal on posted workers (Proposal for a directive of the European Parliament and the Council amending Directive 96/71/ECof The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of Services COM(2016) 128 final). On that occasion, it is primarily motivation of a political nature (and indeed influence by governments) that led national parliaments, stemming almost exclusively from Eastern European Member States, to adopt reasoned opinions. For detailed analyses of the three yellow cards, see: G. Barrett, 'Monti II: The subsidiarity review process comes of age...or then again maybe it doesn't', (2012) Maastricht Journal of European and Comparative law, 2012, pp. 595-600; F. Fabbrini and K. Granat, "Yellow Card, but no Foul': The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike', Common Market Law Review, 2013, pp. 115-144; M. Goldoni, 'The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation', European Constitutional Law Review, 2014, pp. 90-118. D. Jancic, 'The Game of Cards: National Parliaments in the EU and the Future of the Early Warning System and the Political Dialogue', Common Market Law Review, 2015, pp. 939-376; D. Fromage, 'The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member States Parliaments?', Yearbook of European Law, 2016, pp. 5-27; D. Fromage and V. Kreilinger, 'National Parliaments' Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive', European Journal of Legal Studies, 2017, pp. 125-160.

[4] European Parliament, Resolution of 18 April 2018 on the Annual reports 2015-2016 on subsidiarity and proportionality, 2017/2010(INI), point 26.

[5] I. Cooper, 'National parliaments in the democratic politics of the EU: The subsidiarity Early Warning Mechanism, 2009-2017', Comparative European Politics, 2019, pp. 919-939.

the EU (the Court of Justice, CJEU) ***ex post*** – following procedures that must be detailed at the domestic level – was also expressly guaranteed in the Lisbon Treaty. However, this new parliamentary prerogative has yet to be used by national parliaments (see Section 4.3. below). The importance devoted to the local and regional dimension is visible in this respect as well, as the **Committee of the Regions** (CoR) has also been guaranteed the **possibility to launch a procedure** if it concerns a piece of legislation for whose adoption it had to be consulted.

In January 2022, national parliaments (and Parliament) launched a **Working Group on the role of the national parliaments in the European Union in the framework of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC)**.[6] Although the mandate of this Working Group is not limited to the sole issue of the control of the respect of the principle of subsidiarity, this group of 41 national and European parliamentarians also examines the EWS. In fact, during its constitutive meeting, it was noted that the 'control of the principle [of subsidiarity is] not operating satisfactorily and, furthermore, that it [is] carried out less and less by the national parliaments. In addition, this prerogative only allows them to impose a veto and, as several contributors [from national parliaments] pointed out, this is no longer enough for them'.[7] This statement is in line with Parliament's view that 'the current structure of the procedure for the subsidiarity control mechanism results in national parliaments' committees for the EU dedicating excessive amounts of time to technical and legal assessments with short deadlines, which complicates the goal of holding a deeper political discussion on European politics'.[8]

An evolution of the way in which national parliaments have performed their control of the principle of subsidiarity, and of how EU institutions have complied with their obligation to respect that principle, may thus be observed since the Lisbon Treaty entered into force. Criticism regarding the efficiency of the EWS has regularly been voiced, and initiatives to improve the functioning of the EWS were launched. Among these efforts is the **Task Force on subsidiarity, proportionality and 'doing less more efficiently'** created by the Commission in 2017 (detailed in Section 4.1.2. below). National parliaments and Parliament themselves have also examined this issue – both individually and collectively – on numerous occasions since the Lisbon Treaty entered into force. For instance, they recently created the COSAC Working Group on the role of the national parliaments mentioned previously whose establishment was, among other reasons, motivated by shortcomings inherent to the EWS. In addition to this, it is worth noting that **national parliaments have been much more active in the framework of the informal Political Dialogue** with the Commission than in the framework of the EWS. The former Dialogue was established in 2006 by then Commission President Barroso after the Treaty establishing a Constitution for Europe was rejected by the Dutch and French peoples.[9] In its framework, **national parliaments may express their opinion on any aspect of a legislative proposal at any point in time** (in addition to being able to submit opinions collectively, and on their

[6] More information on the Meeting of the Chairpersons of COSAC, 13-14 January 2022 is available at: https://secure.ipex.eu/IPEXL-WEB/conferences/cosac/home.

[7] COSAC Working Group on the role of the national parliaments in the European Union, Minutes of the constitutive meeting held on 8 February 2022, p. 1.

[8] European Parliament, Resolution of 24 June 2021 on European Union regulatory fitness and subsidiarity and proportionality – report on Better Law Making covering the years 2017, 2018 and 2019 (2020/2262(INI)), point 4.

[9] See generally on this Dialogue and its origins: D. Jancic, 'The Barroso Initiative: Window Dressing or Democracy Boost?', Utrecht Law Review, 2012, pp. 78-91.

own initiative, that is independently of the existence of any EU legislative proposal or consultation document).[10]

Highlighted by the above quote and the aforementioned initiatives, there still seems to be some room for improvement in the functioning of the EWS. In any event, a deeper reflection in its respect appears to be necessary 12 years after the entry into force of the Lisbon Treaty, at a time when contemplations on the future of Europe and its democracy are on-going.[11]

To define solutions for the existing issues, the evolution of the way in which Parliament and the national parliaments have performed their control over time must first be assessed. Furthermore, assessing the role played by other European Institutions, including the Commission, the CoR and the CJEU can help to understand the overall context and to suggest some recommendations for the future. Beyond this, examining parliaments' role in ensuring the respect of the principle of subsidiarity also begs the question of the need to reconsider this control in the broader context of national parliaments' role within the EU, and of the EU's relationship to national authorities at various levels of governance (i.e. local, regional and national) more generally.

The following sections therefore examines these issues in turn. The study begins first by specifically focusing on the parliamentary control of the principle of subsidiarity at both the EU and the national levels (Section 3). Then, it turns to the question of how the Commission, the CoR and the CJEU have dealt with this principle since it was first introduced as a general principle of EU Law at Maastricht (Section 4). Section 5 concludes this study and offers a few recommendations for the future. However, before this in-depth analysis may be performed, the principle of subsidiarity, the context of its introduction and its evolution in the EU legal order since Maastricht need to be recalled first; to which the remainder of this introduction is dedicated.

1.2. The principle of subsidiarity and its evolution in the Treaties since Maastricht

The principle of subsidiarity has been included in the European Treaties since the 1987 Single European Act.[12] However, it only referred to subsidiarity in the area of environmental policy, and this principle only became a general principle of EU law with the entry into force of the Treaty of Maastricht in 1993.[13] As a consequence, from then onwards, subsidiarity became liable for judicial review by the Court of Justice. However, this remained the only enforcement mechanism available within the EU until the Treaty of Lisbon attributed a special responsibility to national (and, to some extent, regional) parliaments in this regard.

The explicit recognition of the principle of subsidiarity in the Treaties was a response to the criticism from, primarily, the German *Länder* and the United Kingdom that the European Community was acting unduly by neglecting the existence of federal entities in some of the Member States, and by ever self-

[10] The Dialogue is not limited to its written dimension, but also takes the form of visits by Commissioners to national parliaments. See on both of these aspects the European Commission's Annual reports on relations with national parliaments.

[11] Democracy is indeed one of the themes examined by selected European citizens in the framework of the Conference on the Future of Europe to which more is available at https://futureu.europa.eu/?locale=en.

[12] Article 130R.

[13] Article 3B. See general information on this historical evolution: D. Fromage, 'Subsidiarity: From a General Principle to an Instrument for the Improvement of Democratic Legitimacy in Lisbon' in M. de Visser and A.P. van der Mei (eds) The Treaty on European Union 1993-2013: Reflections from Maastricht. Maartje de Visser and Anne Pieter van der Mei (Ed.). Maastricht, Intersentia, pp. 139-156.

expanding its competences without consent from its Member States. As such, it was meant to limit European action to those cases in which it was truly necessary.

Defining the principle of subsidiarity has been difficult to date. Indeed, the need to further clarify it was evident soon after it had been included as a general principle of EU law.[14] However, it is worth noting that the **definition included at Maastricht has only marginally evolved over time**. With the entry into force of the Lisbon Treaty, the regional and local dimensions were added to the elements that needed consideration in the performance of the (national) insufficiency test ('the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, *either at central level or at regional and local level*' (emphasis added)), but no further clarifications were included in the Treaties. In fact, the assessment criteria that had been included to provide some guidance in the Amsterdam Treaty in the Protocol on the application of the principles of subsidiarity and proportionality were removed. Nevertheless, the Commission declared soon after the entry into force of the Lisbon Treaty that parliaments should continue to be inspired by these indications.[15]

The **major changes introduced at Lisbon** thus consist of the **creation of the EWS, the express recognition of parliaments' possibility to request their government to bring a claim before the CJEU on the ground of a subsidiarity breach, with the same possibility also available to the CoR**.

The introduction of the principle of subsidiarity in the EU legal order should be viewed against the general background of growing trends in favour of Euroscepticism and allegations that a democratic deficit existed (and still exists in the eyes of some individuals) within the EU. To counter these trends, national parliaments and Parliament were thus attributed an ever-growing role within the EU. This evolution culminated with the entry into force of the Lisbon Treaty, which defined democracy within the EU for the first time ever, as being anchored on two pillars constituted by, on the one hand, Parliament and, on the other hand, national parliaments (Article 10 TEU):

Article 10 TEU

> 1. The functioning of the Union shall be founded on representative democracy.
>
> 2. Citizens are directly represented at Union level in the European Parliament.
>
> Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

The Treaty also attributed a larger role to Parliament, and entrusted national parliaments with the task of 'contribut[ing] to the good functioning of the Union' (Article 12 TEU):

Article 12 TEU

> National Parliaments 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 […].

[14] Heads of states and governments provided some guidance at the Edinburgh summit of the European Council held in December 1992. European Council, Conclusions of the Presidency, Edinburgh, 12 December 1992.

[15] European Commission, Annual report 2011 on relations between the European Commission and National Parliaments, Brussels, 2012, p. 3.

The role of national parliaments within the EU had been contemplated long before the Lisbon Treaty entered into effect; indeed, this subject was first mentioned in the Maastricht Treaty. However, **the Lisbon Treaty undoubtedly represented a breakup point and a reinforcement of the importance of national parliaments**, both formally because they were now mentioned in the main text of the Treaties on several occasions, and in terms of substance, as some rights of information and participation were being directly attributed to them in the Treaties for the first time, with the goal of enabling national parliaments to contribute to the good functioning of the Union. Concerning the subject of prerogatives, national parliaments' capacity to control the respect of the principle of subsidiarity is both the most salient and most frequently used.[16] However, it entails some shortcomings and, as discussed further in the conclusion of this study, the question of the suitability of the rights attributed to parliaments within the EU, as well as that of the direct relationship between the EU and national parliaments (and national institutions, in general) needs exploring.

Having now recalled what the principle of subsidiarity entails, how its definition has evolved over time and which procedure now allows national parliaments to control its respect, the next section turns to the analysis of the parliamentary control of the subsidiarity principle since the Lisbon Treaty's entry into force.

[16] This is the case because national parliaments are called to scrutinize all the draft legislative proposals adopted in areas of non-exclusive competence. However, the capacity to veto resorting to the general passerelle clause is bound to remain exceptional for this procedure, as it is, by definition, used on rare occasions only.

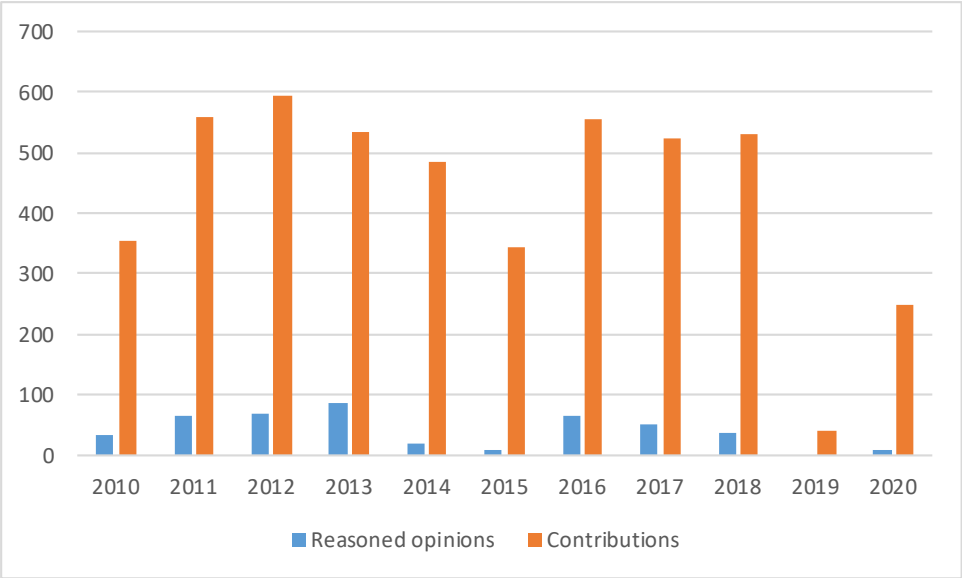
2. THE CONTROL OF THE PRINCIPLE OF SUBSIDIARITY BY PARLIAMENTS AND ITS EVOLUTION

2.1. National parliaments and the principle of subsidiarity

It may generally be said that the introduction of the EWS, and the Political Dialogue that preceded it, originally sparked great interest among national parliaments.[17] In fact, the introduction of this **System may be viewed as an important factor in the Europeanisation of national parliaments**, as it provided an incentive to those parliaments that had not yet adapted their internal procedures to be involved in EU affairs by the entry into force of the Lisbon Treaty to do so. However, **criticism regarding the EWS itself soon began to arise**, and **several initiatives have been launched over the past 12 years by parliaments themselves to improve its functioning**. National parliaments have also adapted their scrutiny procedures over time, both collectively and on an individual basis. In the following sub-sections, a summary of parliaments' control of the principle of subsidiarity is first made (3.1.1.), whereas the following sub-section depicts on-going discussions (3.1.2.).

2.1.1. Looking back at twelve years of parliamentary control of subsidiarity

Figure 1: **Reasoned opinions and contributions (2010–2020)**



Source: Personal compilation based on the data contained in the Commission's Annual Reports on the application of the principles of subsidiarity and proportionality and relations with national parliaments.

As is visible from Figure 1, **contributions submitted by national parliaments in the framework of the Political Dialogue have been much more numerous than reasoned opinions** adopted on the ground of a subsidiarity breach. Although a few of the contributions may, in fact, have been reasoned opinions received at too late a point to be counted as such, these cases could not have been so frequent

[17] This enthusiasm was, at the time, largely shared by regional parliaments with legislative powers, and by academics. Among the latter, a few examples of early contributions to the debate are: P. de Wielde, 'Why the Early Warning System does not alleviate the Democratic deficit', OPAL Online Paper Series, 2012, pp. 1-23; P. Kiiver, 'The Early-Warning System for the Principle of Subsidiarity: the National Parliament as a Conseil d'Etat for Europe', European Law Review, 2011, pp. 98-108. P. Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality*, Routledge, 2012.

so as to reverse this trend. Several other explanations could instead be found to justify the limited number of reasoned opinions, and national parliaments' much more active engagement in Political Dialogue.

The limited number of reasoned opinions and the fact that only three yellow cards have been triggered in a period of more than 12 years indicates that **there have not been any major subsidiarity issues since 2009**.[18] The characteristics of the EWS could have also prevented parliaments from adopting reasoned opinions in due time (the eight-week deadline is often deemed too short and the thresholds necessary to trigger a yellow or an orange card too high),[19] but these may not have been the only factors explaining a limited number of opinions. Rather, the limited number of opinions could have been related to the need for parliaments to adapt to the new procedure in the immediate aftermath of the entry into force of the Lisbon Treaty. In accordance to Protocol No 1 on the role of national parliaments in the European Union, they receive numerous documents, which they have occasionally struggled to filter and scrutinize adequately. Fluctuations in the number of proposals made by the Commission every year are an additional factor explaining the variation and limited number of opinions overall alongside, for example, elections at the national and European levels (for instance, in 2019 European elections took place leading to a drop in the number of legislative proposals), or a disillusion of parliaments towards the EWS. Also, some national parliaments prefer to focus on the scrutiny of their government's action.[20] They have been critical of the Commission's responses to their reasoned opinions, as detailed further in below. Adopting a reasoned opinion has additionally been viewed by some parliaments as overly negative and anti-European, as well as too reactive and not sufficiently proactive enough to be an attractive tool.

In contrast to the limited use of the EWS, national parliaments have shown a preference for and a keen interest in entering a (political) dialogue with the Commission.[21] That procedure, although it does not provide them with any guarantees of any kind due to its informal character,[22] not only allows them to play the positive and proactive role within the EU they strive for, it also offers them much more freedom: contributions may be submitted at any point in time on any aspect of a proposal (or even on their own initiative).[23] Thanks to this framework, national parliaments are much freer and can also transmit a political statement to the Commission that they would have originally adopted with the goal of submitting it to their government.

The Political Dialogue can also be used to submit contributions adopted collectively by several parliaments. In fact, **discussions on a green card** that would be submitted as part of an 'enhanced

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18 In its resolution of 19 April 2018 on the implementation of the Treaty provisions concerning national parliaments, the European Parliament considered that 'the limited use of the 'yellow card' procedure could indicate that the principle of subsidiarity is, on balance, respected within the EU' (2016/2149(INI)), point 14.

19 These arguments have been made on very numerous occasions, *inter alia* in: COSAC, 22nd Bi-annual report, 2014 or in the framework of the work of the Task Force on subsidiarity, proportionality and 'doing less more efficiently'.

20 This is, for example, the case of the Finnish parliament.

21 It is less clear whether the Political Dialogue in its written dimension is indeed a dialogue, implying a follow up to the Commission's response. Based on the information available on the Commission's dedicated website (https://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm), it appears that it is only in rare cases that parliaments/chambers react to the Commission's response to their opinion. It is also rare for them to submit more than one opinion/contribution on a given proposal.

22 In that framework, the European Commission does not have any obligation to follow up on the contributions it receives. However, even in the framework of the EWS, which is indeed enshrined in the Treaties, national parliaments have criticised the fact that they had difficulty in identifying if and how their input had had any influence.

23 The liberty enjoyed by parliaments in this context, however, also induces a high level of heterogeneity among the contributions such that only an analysis of the content of the individual contributions allows to draw meaningful conclusions on the Political Dialogue and its evolution.

Political Dialogue' flourished around 2014 when national parliaments discussed the possibility that they be attributed the right to invite the Commission to consider making a legislative proposal on a given subject (much like Parliament can invite the Commission to do so under Article 225 TFEU).[24] As further discussed below in Sub-section 2.1.2, this initiative appears to have gained momentum again in the past months, for instance in the context of the new Working Group on the role of the national parliaments in the EU launched in January 2022 in the framework of COSAC.[25] However, it is not only with a view to proposing a green card to the Commission that national parliaments have used the Political Dialogue collectively. On several occasions, they coordinated amongst themselves to share their priorities on the basis of the Commission's Annual Work Programme as well.[26]

Before examining on-going debates, it bears emphasizing that, as is visible in Table 1 and in the Annex, on the one hand, **important differences exist in the levels of engagement of the various chambers** since some of them are very active, whilst others rarely submit reasoned opinions or contributions. On the other hand, the levels of participation of the various chambers have varied over time. These differences may be explained by the factors previously outlined, and also by some changes in the (political) preferences and the personality of the actors involved, or by changes in the procedures of control in place. For instance, in 2017 the Italian Senate amended the procedure allowing its participation in the EWS and in the Political Dialogue.[27] As a consequence of this, it has since ceased to be among the most active chambers in the Political Dialogue.

Finally, another element that should be mentioned is the evolution of the tools at parliaments' disposal to inform each other of the progress of their scrutiny procedures, and to coordinate their views. Parliaments continue to resort to the long-established European Center for Parliamentary Research and Documentation (ECPRD), although this channel of interparliamentary cooperation is more useful to for instance share best practices on existing procedures than it is to discuss positions on specific legislative procedures.[28] Next to the by now very well-established network of EU national parliaments' representatives in Brussels,[29] the **Platform for Interparliamentary EU Information Exchange (IPEX)[30] has become a key information hub** for EU affairs-related parliamentary activities, including regarding subsidiarity scrutiny. However, as is visible from the discussions that took place during the latest IPEX Correspondents' meeting held in October 2021, parliaments are still seeking to further

[24] See for a historical overview of this initiative: C. Fasone and D. Fromage 'From veto players to agenda-setters? National parliaments and their "green card" to the European Commission', Maastricht Journal of European and Comparative Law, 2016, pp. 294-316. S. Pazos Vidal, *Subsidiarity and EU multilevel governance. Actors, Networks and Agenda*, Routledge, 2019, p. 196f. At the time, parliaments made three attempts to propose a green card but only the first one launched on the initiative of the French National Assembly on food waste was successful. See further on this: D. Fromage 'National parliaments in the Juncker Commission era: the 'green card' initiative and beyond', Quaderni costituzionali, 2015, pp. 1024-1026.

[25] The French Senate also recently advocated in favour of the introduction of a green card. Rapport d'information n° 592 (2021-2022) de M. Philippe Bonnecarrère, fait au nom de la mission d'information Judiciarisation, 29 March 2022, p. 112f.

[26] For instance, this happened in 2015 and 2016.

[27] See on this evolution of the level of participation of the Italian parliament: C. Fasone, Verso un declino della partecipazione del Parlamento italiano al dialogo politico con la Commissione europea? (1/2020), Osservatorio sulle fonti.

[28] See on this channel of interparliamentary cooperation the dedicated part on Parliament's website (https://www.europarl.europa.eu/relnatparl/en/networks/ecprd) and N. Brack, 'The Parliaments of Europe: full part actors or powerless spectators? A state of play 2010–2020', Study requested by the AFCO Committee PE 698.534, 2021, p. 38.

[29] See: https://www.europarl.europa.eu/relnatparl/en/networks/representatives-of-national-parliaments.
See also the European Parliament's Annual reports on the Relations between the European Parliament and EU national parliaments. For instance, Annual Report 2020 p. 56. For an academic standpoint, see: C. Neuhold and A.-L. Högenauer, 'An Information Network of Officials? Dissecting the Role and Nature of the Network of Parliamentary Representatives in the European Parliament', The Journal of Legislative Studies, 2016, pp. 237-256.

[30] https://ipexl.europarl.europa.eu/IPEXL-WEB/.

improve it.[31] A **possible evolution could make IPEX even more useful for facilitating parliaments to coordinate their positions and possibly reach a yellow or a green card**. The situation that had existed previously whereby parliaments used different channels of communication,[32] and where the information concerning parliamentary activity was scattered across a series of individual websites, has undoubtedly improved since IPEX has centralized and significantly enlarged the amount and types of information available on one platform. But more could still be done, and some practical recommendations are made in the conclusion of this study.

2.1.2. Evolution and on-going discussions

Figure 1 and the Annex reveal that **important fluctuations have existed in the level of participation in the EWS and in the Political Dialogue**. This notwithstanding, the **general trend seems to have been towards declining participation** in general.

According to a survey performed in the framework of COSAC between 2019 and 2021, 19 out of the 35 responding chambers/parliaments had not adopted any reasoned opinion, whilst 14 of them had adopted between one and five.[33] Similarly, more than one-third of the respondents had not submitted more than five contributions in the framework of the Political Dialogue over the same period of time, and eight of them had not submitted any. Only 6 parliaments/chambers submitted between 5 and 10 contributions, whilst only five respondents submitted up to 20 contributions. Four chambers only had submitted more than 20.

The pandemic undoubtedly had an impact on this evolution, as national parliaments had to implement procedures for remote working. Furthermore, European Parliament elections were organised in 2019, which caused the Commission to make only a limited number of legislative proposals in the course of that year. This corresponds also to the decline in the number of legislative proposals made by the Commission in general – a factor which has an immediate impact on the level of participation in the EWS. But it also **confirms the scepticism** most recently **voiced by national parliaments** in the framework of the COSAC Working group, and on numerous other occasions before that. The recent survey conducted in the framework of COSAC revealed that in early 2022, **only 23 out of the 35 responding chambers/parliaments systematically examined whether legislative proposals complied with the principle of subsidiarity**.[34]

As mentioned in the introduction, national parliaments (and Parliament) launched a **Working Group on the role of the national parliaments in the EU** in the framework of COSAC in January 2022.[35] Although its mandate is broader than the sole control of the respect of the principle of subsidiarity, this group of 41 parliamentarians also examines that issue. As noted, the EWS has been criticized, but the necessity to more frequently resort to it as opposed to creating a new green card procedure has been considered as well. Nonetheless, at the time of concluding this study in April 2022, after three out of the seven meetings scheduled until the end of June 2022 have already happened, the participants seem rather to focus on the introduction of a green card procedure, more so than towards an attempt to improve the EWS. This is in line with national parliaments' expectations considering that according

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31 Programme of the IPEX Correspondents meeting held on 28-29 October 2021 available at: https://secure.ipex.eu/IPEXL-WEB/calendar/8a8629a87715b7d5017715d94b390036.

32 COSAC, 26th bi-annual report, 2016.

33 COSAC, 37th bi-annual report, 2022, p 5.

34 This information is extracted from COSAC, 37th bi-annual report, 2022, p. 5.

35 More information on the Meeting of the Chairpersons of COSAC, 13-14 January 2022 is available at: https://secure.ipex.eu/IPEXL-WEB/conferences/cosac/home.

to the recent COSAC survey already referred to above, 24 out of the 25 responding chambers/parliaments supported this initiative.[36] Local and regional authorities have also expressed their support in favour of introducing a green card.[37] Based on this support and strive for reforms, one may speculate that **the decreasing participation in the EWS and in the Political Dialogue is perhaps the illustration of a deeper mutation towards a decreasing interest in these procedures more generally**. Other channels of interaction with the Commission, for instance in the form of dialogues with commissioners, and other means of participation in EU affairs, in general, could become more popular.

2.2. Parliament and the principle of subsidiarity

Parliament is involved in the control of the respect of the principle of subsidiarity in two ways: as an EU co-legislator generally tasked with guaranteeing its respect and as an addressee of the reasoned opinions and the contributions adopted by national parliaments. In the present study, more emphasis is placed on the latter of these two responsibilities as it allows to better assess the EWS and its functioning since the Lisbon Treaty entered into force.

To set the overall context, one may recall that based on the Treaties and on the 2016 **Interinstitutional Agreement on Better Law-Making**, **Parliament is generally committed to respecting the principle of subsidiarity**.[38] To this end, like the Council, it is called to take into account the Commission's impact assessments when adopting amendments, or produce its own impact assessments where necessary. However, in practice, Parliament for instance rarely does so.[39]

In regard to its **treatment of national parliaments' reasoned opinions, they have gradually gained importance in Parliament's work**, as mirrored by the increasing level of detail devoted to subsidiarity-related issues in Parliament's annual reports on relations with national parliaments.

Since it also receives national parliaments' reasoned opinions and contributions, Parliament has thus devised procedures to treat them. In accordance with its Rules of Procedure, the Committee on Legal Affairs (JURI) is responsible for the 'interpretation, application and monitoring of Union law and compliance of Union acts with primary law, notably the choice of legal bases and respect for the principles of subsidiarity and proportionality'.[40] A standing rapporteur for subsidiarity is nominated among the members of the JURI Committee based on a rotating system among political groups.[41] The

[36] COSAC, 37th bi-annual report, 2022, p.7. Note that the EP has defended this initiative for a longer period. European Parliament, Resolution of 18 April 2018 on the Annual reports 2015-2016 on subsidiarity and proportionality, 2017/2010(INI), point 34.

[37] Contribution on 'procedures and subsidiarity' by Apostolos Tzitzikostas, President of the European Committee of the Regions, to the Working Group on European Democracy of the Conference on the Future of Europe, 2022, p. 7.

[38] The EP and the Council undertake to take the Commission's impact assessments in their fulfilling their legislative functions (Article 14). Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, p. 1–14.

[39] European Parliament, Resolution of 24 June 2021 on European Union regulatory fitness and subsidiarity and proportionality – report on Better Law Making covering the years 2017, 2018 and 2019 (2020/2262(INI)), point 26.

[40] Par. XVI of Annex VI to the Rules of Procedure (9th parliamentary term), https://www.europarl.europa.eu/compendium/en/contents.

[41] European Parliament, Annual report on the Relations between the European Parliament and EU national parliaments 2020, p. 44, respectively.

standing rapporteur oversees Parliament's subsidiarity mechanism and prepares the reports which JURI regularly drafts based on the Commission's annual reports on subsidiarity and proportionality.[42]

JURI's central role in controlling of the principle of subsidiarity within Parliament also derives from the fact that it is responsible for the in-depth analysis of the reasoned opinions received: it controls whether they indeed raise subsidiarity-related issues and may rather consider them as contributions where necessary. Furthermore, for a few months, contributions have also been addressed to JURI whereas they used to be solely sent to the responsible sectoral committee beforehand.

Generally, contributions and reasoned opinions are made available to all actors in Parliament (Members, political bodies and European Parliament services) by the European Parliament Directorate for Relations with national parliaments. It also provides those actors with specific expertise and briefings on parliaments' contributions and reasoned opinions, which are used throughout the legislative cycle in trilogue negotiations or where contributions and reasoned opinions are used to draft committee reports. Since 2010, the European Parliament Directorate for Relations has also prepared a Monthly State of Play Note, which provides an overview of those reasoned opinions and contributions received since the last published Note and indicates which files are on the agenda for the next plenary session.[43] The Note is published on Parliament's website prior to each plenary session, and it is enclosed in the meeting file for the European Parliament's Conference of Committee Chair. Reasoned opinions (and their translations) and contributions have been made publicly available to all via the CONNECT database since 2017, and Parliament is currently considering streamlining the submission process of reasoned opinions and contributions even further. According to the plan for the National parliaments Submission Tool, national parliaments should be able to easily upload their reasoned opinions and contributions on a restricted portal. In this way, the functioning of the EWS and of the Political Dialogue would be improved and made more user-friendly. The content of the Submission Tool would automatically be fed into CONNECT, the Legislative Observatory (OEIL) and to the E-Committee platform.

2.3. Conclusion

So far, a **limited use of the EWS by national parliaments** has been observed, although it had sparked a considerable interest immediately before and after the Lisbon Treaty entered into force. Although a general decrease in the total number of reasoned opinions submitted by national parliaments is observed, **other factors have also had an undeniable influence** in this evolution, such as the (diminishing) number of proposals adopted by the Commission or, in recent years, the Covid-19 crisis. Additionally, **fluctuations are visible in the number of contributions transmitted in the framework of the Political Dialogue**, but these are harder to account for on a general level, as the variety of submitted contributions demands their individual analysis before any meaningful conclusion may be drawn. Be this at it may, it remains that **this informal written dialogue between the Commission and national parliaments** – originally established to compensate rejecting the Treaty establishing a Constitution for Europe – **has not only endured over time but has also been quite successful**.

The decrease in national parliaments' interest can be viewed against a general background characterized by the fact that EU affairs have become mainstreamed within national parliaments

[42] European Parliament, Resolution of 18 April 2018 on the Annual reports 2015-2016 on subsidiarity and proportionality (2017/2010(INI).

[43] European Parliament, Annual report on the Relations between the European Parliament and EU national parliaments 2020, p. 47.

thanks to the EWS, but also more generally following the euro area crisis, in particular. That crisis affected national parliaments' core prerogative (their 'power of the purse'), after which several of them obtained new prerogatives as part of the reform packages adopted in response to the crisis. These are some shifts, among others, that may explain why parliamentary interest in the principle of subsidiarity has declined over time.

Concerning Parliament and its interaction with national parliaments in the control of the respect of the principle of subsidiarity, it may be said that it **quickly adapted its working methods** after the Lisbon Treaty had entered into force to ensure that reasoned opinions and contributions could be used the legislative process. Over time, **the procedure in place has progressively improved**, leading to reasoned opinions gaining more importance in Parliament's work.

3. THE EU INSTITUTIONS AND THE PRINCIPLE OF SUBSIDIARITY SINCE MAASTRICHT

Considering that the Commission authors the vast majority of the legislative proposals made at the EU level, it plays a key role in guaranteeing its respect. The Commission is thus examined first in the following analysis (4.1.). Next, local and regional authorities individually, and especially the CoR in its quality as one of the institutions called to control subsidiarity are considered (4.2.), while the CJEU's role is analysed last, due to the limited number of cases in which it has been called upon to control the respect of the principle of subsidiarity to date (4.3.).

3.1. The European Commission and the principle of subsidiarity

As noted above, the EWS is complemented by the Political Dialogue between the Commission and national parliaments. Although the latter takes place on an informal basis, it usefully complements the former and has indeed been largely favoured by national parliaments. Also, the perception by national parliaments of their relationship with the Commission in this context will influence their incentive to participate in both the EWS and the Political Dialogue. The following sub-sections therefore recall the evolution of the Commission's relationship to national parliaments in the framework of the EWS and the Political Dialogue since the entry into force of the Lisbon Treaty (4.1.1) before turning to the Task Force on subsidiarity, proportionality and 'doing less more efficiently' and the follow up of its recommendations to date (4.1.2., and 4.1.3.).

3.1.1. The EWS and the Political Dialogue since the entry into force of the Lisbon Treaty

This section presents an overview of the relationship between the Commission and national parliaments first. Second, it zooms in on how the Commission reacted to the three yellow cards.

In general, the **Commission's attention to the principle of subsidiarity and its control by national parliaments has increased over time**. This is so not only because it created a dedicated Task Force in 2017 or has launched other specific initiatives. Every year, the Commission publishes reports on the application of the principles of subsidiarity and proportionality and its relations with national parliaments,[44] and over the years, the level of detail of the reports has increased. This is illustrated, for instance, by the fact that the Commission has been presenting an analysis of the legislative proposals that attracted most feedback by parliaments in recent years. Yet, room for improvement still exists, as noted further below.

Moreover, **although national parliaments had been critical of the quality of the Commission's replies to their contributions in the past,[45] it now appears that they are largely satisfied with it**: 24 out of the 31 responding parliaments/chambers involved in the COSAC survey of 2022 found that the Commission 'mostly addressed the issues raised in their opinions within the Political Dialogue'. Six of them, however, considered this mostly not to be the case, and one parliament, the Cypriot one, found this not to be the case at all.[46]

[44] Until 2018, these reports were published independently from each other.

[45] COSAC, 16th bi-annual report, 2011, p. 7.

[46] COSAC, 37th bi-annual report, 2022, p. 7.

The **Commission's reaction to the three yellow cards** triggered so far may hardly be generalised because they were triggered in three exceptional sets of circumstances, and because these episodes have remained particularly rare, thus making any generalisation risky. Nevertheless, the way in which the Commission reacted on those occasions certainly had an impact on national parliaments' readiness to participate in the EWS, and on their perception of this procedure in general.

The Commission's reaction to the three yellow cards differed quite significantly. In the first case, national parliaments received a standardised answer more than two months after the yellow card had been triggered. On the occasion of the second yellow card however, the Commission's reaction was swifter (three weeks) and it sent individual answers in response to each of the reasoned opinions. After the third yellow card was triggered, the Commission's response was also thorough. The first and the second yellow cards were triggered under the presidency of José Manuel Barroso, whereas the third yellow card happened under Jean-Claude Juncker's presidency. The personality of the President of the Commission does not seem to have been instrumental in determining how the Commission reacted. Rather, it would appear that the context played an important role (the Monti II proposal which gave rise to the first yellow card was based on the flexibility clause and the proposal itself was very brief, such that some doubted whether the Commission had really sought to have this proposal approved).

Since 2016, the EWS has remained inactivated and has not yet been activated under the presidency of Ursula von der Leyen, so only speculations may be made at this stage. Considering how engaged the Commission has been in promoting its Better Regulation agenda, it may be anticipated that the Commission could react with matched celerity and eagerness, as in the case of the second and third yellow cards, to engage with national parliaments' opinions should a fourth yellow card be triggered.

3.1.2. The Task Force on subsidiarity, proportionality and 'doing less more efficiently'

The Commission launched the **Task Force on subsidiarity, proportionality and 'doing less more efficiently'** in 2017 in order to 'mak[e] recommendations on how to better apply the principles of subsidiarity and proportionality, identify[…] policy areas where work could be re-delegated or definitely returned to Member States, as well as ways to better involve regional and local authorities in EU policy making and delivery'.[47]

The Task Force was chaired by then European Commission First Vice-President in charge of Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights, Frans Timmermans. Contrary to what the Commission had originally intended, it was composed of only six members – three representatives from the CoR and three representatives of national parliaments – since Parliament refused to take part in this initiative. It 'considered that participation in the task force set up by the Commission would disregard [its] institutional role and standing as the only directly elected Institution of the European Union, representing the citizens at Union level and exercising functions of political scrutiny over the European Commission'.[48]

The Task Force convened during the first half of 2018 and published its final report on 10 July 2018.[49] It adopted **nine recommendations**, and generally promoted the concept of '**active subsidiarity**'

[47] Article 3, European Commission, Decision on the establishment of a Task Force on subsidiarity, proportionality and 'doing less more efficiently', 14 November 2017.

[48] European Parliament, Resolution of 18 April 2018 on the Annual reports 2015-2016 on subsidiarity and proportionality, 2017/2010(INI), point 8.

[49] Report of the Task Force on subsidiarity, proportionality and 'doing Less More Efficiently', 2018.

whereby this concept 'denote[s] an improved engagement with all stakeholders and local and regional authorities throughout the entire policy cycle'.[50]

First, it advocated a **common definition of subsidiarity** by resorting to a subsidiarity grid common to the Commission, the EU co-legislators, the CoR, and regional and national parliaments to assess subsidiarity, proportionality, and the legal basis of new and existing legislation.

Second, it recommended that the **Commission flexibly apply the eight-week deadline** defined in the Treaties by taking recess and holiday periods into account. Its **annual reports on subsidiarity should reflect the opinions received by both national and regional parliaments**, and '[i]t should also make available to the co-legislators, in a comprehensive and timely manner, information about proposals where significant concerns have been raised in respect of subsidiarity'.[51]

Third, the Task Force proposed that **the next Treaty change be used to extend the deadline set for parliaments to submit their reasoned opinions**, and that in general they be given the possibility to 'express fully their views about subsidiarity, proportionality and the legal basis (conferral) of the proposed legislation'.

Fourth, the Task Force **advised in favour of the involvement of national, regional and local authorities** in policymaking.

Fifth, the Commission **should always include the local and the regional dimensions** in its impact assessments.

Sixth, **Parliament and the Council should also use the subsidiarity grid**, and the **Commission should highlight any views it received from local and regional authorities during the consultation period**. It also suggested making the interface between IPEX and REGPEX more efficient.

Eighth, it suggested that **the REFIT initiative be enhanced** by 'develop[ping] a mechanism to identify and evaluate legislation from the perspective of subsidiarity, proportionality, simplification, legislative density and the role of local and regional authorities.'

Lastly, **more effective implementation of existing initiatives should be preferred to new legislative proposals**.

In response to this report, the Commission adopted a communication in October 2018.[52] Although it did not foresee any major reforms, it committed to propose a subsidiarity grid, and agreed to extend the eight-week deadline on an informal basis. These reforms, which have since been introduced, are detailed in the next section which also serves to evaluate 12 years of interactions between European Commission and national parliaments.

3.1.3. The European Commission's interaction with parliaments and its evolution

The creation of the Task Force on subsidiarity, proportionality and 'doing less more efficiently' can be viewed against an **overall background characterised by the Juncker Commission's commitment to better regulate and act only where necessary**. To achieve that objective, in 2015 the Juncker

[50] European Commission, Communication on 'The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking', COM(2018)703 final, p. 6. For instance, this concept has since been promoted by the CoR. See for example: Committee of the Regions, Subsidiarity Annual Report 2020, p. 3.

[51] Note that the number of opinions required for there to be 'significant concerns' was not defined by the Task Force.

[52] European Commission, Report on The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking, COM(2018) 703 final.

Commission prepared **guidelines on Better Regulation** accompanied by a **Better Regulation Toolbox**, which were later updated in 2017.[53] They guide Commission staff throughout the entire policy cycle, and have better defined how the principle of subsidiarity (and the principle of proportionality) ought to be taken into consideration.[54] The Commission also set up a **Regulatory Scrutiny Board** in 2015,[55] which replaced the Impact Assessment Board that had existed since 2007. This independent body 'shall assess the quality of draft impact assessment reports, fitness check reports and major evaluation reports',[56] and thus has a broader mandate than its predecessor who focused exclusively on impact assessments. Especially after the Impact Assessment Board was first created and until as late as 2017, concerns were regularly raised regarding insufficient subsidiarity justifications in impact assessments.[57] However, significant improvements were made, and the justification provided by the Commission is now found to be satisfactory.[58] It should additionally be reminded that subsidiarity not only plays a role when the Commission drafts a new legislative proposal, but is also a key consideration in the retrospective evaluation assessments it conducts as part of its REFIT programme (which itself is part of the Commission's Better Regulation agenda), another aspect considered by the Task Force. [59]

Furthermore, a **new Interinstitutional Agreement on Better Law-Making approved in 2016**[60] recalls the Commission's, Parliament's and the Council's commitment to respect the principle of subsidiarity (Article 2). It highlights that the impact assessments produced by the Commission should ensure that this principle is duly respected, and that a statement on this matter is to be included in the explanatory memoranda as well (Articles 12 and 25, respectively). In this way, justifications on the respect of the principle of subsidiarity are always included: in the case of proposals which are not of significant economic, environmental or social impacts and which thus do not have to be accompanied by an impact assessment (Article 13), the justification in terms of subsidiarity are included in the explanatory memorandum.

As a follow up to the recommendations issued by the Task Force, **the Commission additionally revised its toolbox in late 2021**.[61] Its **Tool no. 5 'Legal basis, subsidiarity and proportionality'** details how the Commission should act to ensure that the principle of subsidiarity is respected. For

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53 See further on this the dedicated part of the European Commission's website: https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en#documents

54 European Commission, Communication on 'The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking', COM(2018)703 final, p. 4.

55 European Commission, Communication to the Commission 'Regulatory Scrutiny Board Mission, tasks and staff', C(2015) 3262 final.

56 Article 2, Decision of the President of the European Commission on an independent Regulatory Scrutiny Board, P(2020) 2.

57 This is visible in the annual reports these Boards have produced. For instance, in 2015 and 2016 weaknesses in this domain were identified in close to 20% of cases, and in 2017 subsidiarity issues featured in approximately 30% of the negative opinions adopted. Regulatory Scrutiny Board, Annual Report 2016, 2017, p. 13, Regulatory Scrutiny Board, Annual Report 2017, 2018, p. 20. National parliaments also raised this issue in numerous opinions, as noted for instance by the European Parliament. European Parliament, Resolution of 13 September 2012 on the 18th report on Better legislation – Application of the principles of subsidiarity and proportionality (2010) (2011/2276(INI)), point 9. The European Parliament had been concerned early on by the fact that the European Commission was using a 'standard recital' to justify its compliance with the principle of subsidiarity. European Parliament, Resolution on the Commission report to the European Council on better lawmaking 2000 (P5_TA(2003(0143), point 17.

58 The Regulatory Scrutiny Board noted concerning 2020 that '[o]n average, the analysis of subsidiarity and EU value added was satisfactory, even for impact assessments that received an initial negative opinion. This was comparable to previous years'. Regulatory Scrutiny Board, Annual report 2020, 2021, p. 19.

59 European Commission, The EU's efforts to simplify legislation – 2019 Annual Burden survey, 2020, p. 10.

60 Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, p. 1–14.

61 European Commission, 'Better Regulation' Toolbox November 2021 edition, 2021, p. 30f.

instance, the subsidiarity grid that had originally been designed by the CoR must be appended to significant or politically sensitive legislative proposals accompanied by an impact assessment which do not fall under the EU's exclusive competence. Tool no. 5 also details the practical steps that need to be taken to assess subsidiarity.

Finally, following the adoption of the report by the Task Force, **an informal agreement was also reached according to which the period between 20 December and 10 January is now excluded** from the eight-week period reserved to the scrutiny of the principle of subsidiarity.[62]

3.1.4. Reflecting upon twelve years of European Commission's engagement with parliaments in subsidiarity-related issues

There is little doubt that, since the entry into force of the Lisbon Treaty, **the exchanges between national parliaments and the Commission have been regular and frequent, both in the framework of the EWS and even more so in the framework of the Political Dialogue**. In the same vein, it is also clear that this twelve-year period has been characterised by a (much-welcome and needed) **constant thrive towards improvement of the existing procedures**, as is for instance evident from the establishment of the Task Force on subsidiarity, proportionality and 'doing less more efficiently', the enhanced quality of the subsidiarity justifications contained in the impact assessments, or the inclusion of the subsidiarity grid in the latest version of the Commission's Better Regulation Toolbox.

Despite these improvements, some aspects could still be enhanced. For instance, national parliaments have regularly expressed the view that the replies provided by the Commission to their reasoned opinions were not satisfactory, as they were too standardised and were received too late. Although improvements in this regard were noted at a later stage, there still seems to be some dissatisfaction in so far as some parliaments would be in favour of the Commission following up on its intention to provide replies to reasoned opinions where several parliaments have expressed similar concerns but the threshold for a yellow card has not been reached.[63]

National parliaments have also regretted that the impact of their reasoned opinions (and contributions), that is the way in which they may have had an influence during the legislative process, was not always easy to identify, thus raising the question of the added value of their participation in the absence of a yellow card. This concern is certainly legitimate. However, it also hinges on the limits inherent in the EWS in the current legal framework. Formally, the Commission is only allowed to amend, withdraw or maintain a proposal based on the subsidiarity assessment conducted by parliaments. In other words, the Commission is not permitted to introduce substantive amendments off of the content-based input received by parliaments – hence why they should make their voices heard early on in the legislative process, as detailed in the conclusion of this study.

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[62] European Parliament, Resolution of 24 June 2021 on European Union regulatory fitness and subsidiarity and proportionality – report on Better Law Making covering the years 2017, 2018 and 2019 (2020/2262(INI)), point 13.

[63] This was put forward by the German Bundesrat in 2018 and reiterated in 2021. Bundesrat, Official Document 554/18 (Decision), p. 4 and Bundesrat, Official Document 738/21 (Decision), p. 3.

3.2. Sub-national entities and the principle of subsidiarity: The Committee of the Regions, Local and Regional Entities

As noted in the introduction, the definition of the principle of subsidiarity described in the Treaties has not been significantly amended since it was first introduced in the Treaty of Maastricht. Nevertheless, following the adoption of the Lisbon Treaty, **express reference to the local and regional levels is now made in the definition of the principle of subsidiarity**. In addition to this, the **CoR's ability to bring a case before the CJEU on the ground of a subsidiarity breach** has also been specifically recognised. These innovations should be viewed against the **background of a larger role reserved to the sub-national dimension in the EU Treaties**.[64] This trend has not only endured since the Lisbon Treaty, but it has arguably grown even further as illustrated, for instance, by the importance devoted to the local and regional levels in the final report of the Task Force, or by the resolution recently adopted by Parliament in which it emphasized that **approximately 70 per cent of EU legislation is implemented by local and regional authorities**.[65]

The following section first considers the role of local and regional entities, then analyses their control of subsidiarity (4.2.1.), and finally looks at the evolution of the CoR's role in the scrutiny of subsidiarity and where we stand at present (4.2.1.).

3.2.1. Local and regional entities and their control of the principle of subsidiarity

Great variety exists among local and regional entities within the various Member States. In particular, only six Member States have regional parliaments with legislative powers. Those parliaments may have up to three avenues to exercise influence at their disposal, but this varies in the various Member States. First, they may be represented in one of the two parliamentary chambers, as is the case in Austria, for instance. Second, a procedure may exist through which they are consulted by their respective national parliament. Third, they may try to make their voice heard at the CoR level directly. It should be noted that the Treaties only acknowledge (indirect) rights to regional parliaments with legislative powers in the area of subsidiarity. However, this does not necessarily mean that no rights have been guaranteed to other types of sub-national entities in the various Member States,[66] nor that this distinction is justified, although it is probably understandable.

Furthermore, in general, it may be observed that regional participation in the EWS has decreased over time. This trend is visible both in the case of the individual participation examined here, as well as the collective participation via the CoR analysed in the next sub-section. For example, regional parliaments with legislative powers cooperate in the framework of the Conference of European Regional Legislative Assemblies (CALRE), which has also instituted its working group on subsidiarity. Although CALRE had been quite engaged with this matter, no activity has been reported since 2018 on its website.[67] The

[64] See on this C. Panara, *The sub-national dimension of the EU. A legal study of multilevel governance*, Springer, 2015, in particular p. 160f.

[65] European Parliament, Resolution of 24 June 2021 on European Union regulatory fitness and subsidiarity and proportionality – report on Better Law Making covering the years 2017, 2018 and 2019 (2020/2262(INI)), point 3.

[66] This may however happen on an informal basis, as in the case of Romania. See further on this issue: P. Schmidt, T. Ruys and A. Marx, The subsidiarity early warning system of the Lisbon Treaty. The role of regional parliaments with legislative powers and other subnational authorities', Committee of the Regions, 2013.

[67] https://www.calrenet.eu/.

Catalan Parliament had been very active in fostering regional participation in the EWS in its early years as well, but this interest has faded over time as well.[68]

However, the CoR has been very active in this domain as examined next.

3.2.2. The Committee of the Regions and the subsidiarity check

Since its creation, **the CoR has been committed to contributing to the control of the respect of the principle of subsidiarity, and is considered to have been quite active in that area**.[69] Subsidiarity is one of the elements it takes into consideration when adopting an opinion.[70] As detailed in the following paragraphs, it has adapted its institutional structures with a view to conducting that control: it adopts an annual work programme and produces annual reports on this matter, and has launched several initiatives to collect the views of its members and promote subsidiarity in general.[71]

In 2007, the CoR created the **Subsidiarity Monitoring Network**.[72] This network brings together **Parliaments and Governments from regions with legislative powers**, **local and regional authorities without legislative powers** and **local government associations** in the EU (150 members by the end of 2020). National delegations and chambers of national parliaments may also participate. Membership within the network is thus very diverse. It aims at enabling the dialogue between regional and local authorities the Commission regarding political documents and legislative proposals, which directly affect these authorities these authorities and the policies they are responsible for. This network exists thus as the main gateway for these authorities to be actively involved in monitoring the principles of subsidiarity and of proportionality. More specifically, the network aims at:

> '1. Raising awareness as regards the practical implementation of the subsidiarity and proportionality principles;
>
> 2. Keeping CoR rapporteurs and members informed about contributions regarding subsidiarity and proportionality from a representative network of local and regional stakeholders;
>
> 3. Identifying measures for better law-making, cutting red tape and increasing the acceptance of EU policies by EU citizens;
>
> 4. Acting as a laboratory for the identification and exchange of best practices and experiences between local and regional authorities on the application of the subsidiarity principle and the decentralised implementation of EU policies at the local level'.[73]

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68 It had organised several events and published several books among which: Parliament de Catalunya, *El control del principi de subsidiarietat*, 2010; M. Palomares i Amat, *Parlaments regionals i procediment d'adopció de decisions a la Unió Europea*, Parlament de Catalunya, 2005.

69 In addition to the initiatives mentioned below, it commissioned three studies in 2006, 2013 and 2018. C. Jeffery and J. Ziller, *The Committee of the Regions and the implementation and monitoring of the principles of subsidiarity and proportionality in the light of the Constitution for Europe*, Committee of the Regions, 2006; G. Vara Arribas and D. Bourdin, *The Role of Regional Parliaments in the Process of Subsidiarity Analysis within the Early Warning System of the Lisbon Treaty*, Committee of the Regions, 2013 and P. Schmidt, T. Ruys and A. Marx, The subsidiarity early warning system of the Lisbon Treaty. The role of regional parliaments with legislative powers and other subnational authorities', Committee of the Regions, Brussels, 2018. See generally on the CoR's in controlling the respect of the principle of subsidiarity: S. F. Nicolosi and L. Mustert, 'The European Committee of the regions as a watchdog of the principle of subsidiarity', Maastricht Journal of European and Comparative Law, 2020, pp. 284-301, p. 296.

70 Article 51 CoR Rules of procedure OJ L 65, 5.3.2014, p. 56.

71 See also the CoR's Annual Reports on subsidiarity.

72 https://portal.cor.europa.eu/subsidiarity/thesmn/Pages/default.aspx.

73 Committee of the Regions, 'The Subsidiarity Monitoring Network', https://portal.cor.europa.eu/subsidiarity/thesmn/Pages/default.aspx.

Members of the network may submit their opinions on all political or legislative documents subjected to an opinion by the CoR, and the rapporteur from the CoR drafting a report on a specific matter may request their opinion on subsidiarity, proportionality or any other matter. Their views are sometimes sought during the impact assessment consultations, and the network is also used for exchanging experiences and best practices in subsidiarity, the implementation of EU policies at the regional and local level and better regulation as seen from a local and regional perspective. In sum, the network may organise impact assessment consultations, targeted consultations, and its members may submit open contributions. The **REGional Parliamentary EXchange (REGPEX)** platform created in 2012[74] is a **sub-network of the Subsidiarity Monitoring Network**. It facilitates the participation of regional parliaments with legislative powers in the EWS and serves as a means for regional parliaments and governments to exchange information. By the end of 2020, it had 76 members in total.

Table 1: Contribution to REGPEX by year

Year	Number of contributions
2020	18
2019	2
2018	95
2017	66
2016	28

Source: Personal compilation based on the CoR's Annual reports on subsidiarity.

Table 2: CoR opinions contemplating subsidiarity (2010-2020)

Year	Total number of CoR opinions [NB : not all opinions concern legislative proposals]	Of which address subsidiarity (or raise subsidiarity concerns (2014, 2017))
2020	48	18
2019	49	8
2018	78	35
2017	15	2
2016	52	2

[74] https://portal.cor.europa.eu/subsidiarity/regpex/Pages/default.aspx.

2015	46	5
2014	14	3
2013	75	2
2012	71	30
2011	62	15
2010	64	12

Source: Personal compilation based on the CoR's Annual reports on subsidiarity (NB: data for 2013 and 2016 were compiled manually from the CoR's website).

Interestingly, the Austrian Bundesrat – which brings together the regional parliaments of Austria – uses this platform to share its reasoned opinions. The French Senate also uploads its reasoned opinions on REGPEX, although neither one of these chambers are regional chambers.

In recent years, REGPEX has mostly been used by Austrian regional governments and parliaments, German regional parliaments, and occasionally by Italian regional parliaments and the French Senate. **The variety of actors using REGPEX, and thus presumably those adopting reasoned opinions, has significantly decreased over time**. Following the first years after its establishment, other actors like the Belgian and Spanish regional parliaments, the Association of Finnish Local and Regional Authorities, Denmark Local Government, or the Council of European Municipalities and Regions (CEMR), had also used REGPEX.

Moreover, in 2012 the CoR revised its subsidiarity strategy with a goal of:

> '1) reinforcing the governance structure of the CoR's subsidiarity monitoring;
>
> 2) establishing a comprehensive approach for monitoring subsidiarity during the whole EU decisionmaking process;
>
> 3) involving relevant EU and national institutions in these activities; and
>
> 4) consolidating the CoR's readiness regarding any potential action before the Court of Justice'.[75]

Among the initiatives for reaching these objectives is the creation in 2012 of a **Subsidiarity Steering Group** chaired by the coordinator of the Subsidiarity Monitoring Network, composed of one member per political group. The Steering Group plays a key role in allowing the CoR to be involved in the control of the principle of subsidiarity. The Steering Group promotes the coordination and the political follow up of subsidiarity monitoring activities throughout the year and defines subsidiarity monitoring activities on a yearly basis, as well as suggests relevant tools and procedures of the Subsidiarity Monitoring Network to support the work of the rapporteurs designated in the legislative process. Additionally, it makes proposals and presents texts on subsidiarity for their adoption by the Bureau of the CoR. It monitors the CoR's Subsidiarity Annual Work Programme, endorses the Subsidiarity Annual

[75] Committee of the Regions, A new subsidiarity strategy for the Committee of the Regions, 2 May 2012, https://portal.cor.europa.eu/subsidiarity/Documents/A8782_summary_subsi_strategy_EN_modif1_final.pdf.

Report and presents it to the Bureau. It should be made aware of the position of CoR opinions regarding compliance of EU proposals with the principles of subsidiarity and of proportionality, of the main findings of the consultations conducted in the framework of the network, and of reasoned opinions adopted by national and regional parliaments, which are members of the network. In the fulfilment of these tasks, it is supported by a group of (local and regional) experts selected among the members of the Subsidiarity Monitoring Network, according to their expertise in terms of subsidiarity and in EU law. They form the Subsidiarity Expert Group and are endorsed by the Steering Group. This Expert Group provides input for the Subsidiarity Annual Work Programme, and the Group may be consulted by rapporteurs if they so choose. The experts play a key role in promoting multilevel governance as their input 'creates a link with subsidiarity debate in the Member States, strengthens mutual understanding and brings the CoR closer to its local and regional partners and thus to the needs of Europeans […and] the Expert Group also serves as a network of 'core' CoR contact points for subsidiarity in the Member States'.[76]

The subsidiarity scrutiny by the CoR starts at the pre-legislative phase and continues throughout the whole legislative cycle, including until after the proposal has been adopted. To this end, the Subsidiarity Expert Group first selects certain legislative proposals based on the work programme of the Commission and its Roadmaps for the legislative process. The selected proposal should present a clear political interest for local and regional authorities, touch on competences of local and regional authorities, and bear a potential subsidiarity dimension. Preference is given to legislative proposals, and the CoR's priorities and initiatives included in the work programme of the thematic commissions are duly considered. The identified priorities are then contained in the CoR's Subsidiarity Work Programme drafted by the Steering Group and endorsed by the Bureau of the CoR. These proposals are monitored by the administration of the CoR: it flags those proposals that might bear subsidiarity issues that would require action by the CoR. When a proposal that might bear subsidiarity issues arises, all the relevant political and administrative stakeholders are mobilized to define and plan the subsidiarity monitoring activities that need to be carried throughout the year, both before and after the adoption of the proposal at stake by the Commission.

Additionally, the CoR has organised Subsidiarity conferences every other year since 2008.[77] These events seek to 'strengthen the EU inter-institutional dialogue on subsidiarity scrutiny and allow[…] for a true exchange between all players involved in the subsidiarity monitoring process'.[78] The latest of these conferences took place in Rome in November 2019. On that occasion, discussions revolved around the ways in which the institutional framework could be opened – this part of the Conference responded to the recommendations of the Task Force – and how local and regional input in EU decision-making could be guaranteed.[79] As a follow up to the work conducted by the Task Force, the CoR actually introduced a pilot project for regional hubs to assess the implementation of the EU's legislation, an initiative later confirmed in the form of RegHub 2.0 (Network of Regional Hubs for EU Policy Implementation Review).[80] This network now counts 46 members from local and regional

[76] Committee of the Regions, Subsidiarity Annual Report 2020, 2021, p. 11.

[77] For more information on the nine conferences organised to date: https://portal.cor.europa.eu/subsidiarity/Activities/Pages/SubsidiarityConferenceAssises.aspx. It also used to organise Thematic Subsidiarity Workshops, but these have been discontinued since 2014. https://portal.cor.europa.eu/subsidiarity/activities/Pages/SubsidiarityWorkshops.aspx.

[78] Committee of the Regions, 9th Subsidiarity Conference - Active Subsidiarity: Creating EU added value together, https://portal.cor.europa.eu/subsidiarity/news/Pages/9th-Subsidiarity-Conference-Rome-22-November-2019.aspx.

[79] Committee of the Regions, Programme of the 9th Subsidiarity Conference, https://portal.cor.europa.eu/subsidiarity/news/Documents/Subsi_Conf_2019/Conference-Agenda.pdf.

[80] Committee of the Regions, Subsidiarity Annual Report 2020, 2021, p. 4.

authorities and 10 observers[81] whose task it is to 'monitor the implementation of EU policies on the ground and make sure that the voices of hundreds of regional and local stakeholders are taken into account when these policies are evaluated at European level'.[82] To this end, consultations are launched, of which the latest one launched in 2021 regarded eProcurement, the INSPIRE Directive and local and regional infrastructure. The Network is part of the broader Fit for Future Platform (F4F), which is an expert group that supports the Commission in trying to simplify EU legislation and reduce related costs, thus contributing to the promotion of 'active subsidiarity' throughout the entire legislative cycle.[83]

Finally, as noted previously, **with the entry into force of the Lisbon Treaty, the CoR was guaranteed a right to launch an action for annulment before the Court of Justice on the ground that a legislative act breaches the principle of subsidiarity**. It gained this right thanks to its tendency to stretch its institutional power.[84] The internal procedure to this end is defined in the CoR's Rules of procedure (Article 58). Accordingly, the President of the CoR or the commission responsible for drawing up the draft opinion may propose bringing an action or an application to intervene. A majority of the vote cast may confirm this decision. Where this is the case, the President of the CoR shall bring the action before the Court of Justice. If the plenary cannot come to an agreement within the established deadline of two months, the Bureau may decide on the President's or the commission's proposal by a majority of the votes cast. Thereafter, the President shall bring the action before the Court of Justice, but the plenary will have to confirm it on the occasion of its next session.

The CoR considered using this power in 2012 for the first time regarding the Monti II proposal, which triggered the first yellow card ever, except that it did so after the Commission had already withdrawn its proposal.[85] In 2018, it threatened to use this prerogative if the regulation amending the rules governing EU regional funds for the period 2014-2020 were agreed upon as proposed by the Commission, as it considered that a subsidiarity breach existed.[86]

The reasons for which the CoR is yet to use its possibility to bring a case before the Court of Justice are certainly identical to those of the national parliaments, but there is also the fact that '**it considers itself as a political body** – not a legal one – whose main interest is being part of the political negotiations with the EU'.[87] Furthermore, this is likely related to the fact that 'the Committee feels that it is important to avoid reaching this stage, which would come down to acknowledging failure of the law-making process, and instead to strengthen cooperation with the other EU institutions to achieve the best possible legislation'.[88]Because of this, **the CoR actually recently demanded that it, too, be**

81 A list may be consulted at: https://cor.europa.eu/en/our-work/Pages/network-of-regional-hubs.aspx.

82 Committee of the Regions, Network of Regional Hubs, https://cor.europa.eu/en/our-work/Pages/network-of-regional-hubs.aspx.

83 Committee of the Regions, RegHub Evaluation Report, 2020, p. 8.

84 J. Schönlau, 'Beyond mere 'consultation': Expanding the European Committee of the Regions' role', Journal of Contemporary European Research, 2017, pp. 1166-1184 (pp. 1171-1172 on the subsidiarity aspect specifically).

85 S. F. Nicolosi and L. Mustert, 'The European Committee of the regions as a watchdog of the principle of subsidiarity', Maastricht Journal of European and Comparative Law, 2020, pp. 284-301, p. 296 and S. Pazos Vidal, Subsidiarity and EU multilevel governance. Actors, Networks and Agenda, Routledge, 2019, p. 196.

86 Committee of the Regions, Resolution of 1 February 2018 on changing the ESI funds Common Provisions Regulation to support structural reforms, RESOL-VI/29.

87 Interview with Dr. Gsodam, Head of Cabinet of the Secretary-General of the CoR and formerly expert in the Task Force as reported by S.F. Nicolosi and L. Mustert in S. F. Nicolosi and L. Mustert, 'The European Committee of the regions as a watchdog of the principle of subsidiarity', Maastricht Journal of European and Comparative Law, 2020, pp. 284-301, p. 297.

88 Committee of the Regions, Subsidiarity Annual Report 2011,2012, p. 2.

involved in the EWS alongside national parliaments, as opposed to only being able to bring a case before the Court Justice ex-post.[89]

3.2.3. Balance of the participation of local and regional entities since 2009

Considering that, as recalled in the introduction to this study, the German *Länder* had been instrumental in the introduction of the principle of subsidiarity within the EU prior to the Treaty on European Union and, most importantly, considering the essence of that principle itself, it is unsurprising that the local and regional dimensions have become so salient in recent years. It is also the case that local and regional entities by and large lack the possibility open to lower national parliamentary chambers to make their voice heard via the national representative sitting in the Council. This is why these entities may seek to directly engage with the EU institutions, and especially the Commission.

However, **the keen interest in subsidiarity shown by regional parliaments with legislative powers when the Lisbon Treaty first entered into force has faded over time**, or at least in some Member States. In contrast to this, **the local and regional levels of governance, and especially regional parliaments with legislative powers, have been subject to an extraordinary amount of attention in the discussions that have taken place at the EU level** over the past years. For instance, the Task Force on subsidiarity, proportionality and 'doing less more efficiently' mentions local and regional entities, as well as those regional parliaments on numerous occasions in its concluding report. It devotes great attention to these entities in its 'Active subsidiarity scheme' and insists for example on the necessity for them to be consulted by their national parliaments.[90] The Task Forces's Recommendation no. 4 is also specifically devoted to the 'Better involvement of national, regional and local authorities in policymaking'.[91]

For many years, the direct interaction between the Commission and regional parliaments with legislative powers remained vague, as it was not mentioned on the Commission's website dedicated to relations with national parliaments – where the reasoned opinions and the contributions submitted by those national institutions are included. However, as a response to the recommendations adopted by the Task Force, the Commission committed to give more visibility to the feedback it directly receives from regional parliaments,[92] allowing for more information to be included in its annual reports on its relations with national parliaments.[93] An additional change introduced in response to the reflection conducted by the Task Force has been the Commission's reinforced commitment to engage more actively with local and regional entities, in particular regional parliaments, especially during the consultation phase.[94]

This **evolution towards more transparency regarding the interaction between the Commission and regional parliaments** is welcome because it sheds light on a dialogue that could have otherwise

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89 Contribution on 'procedures and subsidiarity' by Apostolos Tzitzikostas, President of the European Committee of the Regions, to the Working Group on European Democracy of the Conference on the Future of Europe, 2022, p. 5.

90 Report of the Task Force on Subsidiarity, Proportionality and 'Doing Less More Efficiently', 2018, pp. 8-9 and 13, respectively.

91 Report of the Task Force on Subsidiarity, Proportionality and 'Doing Less More Efficiently', 2018, p. 14f.

92 European Commission, Communication on 'The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymarking', COM(2018)703 final, p. 8.

93 For instance, this was the case in 2020. European Commission, Annual report 2020 on the application of the principles of subsidiarity and proportionality and relations with national parliaments, 2021.

94 European Commission, Communication on 'The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking', COM(2018)703 final, p. 9.

easily gone unnoticed and contributes to more transparency. However, this direct interaction between the Commission and regional parliaments may only develop with caution, so as not to 'affect[…] the primary role of national Parliaments in the operation of the subsidiarity control mechanism'.[95] In addition to this, this direct interaction can be considered to be positive, as it is a channel for regional parliaments to raise their concerns, it contributes to improving the quality and the legitimacy of the Union's action, and it constitutes an incentive for regional parliaments to engage with European matters. However, considering how numerous they are (71), a danger exists for the Commission to receive too much input directly from the regional parliaments (in particular if their input includes both reasoned opinions and contributions). Furthermore, this direct interaction should not be used to compensate shortcomings inherent to the mechanisms devised for the participation of regional parliaments at the national level, that is it should not be used to bypass the national level. This would be contrary to the procedure foreseen in the framework of the EWS, and it could unduly disturb interinstitutional balances established at the national level. Hence why the Commission (rightfully) 'encourage(s) national Parliaments to consult regional Parliaments and to cooperate on EU matters'.[96]

3.3. The judicial review performed by the Court of Justice and its evolution

Since its introduction as a general principle, **the principle of subsidiarity has not been subject to intense judicial review** and the CJEU's approach was found to be 'lenient, generous, prudent, restrained, deferential'.[97] **Only very few cases have dealt with that principle so far, and no breach has ever been found by the Court of Justice**.[98] As noted above, the definition of the subsidiarity principle remained blurred for a long time and although the subsidiarity grid clearly contributes to a common definition, it remains that this principle is political in nature,[99] and thus bound to be difficult for the Court of Justice to adjudicate. [100]

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[95] As underlined by the European Commission itself, which came to this conclusion in its reaction to the report adopted by the Task Force. European Commission, Communication on 'The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymarking', COM(2018)703 final, p. 8.

[96] European Commission, Communication on 'The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking', COM(2018)703 final, p. 8.

[97] P. Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality*, Routledge, 2012, p. 75.

[98] See further on the case law : K. Granat, *The Principle of Subsidiarity and its Enforcement in the EU Legal Order. The Role of National Parliaments in the Early Warning System* , Hart, 2018, p. 30f. A search on the Court's website reveals that the principle of subsidiarity has only ever been considered in 21 cases since the entry into force of the Lisbon Treaty.

[99] This was recalled by the Juncker Commission in the Communication adopted following up on the recommendation of the Task Force in which it noted that '[t]he check on compliance with the principle [of subsidiarity] is essentially a political question entrusted to the EU's political institutions and the national Parliaments'. European Commission, Communication on 'The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking', COM(2018)703 final, p. 2.

[100] The Committee of the Regions very clearly states: 'Although the subsidiarity principle has been part of the Union's institutional life for over 15 years, Court of Justice case-law on this subject is quite small. It is unusual for the legality or validity of a Community legislative act to be brought before the Court for failure to comply with the subsidiarity principle, and to date the Court has never had occasion to annul a legislative act on these grounds. This state of affairs is largely due to self-discipline on the part of the legislator, as well as to the fact that this principle does not really lend itself to judicial supervision'. Committee of the Regions, Subsidiarity in the EU legislative process, https://portal.cor.europa.eu/subsidiarity/whatis/Pages/SubsidiarityintheEUlegislativeprocess.aspx.

Although national parliaments' capacity to ask their government to launch a case on the ground of a subsidiarity breach was explicitly recognised in the Lisbon Treaty,[101] so far none of them has made use of this prerogative.[102] **This reinforces the hypothesis mentioned earlier that there may well not have been any case of subsidiarity breach at all** that would have demanded from parliaments that they launch a case. However, the fact that the Court of Justice has never found any subsidiarity breach to date, and that it has refrained from conducting an in-depth control, may also have been a deterring factor for parliaments.

The first important case when examining the judicial control of the principle of subsidiarity is the *Vodafone* case.[103] It marks a turn in the CJEU's interpretation as it is the first case in which the Court considered the impact assessment in its evaluation of the respect of the principle of proportionality.[104] This trend was later followed in the *Luxembourg airports* case.[105] Although this inclusion by the Court of impact assessments as a parameter of review should be assessed positively, it is still problematic in so far as the impact assessment is not translated in all official languages. Therefore, it is not possible to assume that MPs have access to all the necessary information for assessing the compliance of a specific legislative proposal with the principle of subsidiarity. Furthermore, MPs only have eight weeks to conduct their subsidiarity check, and impact assessments are often lengthy documents; it can thus not be expected that they will have the time and the resources necessary to examine the detail of the impact assessment. Against this background, it is welcome that the Commission has committed to include detailed justifications in the explanatory memoranda.

Post-Lisbon, the principle of subsidiarity has been subject to closer judicial review than had previously been the case, and four cases in particular have shed light on its interpretation. These cases are: the *Estonia v Parliament and Council* case, the *Philip Morris* case, the *Pillox 38* case, the *Poland v Parliament and Council* case.[106] The *Philip Morris* case is especially relevant for several reasons. First, contrary to the *Vodafone* case, it was judged on the basis of the legal framework existing since the entry into force of the Lisbon Treaty. Second, the Court of Justice detailed further the conditions under which the obligation to state reasons contained in Article 5 of Protocol No 2 is respected: departing from its previous general assumption, the Court of Justice went on to consider that 'it should be borne in mind that, according to the Court's case-law, observance of the obligation to state reasons must be evaluated not only by reference to the wording of the contested act, but *also by reference to its context and the circumstances of the individual case*'.[107] It is on that basis that it found that 'it is undisputed that the European Commission's proposal for a directive and its impact assessment include sufficient

[101] The way in which this possibility had been articulated at the national level varies across Member States. For example, in Spain, the government may decide to abide by Parliament's request, whilst in Germany this right has been guaranteed to the parliamentary minority. D. Fromage, *Les Parlements dans l'Union Européenne après le Traité de Lisbonne. La Participation des Parlements allemands, britanniques, espagnols, français et italiens*, L'Harmattan, 2015.

[102] COSAC, 37th bi-annual report, 2022, p.6. This possibility was envisaged by the German Bundestag on three occasions, but all of these requests were rejected by the plenary.

[103] Judgment of the Court (Grand Chamber) of 8 June 2010, The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform, C-58/08, EU:C:2010:321 (Vodafone judgement).

[104] K. Granat, *The Principle of Subsidiarity and its Enforcement in the EU Legal Order. The Role of National Parliaments in the Early Warning System* , Hart, 2018, p. 34.

[105] Judgement of the Court (Third Chamber) of 12 May 2011, *Luxembourg v Parliament and Council*, C-176/09, EU:C:2011:290 (Luxmbourg airports), par. 65.

[106] Judgment of the Court (Second Chamber) of 4 May 2016, *Philip Morris Brands SARL and Others v Secretary of State for Health*, C-547/74, EU:C:2016:325 (hereinafter *Philip Morris* judgement), Judgment of the Court (Second Chamber) of 4 May 2016, *Pillbox 38 (UK) Limited, trading as Totally Wicked v Secretary of State for* Health, C-477/14. EU:C:2016:324 (hereinafter *Pillbox 38* judgement)and Judgment of the Court (Second Chamber) of 4 May 2016, *Republic of Poland v European Parliament and Council of the European Union*, C-358/14, EU:C:2016:323.(hereinafter *Poland v EP & Council* judgement).

[107] *Philip Morris* judgement, par. 225, emphasis added.

information showing clearly and unequivocally the advantages of taking action at EU level rather than at Member State level.'[108]

It is worth noting in this regard that even if the Court of Justice has not found any violation of the EU legislature on the ground of the lack of a correct justification, the Advocate General Kokott has now repeatedly warned it against the use of empty formulas.[109] Her subsidiarity analysis in the *Republic of Poland v European Parliament and Council of the European Union* case was more detailed than previous analyses.[110] She devised a detailed subsidiarity test whereby she makes a distinction between 'the substantive compatibility of EU measures with the principle of subsidiarity', and the 'their statement of reasons in the light of the principle of subsidiarity.'[111] She additionally stressed the political character of the subsidiarity assessment, and the limited scope for judicial review that derives from it; in doing so, she also reinforces the importance of the EWS.[112] This statement should not be overestimated though, as she also found that a certain number of reasoned opinions are no proof of a subsidiarity breach because 'such objections are based less on a legal assessment than on a political assessment of the draft legislation submitted by the European Commission, with the result that they are less meaningful for the purposes of the judicial review'.[113] She found that 'hardly any of the reasoned opinions actually contained any substantive statements regarding the point at issue here'.[114] As underlined by K. Granat,[115] the Advocate General seems to imply that the fact that no yellow card was triggered points to an absence of subsidiarity breach.[116] Yet, as explained above, there could be numerous reasons why national parliaments would not succeed in triggering a yellow card on time, or why they may not be willing to trigger one despite there being a breach. On the contrary, they could trigger a yellow card for reasons unrelated to subsidiarity and have in fact already done so in the past on the occasion of the third yellow card on posted workers.

The three cases in which the Court of Justice was recently led to evaluate the respect of the principle of subsidiarity are peculiar in that all three of them included the objective to improve the functioning of the internal market on the basis of Article 114 TFEU while also guaranteeing high standards of health protection. Even if the EU does not have any exclusive competence in this domain, its action is arguably required in most cases to ensure the proper functioning of the internal market because of the intrinsic

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[108] *Philip Morris* judgement, par. 226.

[109] *Inter alia* Opinion of Advocate General Kokott in *Poland v EP & Council* case, EU:C:2015:848, par. 188.

[110] Further on this : K. Granat, 'Cases C-547/14 Philip Morris, C-477/14 Pillbox 38 and C-358/14 Poland v EP & Council – Subsidiarity Scrutiny: Comments on the Opinion of Advocate General Kokott, DELI Blog, 16 February 2016, https://delilawblog.wordpress.com/2016/02/16/katarzyna-granat-cases-c-54714-philip-morris-c-47714-pillbox-38-and-c-35814-poland-v-ep-council-subsidiarity-scrutiny-comments-on-the-opinion-of-advocate-general-kokott/.

[111] Opinion of Advocate General Kokott of 23 December 2015 in Poland v EP & Council case, EU:C:2015:848, par. 140f.

[112] Opinion of Advocate General Kokott of 23 December 2015 in Poland v EP & Council case, EU:C:2015:848, par. 146.

[113] Opinion of Advocate General Kokott of 23 December 2015 in *Pillbox 38* case, EU:C:2015:854, par. 161.

[114] Opinion of Advocate General Kokott of 23 December 2015 in *Pillbox 38* case EU:C:2015:854, par. 161.

[115] K. Granat, 'Cases C-547/14 Philip Morris, C-477/14 Pillbox 38 and C-358/14 Poland v EP & Council – Subsidiarity Scrutiny: Comments on the Opinion of Advocate General Kokott, DELI Blog, 16 February 2016, https://delilawblog.wordpress.com/2016/02/16/katarzyna-granat-cases-c-54714-philip-morris-c-47714-pillbox-38-and-c-35814-poland-v-ep-council-subsidiarity-scrutiny-comments-on-the-opinion-of-advocate-general-kokott/.

[116] The Advocate General indeed notes 'there is a suggestion in the order for reference that the principle of subsidiarity might be infringed because a number of national parliaments filed reasoned opinions in accordance with Article 6 of the Protocol on the application of the principles of subsidiarity and proportionality during the legislative procedure. […] This argument is not very convincing. There was an insufficient number of objections regarding subsidiarity in those opinions to trigger the 'yellow card' procedure under Article 7(2) of Protocol No 2. Opinion of Advocate General Kokott of 23 December 2015 in *Pillbox 38* case, EU:C:2015:854par. 160-161. It is interesting to recall however that when the EWS was first introduced, the question of the relationship between the launch of an action for annulment and the necessity that a reasoned opinion or a yellow had first been raised was indeed debated. P. Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality*, Routledge, 2012, p. 43.

EU-wide nature of the actions needed. It is interesting to note how the Court of Justice – rightfully – shows how the only way to both improve the functioning of the internal market while ensuring a high level of health protection is by means of an EU action,[117] even if the second objective (i.e. health protection) could arguably be better guaranteed at national level. In other words, the Court of Justice makes the good functioning of the internal market prevail over possible more adequate national actions to protect health. In those cases, the Court of Justice also examines the quality of the subsidiarity justification and even if it refrains from examining the detailed content of such justification, it does find the reasons contained for instance in the proposal and in its impact assessment as well as the context and the circumstances of the individual case[118] to be sufficient.

[117] For instance: *Poland v EP & Council* judgement, par. 117f.

[118] *Poland v EP & Council* judgement, par. 123.

4. IMPROVING THE CONTROL OF THE PRINCIPLE OF SUBSIDIARITY AND RE-SITUATING IT IN THE EU'S MULTILEVEL GOVERNANCE SYSTEM

4.1. Main findings

An analysis of the first 12 years of subsidiarity control by national (and regional) parliaments shows that the **EWS has not been used much**, **nor has it been unduly used to block legislation** as some may have feared when it was first introduced in the Lisbon Treaty. **National parliaments have indeed used it to channel their view that a subsidiarity breach has occurred, and they have resorted to the more open Political Dialogue to participate in EU affairs, and to engage with the Commission (and Parliament)**. Against this background, **the fact that only three yellow cards have been triggered to date may not automatically be viewed as evidence that the EWS has failed; rather the opposite is the case**. **This does not, however, mean that the EWS (or the Political Dialogue) is flawless** and may not or should not be improved. Several initiatives from the various actors involved in these procedures, among which especially the Task Force on subsidiarity, proportionality and 'doing less more efficiency' and the COSAC working group set up in early 2022, show that **improvements are dearly necessary** with a view to guaranteeing that the EWS and the Political Dialogue remain efficient and attractive, and that national parliaments as well as local and regional entities contribute to ensuring that the EU's multilevel governance works in the best manner possible. Some recommendations as to how this could be achieved are made in Sub-section 5.2. below.

To date, **neither national parliaments nor the CoR have used their capacity to launch an action for annulment before the Court of Justice on the ground of a breach of the principle of subsidiarity**. As noted in this study, several reasons may account for this, among which is the fact that subsidiarity may indeed have been observed, or that this principle is ill-suited for judicial control for it calls for a control of political nature instead. But it remains in any event that using this power just because it has been attributed to national parliaments and to the CoR[119] would be at odds with its purpose, and could send a negative, anti-European signal, in addition to likely reducing the credibility of the institution that would use this power without a truly justified reason for it.

Finally, **the importance attributed to local and regional authorities in the control of subsidiarity has grown significantly over time, but regional participation in the EWS has simultaneously decreased**.

4.2. Recommendations

Improving the mechanisms in place is urgent at this point in time to ensure that representative democracy within the EU functions adequately, that interest for European matters is kept alive and beyond this, that citizens' concerns and demands do not remain unaddressed.[120]

[119] This possibility has been discussed in the framework of the information mission on the judicialisation of public life launched by the French Senate in 2021. https://www.senat.fr/commission/missions/2021_judiciarisation_de_la_vie_publique.html.

[120] As most recently expressed in the framework of the Conference on the Future of Europe. One of the four European Citizens' Panel focuses on 'European democracy/Values and rights, rule of law, security' and has considered the issue of European democracy in its debates.

To this end, reforms could be considered in the three following areas:

1. Regarding the EWS itself:

- The **existing thresholds should be applied in a flexible manner**, as also recommended for instance by Parliament, suggesting that the Commission consolidate its response where a given proposal has attracted seven or more reasoned opinions to enhance their visibility.[121] Moreover, the **established eight-week deadline should be applied in the most flexible manner possible**, even though **an extension to a twelve-week period would likely not make a significant difference** if parliamentary scrutiny has not started before a given proposal is published. In the same vein, considering that the limited number of yellow cards does not appear to be predominantly caused by too high of thresholds, **lowering the number of reasoned opinions necessary to trigger a yellow card would be unlikely to make a significant difference**.

- In any event, it is desirable that the Commission **provide detailed and individual answers to all the reasoned opinions it receives**, and that, along with the EU legislator, **outlines the impact of reasoned opinions (and contributions) on a given legislative proposal.**

2. As to the **measures designed to encourage parliaments to play a more active role within the EU**, this objective could be reached by:

- Attributing a **more positive and proactive role** to them by, for instance, **creating a green card** that would operate with thresholds that are both reachable and not so low as to trigger very numerous green cards. In any case, the Commission **should consider all the input** it receives as potential ideas to take on board its policy agenda, regardless of the number of chambers supporting it;

- Making sure that they **always provide an English translation of the contributions** they submit in the framework of the Political Dialogue;

- **Using IPEX as the sole platform of interparliamentary exchange** and improving the Platform even further by, for instance, setting up automatic notifications also for regional parliaments where a certain number of parliaments/chambers (for instance: 4) indicate that they are scrutinizing a specific proposal;

- **Inviting parliaments to participate at an earlier stage**, more specifically, when consultations take place;

- **Inviting them to play a role in the REFIT initiatives** of the Commission as they are the best placed to identify the existing shortcomings and resulting needs;

- **Recognising their specific importance as (national) organs of democratic representation** and thus attributing an enhanced status to them in the framework of Better Regulation.

[121] European Parliament, Resolution of 24 June 2021 on European Union regulatory fitness and subsidiarity and proportionality – report on Better Law Making covering the years 2017, 2018 and 2019 (2020/2262(INI)), point 34.

3. An **enhancement of the participation of local and regional authorities** could be achieved by,

- **Improving the links between the IPEX and the REGPEX Platforms**;

- Beyond this, **creating a single 'subsidiarity hub'** based on IPEX where reasoned opinions as well as contributions, CoR opinions, answers by the Commission, resolutions of Parliament etc. would be collected. In this way, a true dialogue among local, regional, national and European authorities would be fostered as opposed to the current situation where exchanges stop after a single interaction (e.g. following a reasoned opinion or contribution and answer) in most cases.

Beyond the possible solutions to currently existing shortcomings, **it is necessary for institutions at all levels of governance within the EU, as well as citizens, to engage in a broader reflection on the relationship between, on the one hand, the EU and, on the other, national institutions, including local and regional entities and national parliaments.**

The current standing of national parliaments within the EU is illustrated by ambiguity. The EU has progressively departed from its original stance which had been characterised by 'institutional blindness', that is the EU had largely left it to the Member States (governments) to decide if and how to involve national parliaments, as well as regional parliaments and local and regional authorities. With time, national parliaments (and national institutions) saw that their existence and their importance within the EU recognized, but the instruments they were attributed directly in the EU Treaties to 'contribute actively to the good functioning of the EU' of which the EWS is the most important are not truly suitable for that purpose. This is so for a variety of reasons. For example, the control of subsidiarity is too restrictive as it only covers legislative acts whereas number of non-legislative acts adopted keeps increasing.[122]

[122] COSAC Working Group on the role of the national parliaments within the EU, Minutes of the meeting of 8 February 2022, p. 2.

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ANNEX

Reasoned opinions (RO) and Contributions (C) submitted by each Chamber (2010-2020)

		2010		2011		2012		2013		2014		2015		2016		2017		2018		2019		2020	
Member State	Chamber	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C
Austria	**Bundesrat**	2	11	1	2	3	9	6	3	3	7	0	7	4	11	6	14	3	10	0	0	1	3
	Nationalrat	1	11	0	7	1	2	0	2	1	3	0	0	0	1	0	1	0	0	0	0	0	1
Belgium	**Chamber of Deputies**	0	1	1	3	3	6	1	2	0	1	0	2	0	0	0	2	0	1	0	0	0	0
	Senate	0	0	1	1	0	0	1	*	0	0	0	0	0	0	0	1	0	1	0	1	0	1
Bulgaria	**National Assembly**	0	0	2	17	0	13	0	1	0	0	0	2	3	6	0	1	0	0	0	0	0	0
Croatia	**Parliament (Hrvatski sabor)**						since 01/07/13	0		1	3	0	5	1	2	0	2	0	1	0	0	0	2
Cyprus	**Chamber of Deputies**	0	1	1	*	1	1	1	*	0	1	0	4	0	4	0	4	0	0	0	0	0	0
Czech Republic	**Senate**	1	28	0	43	0	46	2	62	1	40	1	24	3	46	0	53	1	81	0	21	0	0
	Chamber of Deputies	1	2	0	5	0	10	2	6	0	5	1	9	4	19	1	17	4	37	0	13	1	17
Denmark	**Folketinget**	2	9	1	13	3	5	1	3	1	2	0	2	2	7	0	6	2	2	0	0	1	1
Estonia	**Parliament (Riigikogu)**	0	0	0	0	0	2	1	1	0	0	0	0	1	1	0	0	0	0	0	0	0	0
Finland	**Parliament (Eduskunta)**	0	1	1	1	1	*	1	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0

		2010		2011		2012		2013		2014		2015		2016		2017		2018		2019		2020	
Member State	Chamber	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C
France	**Sénat**	3	*	1	3	7	12	4	4	2	4	0	8	0	0	7	29	2	24	0	12	1	19
	Nat. Assembly	0	0	1	1	0	0	1	39	1	34	0	23	0	33	2	16	1	11	0	0	0	7
Germany	**Bundesrat**	1	22	1	32	5	54	3	37	0	24	0	20	0	47	3	43	0	52	0	11	0	21
	Bundestag	1	5	1	5	1	1	0	0	0	2	0	2	0	5	3	43	2	2	0	0	0	2
Greece	**Vouli ton Ellinon**	0	4	0	4	0	6	3	1	0	0	0	0	0	1	0	3	0	0	0	0	0	1
Hungary	**National Assembly**	0	0	0	0	0	0	1	1	0	1	1	4	2	6	2	8	0	3	0	0	1	2
Ireland	**Both Chambers**	0	3					3	9	0	8	0	9	0	3	1	6	4	12	0	0	0	0
	Seanad Éireann													1	1	1	2						
	Dail Eireann			1	*	0	0							2	2	1	1	0	0	0	0	0	0
Italy	**Senate**	1	70	3	74	1	95	2	34	1	62	0	25	3	81	1	56	1	18	0	7	0	5
	Chamber of Deputies	0	25	2	26	0	15	0	6	0	15	0	7	0	0	0	45	0	0	0	0	0	10
Latvia	**Parliament (Saeima)**	0	1	0	1	1	*	1	*	0	2	0	1	1	4	0	0	0	0	0	0	0	0
Lithuania	**Seimas**	2	2	0	4	1	*	6	*	1	4	0	4	1	7	0	2	0	2	0	3	0	2
Luxembourg	**Chamber of Deputies**	3	4	7	7	3	3	2	3	1	2	0	2	2	6	0	1	0	0	0	0	0	0
Malta	**Chamber of Deputies**	0	0	2	*	1	1	5	2	0	3	0	1	5	6	0	1	1	1	0	2	1	2

		2010		2011		2012		2013		2014		2015		2016		2017		2018		2019		2020	
Member State	Chamber	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C
The Netherlands	**Eerste Kamer**	0	3	0	6	2	5	3	7	0	6	0	2	1	7	2	6	0	2	0	0	1	6
	Both Chambers	2	*	2	1	1	*																
	Tweede Kamer	0	1	1	*	3	*	5	2	2	7	1	5	3	8	2	5	1	3	0	2	0	0
Poland	**Senate**	4	1	4	*	1	10	2	6	0	6	0	3	2	17	4	14	0	6	0	2	0	1
	Sejm	2	*	5	*	3	*	2	4	0	6	0	0	2	4	2	6	0	7	0	2	0	1
Portugal	**Parliament (Parlamento)**	0	106	1	183	1	226	1	191	0	118	0	55	1	57	0	64	0	99	0	14	0	40
Romania	**Senate**	0	9	2	31	0	2	3	23	0	3	0	14	1	43	2	33	0	45	0	0	0	28
	Chamber of Deputies	0	0	2	38	0	26	2	36	0	30	1	46	2	70	1	41	0	48	0	15	0	0
	Both Chambers	0	2	/	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Slovakia	**Parliament (Národnárada)**	0	0	2	*	1	*	0	1	0	1	1	6	2	7	0	6	0	4	0	3	0	1
Slovenia	**National Council (Državni svet)**	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0
	National Assembly	0	0	0	0	0	0	1	4	0	2	0	0	0	0	0	0	0	0	0	0	0	0
Spain	**Both Chambers**	0	4	2	*	2	5	5	12	1	44	1	10	0	13	2	38	0	53	0	8	0	28
Sweden	**Riksdag**	3	17	11	31	20	13	9	13	2	8	1	9	12	23	4	17	0	0	0	0	2	10

Source: Personal compilation based on the European Commission's Annual reports.

NB : The number of contributions incudes the number of reasoned opinions.

Since the entry into force of the Lisbon Treaty (2009), the EU national parliaments have had the right to control the principle of subsidiarity through the Early Warning System (EWS). This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, examines how the EWS has worked over the past 12 years. It also looks into the interaction of the Commission, local and regional entities, the Committee of the Regions and the Court of Justice of the EU with national parliaments to this end.

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