CENTRO STUDI SUL FEDERALISMO

PERSPECTIVES ON FEDERALISM

VOLUME 5

ISSUE 2

2013

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

VOL. 5, ISSUE 2, 2013

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SPECIAL ISSUE

Regional Parliaments in the European Union: A comparison between Italy and Spain

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ESSAYS

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

National and Regional Parliaments in the EU decision-making process, after the Treaty of Lisbon and the Euro-crisis

by

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Perspectives on Federalism, Vol. 5, issue 2, 2013

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Abstract

The Treaty of Lisbon increased the role of National and Regional Parliaments in the EU decision-making process, in order to compensate for some of the weaknesses of the European institutional architecture. Neither National nor Regional Parliaments are given a real power of veto. However, their active involvement – through the day-to-day activity of direction and scrutiny of their executives and sometimes through the triggering of the "early warning mechanism" – can significantly help in closing the gap between (mainly national) politics and (mainly European) policies and in letting national public opinions have a say in the decisions being taken "in Brussels". Their active involvement seems even more necessary after the Euro-crisis, which has brought about a steady acceleration of both the trends towards a more inter-governmental EU and the development of an "asymmetric" Europe. Under the light of these trends, in fact, a further increase of the scrutiny function of the European Parliament seems an unrealistic scenario and, in any case, not sufficient in order to oversight and to counterbalance the fragmented (and, thus, very powerful) executive power of the EU.

Key-words

National Parliament, Regional Parliament, EU democracy, early warning system, political dialogue

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1. Parliament and Democracy in the founding European Treaties: for a long time, two forbidden words

For a long time the words "Parliament" and "Democracy" were absent in the founding Treaties and were in any case never used to refer to the institutions of the European Communities.

As is well known, the expression "European Parliament" did not appear in the founding Treaties and it was necessary to wait until the mid-Eighties for it to be included in the Treaties and not only in the official documents of that Institution.

In fact, the Treaty establishing the European Coal and Steel Community-ECSC of 1951, coherently with the functionalist approach suggested by Jean Monnet, established what was generically called an 'Assembly', with only exclusively consultative powers and made up, on the model of the consultative Assembly of the Council of Europe[I], of 78 members designated by each national parliament, among its members, once a year. This was also because, in the minds of the drafters of the ECSC Treaty – not very unlike the ones of the drafters of the statute of the Council of Europe – the relations between Assembly and High authority (the future Commission) were conceived more like those between the board of directors and the assembly of shareholders in a private company, rather than those between a government and a parliament (Costa 2001: 20 ff.).

Nevertheless, at least a couple of elements, both present since the very beginning, seem to some extent original, and subversive with respect to the traditional logic of an assembly of an international organisation (arts. 21 and 24 of the ECSC Treaty). Reference is made, firstly, to the fact that in the ECSC Treaty the possibility was advanced of an election of the Assembly members by direct universal suffrage, alternatively to their designation by the national parliaments. And, secondly, to the provision that a motion of censure could be put forward, by which the Assembly, with a qualified majority (with more than two thirds of the votes and more than half of the components), would oblige the members of the High Authority to resign.

Similar institutions, also called "Assemblies", were foreseen by the European Economic Community-EEC and European Atomic Energy Community-EURATOM treaties of 1957. At the same time, an agreement was drawn up by which it was established

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that the institutions outlined in the three treaties would have been common (with their relative functions remaining separate nonetheless, to be exercised according to the conditions foreseen by each treaty). It was the same Assembly, thus unified, by way of its own resolutions, to be called first of all the "European parliamentary Assembly" in 1958 and then the "European Parliament" in 1962.

For the name "European Parliament" to make its appearance in the text of the treaties it has been necessary, as mentioned above, to wait for the European Single Act, which was signed in 1986 and came into force in 1987: that is, seven or eight years following the direct election of the Assembly-Parliament in 1979.

It has been necessary to wait even longer in order to see the word "democracy" appear in the provisions of the treaties.

The word "democracy", in fact, made its modest appearance in the preamble of the just mentioned European Single Act of 1986[II], and then in the articles of the European treaties only with the Treaty of Maastricht of 1992, but in this case with exclusive reference to the systems of government of the Member States, on the one hand, and to the policy of development cooperation and the Common Foreign and Security Policy (CFSP), on the other[III].

It is only with the Treaty of Amsterdam of 1997 that the democratic principle is explicitly referred also to the European Union itself, stating that "the Union is founded on the principles of liberty, democracy, the respect for human rights and fundamental freedoms, the rule of law, principles which are common to the Member States" (Article 6 TEU).

This extreme caution, not to say reluctance, of the founding treaties to tackle the crux of the democratic nature of the European architecture comes as no surprise, if one considers the clearly elitist genesis of the European integration process and its purely internationalist original background (Nugent 2010: 99; Habermas 2012: 342; Weiler 2012: 256 ff.) and the fact that such process has certainly not seen the peoples, and to a lesser degree the (controversial, in its own existence) European people, as protagonists (Grimm 1995; Della Valle 2002).

Moreover, in the meantime, the Court of Justice had already set out and made use of – although initially somewhat carefully – the democratic principle, even before its written formulation in the treaties: deriving it from the common constitutional traditions of the

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Member States and defining it as a general principle of the law of the European institutions (Ninatti 2004: 6 ff and 70 ff.; Lenaerts 2013: 281 ff.).

The German Federal Constitutional Court, with its decision on the Treaty of Maastricht of 12 October 1993, had then with unusual emphasis, pointed out the risk of contradiction between the structure of the European architecture and democratic principle (as is expressly stated by Article 20 of the German fundamental law), forcing the European institutions to no longer evade the question (Sorrentino 1994; Cartabia 1994), and somewhat proposing to the EU the German model of parliamentary democracy.

2. The democratic principles in the Treaty of Lisbon

With the Treaty of Lisbon – which follows, for the most part, what was already stated on this by the treaty adopting a Constitution for Europe – the framework has changed dramatically. The Treaty deals directly with the "democratic challenge facing Europe"[IV] and does this by using all the possible available arrows in the bow of the European integration process. That is to say, all the forms of democratic legitimacy: those already present since the origin of the European construction, as well as those that have been progressively added over the decades, and lastly some newly introduced or enhanced ones with the same Treaty of Lisbon.

This is then why Title II (enumerated as "Provisions on democratic principles")[V] contains an important statement with a general slant in Article 10.1: "The functioning of the Union shall be founded on *representative democracy*".

Literally, as it can be remarked, not the European Union in itself, but only its functioning is founded on representative democracy. As if to say, we are aware that to state that the structure of European Union has been or is founded on representative democracy would be a somewhat too strong affirmation, and only partially corresponding with the truth. It would have meant to deny the above mentioned pactional and elitist origins of European development, as well as the persistent and rather increasing intergovernmental elements that distinguish its structure (Dehousse 2011; Fabbrini 2013); or the considerable weight that lies – in such legal system, perhaps even more so than in that of the Member States – with independent bodies or authorities unconnected from any form of link with the circuit of political representation (starting with, in many ways, the European

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Commission and the European Central Bank) (Bredt 2011). Instead, the attention is more realistically directed at the capacity to effectively guarantee a democratic character in the carrying out of the functions of the European Union.

From the standpoint adopted here, the reference made not to democracy without adjectives, but to "representative democracy" is fundamental: in the awareness that the latter, also known as "parliamentary democracy", is the form of "democracy of the moderns" being referred to. Moreover, the reference to democracy *tout court* would have been equivocal, considering that, as has been pointed out (Ridola 2010: 327), in the history of Europe and therefore in its constitutional patrimony, a multiplicity of models of democracy is to be found, which have been enacted: procedural and substantial democracy; representative and plebiscitary democracy; *Volksdemokratie* and *Bürgerdemokratie*.

This has also been at the expense of not including in the expression "representative democracy" the forms of direct democracy or participatory democracy[VI]. Or, perhaps better, seeing that some institutes ascribable at least in part to these other forms of democracy are foreseen by the successive provisions, recognising in such other forms of democracy an ancillary role in the completion of representative democracy, which remains the principal characterisation of democracy in Europe (Starita 2011; Bifulco 2011; Manzella 2013; Pinelli 2013).

The representative channels of which the democracy of the European Union avails itself are essentially two, taking the shape of a "dual system of representative democracy" (Verhey 2009: 240). They are both referred to in para. 2 of Article 10 TUE. The first, more direct, and in force since 1979, consists in the election of the European Parliament, which represents the European citizens at European Union level. The second, more indirect, whose origins can be traced back to the beginning of the European integration process, is today enforced through the government of the Member States – present both in the European Council (with their respective heads of state or, more frequently, of government), and in the Council of Ministers – which are "in turn democratically responsible either before their national parliaments or before their citizens".

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3. A "multilevel parliamentary field" in the EU compound Constitution

For a long time, especially after 1979, the word "Parliament" in the European integration process has been used rather exclusively to refer to the European Parliament. It was by means of this word and through this institution – extremely capable of using the rhetoric formula of the "democratic deficit" for its own advancement (Della Cananea 2003; Ziller 2013: 315) – that, as we have just seen, the idea of democracy started to find a place in the institutional architecture of the then European communities (Costa 2001: 29 ff.).

Both national and subnational Parliaments, indeed, were not deemed relevant neither in the institutional architecture, nor in the EU decision-making processes.

National parliaments were completely covered by their respective Governments, at least in the day-to-day decisions, centered on the Council (of ministers). And, internally, European affairs were almost always considered as a part of foreign affairs, therefore mainly inside the powers of the Government (except for the ratification of the Treaties).

In order to have their say in EU affairs, subnational parliaments had to overcome a double obstacle: their regional Governments and the idea that all subnational institutions were irrelevant in the EU decision-making processes (only partially attenuated with the creation of the Committee of the Regions: Fasone, in this issue). It is not by chance that – as we will see in § 5 – subnational parliaments and, more generally, subnational institutions often tended to be considered as equivalent, in the EU polity, to lobbies and pressure groups and, as can be easily imagined, to act consequently.

With the Treaty of Lisbon, national parliaments have been defined an essential element for the democratic legitimacy and for the good functioning of the EU (Article 12 TEU). More specifically, they have been granted several information rights towards EU Institutions and have also been admitted directly to the decision-making processes of the European Union, through a list of powers.

Article 12 TEU groups together the principal functions expected of the national parliaments. It opens with a general affirmation, according to which "National Parliaments contribute actively to the good functioning of the Union" (Louis 2009; Olivetti 2012). And it refers explicitly to the contents of Protocol No. 1 (on the role of the national parliaments in the European Union) and Protocol No. 2 (on the application of the principles of subsidiarity and proportionality), as well as to a series of articles in the TEU and TFEU.

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Some of these "European powers" of national parliaments are individually attributed to each chamber (the power of information; those which enable an act to be brought before the Court of Justice); others to each national parliament, thus requiring a double approval in the case of bicameral parliaments (the veto powers in the "*passerelle*" clauses); others must be exercised in "groups of chambers", which are variously composed, on condition that they reach a certain threshold (this is the case for the verification of the respect for the principle of subsidiarity, in order to trigger the "yellow card" and "orange card" mechanisms); others, finally, for reasons of necessity are in collective form, usually with the involvement of the European Parliament (for example, the "convention method" and the multiple features that inter-parliamentary co-operation can assume).

Of these powers, the most visible has been the subsidiarity check on the EU legislative acts that national Parliaments can exercise through the "early warning system". In this last check, whose procedure is foreseen by Protocol No. 2, it is also provided that some Regional Parliaments could be involved, although through their national parliaments. To use the wording of Article 6 of this Protocol, "It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, *regional parliaments with legislative powers*".

That is why, after the Treaty of Lisbon, some authors have envisaged the existence of a "multilevel parliamentary field" (Crum-Fossum 2009: 249 ff.), in which neither the European Parliament, nor national Parliaments, nor regional Parliaments could play an exclusive role any longer, given the fact that most of the policies are decided at more than one level of government. All those legislatures share a quota of political representativeness in the European "representative democracy".

Furthermore, it is clear that in this rather crowded field, the interparliamentary cooperation (between the European Parliament and national Parliaments; among national Parliaments; and among national Parliaments and their regional Parliaments) could play a crucial and difficult role.

Moreover, this theory of a multilevel parliamentary field seems quite perfectly coherent with the idea of the EU as a legal system with a composite Constitution, which is currently the subject of lively debate among constitutional scholars (Avbelj-Komarek 2012; Martinico 2013a). It is obviously not a debate that can be addressed here. It is only interesting to note that, as Parliamentary law, in the countries of continental Europe, is

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often deemed to be a part of Constitutional law (Gianniti-Lupo 2008; Avril-Giquel 2010: 2), the way we define the latter with regards to the EU reflects also on the way we analyse the former (and *vice versa*). Also in the evolution of European integration, as happened in the Constitutional history of most Member States, Parliaments and Constitutions are marching together, often sharing the same path.

4. National Parliaments in the Treaty of Lisbon: a heterogeneous family

The national Parliaments are a somewhat numerous "family" of institutions, which are very heterogeneous both at a quantitative and qualitative level, often with century-old traditions behind them (Kiiver 2006; Kaczyński, 2011). In order to obtain an idea of this heterogeneity, suffice it to recall that in the European Union, now composed of 28 Member States, there are 41 parliamentary chambers (13 bicameral and 15 unicameral parliaments); and that they go from 59 members in the House of Representatives in Cyprus to 760 Lords in the United Kingdom. At a qualitative level, it is sufficient to observe that, among these 41 assemblies, there are also chambers (for example, with life tenure) made up of representatives, some of whom are hereditary (for example, the House of Lords, albeit to a much lesser extent than in the past) or appointed at government discretion. In addition, some chambers exist whose members represent the governments of autonomous territories: see, for example, the German *Bundesrat*. In the latter case, as is well-known, even the very parliamentary nature of the assembly is subject to debate, given that, in this chamber, only the *Länder* executives, and not the people, are represented, and that, therefore, its members have a different status from that the one of the political representatives, exercising a free mandate (Falcon 1997: 277; Ruggiu 2006: 205).

All the members of this heterogeneous family have been identified in the Treaties as "national Parliaments". It could be interesting to comment on the adjective chosen and then to ask whether this picture could be hypothetically somewhere altered in the future, for instance through a Constitutional revision suppressing or reforming one or both Chambers in one of the Member States.

It is, in fact, well-known how the phenomenon of European integration is generally placed in contraposition to the nationalistic tendencies which have long prevailed

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throughout the continent, and how the development of this phenomenon, following forms and modalities which differ greatly from the traditional character of inter-*national* organisations, often tends to be considered as one of the indices of the overcoming of the logic of the nation-state in the contemporary world[VII]. It thus comes as no surprise that the entire European construct has endeavoured – and, indeed, continues to endeavour – to resist the call to a return to every form of terminology that makes explicit reference to the idea of the nation (especially where it is conceived in an ethno-linguistic manner). And yet, contrary to this tendency, the term "national" re-appears, in the European treaties, precisely in the very discipline addressed to those who, with more neutral terms which are only slightly more articulate, could have been called the "Parliaments of the Member States".

This essentially seems to be due to practical identification reasons, which establish the need to distinguish, with a concise and unambiguous formula, every reference to such parliaments with regard to those made at the European Parliament and also those which, as we have just seen, Article 6 of Protocol 2 defines as "regional parliaments with legislative powers".

Nevertheless, it cannot be excluded that, besides these reasons of a practical identification nature, there are no other reasons which have determined the adoption of this term, indeed already established in the institutional practice, in the Treaties. These further reasons may be linked to the fact that parliamentary institutions of the Member States are often deemed, especially when observed "from Brussels", as the arenas in which national public opinions manifest themselves more directly. Thus, *politics*, still prevalently anchored in its national dimension, often dependent on populist and demagogic instincts and passions, whose figurative and institutional manifestation more often and more frequently takes place in the assemblies, and especially on the floors, of the various parliaments of the Member States (which are, themselves, often rich with national history, and in which passionate and hard-fought debates arise).

With this term, however, appearing here for the first time in the main text of the Treaty (Bellamy 2013: 508), the Treaty of Lisbon intended to "capture" a very precise family of institutions, which have already been on the European scene for some time, but to which it now gives some autonomous functions: that is, which can be exercised even independently of the respective governments.

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Thus, as already remarked, national parliamentary law in some way comes to share the composite nature that it is already actually seen to have, in the Member States of the European Union, in Constitutional law. The attributive sources of powers to national parliaments, in fact, are no longer just the Constitution and, occasionally, national legislation, but also the EU treaties (including their protocols) and, if need be, the secondary norms of EU law. It follows that the parliamentary rules of procedures are thus called to design procedures relating to the exercise not only of the powers conferred by national sources of law, but also those stemming from norms of EU law.

It is in this sense – namely, that of composite parliamentary law – that the solution to the problem of the identification of "national Parliaments" should also be framed. This competence does not appear to have been fully assumed by the EU legal order (nor can it be, in fact, in the name of the principle of respect for the constitutional identity of the Member States, as explicitly stressed in Article 4, para. 2, TEU). The identification of what the term "national parliaments" actually means cannot, however, be totally left to the individual Member States, which would have *carte blanche* in this field, without encountering any limitation on the part of EU law. The latter, in effect, could impose limits, in the name of protecting the common constitutional traditions of the Member States, recognised as general principles of EU law in Article 6 para. 3 TEU (thus, avoiding, for instance, the identification of the national parliament in one Member State only with one or two non-elected Chambers).

5. Regional Parliaments with legislative powers: a strange family

As previously remarked, almost no place was reserved, in the original European institutional system, for subnational Parliaments. The traditional principle of the indifference of the European Communities, and then of the EU, for the internal constitutional structure of the Member States, also called "blindness" towards the territorial organization of federal and regional Member States (Weatherill 2005: 3 ff.; Savino 2007; Raspadori 2012: 16; Borońska-Hryniewieka 2013; Martinico 2013b; Fasone in this issue), was the first obstacle. The second obstacle was represented by the strongest role and significance given to the Regional Governments, instead of the Regional Assemblies, in the

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EU decision-making process (D'Atena 2003; Spadacini 2007; Rivosecchi 2009; Antonelli 2010; Olivetti 2013).

The creation, with the Treaty of Maastricht, of the Committee of Regions did not alter the general picture. It is true that the members of this advisory body are chosen amongst those people who "either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly" (Art. 300.3 TFEU). However, in accordance with the traditional principle of indifference or blindness, from a formal point of view, they are appointed by the Council, as per the proposals made by each Member State (art. 305 TFEU). Therefore, the intermediation of national governments is still essential in order to be chosen as a representative in the Committee of Regions. Furthermore, although not being an assembly representing States, national delegations have considerable influence in the functioning of the Committee of Regions, at the expense of the interests of single regional and local autonomies, represented in a very heterogeneous way (Domenichelli 2007: 21; Piattoni 2012; Fasone in this issue).

However, the traditional "blindness" of the EU has been gradually attenuated thanks to the activism of some among them (Brunazzo 2005) and the Treaty of Lisbon now expressly states a number of principles inspired by the very opposite view. It does so both where it recognises the national identity of each Member State (Article 4.2 TEU), "inherent in their fundamental structures, political and constitutional, *inclusive of regional and local self-government*" (Di Salvatore 2008; Guastaferro 2012; Vecchio 2012; Martinico 2013b), as well as in the new formulation of the subsidiarity principle (Article 5.3 TEU), which expressly considers also regional and local levels within the Member State (Schuetze 2009; Borońska-Hryniewiecka 2013).

Coherent with this new framework are numerous provisions of the Treaties and Protocols, among which Article 2 of Protocol No. 2, according to which the consultations undertaken by the Commission cannot disregard the Member States' subnational units, when their competences might be affected by the EU policy or because of the envisaged impact of the EU action on the local communities (i.e., citizens, local administrations, firms). And it states so, namely with the aim of verifying if the action complies with the principle of subsidiarity. The provision is specifically referred to all pre-legislative consultations, which take place before the beginning of the legislative process, even before a legislative proposal is drafted by the Commission, and which are generally carried out on

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documents that are devoid of legal effects, such as green and/or white papers and/or communications. In this way, subnational entities are able to interact, at this very preliminary stage and together with interest groups, with the Commission without the "filter" of the Member States and on their own initiative (Fasone-Lupo 2013).

All those innovations led to the emergence of the "regional Parliaments" in the EU legal system. This occurred explicitly in the procedure of the early warning system, in which – as we have seen in the previous paragraph – all the national parliaments are now involved. According to Article 6 of Protocol No. 2, also some sub-national Parliaments could take part in this procedure: "It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, *regional parliaments with legislative powers*".

Actually, this is quite a vague provision. Leaving to the other contributions of this special issue the task to examine what the main interpretative and implementing problems are, we would concentrate only on a single issue, regarding the identification of the category here outlined. It is interesting to understand for which reasons this category of "regional parliaments with legislative powers" appeared, in these terms, in Protocol No. 2.

The main reasons – as frequently happens in EU law, in whose framing interest groups play an important role – have to do with the ways and the forms in which territorial interests are organised. In this case, in November 2000, right in the wake of the Laeken declaration of 2001 and then in coincidence with the works of the Constitutional Convention, the Regions benefiting of a wider autonomy, clearly not satisfied by the role then played by the Committee of Regions, decided to create a new association: called REGLEG-Conference of Regions with Legislative Powers (Jeffrey 2005: 38 ff.; Domenichelli, 2007: 35 ff.). They decided to find their element of identification in the fact of being able to exercise "legislative powers". This criterion, although founded more on the holding of formal powers – their qualification as legislative being decisive – than on substantial autonomy, allowed the involvement in this association of the most active entities: that is, all the regions of 5 Member States (Austria, Belgium, Germany, Italy and Spain, for a total of 67 Regions) and 6 other Regions included in 3 other Member States (Åland from Finland; Azores and Madeira from Portugal; Scotland, Wales and Northern Ireland from the United Kingdom).

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In parallel with the REGLEG – and actually with even older origins, since the late Nineties, the first meeting being held in 1997 – another association was created: the CALRE-Conference of European Regional Legislative Assemblies, which collects 77 presidents of European regional legislative assemblies (the same ones mentioned above, plus Italian autonomous provinces of Trento and Bolzano and the Spanish autonomous cities of Ceuta and Melilla) (Domenichelli 2007: 43; Raspadori 2012: 32 ff.).

It is interesting to observe that, also from a textual point of view, the provision of Article 6 of Protocol No. 2 imports the same vocabulary adopted by the CALRE. Thus using, in the English language, the word "Regions", to refer to subnational entities with legislative powers; and the word "Parliament", to refer to their legislative assemblies.

This leads to some kind of adaptation also of the national terms traditionally (and often constitutionally) used to refer to these institutions. So, for instance, we find "regionalen Parlamente" in the German version of the Protocol, instead of "Landtage", which is the term normally adopted for addressing these institutions in Germany (except for Berlin, Bremen and Hamburg) or in Austria; or "Parlamentos regionales" in Spanish, instead of "Parlamentos Autonomicos"; or "Parlamenti regionali" in Italy, in this way adopting an expression which is unknown to the Italian Constitution (which uses "Consigli regionali") and, most of all, that the Italian Constitutional Court had considered, not so many years earlier, as inacceptable if employed by any of these assemblies, even if used in addition to "Consiglio regionale" (decisions No. 106 and 306 of 2002: Lupo 2002).

Notwithstanding the specific attention paid, as already remarked, by Articles 4.2 and 5.3 TEU and by Art. 2 of Protocol No. 2 to the regional and local dimensions of the EU action, no *sui generis status* is guaranteed to regional and local governments within pre-legislative consultations, compared to interest groups, with or without a limited territorial dimension (Fasone-Lupo 2013). Their conduct often resembles that of lobbies, more than the behaviour of institutional actors: as has been pointed out, "in practice, distinctions between territorial public authorities and territorially based interests are difficult to make, because territorial public authorities work to attract, promote and protect key private interests within their domain" (Greenwood 2011: 178)

However, if this is true from an historical point of view, explaining the origins of the involvement of (some) Regional parliaments in the subsidiarity check, this could change in the future, partly thanks to this mechanism, indeed. In the early warning system, in fact,

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regional parliaments are asked to intervene not in the same way as lobbyists, but as parliamentary institutions: so, their duty is that to act trying to consider also and foremost the general point of view, verifying the compliance with the principle of subsidiarity – although considered in a broad meaning, as we will see in the next paragraph – instead of promoting uniquely their specific territorial interest. What they say will probably be heard only if they manage to take a position that can be joined by other parliaments, national and regional, especially if it signals a violation of the subsidiarity principle. In the latter case, in fact, regional Parliaments' representatives have the possibility – recognised by Art. 8 of Protocol No. 2 – to bring the act adopted by the EU Institutions before the Court of Justice, either through their national Parliament (Granat 2013: 446 ff.) or through the Committee of Regions (Bußjäger 2010; Fasone in this issue).

6. Two possible interpretations of the "early warning system": a legal or political scrutiny?

The involvement of national and regional Parliaments in the "early warning system" has been interpreted in two different ways. With some simplifications, we could say: either essentially as a legal instrument, in which Parliaments need only to verify if the proposed act complies with the principle of subsidiarity, intended *stricto sensu*; or, on the contrary, mainly as a political instrument, in which Parliaments can evaluate the proposal not only regarding its compliance with the principle of subsidiarity, but also according to other parameters and criteria.

Along the first interpretative line we can place, first of all, the arguments used by Philip Kiiver. In the light of an in-depth monographic study of the topic, he has defined the function that lies with national parliaments of checking subsidiarity as a legal-institutional advisory function: an advisory function which is rather narrow, and similar to that one entitled to the *Conseil d'Etat* in France. In other words, scrutiny under the early warning system should focus "on the lawfulness, on the admissibility of legislation, rather than its political desirability" (Kiiver 2012: 133).

A collocation along the same lines can be reserved for a study conducted by Federico Fabbrini and Katarzyna Granat. They upon the basis of an accurate reading of the text of the treaties, have reached the conclusion that the scope of application of the early warning

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system should remain bound to a strict interpretation of the principle of subsidiarity, excluding all other types of evaluation. Therefore, the role of parliaments "under Protocol No. 2 should be limited to the analysis of the subsidiarity of a legislative proposal and not extend to the evaluation of its proportionality, necessity or political merits" (Fabbrini-Granat 2013: 116).

On the other side, already immediately after the Constitutional Treaty other authors expressed their perplexity on the possibility of a subsidiarity check completely autonomous from the evaluation on the political substance of the draft legislative act. The reference is here to some contributions of Marta Cartabia, who argued that the introduction of a control over subsidiarity at the national level has the advantage of "unifying in a single process both the scrutiny of the political merits and the scrutiny of competences and subsidiarity" (Cartabia 2007b: 1099). Moreover, in order to show the difficulties of a sharp and rigid distinction between legal and political checks when exercised by a Parliament, she proposed an evocative parallel with a failed attempt, in Italy, to delineate a specific parliamentary evaluation on the existence of the pre-requisite of urgency and necessity of each decree-law enacted by the Government, distinct from the evaluation of the content of the same act (Cartabia 2007a; see also D'Andrea 1983; Rizzoni 1993; Ghiribelli 2011).

This argument has been strengthened after the adoption of, upon initiative of the Commission and even before of the coming into force of the Treaty of Lisbon, the "Barroso procedure" (also called the "political dialogue": Jancic 2013: 83 ff.; Casalena-Fasone-Lupo 2013). Thanks to this procedure, which allows national parliaments to send any contribution to the Commission regarding its acts (notwithstanding the respect of the time-limit, the legislative nature of the act nor the explicit consideration of the principle of subsidiarity) and obliges the Commission itself to reply to each parliamentary contribution, president Barroso managed to neutralise the negative potential influence of the involvement of parliaments in the EU decision-making process. Thus, showing not only that the Commission is not afraid of standing up to the national parliaments, but also that it counts on their effective and active involvement in order to enhance the EU decision-making process and to strengthen the support and legitimacy of its own initiatives.

Furthermore, in arguing in favour of a wide conception of subsidiarity check, it has been observed that the subsidiarity principle has a variety of meanings and dimensions, being far from being understandable uniquely as a legal principle (Estella 2002: 2 ff.).

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Therefore, such a kind of principle seems to require a flexible and comprehensive check, exercised firstly by political bodies, as national and regional parliaments, at an earlier stage than by the Court of Justice. This is the case, for instance, of the reading of the subsidiarity principle proposed by Neil MacCormick, who considered subsidiarity as the key organising principle that can help to make the EU more legitimate. Among the four possible dimensions of this principle, the author identifies the "rational legislative subsidiarity", as that requiring a collective exercise of decision-making in the European Union, through the involvement of local assemblies, regional and national legislatures, in addition to the European Parliament (Mac Cormick 1999: 155; Fasone 2013: 170 ff.).

Moreover, it can be added that both the theses of Kiiver and Fabbrini-Granat, although accurately formulated and soundly based, have the defect of underestimating the nature of parliaments, national as well as regional ones. Parliaments are institutions that are completely political, and therefore their procedure tend to be "multifunctional", that is, somewhat free in the aim they are pursuing through them (Manzella 2001; Lupo 2013: 127 ff.). As a result, they are free to interpret the meaning and function of their interventions in the EU decision-making process differently, according both to the context and to the case in question. They are obviously bound to observe the EU treaties, but remain free to interpret them, especially if the coordination among them shows itself to be a loose one and if they can find an echo in the EU institutions of their chosen interpretation[VIII].

In short, every parliament is free to interpret the functions conferred upon it by EU law in the manner which it retains to be most beneficial and to intertwine them in a single procedure. It can do so either in a general way, at the moment in which it outlines, by means of a norm of parliamentary law – irrespective of whether these norms are legislative or contained in the rules of the chamber –, a procedure for the expression of reasoned opinions and of contributions, as well as the policy-direction to the EU activity of the government. Or concretely, at the moment in which it finds itself before a specific proposal of a EU draft legislative act and decides which "slant" and which "sense" to give to its intervention (being able, under the circumstances, to opt for a more legalistic interpretation of its role, or to highlight the political profile of its opinion).

It goes without saying that the legal effects – and also the political effects – originating from a reasoned opinion in which a claim of infringement, either in part of an act or in its totality, is made with regard to the principle of subsidiarity *stricto sensu* do not coincide with

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those of a contribution in which some suggestions have been put forward about the relative substance of the specific measure. However, it seems difficult to sustain that this distinction can be made *a priori* and imposed, in the same exact terms, on all the national parliaments, identifying – with precision – the profiles that come under the principle of subsidiarity and those which do not. This does not exclude, however, that a series of general orientations could be made in time (not only by individual national parliaments, but also, at EU level, by the Commission, the European Parliament or by the COSAC) that go in the direction of the adoption of forms of conduct which, while not uniform, are nonetheless better co-ordinated and more coherent on the part of (at least most of) the national parliaments.

The division among the scholars we have seen in the interpretation of the role exercised by parliaments reappeared in the evaluation of the first application of the "yellow card" procedure. The threshold established by the Protocol no. 2 (one third of the votes assigned to all the national parliaments)[IX] was reached for the first (and, for the moment, only) time, on a proposed regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (COM (2012)130 final: so called "Monti 2" proposal)[X]. In its reply to national parliaments, the Commission, while not retaining that the principle of subsidiarity had been infringed, and thereby re-affirming the correctness of its work in drafting the proposed regulation, has, however, recognised the difficulty of obtaining "the necessary political support" for the proposal in the last stages of the decision-making process, and consequently decided to withdraw it[XI].

The decision of the Commission to withdraw the proposal, although re-affirming that it complied with the principle of subsidiarity, would not have made any sense, and would have sounded contradictory, producing negative effects for the future (as noted by Fabbrini-Granat 2013: 142), had the Commission not implicitly acknowledged the national parliaments as having a role that exceeded the strict scrutiny of the principle of subsidiarity. The "yellow card" was clearly a sign that that proposal did not have sufficient support to get it through the European legislative process (Barrett 2012: 599). This is exactly the reason why the Commission decided to withdraw it, instead of engaging itself in a struggle versus national parliaments on the compliance with the principle of subsidiarity and instead

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of amending the draft regulation in order to consider and eventually accept the remarks coming from them.

7. The need for Parliaments in the EU decision-making process, to diminish the "democratic disconnect"

It should not be forgotten that the rationale of the involvement of the national parliaments in checking whether the principle of subsidiarity has been respected is double.

On the one hand, this involvement certainly intended to re-vitalise the principle of subsidiarity and to stimulate a more incisive judicial review on the part of the Court of Justice, which can act more incisively thanks to the evaluation provided (and those requested by the European institutions and national government) by the national parliaments; and thus increase the observance of the principle of subsidiarity, understood as a guarantee of the sphere of competence of the Member States. On the other hand, it also aimed at including, in the often "cold" EU decision-making process, institutions which are usually "warmer" and closer to *politics*, which still remain firmly embedded within the Member States.

In this way, the institutions which symbolise *politics* at national level have been admitted to the EU governance architecture, with an array of powers which are rarely configured as definitive and insuperable (as it would happen if the proposal to introduce a kind of "red card", that is a veto power, to a certain number of national parliaments, had been approved)[XII], but which, nonetheless, do appear to be rather significant in the formation process of European politics (the *policies*).

This intention seems both noble and worthy of merit: that of somehow bringing *politics* and *policies* closer (Schmidt 2006: 5 f.), thus reducing the "*democratic disconnect*", which is the cause of many problems of contemporary Europe (Lindseth 2010: 234 ff.), and thereby diminishing the risk that institutional crises in which national public opinions reject the EU treaties, such as those which occurred in the referenda in France and in the Netherlands in 2005, could be repeated (Manzella 2008: 334).

Thus, the early warning system seems to pre-suppose a high level of discretion on the part of the national parliaments, even in the application of the same rules (at least with regard to those imposed by EU law). The circumstance in which, with reference to a

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specific proposal, the same rules can be interpreted diversely according to the parliament involved, fully seems to refer – analogously to the hypothesis, to some degree complementary, of a different interpretation on the part of the same parliament dependent on the issue in question – to the sphere of auto-determination conferred upon the political organs and constitutional status of the national parliaments. What we are looking at, in other words, is a manifestation (as already noted, with legal effects, albeit not particularly destructive effects), in the EU decision-making process, of the plural structure of the European Union, and, in particular, in the constitutional identity of each Member State, as expressly safeguarded by Article 4.2 TEU.

The way in which the early warning system develops in each national parliament tends to be influenced, to some degree, by its national characteristics, by its political and institutional culture (first and foremost, with regard to the process of European integration, but also with regard to the equilibrium between the parliament and the government), by the configuration of the parliamentary groups and commissions, as well as the influence of the parliamentary bureaucracy. All these elements can be fairly easily traced back to the constitutional identity of each Member State.

8. Perspectives: the increasing role of the "other Parliaments", after the Eurozone crisis and the difficulties of the European Parliament in an asymmetric Europe

As we have seen, EU democracy relies not only on the legitimacy provided by the directly elected European Parliament, but also on roots deriving from the national level (in turn strictly connected, especially in federal and regional States, with the sub-national representative bodies). Therefore, it is necessary to devote specific attention to the mechanisms of this double channel of EU parliamentary democracy, in order to understand the tangles of EU democracy.

The longstanding tension towards the recognition of a legitimacy criterion for the EU architecture has recently grown in importance, as the Eurozone crisis started questioning the "output legitimacy" of the EU institutional system and its policies[XIII]. The need to counterbalance the effects of the financial and economic crisis has led the European institutions to urge for the adoption of quick and intrusive measures, investing some of the

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core competences of the Member States, in particular those relating to the budgetary and financial decision-making. This situation boosts the need for democratic legitimacy of the EU institutions, due to the fact that the increased risk of a possible divergence between European budgetary and financial policies and voters' preference makes it more difficult to justify the autonomy of the EU legal order.

The legitimacy problem of the EU in the Eurozone crisis is moreover exacerbated by the fact that one of the two channels of European parliamentary democracy – the one relying upon the European Parliament – does not seem capable any longer of fully complying with the expectations concerning its always increasing contribution to fostering democracy in the EU.

As it is well known, from the Single European Act of 1986 to the Lisbon Treaty of 2007, the European Parliament has in fact experienced a constant trend towards the enlargement of its functions, which has been very important, but has turned out to be not sufficient to assure the democratic legitimacy of the EU (as shown by the constant decrease of the citizens' participation in European elections).

However, this constant trend seems to be stopping or at least slowing down after the coming into force of the Lisbon Treaty. The weakening of the European Parliament, in particular, can be considered as a consequence both of the crisis of the "community method" (and the already mentioned trends towards more intergovernmentalism in the EU and in the European Economic and Monetary Union) and of the coming into force of new legal constructions (such as the so called "Fiscal Compact"), separated from the EU and not involving all Member States.

In a wider picture, the perspective of a more intergovernmental and a more asymmetric EU will undoubtedly weaken the role of the European Parliament, given the fact that the EU still needs it as a political representative body and as a legislature in the full sense of the word. Therefore, the European Parliament, being the institution "composed of representatives of the Union's citizens" (Article 14.2 TEU), cannot act through bodies composed according to a principle different from that of the proportional representation of all the MEPs, elected in all the EU Member States.

The insufficiencies of the European Parliament as the unique or even the main channel of democratic legitimacy for a more and more intergovernmental and asymmetric European Union justify the need to reinforce the other channel, the one based on the role

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of national (and regional) Parliaments (Griglio-Lupo 2012; Groppi-Spigno-Vizioli 2013). As rightly observed (Lindseth 2011), "when push comes to shove, European integration still needs democratic legitimation coming from the national level, both in a formal and substantive sense". In other words (Weiler 2013: 249), "the Union has had to turn to its Member States for salvation. The solutions will still have to be European, but they will not be ideated, designed and crafted using the classical 'Community method' but will have to be negotiated among and validated by the Member States. They will require the 'legitimacy resources' of the Member States—though in many countries these are close to depletion too—in order to gain valid acceptance in Europe". Or, if you prefer to adopt the approach proposed by other authors, the legitimacy of the European Union, being a "demoicracy", that is "a Union of peoples, understood both as states and as citizens, who govern together but not as one" (Nicolaidis 2013: 353), needs to rely, especially during critical phases, not only on the representatives of the European demos, but also on those of the demoi of the Member States (and, in certain cases, even of those of their sub-entities).

In this context, this special issue of Perspectives on Federalism *aims at offering some elements on the experiences of the regional parliaments in two of the most decentralised Member States of the EU: Italy and Spain. Through the essays included, written both by Constitutional Law and Parliamentary Law scholars and by some senior officials working in national or regional parliaments of the two countries, the reader is able to understand how complex, but at the same time how interesting the "European activities" of the regional parliaments have become. And how much those activities have been evolving and increasing, together with the European role of Spanish* Comunidades Autónomas *and Italian* Regioni*, after the coming into force of the Treaty of Lisbon.*

The idea underlying the researches collected in this special issue is that most of the innovations that nowadays occur in the Constitutional Law of the EU Member States derive from the evolutions of the European integration process. Regional (as well as national) parliaments are no longer what they used to be twenty or even ten years ago. One of their most interesting current tasks is exactly that of following the activities of the European Union. It is not a passive task, as what takes place in the European Union is a complex decision making-process in which States as well as Regional institutions, including their parliaments, do have a say and can therefore – if able to act timely, being well informed and finding the right alliances – play a very significant role. The more this task will be played actively, the more those parliaments will offer a contribution to the democratic legitimacy of the European construction.

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[I] It is symptomatic that also the Assembly of the Council of Europe (1949), even though later in time (starting from July 1974), substituted, first *de facto* and later *de iure* (see a deliberation of the Committee of Ministers, in 1994), its own name, "Consultative Assembly", with that of "Parliamentary Assembly" (Evans-Silk 2008: 35 ff.).

[II] See the third and fourth paragraphs of the preamble of the Single European Act, in which the States declare themselves "determined to work together to promote *democracy* on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notable freedom, equality and social justice". And, at the same time, "convinced that the European idea, the results achieved in the fields of economic integration and political cooperation, and the need for new developments correspond to the wishes of the *democratic* peoples of Europe, for whom the European Parliament, elected by universal suffrage, is an indispensable means of expression".

[III] See, respectively: Article F of the Treaty on the European Union (TEU), according to which "The Union shall respect the national identity of its Member States, whose systems of government are founded on *democratic* principles"; Article 130U tr. EC, according to which the Community policy on development cooperation "shall contribute to the general objective of developing and consolidating *democracy* and the rule of law, and to that of respecting human rights and fundamental freedoms"; and, finally, Article J.1 TEU, according to which, among the objectives of the Common Foreign and Security Policy, there is "to develop and consolidate *democracy* and the rule of law, and respect for human rights and fundamental freedoms".

[IV] As expressly defined in the declaration approved by the European Council of Laeken, 15 December 2001, in which, in approving the mandate for the Constitutional Convention, it was furthermore underlined how "the European institutions must be brought closer to its citizens", to remedy the fact that they "feel that the Union should involve itself more with their particular concerns, instead of intervening, in every detail, in matters by their nature better left to Member States' and regions' elected representatives". Furthermore, "they feel that deals are all too often cut out of their sight and they want better democratic scrutiny". The answer is, therefore, inevitably that to increase the democratic legitimacy and transparency of the institutions of the European Union.

[V] The corresponding headings (of title VI of part I: arts. from I-45 to I-52) of the treaty establishing a Constitution for Europe (from now on, Constitutional treaty) was less technical and more evocative, referring to "The democratic life of the Union" (a formula which furthermore persists, as will be seen, in art. 10 para.3, TEU). Even in the subjects addressed it appeared wider and more vague: the principle of democratic equality; the principle of representative democracy; the principle of participative democracy; the social partners and autonomous social dialogue; the European mediator; the transparency of the work of the institutions, bodies and organisms of the Union; the protection of personal data; and the status of the churches and non-confessional organisations (Ridola 2010: 354 ff.).

[VI] The question of the identification of the contents of "participatory democracy" is not dealt with here, nor are its relations with other contiguous forms of democracy, such as "deliberative democracy". See Bifulco (2011) and, with regards to regional experiences in Italy and Spain, Gianfrancesco-Lupo-Mastromarino (2012). The term "participatory democracy" appeared in the Constitutional treaty, as the heading of art. I-47 (its content basically corresponding to the one of art 11 TEU, mentioned in the paragraph below).

[VII] The dominant ideology of the European integration process is, therefore, that of a form of overcoming nationalism and nations, especially in their ethno-linguistic conception (from the Ventotene Manifesto 1941 to Habermas 2012). However, it has been remarked that the European integration institutions have been a creation of the same European nation states, in order to better pursue their own national (economic) interests (Milward 1992: 18; Moravcsick 1998: 3 ff.; for a recent re-reading, Lindseth 2012: 458 ff.).

[VIII] See the report on subsidiarity and proportionality (19th report on Better Lawmaking covering the year 2011- COM(2012) 373 final, 10 July 2012, 4 ff.), in which the European Commission, after having remarked that "Apart from the more formal aspects, the content and reasoning of the reasoned opinions sent to the

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Commission in 2011 also varied", nevertheless "considers that the issuance of a reasoned opinion on a Commission proposal and the arguments on which it is based, fall solely within the responsibility of each national Parliament". In order to have an idea of the different interpretations of the subsidiarity check see COSAC, Eighteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, 27 September 2012, p. 3 ss. (available at http://www.cosac.eu/en/documents/biannual).

[IX] The threshold levels of the "yellow card" (one-third raise an objection) and the "orange card" (the majority raise an objection) in the procedure of the *early warning system* are stated in Article 7 of Protocol no. 2: "Each national Parliament shall have two votes, shared out on the basis of the national Parliamentary system". Adding, immediately afterwards, that, "In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote". Essentially, in a European Union with 28 Member States, a total of 56 votes are conferred, 2 for every Member State, and the threshold levels for attaining the "yellow card" and the "orange card" are set at 19 votes (14 when the proposal concerns the area of freedom, security and justice in conformity with Article 76 TFEU) and 29 votes, respectively. On this criterion, which gives equal "weight" of each Member State, with a criterion which clearly favours the smallest states, it has been observed that it raises a clear paradox, according to which the chamber of representatives of Malta counts for twice as much as the German *Bundestag* in this procedure (Kiiver 2012: 62).

[X] 12 Parliaments (for a total of 19 votes) issued reasoned opinions (the threshold, with 27 Member States, was then at 18 votes), with a variety of reasons (Granat 2012; Fabbrini-Granat 2013: 135 ff.): Belgian *Chambre des représentants*, Danish *Folketing*, Finnish *Eduskunta*, French *Sénat,* Latvian *Saeima*, Luxembourg *Chambre des Députés*, Maltese *Kamra tad-Deputati*, Polish *Sejm*, Portuguese *Assembleia da República*, Swedish *Riksdag*, Dutch *Tweede Kamer*, UK *House of Commons*.

[XI] See, for instance, the letter from the deputy president of the Commission, Šefcovic, to the president of the Italian Senate, Schifani, on 12 September 2012. For a more general reconstruction, also referring to the exchanges of information preceding the issue of the reasoned opinion and to the comments from the national parliaments to the withdrawal of the draft regulations, see COSAC, *Nineteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny*, 17 May 2013, p. 30 ff. (available at http://www.cosac.eu/en/documents/biannual) and the Commission annual report on subsidiarity and proportionality, covering the year 2012 (COM(2013) 566 final, 30 July 2013, 6 ff.).

[XII] The proposal aiming at introducing a "red card", already discarded during the Constitutional Convention, has been recently (on 31 May 2013) re-advanced by the UK Foreign Secretary, William Hague (http://www.bbc.co.uk/news/world-europe-22730226).

[XIII] As observed, «The question for the EU, then, is not only whether it can get the economics right – thereby ensuring more 'output' legitimacy – but also whether it can get the politics right, through greater 'input' legitimacy» and greater 'throughput' legitimacy (Schmidt 2012: 108). For incisive critical approaches to the theory of the "output legitimacy" see Bellamy (2012: 500) and Weiler (2012: 255). The latter remarks that the output legitimacy theory reminds that one of *panem at circenses* and that, in any case, it cannot be proposed anymore for a simple empirical reason: that is, that the output of the EU is judged, rightly or wrongly, deceiving.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Spanish Autonomous Communities and EU policies

by

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Perspectives on Federalism, Vol. 5, issue 2, 2013

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Abstract

The European Union affects not only the competences of the Governments and Parliaments, but also of all public authorities, in particular the powers of sub-state entities of compound states, who saw how decisions that their governments could not adopt domestically nevertheless ended up being adopted in Europe. This affected the competences of these sub-state entities, which had no representation in Europe – or, to put it shortly, no voice and no vote. Or rather, in the expressive German phrase: the European Community had long practised *Landesblindheit*.

This paper considers the evolving role of Spanish Autonomous Communities in shaping EU norms and policies. The presentation follows the classical model of distinguishing between the ascendant phase of European law and its descendant phase. Finally, it shall discuss the relationships that the Autonomous Communities have developed regarding the Union or any of its components and which can be grouped under the expressive name of "paradiplomacy" or inter-territorial cooperation.

Key-words

Spain, Autonomous Communities, regional parliaments, European affairs

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1. Historical overview

The political and legal developments of the institutions created by the Treaty of Rome in 1957 quickly demonstrated that the European Economic Community was not an international organization in the classic sense, a structure of states which agree in principle on topics far removed from the citizens' everyday life, but instead it was something rather different, an organization with the capacity to adopt rules directly binding for all persons and public authorities of the Member States. It was to be a Community of States, "unprecedented in history, a new form of international organization that would eradicate borders" [Valverde, 2013: 86]. Inevitably this *supranational* organization affected not only the competences of the Governments and Parliaments, but also of all public authorities, in particular the powers of sub-state entities of compound states (which include Germany and Italy, two of the six founders,), who saw how decisions that their governments could not adopt domestically nevertheless ended up being adopted in Europe. This affected the competences of these sub-state entities, which had no representation in Europe – or, to put it shortly, no voice and no vote. Or rather, in the expressive German phrase: the European Community had long practised *Landesblindheit*, a "*federal* (or autonomous) *blindness*", [Ipsen, 1966].

Such *blindness* was, of course, something freely loved by the Community because the sub-state public authorities soon began to claim some type of participation in decision-making within the European Economic Community, controlled exclusively by State representatives. Even the European Parliamentary Assembly itself called for regional representation within the European Communities on 9 May 1960, the same year that the Council of Europe showed itself sensitive to regional demands and created the European Conference of Local Authorities. However, it took until 1988 for the creation of the Consultative Council of regional and local authorities attached to the Directorate General XVI of the Commission. And it was only in 1992 that the Maastricht Treaty recognized the Committee of the Regions and created the possibility that these regions could represent their States in the Council of Ministers (now the Council of the EU).

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Obviously, by the mere fact that currently regions have found a gap in the Union, the States have not lost their predominant role in decision-making; indeed, some of the latest reforms have increased intergovernmental instruments, in prejudice to the strictly *communitarian* idea. Therefore, the States have not lost their role in the decision-making process of the Union, nor have they ceased to be the only ones who can reform the treaties: they remain the 'masters of the treaties', according to the well-known expression of the German Federal Constitutional Court in its judgment on the Treaty of Maastricht of 12 October 1993.

2. The European Union and the Autonomous Communities in Spanish constitutional law

The Spanish Constitution of 1978 made no express mention of the European Union until the much-debated reform of 27 September 2011 in which, finally, it looked at the constitutional text. Even now, there is still no solemn declaration of integration, but an indirect reference to the Union in that a statute admits that the Union sets the limits of public debt. It is worth noting that the silence of 1978 was no proof of lack of interest in Europe – on the contrary, all political parties and Spanish citizens themselves – and I think this remains true – are very supportive of European integration, completely endorsing the phrase pronounced at the beginning of the early twentieth century by the Spanish philosopher, José Ortega y Gasset: 'Spain is the problem, Europe the solution.' Therefore, all political parties agreed with the application for membership in the European Community presented by the Spanish Government in July 1977, immediately after the conclusion of the first democratic elections. That same Europeanism caused the members of the constituent assembly not to devote too much time to Europe, limiting themselves to approving Article 97 of the Constitution: which is an opening clause that allows sovereignty to be ceded without having to amend the Constitution.

If the Constitution was silent on both the participation of the Autonomous Communities in European institutions and on the way in which the Spanish will was to be constituted within the Union, the Statutes of Autonomy, all written before Spain was incorporated into Europe, equally say nothing explicitly. This *statutory silence* was broken

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timidly only in 1996 by amending the Statute of the Canary Islands[I] and was exchanged for an enthusiastic *Europeanism* in the new Statute of Autonomy for Catalonia of 2006 and all that were inspired by it, including that of Valencia which paradoxically, the Parliament approved before that of Catalonia. These Statutes introduced the right of the respective Communities to participate in all proceedings established by the State to define the Spanish position in the framework of the European institutions when referring to autonomous competences.

It is clear that this statement must be nuanced by noting that participation shall be as it is defined by State law, by way of not interfering with the competences of the State, which is constitutionally competent and responsible for relations with the Union. The wording of the Catalan statute gave rise to the view that in that particular case it did invade the sphere of State competences, but the interpretation established by the Constitutional Court in its famous judgment 31/2010 of 28 June 2010 reined in its most contentious sections to a respectful *reading* of State competences in no less than six of the nine articles devoted to relations with the European Union [Pons, Campins, Castellà and Martin, 2012: 12-23]. In the following Statute of the series, the Andalusian, the tension between the will to regulate the relations between the Autonomous Community and the European Union and respect for State competences is clearly discernible. Thus the first Article reads, 'Framework for relationships: The relationship of the Autonomous Community of Andalusia with the institutions of the European Union shall be governed by the provisions of this Statute and within the framework of State legislation' (Art. 230).

I shall leave for another occasion the discussion as to whether this form of regulation *per saltum* with its continuous remissions to state law (explicit in the Valencian, the Andalusian and other Statutes, implicit in the Catalan) is a useful technique for a moderately rational functioning of the institutions or if what it does is create declarations of little legal value and much political friction, some of which invariably end up in the Constitutional Court[II]. Here I consider it more useful for our collective goal that the authors focus on the actually existing mechanisms that enable the Communities to participate in European affairs so far as law and politics permit, subject of course to my referring to the statutory provisions where I specifically consider each of them.

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Precisely because this is a work dealing with Spain and to avoid repetition, I shall not include the specific regional participatory mechanism established by the Union, the Committee of the Regions, which I had the opportunity of discussing in another work [Ruiz Robledo, 2005]. My presentation will follow the classical model of distinguishing between the ascendant phase of European law, which is none other than when the norms are written, and its descendant phase, i.e. its application by national legal operators. I shall exclude from the ascendant phase the study of 'early warning' with its unsatisfactory practice, as the specialized doctrine says [Alonso de Leon, 2011: 283-329], which is the subject of a specific work in this book. Finally, I shall discuss the relationships that the Autonomous Communities have developed regarding the Union or any of its components and which can be grouped under the expressive name of "paradiplomacy" or inter-territorial cooperation [Aldecoa and Keating, 2000].

3. Community participation in the ascendant phase of European law

3.1. The Conference on Issues Related to the European Union (CARUE)

Our analysis must begin with a general statement, agreed upon by all the Spanish doctrine: the Constitution has failed to design a coherent system of participation by the Communities in the formation of the State will, particularly obvious in the case of the Senate, the chamber of territorial representation under Article 69 of the Constitution, which constantly appears as a subject for reform by tyrants and Trojans but to date remains unchanged[III]. Therefore, and for the role of the direction of the Executive authority in autonomous systems, since Spain joined what was then the European Community, it has sought a form of specific involvement for those executive authorities. Thus there emerged in 1988, as a forum for meeting without legislative backing, the Conference on Issues Related to the European Communities (CARCE). It was given statutory regulation by Law 2/1997. In April 2010, at a meeting held in Brussels with a certain solemnity, the Plenum of the CARCE decided that it should be called Conference on Issues Related to the European Union (CARUE) instead. Parliament has still not had sufficient time to bring Law 2/1997 up-to-date, so that it remains unchanged[IV]. Let us take a rapid glance at the most important agreements adopted to allow the participation of Communities in the

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Spanish Permanent Representation to the European Union (REPER) and the internal structure of the Union where States are represented.

3.2. The Ministry for Autonomous Affairs of REPER

Another major agreement between the State and the Communities within CARCE was reached on 22 July 1996 and was reflected in the Royal Decree 2105/1996 of 20 September, which created the Council of Autonomous Affairs in the Permanent Representation of Spain to the European Union (REPER), which in turn channels information from the European institutions to the Autonomous Communities and corresponds to the relationship with the Office of the Autonomous Communities in Brussels. The figure seemed to be inspired by the German model of *Beobachter der Länder*, or States Observer, although with substantial differences, since it was neither chosen by the Community nor was one of its functions to ensure autonomous interests, but rather was it appointed by the Government in order to transmit information to the Communities. Because the Communities wanted the German model and because the government changed from the PP to the socialist PSOE, CARCE adopted a resolution in December 2004 for the Communities freely to appoint two autonomous councillors, to be agreed upon in advance by the Communities within CARCE[V]. In addition, this Agreement reinforced the position of these councillors to the point of permitting them to continue negotiating European issues of interest to the autonomies and to know, first-hand, about 'critical points' in the issues taking place in the European institutions. They were even assigned a coordinating role within REPER, which included organising briefings between autonomous representatives and sectoral councillors of REPER.

3.3. Autonomous participation in EU Council working groups

In the same agreement of 9 December 2004 on the reform of the Autonomous Council the participation of the Autonomous Communities in the EU Council's preparatory working groups was agreed. Two methods provided for this:

a) The ordinary way, by incorporating the autonomies in the Spanish delegation to the working groups of the Council for Autonomous Affairs of REPER when they affect autonomous competences, specifying in the same agreement that, at the least, these groups would relate to employment, social policy, health and

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consumers, agriculture and fisheries, environment and education, and youth and culture. As a complementary channel, the agreement provides that the Ambassador may expand this participation to other groups.

b) The special way, by designating technical representatives in these groups when autonomous representatives are going to participate in the Council.

In both cases, the incorporation also means joining COREPER and enables autonomous representatives to be involved in the meetings of the working groups under the rules set by the agreement itself.

3.4. The autonomous participation in the Council of the Union

The Council of the European Union, the great representative body of the States in the Union, is composed of representatives of the Member States with the competence to commit the will of that State. Now, since the Treaty of Maastricht, that representative need not necessarily be a minister of the central government but shall have that rank. In the words of the current text of the Treaty on European Union: 'The Council shall consist of one representative of each Member State at ministerial level, authorized to commit the government of the Member State in question and to cast its vote' (Art. 16.2).

As happens quite often in Europe, the change introduced in 1992 by the Maastricht Treaty was only a small step in the institutional life of the Union, but of great importance for the regions because it permitted various states (such as Germany, Austria, Belgium, and the United Kingdom) to have a regional representative on the Council. During the 1996-2004 period, the Popular Party government refused to let the regions participate in the Spanish delegation, which aroused the determined opposition of the Communities where PSOE and the nationalist parties enjoyed the majority. So when PSOE won the elections in March 2004, it hastened to open up the Council of Ministers to autonomous participation, while Jose Luis Rodriguez Zapatero included it in the government programme in his inauguration speech of 15 April 2004. And thus, at the same CARCE meeting of 9 December 9 2004 in which the reform of the Autonomous Councils and the participation in the Council's working groups was approved, another quite reasonable agreement was

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reached on the autonomous representation system in the Council's configurations. This materialized into a separate agreement, possibly for reasons of pure formal relevance, since the two agreements were published in the same resolution of the Ministry of Public Administration. The Agreement meticulously details the rules and principles for autonomous participation within the Spanish delegation, which even allows intervention in meetings of the Council, always provided that this happens with the permission of the head of the delegation (the Minister concerned). The Agreement relates in principle to four configurations (employment, social policy, health and consumers; agriculture and fisheries; environment; and education, youth and culture) although the Communities could only take part in issues where they were competent (eleven in total: employment, social issues, etc.). Later, in the CARUE meeting held on 2 July 2009, it was agreed to increase the autonomous participation to five configurations, and include Competition - consumer affairs. And on 7 February 2011, it was decided to expand autonomous participation to the configurations of the Council of Education, Youth, Culture and Sport with regard to issues of Sports.

The delicate question of how autonomous communities should choose their only representative, who must be a member of the Governing Council, was remitted to be agreed by each Sector Conference (ten are involved as specified by the agreement), which thus takes on a new leading role. In practice, these conferences have adopted a simple and objective criterion: rotation of representation every six months, while deciding on the order according to various criteria such as population, the order of creation of the Communities, alphabetical etc. In the final and exceptional instance when there was no agreement, a lottery was used. In any case, the agreements have resulted in a wide participation of autonomous governments in the Councils, as revealed by the reports published by the Government each year, always over a hundred pages[VI].

4. Community participation in the descendant phase of European law

During the first moments of the creation of the autonomous State, there was some political and doctrinal controversy as to who had the responsibility for applying international treaties in Spain, whether the state as signatory and international authority

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responsible for them, or whether, on the contrary, the system of competences would be maintained and each area would be in charge of executing them, the State for treaties on matters within its competence and the Communities in theirs. The Constitutional Court seemed at first inclined to consider that the implementation of treaties was a competence with its own proper substance and was therefore a State competence, unless each statute reserved execution to the Community because some *obiter dicta* stated that 'when the Statutes of Autonomy so provide, the implementation of international treaties and conventions on jurisdiction correspond to the autonomies, without prejudice to the State's obligation to ensure compliance'.[VII] However, when it thought more carefully about how to take the *ratio decidendi* it concluded the opposite: the treaty 'is irrelevant in principle, - and without prejudice to the State's international responsibility, - as a criterion of competence in one direction or another, it neither gives competence to the State under the rule of Article 149.1.3 ª of the Constitution, nor does Article 27.3 of the Statute of Catalonia give it to the Autonomous Community, since, as is clear from the tenor of that Article, it applies whether the autonomous competence is under the material rules of competences included in its own Statute or not' (STC 153/1989, 5 October, Case *granting Spanish nationality to co-produced films*, FJ 9).

This conclusion respecting the system of competences in applying international norms is maintained in its totality in the case of European norms, reinforced by European law itself that upholds the principle of institutional autonomy of States when applying their own laws. Therefore, the first matter the Constitutional Court had to analyse was whether European law and the system of competences allowed, as did the government, a literal interpretation of the European norm as an attribution of executive competence of State bodies, which the Constitutional Court did not accept: against the Government's claim that several directives on animal health attributed competences since they referred to the 'Central Authorities of each of the Member States' and defined an 'official veterinarian' as 'appointed by the central competent authority of the Member State', the Constitutional Court ruled that 'the only thing the directives impose at this point is that the central government is the sole interlocutor of the EEC in what concerns the effective implementation of Community determinations [...] but it cannot be understood as an expression of the attribution of competence by the EEC in favour of this or that sector of

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the apparatus of the States belonging to it, but as a clarification of what are general or central bodies of those States, and ultimately responsible for implementing the European Community legislation and the obligation to notify the EEC and to accept the appointment of an official veterinarian to it'[VIII].

Exceptionally, the Constitutional Court has recognized that the State can intervene in the application of European law affecting autonomous competences in the event that the European norm requires a decision prior to the implementation by all Autonomous Communities, where the typical situation is when Spain receives a global subsidy that subsequently has to be distributed between the Autonomous Communities; in that case, even the State can centrally manage funds whenever they 'are essential to ensure the full effectiveness of aid within the basic organization of the sector and to ensure equal access to procurement and enjoyment of potential recipients' (STC 79/1992, of 28 May, Case C*attle Subsidies*, FJ2).

Now, although an external norm – whether by treaty or European regulation – does not alter the internal system of distribution of powers, it cannot be ignored that the international responsibility for complying with Treaties lies exclusively with States, according to Article 27 of the Vienna Convention on the Law of Treaties. And the same holds true in the case of European law, where the Court has rejected that a State can avoid its responsibility vis-à-vis the Union by alleging that the breach of a European norm was committed by an autonomous sub-state[IX]. In anticipation of that responsibility, Article 93 of the Spanish Constitution establishes that the Parliament or the Government, as the case may be, has to ensure compliance with treaties to which constitutional competences are transferred, 'and of the resolutions issued by international or supranational organisms, holders of the assignment'. The doctrine studied this Article in depth and today there is general agreement that Article 93 does not give the State a new control mechanism over the Autonomous Communities; it is not a separate title. Instead, the guarantee of compliance with European law must be ensured by ordinary instruments under the Constitution, as indeed the Constitutional Court itself has upheld, in its Judgment 80/1993 of 8 March, in the *Expedición de documentos con validez en Europa* case: "although Article 93 sets out a clear manifestation of the monopoly of the State in order to guarantee the fulfillment of the commitments given to other subjects of international law, [...] this does

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not mean that the provision of Article 93 by itself gives a title of autonomous competence to the State".

That maintenance of the system of competences and the ultimate guarantee of the State to comply with European legislation implies, as the Constitutional Court has consistently held, that the central State organs have the capacity to collect all the data and information necessary for such compliance (STC 80/1993, 8 March, *Expedición de documentos con validez en Europa*) as well as, if necessary, to activate the legal controls if they consider that an Autonomous Community is applying supra-state law incorrectly. For the Constitutional Court, the substitution clause of Article 149.3 of the Constitution can enable the State to guarantee the effective implementation of European law and prevent that the relationship with the Union is 'at the mercy of the legal activity or passivity of each and every one of the Autonomous Communities with competence in this area'[X]. Fortunately, the Constitutional Court has not had an occasion to rule on an exceptional instrument that some authors, amongst which I include myself, have considered could be used in extreme cases of repeated non-compliance, fully aware of European legislation and the judgments of the Court of Justice: there is even the possibility that the courts dictate a harmonization law and use state coercion under Article 155 of the Constitution. In any event, in ordinary legislation various state norms have expressly established that if 'the Kingdom of Spain' was sanctioned by the European institutions for breach of any European norm, the responsible Autonomous Community shall assume its cost 'for the part attributable to it'[XI].

If the treaties and European law should not substantially alter the distribution system of competences, this is equally true when analyzing the distribution of functions within the Autonomous Communities, so that when the application of a treaty or a European norm on competences requiring an Autonomous Community law, the respective Parliament will have to approve it and the respective Government will be responsible for enforcement action if needed. However, in practice there is what we might call a certain *temptation* for autonomous governments to develop these norms themselves, claiming that it is sufficient to use regulations. And when regulations with the force of law are clearly needed, then in almost all communities in which these legislative decrees are allowed, they have been used with some frequency to bring the autonomous law in line with the European. Since 2006,

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some autonomous governments have had the power to issue decree-laws that have been used for the same purpose of implementing European legislation[XII].

5. Activities of the European external action in connection with the European Union: Autonomous para-diplomacy

5.1. Diplomatic relations within Spain

As soon as the autonomous communities were constituted, they began to display a characteristic interest in making contacts with foreign authorities, both inside and outside Spain, no doubt as a way to symbolically mark their nature as political institutions. As a way to regulate these contacts, albeit indirectly, the Technical Secretariat-General of the Ministry of Foreign Affairs sent a Circular, 31 October 31 1983, to the Delegates of the Government of the autonomous authorities on visits and foreign contacts. Today, communities routinely maintain in their territories diplomatic relations with foreign ambassadors accredited in Spain, including representatives of the European Union and delegations of the most varied European agencies visiting our country.

5.2. Foreign visits

With the same normality with which the autonomous authorities receive foreign representatives, autonomous representatives travel outside Spain. From frequent trips to Brussels to visits to China and Japan, it is possible to trace a long series of official visits by both members of the Governments and Parliaments for the most diverse reasons: cultural and commercial promotions, study and exchange tours, cooperation, development, etc. Sometimes the purpose of travel, or the number of travellers, is such that the newspapers criticize what most people think of as 'institutional tourism' rather than a journey useful for the Community's general interests. The central government in 1989 sought to regulate and coordinate these visits, but after a first round of consultations with the Presidents of the Communities, the attempt proved ineffective. Thus, the only rules on the matter, if the never officially published Circulars of 31 October 1983 and 13 March 1984 can termed such, have been sent to embassies and consulates abroad. To enjoy the help of this service outside the State, the Communities must notify the Technical Secretary General of Ministry of Foreign Affairs about their journey, specifying departure and return dates, length of stay,

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and identifying people who will go and the reason for the visit [Conde Martínez, 2000: 151-155].

Sometimes these visits have caused more than one confrontation between the central and autonomous governments, typically nationalist governments. Although the recent government strategy of the PP is to not delve into 'political considerations' and not to comment on controversial visits, such as those that the President of the Catalan Government made in recent times to explain his strategy for independence. Of course, the failure of the Catalan President to achieve his aim of interviewing major European leaders suggests behind-the-scenes activities by the Spanish Government. There has also been some confrontation with Communities governed by a national party of different political viewpoint than the central government. Thus in the years of the second Aznar (PP) Government (2000-2004) and while the European Union was negotiating a treaty on fishing with Morocco, there were some visits by the President of Andalusia's government to Morocco that were branded as institutional disloyalty by the Government[XIII].

5.3. Permanent external represenation

After institutional visits abroad, the next logical step in the creation of permanent external action is the opening of official representations, which at first were made under the formula of companies and foundations governed by private law, until the Basque Autonomous Community created a Representative Office in Brussels. The Constitutional Court considered it compatible with the Constitution in its Judgment of 165/1994 of 26 May since the norm creating it did not ascribe any international status or assume state functions. Under this doctrine, virtually all Communities have opened an office in Brussels. For example, Decree 164/1995 of 27 June created the Delegation of the Government of Andalusia in Brussels, which has the mission of dissemination, promotion and 'institutional representation of Andalusia'.

The State acknowledged this situation and Law 6/1997 of 14 April on the Organization and Functioning of the General State Administration stipulated, in Article 36.7, that 'In carrying out the tasks entrusted to it and taking into account the objectives and foreign policy interests of Spain, the General Administration of the State shall collaborate with all

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Spanish institutions and bodies acting abroad and especially with the offices of the Autonomous Communities.'

Meanwhile, seven of the eight Autonomous Statutes (all but Navarre) passed since 2006 have expressly included autonomous delegations in Brussels, and the Valencian and Catalan Statutes enable their respective Governments to open offices in any other State in order to promote the interests of their communities. Moreover, these provisions were not alleged to be unconstitutional in the broad appeal against the Catalan Statute submitted by the PP, in which it appealed against the vast majority of the articles on the external action of the Catalan Government. Equally forthright is the Andalusian Statute's Article 236: 'The Andalusian government shall maintain a permanent delegation in the European Union as the administrative body to represent, defend and promote its interests within the institutions and bodies of the same, and to gather information and establish relationships and coordination mechanisms therewith'.

5.4. Cooperation among the European sub-state entities

If after World War II the idea of cooperation among States spread across Europe, the idea of cooperation among sub-state entities did not lag far behind. In part this was because of a general desire for cooperation and also, in part, so that the voices of the regions could be heard and to avoid European integration being a monopoly of the central organs of the States, however much they remain the main actors in this process. In this defense of regional interests in Europe, the first associations that emerged were associations either of industry, due to their purpose (for example, the Interregional Commission for Transport in the Mediterranean Basin or the Assembly of European Wine-Producing Regions, AREV) or their composition, such as Association of European Border Regions (AFBR), founded in 1971 and with enough weight to make the Union develop, in the 1990s, the regional Interreg cooperation programme in the sense advocated by the AFBR. Similarly, the Conference of Peripheral Maritime Regions of Europe (CPMR), founded in 1973, which includes 127 regions across Europe with the aim of achieving a 'more balanced development of the European Union' and which promotes studies on EU policies with a strong territorial impact, encourages cooperation agreements

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(partnership), collaboration with the European Commission in inter-regional cooperation programs, etc.

In 1985, the great European organisation of the regionalist movement was founded, the Assembly of European Regions. The AER was created by 47 regions and a good number of regional organisations in order to defend regional interests in Europe and certainly the establishment of the Committee of the Regions (CoR) in Maastricht is due in great measure to the work of the AER. In fact, the CoR can be considered a qualified variant of this membership of inter-territorial cooperation bodies, although the nature of the European institution makes it best suited for study as one of the techniques of participation in European Union decisions. Indeed, we should stop, even if just for a moment, to look into two informal associated movements whose leaders were certain sub-state entities and in which the Spanish drive has been essential: the Conference of European Regions with Legislative Powers (REGLEG) and the Conference of European Regions Legislative Assemblies (CALRE). If the accounts of REGLEG are accurate, in the Union there are no less than 74 autonomous Communities with legislative powers, belonging to eight States and including more than 200 million inhabitants, i.e. 43% of the 500 million European Union citizens[XIV].

While REGLEG is made up of the regional presidents, CALRE consists of the Presidents of Regional Parliaments. It is worth noting that CALRE chronologically precedes REGLEC because while this latter was established in 2000 to defend the interests of these regions, CALRE was founded in 1997 in Oviedo at the initiative of the Parliament of Asturias [Arce Janariz, 2005:1]. The claims of both organisations are quite similar and include the overall goal of gaining a special status for these regions and, as specific achievements, they have won some representation in the Council, a greater role for regional parliaments in Europe, and locus standi before the Court of Justice to preserve their competences.

If the new statutes became a legal remedy to fulfil autonomous aspirations to participate in the Union's institutions which has inevitably led – as we have seen – to continuous remissions to State law to avoid encroaching on State competences, the same

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has not occurred when Communities relate to other sub-state entities exercising their own powers. Thus, for example, the Catalan Statute mandates that the 'The Catalan Government shall promote cooperation with the European Regions with which it shares economic, social, environmental and cultural rights and shall establish appropriate relationships' (Art. 197).

In any event, if only briefly, it is necessary to remember that the Communities may participate in the Outline Convention on Trans-Frontier Cooperation made between territorial authorities and Communities on 21 May 21 1980, signed in Madrid and produced within the framework of the Council of Europe, which paradoxically was not ratified by Spain until 1990 and, moreover, even then with a statement that conditioned the validity of the signature of the instruments of cooperation among local authorities upon the conclusion of a bilateral treaty between Spain and the State to which the foreign communities belonged. Five years later, in 1995, the first bilateral treaty applying the Framework Convention was signed: the Spanish-French trans-frontier cooperation signed at Bayonne on 10 March 1995. The relevant treaty with Portugal, which grants those Autonomous Communities bordering Portugal a much wider room for action than the previous regime requiring the express consent of the State, was not signed until 2002. Based on this, in 2010 the *Treaty of Valencia* created the Euroregion of Alentejo-Algarve-Andalusia, whose main purpose is to promote collaboration for the development of those territories and especially to 'prepare joint projects, programmes and proposals eligible for Community co-financing' (Art. 3 of the Cooperation Agreement).

6. Short final reflection

Denis de Rougemont was the foremost theorist of autonomy as a form of European integration. However, in his thinking autonomous communities were not mini-states, but intermediate entities the strong collaboration between which would blur the boundaries, as evidenced by the Regio Basiliensis founded in 1963 as a private law Association not far from Geneva, where the great Swiss federalist founded the *Institut universitaire d'études européennes*[XV]. Therefore, the 'Europe of the Regions', which Rougemont advocated, was not intended – as it is sometimes said out of a political desire to disqualify rather to make

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clearer – to replace the 25 states by 250 autonomous Communities, but rather that these should play a role in a process that affects all public authorities. To put it graphically, and perhaps inaccurately, it tries to prevent the traditional 'federal blindness' of European institutions from increasing to such an extent that regions in Europe would be crushed by a new ventriloquist centralism: the great European voices, the Council of Ministers and the European Council, that are not so much truly European voices as an association of States.

This objective can be accomplished by various means. The first is what we might call the scope of Union policies that do not always have to come from the State, but which in some areas must descend to the regional level, especially as regards economic development, something already recognised in the Treaty of Rome, whose Preamble declares that the signatory States are concerned to 'strengthen the unity of their economies and to ensure their harmonious development by reducing the differences between the various regions and the backwardness of the least favored'. Here originated the important source of the European Regional Development Fund, which has so greatly benefited most Spanish and Italian regions.

The second measure to achieve a Europe of the Regions is the direct cooperation among sub-state entities, creating Euroregions that develop their own solidarities and self-interests, leading to common projects for the benefit of all their inhabitants. At present, there are more than 60 such regions, although many of them are far from being such ambitious projects like Basel Airport, shared by Switzerland, Germany and France, the great example we must bear in mind when thinking about cross-border collaboration.

The third means is an institutional reform of the European Union. However, in my personal opinion, this reform cannot be done by complicating the decision-making system to the point of causing its paralysis, as would happen if the opinions of the Committee of the Regions were accepted as binding. The aim of autonomy is to enhance European integration, not to slow down its decision-making system. Therefore, the solution to the European Union's democratic deficit cannot come from *an intergovernmentalism* in which autonomous Communities become new actors in the legislative procedure, but only through the gradual replacement of these intergovernmental institutions by others that are

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more genuinely European, with their own autonomous legitimacy, such as the European Parliament. It is no coincidence that this Parliament and the European Commission – the two most *European* institutions of the Union – have always shown a regional sensitivity that has gone far beyond that held by State representatives, the Council and the European Council.

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[I] The new Article 37.2 of the EACAN (the Canary Islands Autonomous Statute) was a precedent for a technique that would become habitual from 2006 onwards in the articles on Europe in the Autonomous Statutes. It was politically an important declaration, but almost devoid of legal content: 'The Government of the Canary Islands may participate in Spanish delegations to European Community organs when dealing with matters of specific interest to the Canary Islands, in accordance with what is stipulated in State legislation in the matter'.

[II] For all the doctrine that has studied the new statutory regulation on Europe see Rodríguez-Vergara Díaz 2007. My own opinion is in Ruiz Robledo 2005b.

[III] In February 2006, the Council of State issued, at the request of Zapatero's government, a documented report on the reform of the Constitution in which it proposed, among other questions, that the Senate's position in the autonomous State should be reinforced, both in passing laws that affected the autonomies (for example the delegation laws of Art. 150 of the Constitution would initiate their transmission in the Senate); and in its role as meeting point and for territorial cooperation, especially with the drafting of Community law and its development, application and execution. This valuable report was never applied since the government, preoccupied by other more urgent matters, quickly forgot about it. See Rubio Llorente 2006.

[IV] As our politicians give no importance to formal details, the Conference has come to be called CARUE in all official documents. Doubtless, with the great number of serious problems that harass Spain the government thought that there was no time to change a Law simply to alter the name of a secondary institution. Moreover, the other parties have not had the idea of taking advantage of the occasion to *update* that Law 2/1997 on more weighty matters, since it will soon have been on the statute book for twenty years.

[V] Agreement of 9 December 2004 signed by all the Autonomous Communities, which inevitably demanded some 'special rules' to save bilateral cases, especially insisted upon by the Basque Country, Canary Isles, and Navarre. Unlike the two previous ones and another of 30 November 1994 that has not been explained here as it is of little importance, the 2004 CARCE agreement was conveniently published by the Ministry of Public Administration in its Resolution of 28 February 2005 (BOE nº. 64, 16 March 2005).

[VI] *Los Informes anuales sobre la participación de las Comunidades Autónomas en el Consejo de la Unión Europea* can be consulted at
http://www.seap.minhap.gob.es/es/areas/politica_autonomica/coop_multilateral_ccaa_ue/ccaa_y_ue/Participacion_CCAA_Consejo_Ministros/informe_consejo_ministros_ue.html.
In the last one published up to the present, of 2011, the different procedures adopted by the Sectorial Conferences to choose the autonomous representative in their respective configurations of the Council are detailed (pp. 3-11).

[VII] STC 227/1988, 29 November, Case *Ley de Aguas*, FJ 21 a. It is also true that in another *obiter dicta* the Court had indicated that Art. 27.3 of EAC imposed on the Generalidad an "obligation, not a competence" (STC 58/1982, 27 July, Case *Ley de Patrimonio de la Generalidad de Cataluña,* FJ 4) but the context of the expression is rather restrictive of autonomous competences, just the opposite in meaning to STC 153/1989.

[VIII] STC 252/1988, 20 December, Case *Comercio de carnes,* FFJJ 2 and 4. In STC 172/1992, 29 October, Case *Ley catalana de residuos industriales*, specified the consequences of the idea that the State is the 'only interlocutor': the Constitutional Court admitted the constitutionality of the Catalan norm that established the obligation of the *Generalidad* to report on the management of toxic wastes to the European Commission 'through the competent conducts', as soon as nothing prevented those conducts being interpreted by the State 'to whom corresponded not only the direct relation with the Commission, but also to join the various reports that it receives from other autonomous bodies to enable the Commission to treat as a whole and not separately the information it had requested' (FJ 3). I have analysed this first case law considered by the Constitucional Court in more detail in Ruiz Robledo 1998.

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[IX] The leading case in which the Court fixed this principle is by its Judgment of 11 July 1984, Commission v. Italia (130/1983, Rec. p. 2849), which condemned Italy for a breach of a Decision of the Commission which held that certain agricultural subsidies given to the region of Sicily were incompatible with European law, since it did not admit the exception formulated by the Italian government, according to which it had asked Sicily on several occasions to repeal the norms to which the Commission's Decision referred.
[X] STC 79/1992, 28 May, Case *Ayudas al ganado vacuno*, FJ 3. I had occasion to be concerned with the earlier doctrinal controversy over the use of the substitution clause as a guarantee to fulfilling European law and to opt for the posture that, as I subsequently saw with satisfaction, was then chosen by the Constitutional Court. See Ruiz Robledo 1991. Hence I also defended the State's exceptional possibility of using the mechanisms of Art. 155, to which I shall refer next.
[XI] For example, in 2003 Parliament amended the *Ley de Aguas* of 991 by introducing a new Article 121 b: 'Community Responsibility. The competent public authorities in each river basin, which fail to meet the environmental objectives set by the water planning and the duty to report on these issues, leading to the Kingdom of Spain being sanctioned by the European institutions, shall accept that part of the liability attributable to such breach. In the process of attributing liability the State may offset the amount determined from the financial transfers that the government of the Autonomous Community receives. In similar terms are: Leyes 17/2009, 23 November, sobre el libre acceso a las actividades de servicios, 1/2010, 1 March, de reforma de la Ley 7/1996, 15 January, de Ordenación del Comercio Minorista; and 41/2010, 29 December, de protección del medio marino. In general terms, see the Second Additional Provision of the Organic Law of 2/2012, 27 April, on Budgetary Stability and Financial sustainability.
[XII] See for example, the Catalan Decree-law 1/2009, 22 December, de ordenación de los equipamientos comerciales and the Andalusian Decree-Law 3/2009, 22 December, amending several laws to transpose into Andalusia Directive 2006/123/EC, 12 December 2006, of the European Parliament and the Council, relating to services in the single market. As an example of legislatives Decrees, see the pioneering Catalan legislative decrees 1/1986, 4 August, amending Ley 13/1982,de Colegios Profesionales, to adapt it to Community norms; and 2/1986, to modify Ley 6/1983, sobre residuos industriales, to adapt it to Community norms.
[XIII] The media reports about some of these confrontations between central government and the Andalusian government can be found in the conservative newspaper ABC http://www.abcdesevilla.es/hemeroteca/historico-04-02-2003/sevilla/Andalucia/manuel-chaves-viajara-a-marruecos-para-firmar-un-acuerdo-antes-de-las-municipales-del-25-m_146159.html and a rather different vision in EL PAÍS: http://elpais.com/diario/2003/03/17/andalucia/1047856930_850215.html. In scientific doctrine, see Tuñón 2010: 197 ff.
[XIV] I retrieved the data from http://www.regleg.eu/index.php?option=com_content&view=category&layout=blog&id=4&Itemid=5.
[XV] His concern to make it clear that the regions were not mini-states led him to write an article with that title: Rougemont 1970.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

The scrutiny of the principle of subsidiarity by autonomous regional parliaments with particular reference to the participation of the Parliament of Catalonia in the early warning system

by

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Perspectives on Federalism, Vol. 5, issue 2, 2013

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Abstract

The purpose of this article is to offer a practical approach to the new European dimension for regional parliaments signified by the entry into force of the Treaty of Lisbon. The parliamentary scrutiny of subsidiarity by way of the early warning system has assigned a new mission to legislative assemblies with the aim of reinforcing the intervention of regions in the drafting of policies by Union institutions. In the Spanish case, the institutionalisation of this mechanism came about with Act nº 24/2009, which attributes to the Joint Committee for the European Union, in the name of the Cortes Generales [the Spanish Parliament], the function of receiving the proposals for legislative acts by the EU and transferring them to the regional parliaments in order for the latter to issue, in a brief period of four weeks, a report on compliance with the principle of subsidiarity. The majority of regional parliaments have also carried out normative reforms to regulate the procedure of participation in the early warning system.

Key-words

Principle of subsidiarity, early warning system, regional parliaments

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1. Introduction

The entry into force of the Lisbon Treaty, along with the process of reforms of regional statutes which commenced in Spain in 2006, has given rise to a political scenario in which the Autonomous Communities and their regional parliaments acquire, at least normatively, a greater role in the scrutiny of the principle of subsidiarity by way of the early warning mechanism. This new regulation seeks to provide a response, in part, to the so-called "democratic deficit of the European Union," a demand which has been shown to be associated with "multilevel governance" (Beltrán 2010: 24-28).

The regulation on subsidiarity and proportionality in Protocol number 2 provides for possibilities of participation by regions in different phases of the legislative procedure and with different degrees of intensity. In this way, it attempts to commit three levels of legislative bodies (European, national and regional parliaments), although, as has been pointed out, in reality it affects four competence levels (European, state, regional and local), but in different ways (Fernández Allés, 2011: 4-5).

Articles 5 and 12 of Protocol 2 specify the procedures whereby national parliaments carry out the scrutiny of the application of the principle of subsidiarity and allow, even if only in an embryonic manner, the participation in this process of regional parliaments with legislative powers. This procedure is executed by means of the early warning system. The scope of application of this mechanism only affects drafts of legislative acts, and the period in which the intervention of national parliaments must take place is eight weeks[I].

The possibility the Protocol offers to the intervention of regional parliaments with legislative powers in the scrutiny of subsidiarity is rather limited and remains in the hands of the EU Member States. Thus, Article 6 of Protocol 2 establishes that "*It will be for each national parliament or each chamber of a national parliament to consult, where appropriate, regional parliaments with legislative powers.*" Their intervention occurs only to the extent that it is contemplated in the internal legal system; in such a manner that the presence of regional parliaments is subject to the national parliament deeming it pertinent; and the Commission assumes that when a national parliament expresses its opinion this also reflects the opinion of the regional parliaments of that Member State (Martín y Pérez de Nanclares, 2008: 58). Each national parliament has adopted its own internal regulations, generating a

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heterogeneity that is only explained by the diversity of political, legal, social and cultural factors that inspire each parliamentary institution. In this way, the appropriateness of the consultation of regional parliaments, which seemed imperative (Alonso de León, 2011: 302) especially in those cases in which the competences of the regions were affected (Palomares Amat, 2011: 26), has been the option adopted by the eight Member States of the Union with regional legislative parliaments (Austria, Belgium, Finland, Germany, Italy, Portugal, Spain and the United Kingdom), where all the drafts, with no prior filter, are referred to the regional assemblies (Vara Arribas, 2011: 26). However, although the parliaments of these countries send all draft legislative acts to their regional parliaments, the latter only emit reasoned opinions which are not binding, nor do they oblige the competent State body to justify its decision when it deviates from the standard set out in the same aspect –a fact which undermines the very purpose of the procedure (Martín y Pérez de Nanclares 2010: 84).

2. The early warning system in Spain

The first studies on the scrutiny of the principle of subsidiarity by the Cortes Generales [Spanish Parliament] were conducted during the 8th legislature (2004-2008). The Joint Committee for the European Union formed a Working Group on the early warning system, which drew up a report on the application, by the Cortes Generales, of the Protocol on the application of the principles of subsidiarity and proportionality which accompanies the Lisbon Treaty[II]. In the following legislature, the Joint Committee for the European Union drafted a study paper on the effects of the Lisbon Treaty on the Cortes Generales, incorporating the recommendations of the previous report and approving a text to adapt Act nº 8/1994 of 19 May regulating the Joint Committee for the European Union[III]. Following the pertinent processing by the urgent procedure and in a single reading, Act nº 24/2009 of 22 December was passed, modifying Act nº 8/1994 of 19 May and institutionalising both the early warning system and the participation of regional parliaments in the scrutiny procedure of the principle of subsidiarity by establishing the periods, form and effects thereof.

The Act attributes to the Joint Committee for the European Union[IV] the power to issue, in the name of the Cortes Generales, a reasoned opinion on the infringement of the

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principle of subsidiarity (Article 3j), without prejudice to the power of the Plenary Sessions of the Congress and the Senate to table a debate and a vote on the opinion expressed by the Committee in the terms laid down in the regulations of the respective chambers (Article 5). The maximum period provided for the approval of the opinion by the Joint Committee or, as the case may be, by the Plenary Sessions of the Chambers, is eight weeks from the reception of the draft of the legislative act by the Cortes Generales. In this way, the Spanish legislator opted to establish a joint procedure of approval of reasoned opinions. The Protocol attributes this power to each chamber of the national parliaments, but it does not prevent joint action, especially by way of the Joint Committee[V].

This Committee has the appropriate guarantees for the participation of the national parliaments in the preparation of the legislation of the European Union: all the parliamentary groups are represented; its joint character facilitates coordination between the two chambers, and in spite of not being a legislative committee but a permanent one, it is more than a mere instrument of parliamentary control. The Committee meets periodically – at least twice a month during the sessions– to monitor the action of the Government in European matters, and to this purpose the Act enlarges the list of competences of said Joint Committee, incorporating those conferred to national parliaments by the Lisbon Treaty[VI].

The second innovation contained in Act nº 24/2009 is the possibility provided for also in the Protocol that national parliaments can consult regional parliaments with legislative powers. This possibility is here articulated in a general manner, by way of the referral to the parliaments of Autonomous Communities of *all* European legislative initiatives, as soon as they are received and without prejudging the existence of affects on regional competences (Article 6). Regional parliaments have a period of four weeks from the sending of the European legislative initiative by the Cortes Generales to issue and send their reasoned opinion to the Joint Committee. If this Committee approves a reasoned opinion on the infringement of the principle of subsidiarity by a draft of a legislative act of the European Union, it *must* incorporate the list of opinions submitted by the regional parliaments and the necessary references for consulting them. However, as we will see next, this imposition is only formal and does not incorporate an obligation to justify why the Committee is diverging from the criterion established in the opinion of regional parliament.

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The 2009 Act therefore regulates two phases of the procedure of the scrutiny of subsidiarity: a state (Article 5) and an autonomous region phase (Article 6).

2.1. State phase

The scrutiny procedure to be followed by the Cortes Generales in the application of the principle of subsidiarity for drafts of EU legislative acts required the reform of the Resolution of the Committees of the Congress and the Senate of 21 September 1995, by way of a Resolution, and likewise of the Committees of the Congress and the Senate, of 27 May 2010. The need to conduct the procedure within the chambers, and the internal organisational measures for its execution, required this adaptation to align the role of the Joint Committee with the provisions of the new Lisbon Treaty, and in particular Protocol 2 (Carbajal and Delgado, 2010: 18-24).

These modifications attribute to the Committee and the spokespersons of the Joint Committee for the European Union the task of permanent monitoring of European legislative initiatives by way of decisions adopted by a weighted vote of the members of each parliamentary group in the Joint Committee. The Committee and the spokespersons must carry out a preliminary examination of the drafts of legislative acts forwarded by the institutions of the Union, and may agree to simply acknowledge receipt of an initiative or commence the procedure for drafting a report or a reasoned opinion by designating as its deponent a member of the Congress or Senate who is also a member of the Committee, who will then be in charge of drawing up a proposal, to which alternative proposals or amendments may be submitted, along with requests for final approval by the Plenary Sessions of the Chambers. There also exists the possibility to request from the State Government a report on the degree of compliance of the legislative act with the principle of subsidiarity, within a maximum period of two weeks, accompanied by any official documents of EU bodies which may have been used in the drafting of that legislative act and which are in the Government's power. The short period available makes it reasonable to consider that, in general, the competence for drafting a reasoned opinion is attributed to the Joint Committee, but this measure is complemented by the possibility of a number of Members of Parliament to request both a debate and a vote in the Plenary Session of the respective Chamber.

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The initiative for drafting reasoned opinions is attributed to the Committee and the Spokespersons of the Joint Committee for the European Union, to two parliamentary groups or to one-fifth of the members of the Joint Committee, within the period of four weeks from reception of the initiative. If the initiative originates from the Committee and Spokespersons of the Committee, a Working Group is designated to draft a proposal for the reasoned opinion. In all other cases, the initiative must be accompanied by a proposal of the reasoned opinion[VII].

If the Joint Committee approves a reasoned opinion on the infringement of the principle of subsidiarity, Article 6.3 of the Act requires the incorporation of the list of opinions forwarded by regional parliaments and the necessary references for consulting them. In practice, the published reports and reasoned opinions incorporate only a brief mention of the regional legislative assemblies that have replied to the consultation and the general substance of their replies, without however specifying anything more (Rubio de Val, 2012: 89).

Between the inception of the system (May 2011) and the dissolution of the 9thLegislature of the Spanish Parliament (September 2011), the Joint Committee sent 130 legislative drafts to the regional parliaments, with a balance of 39 reports of compliance and two reasoned opinions, the rest simply being acknowledgments of receipt (Camisón Yagüe, 2012: 39). In the current legislature, between the constitution of the Joint Committee (February 2012) and October 2012, 67 consultations have been undertaken, including 11 reports of compliance and six reasoned opinions.

2.2. Regional phase

The 2009 Act stipulated the *duty* of referring a European legislative initiative to the regional parliaments without prejudging the existence of affected regional competences, in order for those parliaments to be able to submit to the Cortes Generales a reasoned opinion on the application of the principle of subsidiarity. The procedure followed is established in the Agreement of the Joint Committee for the European Union of 24 March 2009[VIII], which lays down that as soon as the European legislative initiative is received by the Cortes Generales, the Secretary of the Joint Committee forwards it via e-mail to the parliaments of the Autonomous Communities, thereby starting the period of four weeks for drafting proposals of reasoned opinions.

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Subsequently, Act nº 38/2010 of 20 December again modified Act nº 8/1994 with the aim of reinforcing the functions assigned to the Joint Committee. This reform incorporates a new Chapter III, which regulates the periodical appearances of the Government – ministers and high officials – before the Joint Committee prior to the holding of a meeting of the Council of the European Union, and a singular Chapter IV (also new) which establishes the participation by and appearance of the autonomous governments before the Committee.

The collective of subjects who can participate is extended to all the members of autonomous governments, and participation is articulated to report on the impact of the regulations of European Union institutions and the drafts of legislative acts and other documents issued by EU institutions on matters in which they hold some form of competence. The singularity lies in the fact of providing, in parallel to the participation mechanism of regional parliaments in the early warning system, for another participation mechanism, which articulates a new system of relations, not merely inter-parliamentary but rather between the State Parliament – the Joint Committee – and the autonomous governments. In this way, participation in the process of scrutiny of subsidiarity is opened up to regional executives, a possibility not contemplated in Protocol 2.

The risk that the participation by autonomous executives distorts the parliamentary nature of the scrutiny of the principle of subsidiarity, relegating to a lower plane the opinion issued by the autonomous parliament itself or even generating conflicts due to the maintenance of differing positions (Rubio de Val, 2012: 89), has led to the consideration that this procedure is contrary to the spirit of the system established in the Protocol, which had been designed to mitigate the democratic deficit through the intervention of representative bodies of citizens (Alonso de León, 2011: 322).

3. Regional participation in the early warning system

New parliamentary functions which are configured by the principle of subsidiarity are also provided for at the regional level. Thus, some Autonomous Communities have included references to the participation of their parliaments in the analysis of compliance with subsidiarity in the articles of their Statutes, as a consequence of the reforms of their statutes undertaken from the year 2006 onwards. Catalonia for example established, in

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Article 188 of its EAC, that its Parliament participates in the scrutiny procedures of the principles of subsidiarity and proportionality established by EU legislation in relation to European legislative proposals when they affect competences (not interest) of the Generalitat[IX].

Other Autonomous Communities also incorporated into their Statutes competences of their Parliament relating to the scrutiny of subsidiarity: the Valencian Community (Article 61.3.a), Andalusia (Article 237), the Balearic Islands (Article 112, although the wording of the precept appears to imply a facultative nature), Aragon (Article 93.3), Castile-Leon (Article 62.2) and Navarre (Article 68.6). In the case of Extremadura, it only includes a generic reference to the State's duty of consultation, but not referring specifically to the principle of subsidiarity (Article 70a).

3.1. Affects on competences as a selective criterion for modulating regional participation

As laid down in Act nº 24/2009, the Joint Committee refers to the regional parliaments, as soon as it receives them, any drafts of European legislative acts "without prejudging the existence of affected autonomous competences." This automatism provided for in the Act entails an indiscriminate sending of documentation to the regional parliaments, and therefore some type of modulation or selective criterion must be activated in view of the short time the regional parliaments have for drafting their opinions, if applicable. This filter is articulated by each autonomous parliament on the basis of the principle of whether or not its competences are affected. This is laid down in the Statutes of Catalonia, Castile-Leon and Aragon, which limit the participation of their regional parliament to the existence of affected competences. Scrutiny only makes sense if it refers to matters for which an Autonomous Community has regulatory powers. This question is a preliminary activity, and only if the reply is positive should the early warning procedure be set in motion. Although the function of the Joint Committee is to automatically forward any legislative initiative, the action of the autonomous legislative assembly must going the contrary direction, i.e. to refuse to perform a scrutiny procedure on initiatives which do not fall within its scope of competences or which represent no political interest or have no impact on its competences.

However, this has not been the practice followed by the different regional parliaments

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and only some of them have opted to select topics.

Such is the case of the Catalan Parliament. Until the end of the 8thLegislature (2006-2010), the Parliament always issued a reasoned opinion on a consultation made. In the previous short legislature (2010-2012) and in the present one it is selecting particularly matters that are of most interest for it, and reports on them. On the rest, it may agree to conclude the procedure with am ere acknowledgement of receipt if the Committee of the Permanent Delegation or the competent Committee consider that there are no significant doubts concerning the requisite compliance with the principle of subsidiarity (Palomares Amat, 2011: 19-20)[X].

This filter operating in the regional parliaments makes it possible to rationalise the system, and grants them a proper and differentiated role from the function that has been assumed by the Cortes Generales. But perhaps, in order for these regional parliaments to preserve and perform effectively the scrutiny function assigned to them, the Joint Committee could be required to send them "the annual legislative programme, along with any other instrument of legislative programming or political strategy" which the Commission sends to it, in accordance with the provisions of Article 1 of Protocol 1. And the fact is that prior knowledge of an initiative – in a pre-legislative phase – would allow for greater coherence of the early warning system itself.

Once this filter has been passed, the next step is to analyse to what extent the European legislative draft received complies with the principle of subsidiarity. This principle, as has been said, has a political dimension of a subjective nature (Albertí *et al.* 2005: 16-17), which requires a value judgment that enters into the realm of appreciation (Arce Janáriz, 2010: 80). It is not a question of determining whether the European Union has legal powers in that ambit, but of making a political appraisal of the necessity of a measure. In this respect, I think the early warning mechanism cannot be seen as a route for claiming the relevant power in the internal sphere (State – Autonomous Community), but for determining whether the requirements that accompany the principle of subsidiarity are fulfilled or not (Pons *et al.* 2012: 206).

In addition, the briefness of the periods of the early warning procedure also entails determining the capacity of action of an autonomous parliament. I think that if the principle of subsidiarity is respected, there is no sense in drafting an opinion. Only in the event that its evaluation is negative does it make sense to issue an opinion. That is to say,

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the reasoned opinion of a regional parliament is justified when an infringement of the requirements of the principle of subsidiarity is detected which affects the competences of the respective Autonomous Community. In another respect, if the Joint Committee considers that the principle of subsidiarity is not affected, it should justify why it is diverging from the opinion of one or several regional parliaments.

However, this is not the solution adopted by Act nº 24/2009, which establishes the early warning system not as a mechanism of participation by regional parliaments but as a mechanism of information on drafts of legislative acts in process, since the will of the autonomous parliament is mediatised and subordinated to a decision of the State Parliament (Martín y Pérez de Nanclares, 2010: 84 and De Castro Ruano, 2012: 101). That is to say, the opinions issued by regional parliaments may or may not be taken into account by the Joint Committee, but the latter is not obliged to justify a decision not to consider those opinions.

3.2. Regulation of the early warning system by the various regional parliaments

The majority of regional parliaments (whether they have reformed their statutes or not) have carried out a series of reforms of their parliamentary rules to adapt to their participation in the scrutiny of the principle of subsidiarity in legislative proposals of the EU.

In the great majority of cases, these reforms have been carried out by way of resolutions of the Presidency, which are more flexible than Parliamentary Regulations[XI]. This has been the option chosen by the Parliaments of Cantabria, Andalusia, Castile-Leon, Castile-La Mancha, La Rioja, Madrid, Asturias, and Galicia. The latter also provides for the application of these rules in the Subsidiarity Monitoring Network of the Committee of the Regions[XII]. The case of the Parliament of the Basque Country is unusual: the regulation on the early warning system was established firstly by a Resolution of the Presidency and was then incorporated as an annex to a subsequent reform of the Regulations of Parliament (Castro Ruano, 2012: 93-111 and González Pascual, 2012: 37-64). In the Parliament of Navarre something similar occurred: first a Resolution of the Presidency was passed, then incorporation into the Regulations of Parliament, as Article 64.

Other regional parliaments have not adopted any type of resolution which would specify the early warning system, but some brief references are nevertheless found in the

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respective parliamentary regulations. This is the case of the Valencian Community (Article 181 of the Regulations of the Cortes), the Canary Islands (Article 48 of the Regulations) and Extremadura (Article 102 of the Regulations).

Finally, we find a third option in this comparative analysis: the absence of a regulation in the parliamentary rules on the participation of the regional parliament in the scrutiny procedure of the principle of subsidiarity, a situation which, however, has not prevented the fostering of an active participation of the parliament in the matter – in fact, rather the opposite has occurred. The case of Aragon is especially striking. Its Cortes preferred the regulation to be decreed in a more flexible rule, such as the aforesaid option of a Presidency Resolution. For this reason, and at the same time as the Parliament was participating in the pilot test, a Draft Resolution was drawn up, but it was then decided to wait to accumulate a certain degree of experience in the procedure in order to be more familiar with the regulation and to be able to execute it in better conditions, to the point that, to our knowledge, Aragon still does not have any legislation regulating this question. However, the Cortes de Aragón remain one of the most active parliaments in the scrutiny procedure of the principle of subsidiarity.

3.3. Internal mechanisms of operation and competent parliamentary bodies for substantiating the early warning system

The possibility offered by Protocol 2 of the Lisbon Treaty was considered by most regional parliaments to be a new avenue of parliamentary work which generated considerable interest due to its innovative nature (Carmona Contreras, 2012: 143), but it has necessitated a style of work marked by speed – because all the processing and the work of the parliamentary groups is concentrated into just four weeks – and the insufficiency of resources and personnel to comply with it. As we will see, this has caused some regional regulations to prefer to obviate the possible action of the Plenary Session in the phase of approval of the opinion.

The internal functioning is as follows. The Joint Committee for the European Union sends, via e-mail, a note with the draft of the legislative act and complementary documentation which is accompanied by the subsidiarity sheet (evaluation of impact) drawn up by the European Commission, which necessarily accompanies all the drafts passed by this body. The contents of the sheet are set out in the Protocol and refer to the

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following elements: analysis of the subject-matter, legal basis in the Treaty, the (autonomous) competence affected, and whether or not it affects the principle of subsidiarity (Camisón Yagüe, 2012: 39)[XIII].

There is no uniformity at the level of regional regulation in regard to the body in charge of drafting the opinion in each autonomous parliament. Some parliaments have delegated this function to a specialised Foreign Affairs Committee (this is the case of Andalusia, Castile-Leon, Castile-La Mancha, Madrid, Galicia, Canary Islands, Extremadura, and Balearic Islands), while others delegate it to materially competent sectoral committees (Cantabria, Basque Country, La Rioja, and the Valencian Community). Both in the Principality of Asturias and in Navarre, the function is assigned to a specialised Foreign Affairs Board (Permanent Early Warning Board in Asturias), composed of one representative from each parliamentary group. In Aragon the power is assigned to the Foreign Affairs Board, constituted with a permanent nature within the framework of the Institutional Committee on Statutory Development. The rationale given for attributing the function to this body is the thematic specialisation of its members and the desire not to deadlock the activity of the Foreign Affairs Committee if it were to be assigned all the EU initiatives for the verification of compliance with the principle of subsidiarity (Rubio de Val, 2012: 90-92). In another respect, the transversal character of many of the EU's legislative drafts, along with the lack of correspondence on many occasions between the EU's material scopes and the nature of parliamentary committees, justifies the attribution of that function to the specific Committee (Palomares Amat, 2011: 33-34).

Concerning the diversity of regulations, we can observe that some opt for a model of "concentrated scrutiny" (study and decision are concentrated in a single, specialised body) and others for a model of "diffused scrutiny" (participation by all the sectoral committees involved by the nature of the issue).

Some parliamentary regulations also contemplate the possibility of the Foreign Affairs Committee operating outside the ordinary sessions period by way of extraordinary sessions necessary for this purpose (this is the case of Castile-Leon and Castile-La Mancha). Others establish that EU legislative drafts enjoy preferential processing over the rest of the Committee's tasks (Andalusia, Castile-Leon, Castile-La Mancha, and Galicia), and some even eliminate the admission procedure by the Bureau of the Chamber (Andalusia, Castile-La Mancha, and Galicia). The power of this Bureau to agree that the opinion be submitted

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to debate and approval by the Plenary Session is expressly provided for in four regulations: Cantabria, Canary Islands, Extremadura and Catalonia; and, in the case of Valencia and the Canary Islands, only if this is expressly agreed by the Bureau. The other communities do not have any provision in this respect.

3.4. Cooperation with autonomous governments

One absolutely essential requirement for the Members of Parliament to perform their scrutiny task correctly is that they have the information and opinion of their own autonomous government. If scrutiny of subsidiarity is fundamentally a political control, knowing the opinion of the autonomous executive on the compliance with or infringement by a European legislative draft provides not only indispensable information for MPs to carry out their task, but also allows the role corresponding to regional parliaments in the scrutiny of subsidiarity to be situated appropriately within the political terrain (Carmona Contreras, 2012: 145). Moreover, the involvement of the autonomous government enables all the necessary technical means to be placed at the parliament's disposal.

From this analysis of the very diverse regional regulations, it is seen that some parliaments generally request that kind of information from their autonomous government (Andalusia, Cantabria, the Basque Country, Castile-Leon, Castile-La Mancha, Madrid, Asturias, Galicia, Navarre and La Rioja). In this latter case, an element of flexibility is added: if the government's opinion is that the legislative draft complies with the principle of subsidiarity and the autonomous competences and no observation has been made by any parliamentary group, the procedure is concluded without the need to call the competent committee. The Resolution of the Government of the Principality of Asturias also provides for the possibility of shelving the proceeding when no opinion is issued: in this case the term "expiry" is used specifically. In Navarre, the Foreign Affairs Board has the power of requiring the appearance of experts in the matter and can forward the legislative draft to the Government of Navarre to report on it. In the case of the Canary Islands, there is no provision for the legislative draft to be sent to the autonomous government: it is only established that the specialised Committee may request the presence of a member of the Government to express its position. In other cases, the cooperation between parliament and government is not systematic but possible (Murcia and Catalonia); in others, it is simply not applied, as is the case of Aragon. The government can be asked

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to express its opinion on the impact on autonomous competences and the appearance of authorities and officials who are competent in the matter covered by the legislative draft can be requested, but neither of these two possibilities has been used to date.

3.5. Cooperation of autonomous governments with the Cortes Generales

Act nº 38/2010 also provides for the possibility of participation by the autonomous governments in the Joint Committee of the Cortes Generales. This Act introduces a Chapter IV on the appearance of the autonomous governments before the Joint Committee for the European Union, by way of which the President or any other member of the Government may request their appearance in order to report on the impact of the regulations of the European Union institutions and the draft legislative acts and other documents issued by European Union institutions which have been forwarded to them in order to scrutinise the degree of compliance with the principle of subsidiarity.

This guarantees that the position not only of the autonomous parliament will be heard, as provided for in the Protocol, but also that of the autonomous government, articulating an additional possibility for the performance of this scrutiny, although always subordinated to the will of the Joint Committee. This places the emphasis once again on the governmental, but not parliamentary, intervention of Autonomous Communities in matters relating to the EU.

As we commented earlier, this represents articulating, along with the mechanism of participation by regional parliaments, a new system of relationships between the State Parliament – the Joint Committee – and autonomous governments. This appears to constitute an additional guarantee for the protection of regional interests, allowing for a second voice to be heard – but this faculty, not provided for in the Protocol on the application of the principles of subsidiarity and proportionality, is contrary to the spirit of that system, which is to facilitate the intervention in the decision-making procedure in the European Union of representative bodies of citizens. The obvious risk is that autonomous governments, often with more resources and greater political initiative, will eclipse the possible participation of the legislative bodies.

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4. The early warning mechanism in the Parliament of Catalonia

The provision for the participation of the Catalan Parliament in the scrutiny procedure of the principle of subsidiarity, and in particular in the early warning mechanism, is regulated very briefly in Article 181 of the Regulations of the Parliament of Catalonia. Palomares Amat (2011: 14) has pointed out that the procedure established by the Regulations was designed "for any consultations which may be formulated, directly, by the institutions of the Union, and specifically the European Parliament, to the Parliament of Catalonia," but it must be recalled that the reform of the Regulations of the Parliament date from the year 2005, that is prior to the passing of the Statute of Autonomy of Catalonia and the Lisbon Treaty of 2007. This is why the regulations on the normative development of the provisions of the Treaty refer to the participation of the Parliament of Catalonia via the Cortes Generales and, in particular, via the Joint Committee. The procedure is only regulated to substantiate consultations relating to the compliance of a legislative draft of the European Union with the principle of subsidiarity, with the issuance, if applicable, of a reasoned opinion of the parliamentary committee within the brief period of four weeks[XIV].

Once the subsidiarity sheet is received by the Committee, Parliament's legal services draw up a preliminary note which incorporates the following elements: the subject-matter and contents of the proposal, the rationale on the basis of the principle of subsidiarity, and the possible impact on autonomous competences (Palomares Amat, 2011: 15).The note concludes with a recommendation to the competent sectoral committee to substantiate the consultation and a consideration of the degree of compliance of the draft legislative act with the principle of subsidiarity.

The Bureau of the Parliament orders the publication of this note, and once the Board of Spokespersons has been heard, the note is sent to the committee competent for the matter. This has caused difficulties on certain occasions, either due to the transversal nature of many legislative drafts of the European Union or due to the non-alignment of the material scopes of drafts with the distribution of work between parliamentary committees. The specific legislative committees of the Parliament are established at the start of each legislature and their material scope largely coincides with the basic distribution of government departments. However, even though the Regulations of the Parliament of

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Catalonia stipulate that the competent body for substantiating the early warning system is the corresponding sectoral committee, in practice the Committee for External Affairs, European Union and Cooperation monitors all the consultations. This solution leads to the insertion of EU affairs into the everyday work of the committees[XV]. Once the competent committee has been designated, the Bureau of the Parliament launches a period for parliamentary groups to submit observations, and once this period has terminated, the Committee drafts an opinion. Depending on both the matter in question and the proposal of the competent committee, the Bureau, in agreement with the Board of Spokespersons, may then agree that the opinion be approved by the Plenary Session, although to date all opinions have been substantiated in the Committee only.

The Catalan Parliament, until the end of the 8thLegislature (2006-2010), issued reasoned opinions during each consultation. However, in the second phase of the 9th Legislature (2010-2012) and during the present one there were consultations which ended in a simple acknowledgement of receipt. All the resolutions issued considered that the proposed future EU rule would not infringe upon the principle of subsidiarity. But there is a difference between the previous legislature – when each consultation was answered with a report – and the current one, which admits the possibility of concluding the consultation procedure without the issuance of a report but simply with an acknowledgement of receipt.

Summary Chart

	Regulatory provision	**Competent body**	**Preferential processing**	**Forwarding to the Government**	**Intervention of the Plenary Session**
Andalusia	Presidency Resolution	Foreign Affairs Committee	Preferential processing	Yes, in all cases	No provision
Cantabria	Parliamentary Resolution	Sectoral Committee	No provision	Yes, in all cases	Yes
Basque Country	Presidency Resolution	Sectoral Committee	Yes	Yes	No
Castile-Leon	Presidency Resolution	Foreign Affairs Committee	Urgent processing	Report drafted if requested	No provision
Castile-La Mancha	Presidency Resolution	Foreign Affairs Committee	Urgent processing	Yes	No provision

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La Rioja	Presidency Resolution	Sectoral Committee	Specialities	Yes, in all cases	No provision
Asturias	Resolution	Sectoral Committee (Permanent Early Warning Board)	No provision	Yes	No provision
Madrid	Presidency Resolution	Foreign Affairs Committee	No provision	If expressly requested	No provision
Navarre	Parliamentary Regulations	Foreign Affairs Board	No provision	Provision for written report	No provision
Galicia	Resolution of the Committee	Foreign Affairs Committee	Yes	Yes	No provision
Valencian Community	Parliamentary Regulations	Sectoral Committee	No provision	No	Agreed by the Bureau
Canary Islands	Parliamentary Regulations	Foreign Affairs and Action Committee	No provision	Report drafted if requested	Yes
Extremadura	Parliamentary Regulations	Foreign Affairs Committee	No provision	No provision	Yes
Balearic Islands	Parliamentary Regulations	Foreign Affairs Committee	No provision	No provision	No provision
Catalonia	Parliamentary Regulations	Sectoral Committee (monitoring by the Committee for External Affairs, European Union and Cooperation)	No provision	No provision	Yes, agreed by the Bureau
Aragon	No provision	Foreign Affairs Board	No provision	No	No
Murcia	Pending approval Presidency Resolution	No provision	No provision	No provision	No provision

5. Conclusions

The early warning system of the Lisbon Treaty signifies yet another step forward in the progressive involvement of regional actors in the process of European construction. Moreover, by increasing the number of actors incorporated into the political dialogue in the drafting of EU regulations, it heightens their legitimacy. But we also have to point out that it does so in a manner that is complex and difficult to articulate and, in the Spanish

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case but also in others, in a manner that is not binding for regional parliaments. Consequently, in practice the early warning system has become more a mechanism for informing the autonomous parliaments of the EU legislative drafts in process than an instrument of truly political participation in these projects. With reference to the Spanish case–where, in addition to all this, there is no chamber of purely autonomous territorial representation – the voice of the Autonomous Communities –or, more precisely, of the autonomous parliamentary chambers– is diluted in a procedure monopolised by the Joint Committee, which has practically all the decision-making power.

The early warning procedure focuses on legislative acts, but many Commission initiatives begin already before, by way of working and action plans from which future initiatives may emerge. Consequently, an essential condition for the parliamentary participation mechanism to be effective is the existence of a direct and automatic flow of information between European Union institutions and the parliaments of the Member States, where governments must be prominently involved. This would allow parliaments to participate in better conditions and be more prepared for the legislative phase.

The regional phase of the mechanism established in the 2009 Act has seen different regional developments with regard to parliamentary procedures. They manifest the absence of a homogeneous criterion for determining the participation of regional parliaments in the scrutiny of subsidiarity, although all regulations allude to the brevity of the four-week period during which regional parliaments have to reply to the consultation. In contrast to the decision by other regional parliaments to entrust the drafting of an opinion to their specific foreign affairs committees, the Catalan Parliament –like others –has delegated this task to the materially competent sectoral committee. This decision is based on the thematic specialisation of the members of each committee, but in view of the transversal nature of many legislative drafts of the Union, the Catalan Parliament has nevertheless opted to activate a kind of permanent monitoring by the Committee for External Affairs, European Union and Cooperation.

The practice followed by the regional parliaments demonstrates that in the face of the great number of proposals that are arriving and the eminently technical nature of the process, it is necessary to articulate some type of filter in order for the autonomous parliaments to be able to give a reply or, if applicable, draft an opinion. As the Spanish Parliament's Joint Committee for the European Union does not perform this function, the

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filtering process must be performed by the regional parliaments themselves, but on the basis of political, and not technical, criteria and in relation to the possible impact on autonomous competences and the possible political interest that the respective government may have. In this way, if the function of the Joint Committee is to automatically forward an EU legislative initiative, the default action of an autonomous legislative assembly must be the opposite, i.e. to refuse scrutinising initiatives which do not fall within its own scope of competences.

It would be advisable, in this respect, for a specialised parliamentary body to examine legislative initiatives of the European Union in a regular and systematic manner and consequently to select only matters of special interest, whether at State or Autonomous Community level. This could be done by the Parliamentary Bureau or the spokespersons of the Joint Committee for the European Union, in the case of the Cortes Generales, or by the Committee for External Affairs, European Union and Cooperation, in the case of the Parliament of Catalonia. Likewise, cooperation mechanisms should be introduced with the respective regional governments to exchange important information more efficiently between the executive and parliamentary spheres.

Finally, and with regard to the legal effects of opinions of regional parliaments with legislative powers, we believe that, if it is considered that exclusive competences are affected, their opinions must be taken in to consideration by the Joint Committee and have to be included in the final reasoned opinion which it sends to the European institutions. That is to say that the reasoned opinion of a regional parliament is only justified when an infringement upon the principle of subsidiarity is detected that impacts on the competences of the respective Autonomous Community. Legal logic would demand that in these cases regional opinions be taken into consideration by the Joint Committee and included in the reasoned final opinion which it sends to the European institutions. Therefore, if the Joint Committee considers that the principle of subsidiarity is not affected, it should justify why it is diverging from the view established in the opinion of one or several regional parliaments.

According to the European Commission's assessment, the early warning mechanism is operating well, but it requires very careful preparation to guarantee that it performs its function. However, in spite of the Commission's undeniable commitment to the procedure, some regional parliaments consider that their intervention, only provided for

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after the sending of the draft by the Commission, is very limited, inappropriate, late, barely effective, and severely hampered by the application of excessively short time periods.

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I However, the Commission itself recognises the difficulties of complying with the period and has admitted that, in practice, 80% of the reasoned opinions of national parliaments are passed between 8 and 10 weeks. For this reason, the Commission considers that the requirement of complying with the period must be treated with a certain flexibility, and thus, for example, other possible and less formal exchanges of opinion between national parliaments and this EU institution can be contemplated, along with reasoned opinions.

II Report published in the BOCG [Official Journal of the Spanish Parliament] of 4 January 2008, series A, nº 474.

III 9th Legislature (2008-2011). BOCG of 16 April 2009, Series A, nº 127.

IV Since Spain's entry into what were then the European Communities, the participation of its Parliament in the European sphere has been channelled by way of the Joint Committee, created by the 1994 Act, as a body specialising in European matters and composed of members of both parliamentary chambers.

V Thus, for example, the Netherlands decided to create an *ad hoc* Joint Committee to apply the early warning system.

VI The purpose of this Act, as is expressed in the exposition of its rationale, was to ensure that Parliament had access to all the drafts of legislative acts prepared by the European Commission and to establish the Government's obligations: the reports which it must refer and the periods for sending them, and appearances before parliamentary bodies. In this way, the powers of the Committee are enlarged: Ministers, high officials of the administration and experts can be required to appear; and study and working groups can be constituted to deliberate on specific matters related with the European Union and the Government's EU policy, with the drafting of a subsequent report. Another function is the maintenance of relations with counterpart committees of other Member States of the European Union, especially within the COSAC.

VII The report submitted by the Working Group on 27 November 2007 recommended the creation within the Joint Committee for the European Union of a Permanent Sub-Committee in charge of applying the principle of subsidiarity, with rules of composition and operation which in the end were not accepted or incorporated into the Resolution.

VIII Published in the BOCG of 16 April 2009, Series A, nº 127.

IX This precept was challenged in the unconstitutionality appeal lodged against the Statute. In Legal Ground 122 of Constitutional Court Ruling nº 31/2010 of 28 June, it is reasoned that there can be no trace of unconstitutionality when the title precept of the chapter dedicated to relations with the European Union (Chapter II of Title V) states that matters related with the Union which affect the powers or interests of Catalonia must be conducted in the terms laid down by the State legislation.

X In fact, a new type of acts publishable in the Official Journals has been added, namely acts concluded with a mere acknowledgement of receipt.

XI Presidency resolutions are a type of rules that are passed either by Committee of the Parliament or its Presidency, according to the specific regulatory provision, in the event of loopholes or doubts concerning the interpretation of Parliamentary Regulations themselves, but having the same rank or normative value as a Parliamentary Regulation.

XII The participation of the regional and local dimension in the Subsidiarity Monitoring Network of the CoR can be articulated in their capacity as regional parliaments (Basque Country, Asturias, Catalonia, Galicia and Navarre); as regional governments or executives (Canary Islands, Basque Country, Galicia, Madrid, Valencian Community, Murcia and Asturias); local authorities without legislative power (Barcelona Provincial Council, autonomous city of Ceuta and the city of Madrid); and other associations such as the Association of Municipalities of Aragon or the Federation of Municipalities and Provinces of Extremadura.

XIII Indeed, the first negative opinion of the Parliament was given because the European Commission had not followed its legislative proposal for the mandatory "subsidiarity sheet".

XIV In autumn 2009, shortly before the Lisbon Treaty entered into force, the Catalan Parliament participated in a pilot consultation with the Cortes Generales. This pilot experience was to be governed by criteria

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approved by the Joint Committee for the European Union, published in the *Official Journal of the Cortes Generales* (Cortes Generales Section, Series A, nº 127, of 16 April 2009). Under the terms of the second aspect of the mentioned criteria, "*any Parliaments of Autonomous Communities which wish to participate in this pilot experience, should they deem it convenient, may forward to the Joint Committee … observations on the degree of compliance with the principle of subsidiarity for the initiative in question. The observations received shall be forwarded to the members of the Joint Committee for the European Union. In order to be taken into consideration, they must be received within a maximum period of four weeks from when they were sent.*" During the pilot test, the autonomous parliaments were able not only to report on the possible impact on the principle of subsidiarity but also to formulate all the recommendations and observations they might consider pertinent due to the nature of the matter. This singularity is no longer possible.

[XV] The Committee for External Affairs, European Union and Cooperation is a monitoring committee of non-legislative nature. Its mission is the specific scrutiny of certain actions and policies of the Government (Article 56, RPC [Regulations of the Parliament of Catalonia]).

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Early warning and regional parliaments: in search of a new model. Suggestions from the Basque experience

by

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Perspectives on Federalism, Vol. 5, issue 2, 2013

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Abstract

The balance sheet of having had the early warning procedure for two years shows that the active role developed by some regional parliaments, like the Basque Parliament, has reached a point of lack of efficacy and confidence.

The Basque Chamber has not limited itself to express a "yes-or-no"-opinion, but has tried to make specific contributions for improving the proper performance of the provisions of Protocol 2 of the Treaty of Lisbon. But the mechanism implemented in Spain does not guarantee the taking into account of the contributions by the regional parliaments, and so we need a new procedural scheme.

The author proposes a step-by-step approach to making a selection of all the initiatives expressed in the yearly legislative program of the European Commission, with a focus on analysing the procedure for selected topics to provide an informational background to the Basque parliamentary committees.

If no solution is found, the early warning system will become a repetitive ritual that will fail due to lack of effective use.

Key-words

Early Warning, Parliament, Legal Procedure, Regional Institutions, Basque Country

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1. Introduction

It is not very frequent that a Parliamentary Law incorporates a new procedure that the assemblies have not put in place themselves and which possesses, as yet, unknown functions. This evidence shows, it is true, the difficulty to upgrade a parliamentary institutional framework. But these developments must also be analyzed carefully to evaluate their practical extent.

Such is the case of the so-called "early warning" system that since 2010 has joined the list of competences of our parliaments.

The origin and guidelines of this mechanism have already been studied by several specialists, which dispenses us from pondering about theoretical aspects. On the other hand, the intention of this contribution is to provide some elements about its practical application.

The arguments to be developed, then, are born from a specific experience, which is that of the Basque Parliament. But we believe that this does not imply excessive unilateralism or analytical bias because its procedural rules are very similar to those of other parliaments. On the other hand, the Basque Chamber has been at the forefront of the more proactive parliaments, internalising in this way from the very beginning the interests of bottom-up participation. Therefore, a summary of its performance may have an important significance on the actual effectiveness and future of the Early Warning System´s regional participation.

Three years have passed (although our data stop in the autumn of 2012) that let us draw up a balance sheet which, as we already anticipate, forces us to recognize the limitations of this first phase.

Without useless pessimism but professing the necessary recognition of the situation of paralysis which has characterised the review of procedures developed until now, we now provide a critical view accompanied by an outline of innovative proposals.

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2. The beginning of early warning in the Basque Parliament

Since the double precedent of trials that preannounced the entry into force of the Lisbon Treaty, the Basque Parliament took with dedication to the implementation of a mechanism that would have an impact on the participation of sub-state institutions in the European legislative process (a possibility claimed exclusively by their parliamentary groups in the past).

The three simulations undertaken by the Committee of the Regions between October 2007 and September 2008[I] and the other two directed in 2009 by COSAC[II] configured routes of processing that were later consolidated.

-A logical **preferential relationship with the Basque Government** was established, who committed to the development and elaboration of a report on each of the initiatives that had arrived. This is a point that deserves to be highlighted, because this obligation assumed by the Executive has worked in almost all cases. While in other parliaments either there never were any hearings or governmental information was provided only sporadically, what in the Basque case has remained continuous is the (only informative) advice that, in practice, was received by the parliamentary groups.

It is also necessary to recognize that the fatigue caused by the repetition of procedures without any visible practical effects has become evident in these reports that have sometimes adopted a merely repetitive formula.

- **Training activities** with parliamentarians and senior departmental executive chiefs. The involvement of civil servant lawyers in counselling, follow-up and elaboration activities of the resolutions was also important.

- It became clear that **the natural parliamentary instance for the treatment** of early warnings should be **the sectoral committee affected** (unlike in other parliaments such as that of Aragon, the Canary Islands, Castilla - La Mancha or Castilla y Leon).

This choice was due to the belief that "community matters" could not confine themselves to the stronghold of a single committee responsible for European Affairs but, in line with the consideration of domestic jurisprudence given to Community legislation, should lie with each committee who addressed and informed the European legislative innovations. This kind of socialization of the community required the harmonization of the

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actions of each organ, something that has been a major concern of the Basque Parliament´s inner bodies.

3. The Basque parliamentary rules about early warning

Some statutes of autonomy include in their new versions a provision about regional participation in the control of the principles of subsidiarity and proportionality: the Statutes of Andalusia (Art. 237), Aragon (Art. 93), Balearic Islands (Art. 112, mentioned is only the subsidiarity principle), Castilla and Leon (Art. 62), Catalonia (Art. 188), Navarra (Art. 68.6) and Valencia (Art. 61).[III]

The governing bodies of the Basque Parliament, in turn, have introduced several internal regulations as a sign of the concern to give coherence and homogeneity to the dynamics of the committees.

1. Order of the Presidency of 9.12.2009 on **the procedure to be followed in processing the rapid alert for the verification of compliance with the principle of subsidiarity in relation to policy initiatives of the European Union**. This is the basic text under which the alerts have been developed. However, because of continued doubts, hesitations and even passive attitudes in some committees, there were several complementary agreements. The procedural scheme has been continuously enlarged until its final realization in the agreement of the 13.9.2011 (included below) that sets out the basics of the procedure.

2. Agreement of the Board (Mesa) of Parliament of 20.4.2010 in relation to proposed European regulations which refer to the chamber and **the rule that the corresponding sectoral Committee be responsible to carry a resolution**: while the communications received from the Joint Committee on European Affairs of the Spanish Parliament (*Cortes Generales*) only refer to single pronouncements of the Parliament about the contravention (or not) of the principle of subsidiarity, the Board understood that in case of a negative – or, also, in case of a positive opinion – the committee ought to pass an explicit resolution. This agreement was due to the reflection of a contradictory tension.

Some committees were not involved in the mechanism insofar as they did not issue any decision. Therefore, in roughly a quarter of the initial initiatives there was no opinion by the Basque Parliament.

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The other committees performed a more proactive position, as frequently a resolution went beyond the simple alternative of "Yes" or "No".

Finally, the Board of Parliament (by the mere force of exhortation) established the rule that all committees had to follow a homogeneous and active pattern.

3. Agreement of the Board of 21.9. 2010 on **the establishment of deadlines by the committees**. The Bureau reminded the presidents and lawyers in the various committees that when it was agreed to delegate to the boards of the committees the establishment of the appropriate timeframe, the parliamentary groups also assumed the responsibility to demonstrate their allegations on the violation (or not) of the principle of subsidiarity. In this sense, the Board requested that this timeframe be properly respected and understood to avoid misunderstandings.

4. Agreement of the Board of 29.3.2011 relative to **the duty of resolutions** by the committees in cases of European policy proposals. The intention of the Board was, once again, the unification of the divergent criteria of the different parliamentary committees about resolutions. Hence it was established that in all cases a formal resolution needed to be issued.

5. **Committee decisions.** Following that third Board agreement, the committees equally endorsed a self-regulating way. The right to formulate observations and request hearings (never used) was granted to parliamentary groups, the Government and, where appropriate, to the historical territories (which are similar in extent to the provinces in Italy or the counties in the UK) within a timeframe that ends 10 days before the end of the four weeks in which the Parliament can express his opinion. If observations are not made, the power to develop a resolution that expresses knowledge of the proposed decision is delegated to the officers of the Committee. If motivated remarks are presented, the Committee will be convened to approve a corresponding resolution.

6. Agreement of the Board of 13.9.2011 concerning **the adoption of a common procedure for all the parliamentary committees.** This is, for now, the last link in the chain of internal rules. In short, it was prescribed that the legislative proposal be sent by the Secretary General to all subjects concerned (parliamentary groups, Basque Government, affected committee) and that each body had until 14 days before the expiry of the four weeks available to Parliament to express its opinion.

If within this timeframe nobody questions the implementation of the principle of

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subsidiarity by the European initiative at hand, the power to develop a formal resolution acknowledging the proposal is delegated to the Bureau of the respective committee. If, on the other hand, a parliamentary group presents, within the preset timeframe, motivated remarks sustaining that the initiative subjected to evaluation would not conform to the principle of subsidiarity, the committee is convened so that the observations raised can be discussed.

4. Content of the parliamentary resolutions

Although it seems that, as was remarked previously, an answer to the question of the violation of the principle of subsidiarity can only consist in a *Yes* or a *No*, are there other possibilities? Let us look what has been the range of decisions in practice.

a) Negative opinion. The most extreme possibility demands thorough knowledge about the material content of a matter to sustain a conclusion as politically relevant. Predictably, there was only one such case, related to the implementation of the *acquis* of the Schengen Agreement.

The Institutional and Internal Affairs Committee of the Basque Parliament estimated that Schengen did not comply with the subsidiaririty principle because of the need that the Basque Police (*Ertzaintza*) had be included in the effective presence within that police system. This was an unexpected decision in a political, partisan game without special juridical argumentation.

b) Absence of participation by and consultation with the autonomous institutions. Article 2 of the Subsidiarity and Proportionality Protocol demands of the European Commission that, before proposing legislation, it undertakes the relevant consultations which, "where appropriate, take into account the regional and local dimension of the action envisaged." According to the report of the Basque Government, twice (tourism statistics and energy project aid) such inquiries were not made – facts which were then well reflected in the relevant parliamentary resolution as well.

c) Lack of impact evaluation criteria. As in the previous case, but here even more clearly, there are two requirements explicitly contained in the second Protocol of the Treaty of Lisbon. Indeed, Article 5 requires the Commission to assess compliance with the principles of subsidiarity and proportionality, specifically stipulating that all draft legislation

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must include a "detailed statement" evaluating the "financial impact and, in the case of a directive, […] its implications for the rules to be put in place by Member States, including, where necessary, regional legislation ".

This provision is so clear that there is no other rational way than to verify the empirical data of subsidiarity objectives.

The two pilot tests of COSAC highlighted the low completion of Article 5 in the following specific items:

- Lack of analysis of the impact of the financial and administrative burdens that would involve regional budgets.

- Non-existent documentary contribution of qualitative and quantitative indicators for the justification of Community action.

- No data on the assessment of compliance with the principle of subsidiarity.

The first early warnings persisted in these critical concentrations and strongly emphasized this deficiency (proposal on the law applicable to divorce and legal separation, crime statistics and services of the Information Society).[IV]

(d) Lack of statutory competence. It is meaningful to detail this imperative pre-requisite. In fact, it was mentioned that the statutes of autonomy – in their renewed form – incorporate the necessary involvement of autonomous competences. The *Cortes´* Joint Committee works on the basis of full remission of the texts that are received by the European Commission without discrimination by competence criteria. It is the duty of regional parliaments to make the prior check for regional competences. There have been no problems in the determination of the shared character of a competence. In the approximately half a dozen cases that were raised, the out-of-competence character of the matters was absolutely evident and beyond doubt: external borders of the European Union and control of foreign arrivals or criminal investigations; prosecution of delinquencies, interchange of judicial information and so on.[V]

(e) Matters of provincial competence. This is a possibility strictly limited to the Basque institutional framework. Aware of the historical and institutional evidence on strong provincial (the three *Territorios Históricos*: Áraba, Bizkaia, and Gipuzkoa) capabilities (notably in the tax field), the resolution of the Presidency of December 2009 already prescribed quite clearly the immediate referral of all community projects to provincial bodies so they could give their opinion. Unfortunately, there has not been any response

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coming from these institutions. But, having said that, the Basque Parliament would have to enter into a collaborative liaison with them to achieve an accurate opinion of all Basque institutions.

f) No transferred competence from the central government to the Basque Community. Like the last response mode, and according to the Basque Government´s report on the proposal on the protection of the rights of intellectual property and the European Observatory on Counterfeiting and Piracy: "having not yet transferred the competence in this matter to the autonomous community, a parliamentary opinion makes no sense".

5. Some provisional conclusions

1.- It is clear that these first steps of involving sub-State parliaments have formed a starting point whereby the autonomous communities have tried to manage, firstly, their self-perception as political agents with legislative competence and, also, according to their material possibilities of time and available resources. There have been many institutional events and discussion forums (sponsored by Parliament of Galicia, the Cortes of Aragon, the Parliament of Catalonia, the Basque Parliament etc.); debates within and among parliamentary groups, presidencies, and the spokespersons and boards of political factions; and the parliamentary lawyers in the Chambers have also and frequently assumed a dynamic role by mobilizing and undertaking great efforts. As a result, what can be recognized is that **the "European question" has firmly entered the political agenda of our parliaments**. But to such evidence must be attached an array of contrasts and notorious doubts.

2.- Our experience has shown a certain disorientation about the material object of debates. Initially, the dominant tendency was to limit the debate to a kind of legal study on the alignment with the principle of subsidiarity. The fact that parliaments are neither courts nor legal cabinets has plunged them into a **certain uncertainty about the subject of the procedure** and, even more so, about the role of groups and the virtuality of parliamentary decisions. This perplexity can only be discarded trough claiming a political function that will be outlined in the section dedicated to proposing new ways. A political insight must go beyond the reductionist vision of subsidiarity and proportionality. Of course, this does not

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interfere with the legislative process of the European Parliament, but serves to reinvigorate the true parliamentary functions: to discuss the basics and political opportunity of a proposal, its scope, costs, and obviously also its chosen normative extension (proportionality). Without regard for this set of issues, it is impossible to reach a proper decision on subsidiarity. To persist in the current, depressing path would condemn parliaments to manifest themselves in a radical way and without details about the violation of fundamental principles when, paradoxically, the multiplicity of bodies involved and of opinions issued characterizes the Community regulatory process better than anything else. The "organized chaos" (an adequate doctrinal expression) of the Treaty of Lisbon is hardly compatible with a rigorist interpretation of Protocol no. 2. In other words, faced with the choice of embarking on opposition to a European initiative (by way of a formal, detailed resolution issued within a short time span and with the predictable risk for one's political image), nothing but emphasized indolence can be expected from parliaments that are inexorably inundated in these matters. Examples that can, and should, point to something else than a strict subsidiarity accommodation are offered by the practice of the Joint Committee of *Cortes*, with precedents such as the following:

- Reports nos. 1 and 15/2010 (Information Systems Agency): Although the Joint Committee did not observe any violation, it advised the European Commission not to create a new entity but to entrust the management to the existing FRONTEX. In the same way, Report no. 21/2010 on the European Maritime Safety Agency.

-Opinion 3/2012 (water policy) made specific recommendations.

-Opinion 1/2011 (energy products): a negative opinion based precisely on the fact that the proposal was not accompanied by the schedule of evaluation required in Article 5 of Protocol 2 (analogous to the Basque examples cited above).

3-A feeling of **imbalance between the institutional efforts made and the results obtained** is also notorious in relation to the previous evidence. So if there is no minimal utility, the regional report has to be about an initiative that also matches the attention of the Joint Committee, which only is the case in less than 20% of the total number of initiatives submitted and processed. These are data that show the relationship between the 52 reports and opinions of the Joint Committee on a total of 270 initiatives (given up to July 2012). But, in addition, the autonomic opinion is only taken into account when the

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resolution of *Cortes* concludes with a motivated opinion, which was the case only for eight proposals.

4.-Finally, we do not believe it is excessive to conclude that a clear feeling that **Parliament's opinion does not reach the European institutions** is also shared by the parliamentary groups.

In this regard, we have to mention the only report of the Joint Committee of *Cortes* that contains a significant mentioning of a regional contribution: Report no. 1/2012 (on the right to political asylum and migration background) welcomed the claim of the Parliament of Catalonia, as the competent regional authority, to have access to the European Fund in that area.

But this isolated fact does not contradict our overall impression. Also in the discussions within the European Parliament can one detect the lack of relationship between Community bodies and regional parliaments. In September 2010 (that is, five months after the entry of the first early warning), Mr Barroso recognized, on behalf of the Commission, that the latter "has no information as to the involvement of the respective regions in the elaboration and adoption of these opinions".[VI]

What is more, at the session of 10 October 2011, the Commissioner for Interinstitutional Relations and Administration, Mr. Maroš Šefcovic, told the same MEP (Mrs. Bilbao Barandica) "that the Commission does not take account of the extent to which opinions of the regions are reflected in reports forwarded by the Member States". [VII]

We saw earlier that the Basque Parliament had contributed in the first phase of the process with several critical considerations that, without reaching a decision on the breach or deficit of subsidiarity, put in evidence a touch of attention so that Community institutions would fulfill the terms of Protocol 2 of the Treaty. Would it have been irresponsible to send these opinions to Brussels in order to enhance and improve the quality of Community legislation? We are sure that, quite the contrary, such a step would have been appreciated, would have enhanced the mutual knowledge and, at the same time, provided the parliament with a recognition of its demonstrated interest.

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6. Towards a new stage of the early warning

Based on the foregoing explanations, it certainly follows that this procedure is facing a crossroads in its continuity and real effectiveness.

We are aware that there is no a magic solution, since the main problem lies in the real insertion of sub-State authorities in the Community decision-making process. The extremely deep crisis affecting the European landscape (which in southern States acquires a character of systemic crisis, using the terminology of Thomas Kuhn) and the heterogeneous internal articulation of its components disallow us to predict a solution. In spite of this, and to avoid a steadily extinction by *desuetudo*, the following may be a reasonable step-by-step alternative model:

1. Selection of proposals. From the myriad of legislative initiatives that are put in place in each area, it is essential to choose only those that contain a greater interest. This interest and the impact of European legislation can vary greatly for each territorial context. There is no point in reaching an opinion about all the proposals

2. Starting point: the legislative calendar of the European Commission. The details of the Commission Work Programme 2013 were presented in the Annex to document COM(2012) 629, dated 23 October 2012. While on other occasions the programme has appeared with posterity, in this case there was enough time for study and careful analysis.

3. Parliamentary determination of issues to be discussed. This proposal and its attached documentation must be sent to the respective Government, because of its much higher informational possibilities which enable it to highlight initiatives of greater interest, and thus reflect this in a report to be submitted to Parliament. Based on the Government's report, groups would then have a proper period (about 15 days) for the proposal of selected topics. Obviously, determining the work schedules should be the competence of each sectoral committee and, to that effect, they would approve the annual roadmap.

4. Fixing the work roadmap. Once the selection of initiatives to be considered is established – they should not go beyond a manageable number of issues – and instead of passively awaiting reception on an unexpected date, we propose that each subject is entrusted to a *rapporteur* so he ensures a follow-up of its processing in the Community

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decision chain. It would be a non-partisan institutional mission to inform the respective parliamentary committee of successive procedural steps.

5. Discussion and adoption of the opinion. When, finally, the Parliament officially receives the draft legislation for the activation of the early warning system, the parliamentary groups would already have the required background necessary for developing a reasoned debate. This debate should focuse, of course, on the assessment of the respect for the principles of subsidiarity and proportionality. But this could also develop into a real political debate on the opportunity, scope and consequences of the material content of the initiative.

6. Coordination with the Joint Committee and other parliaments. It seems unproductive that the *Cortes´* and the regional assemblies' duties go on in a diachronic way. It would be more convenient if the Joint Committee´s commitment to a prior selection of issues and its provision of work were known. This would not be in contradiction to the inevitable flexibility needed to address initially unforeseen or unexpected initiatives, nor with other reasoned initiatives submitted to consideration by a territorial parliament. An interinstitutional agreement is essential to achieve a consensus-based action system. There have been some attempts on more than one occasion, but operating achievements of relevance have not obtained. It seems obvious that this battery of renovated items concerns also the interest of other assemblies. We cite as a simple sign of this the Murcia Regional Assembly, which in the framework of the pilot trial of 2009 in matters of inheritance and donations, issued the same claims as the Joint Committee about the report of the central Government (Diary of Proceedings n. 9 from 16.11.2009). The COPREPA (Conference of Regional Parliamentary Presidents) has also appeared on several occasions with a similar line on the necessary inter-institutional collaboration. In the same vein, the IPEX network utilization could also be improved.

It is time to put an end (or perhaps continue them on another occasion) to these lines guided by pragmatism. We could explore other, more ambitious directions based on comparative experience[VIII] or foresee possibilities as yet unexplored but legally feasible.[IX] But this road must be talen, as European construction teaches us, *slowly but surely*.

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[*] Legal Adviser, Basque Parliament.

[I] Projects of Community rules relating to European energy policy (17.10.2007); in the field of immigration (23.11.2007) and cross-border health care (16.09.2008). They were the only cases in which there were hearings from senior members of the Basque Government.

[II] Proposal for a framework Council Decision relating to the right to interpretation and to translation in criminal proceedings, proposed by the Commission on 8 July 2009; and proposal for regulation on jurisdiction, applicable law and recognition of decisions and administrative measures in the field of successions and donations, adopted by the Commission on 14 October 2009.

[III] Asturias: Resolution of the Presidency of 4.5.2010; Andalusia Board´s agreement of 18.12.2009; Canary Islands: articles 48 and 49 of the rules of procedure; Cantabria: Board´s resolution of 27.11.2009; Castilla - La Mancha: Resolution of the Presidency of 20.7.2010; Castilla y León: Resolution of the Presidency of 3.12.2009; Catalonia: art. 181 of the rules of procedure; Extremadura: article 102 of the rules of procedure; Valencian Community: article 181 of the rules of procedure; Galicia: Board´s agreement of 15.7.2010, modified by agreement of 5.4.2011; La Rioja: resolution of the Presidency of 26.4.2010; Madrid: resolution of the Presidency of 27.4.2010: Navarra: 9.11.2009 resolution of the Presidency.

[IV] It should be noted that even after 2011, these extremes are still included with regularity.

[V] Incidentally, it is true that there have been two very recent cases in which the Government report points out the incompetence of the Basque country in matters such as the so-called adaptation fund to globalization (a solidarity mechanism to mitigate the employment consequences of offshoring at Community level) or the regulation of mobile telephone roaming (a matter between the management of telecommunication companies and consumer protection), in which, from a personal point of view, one would have liked a more accurate conceptualization of incompetence.

[VI] Question for written answer by MEP Izaskun Bilbao Barandica (ALDE) on the statistics on the early warning process, no. E-5865/2010, at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2010-5865+0+DOC+XML+V0//EN.

[VII] Question for written answer E-009555/2011 on the Committee of the Regions and early warning system: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2011-009555+0+DOC+XML+V0//EN.

[VIII] In Austria, for example, federated states attend and take part in the debate in the Federal Parliament. On the other hand, it is advisable to consult the vivid experience of the Parliament of Scotland with its roadmap for the monitoring of Community legislation and relations with the Parliament of Westminster http://archive.scottish.parliament.uk/s3/committees/europe/inquiries/euDirectives/documents/EUStrategy_Final.pdf.

[IX] What would happen if a regional Assembly requested from the Government a judicial action to obtain the annulation of a community regulation due to the violation of the principle of subsidiarity (article 8 of the Protocol, and 7 of the Act)? It must not be forgotten that this is a vindication of the COPREPA in the Cartagena Declaration of May 5, 2009. Then, the commitment was to "formally request the *Cortes Generales* to articulate the required system so that legal actions for violations of the principle of subsidiarity can be taken by the Government, through appeals to the Court of Justice of the European Union, taking into account the position of regional parliaments with legislative powers".

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

The evolving role of the Italian Conference system in representing regional interests in EU decision-making

by

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Perspectives on Federalism, Vol. 5, issue 2, 2013

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Abstract

This contribution focuses on the Italian experience of the 'collective representation of regional interests through the State-Regions Conference and the other 'horizontal', interregional Conferences representing either the regional executive bodies (the Conference of the Regional Presidents, better known as "Conference of the Regions") or the legislative assemblies (the Conference of the Presidents of the Regional Councils). Although such Conferences have, over time, conquered a well-defined institutional position also in the stage consisting in the implementation of EU norms, the present analysis is centred on the role exercised by such bodies in the EU decision-making process. After a general overview of the main organisational and functional features characterising the activity of these bodies in EU affairs, the contribution focuses on the most relevant reforms which have affected the Italian legislation as regards the participation in the EU integration process. This diachronic analysis is critically assessed in the conclusions. It is argued that some challenges still remain open in the coordination of the functions of intergovernmental Conferences - also due to confusion of roles between the State-Regions Conference and the Conference of the Regions - and in the promotion of a reinforced synergy between these latter and the Conference of the Presidents of Regional Councils.

Key-words

Regional representation, European affairs, Conference of the Regional Presidents, Conference of the Presidents of Regional Councils

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1. Representing regional interests in EU matters: a comparison of different channels of participation

Among the factors that have accompanied EU integration, the gradual engagement of the regional entities of Member States in Community and European affairs has distinguished itself as a process carried out both at European and national level (Chiti 2002: 1401 ff.; Gozi 2003: 340 ff.; Ruggeri 2004: 782 ff.).

At European level, signals of the ongoing "opening" of the European Communities and the EU with regard to the proactive participation of regional representatives (Cole 2005) can be found in the co-operation of Regions and the European Commission on regional policy that started in 1975 (Armstrong 1995: 35; Jones - Keating 1995: *passim*), in the participation of regional ministers at the Council, allowed by the Treaty of Maastricht in 1992 (Berti 1992: 1203 ff.), and in the establishment of the Committee of the Regions (CoR) in 1994 (Tizzano 1992: 603 ff.; Dehousse - Christiansen 1995: *passim*) and its further development with the Treaty of Amsterdam (Anzon 1998) and the Treaty of Nice[I]. This process was continued by the Treaty of Lisbon, which extended the principle of subsidiarity to the local and regional level (Article 5), envisaging the participation of regional parliaments with legislative powers through the "early warning system" (Article 6 of Protocol n. 2 annexed to the Treaty of Lisbon). This legal background created the premises for a direct involvement of regional bodies in the EU decision-making process.

At national level, most Member States have gradually tried to adapt to the impact of the European integration process in their internal organisation, in particular as regards the relationship between the central authority and decentralised entities (Sharpe 1993: 1 ff.). This process has also characterised the Italian experience, which, starting from an original situation of striking imbalance in the role attributed to regional bodies and to State institutions in EU affairs, has then slowly recognised that Regions play an autonomous role in the implementation of EU legislation and also in their participation of EU decision-making (Torchia 1993: 91 ff.; Desideri - Santantonio 1997: 96 ff.).

Generally speaking, the purposes of this transformation are manifold: enabling a more effective representation of regional interests in the formulation of European strategic choices (and, as regards the national level, in the formulation of the Government's position

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on European affairs) (Greenwood 2011: 218 ff.); contributing to the democratisation of European decision-making by involving those territorial entities which, due to their proximity to citizens, can give legitimacy to European choices (Hooghe 1995; Pizzetti 2002: 935 ff.); and improving the overall European policy-making (considered as the result of both the national and the European stages) by involving, throughout the process, the regional entities as subjects which are in charge of the implementation of a significant part of European policies (Iurato 2006: 680). In any case, the process was favoured by the increasing activism of the regional entities themselves in getting engaged in European affairs[II].

The features and forms of regional involvement in European affairs have varied consistently across Member States. However, the solutions concretely adopted usually represent a combination of four different variables of participation: the participation of single regional entities at the European decision-making process as an alternative to the collective representation of regional interests mediated by interregional bodies; and the direct engagement of regional entities at European level (Woelk 2003: 575-576) as opposed to involvement mediated by the representation of regional interests by national authorities (Tripodi 2004)[III].

In Italy, these patterns of regional involvement have tended to acquire a distinct relevance in the subsequent stages of European policy-making: in the decision-making stage, in fact, the collective dimension usually prevails over the representation of regional interests by single Regions[IV]; the involvement of regional entities is mostly based on indirect procedures, taking place at national level. An opposite situation characterises the implementation stage of European decisions, which is rather carried out individually by each regional entity[V]; the search for a coordination of regional activities has however attributed a growing relevance to national cooperative procedures, which tend to find their focal point in the interregional conferences[VI] (see Table 1).

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	Direct participation of regional entities (individual dimension)	**Indirect participation through the Conferences (collective dimension)**
National procedures for the participation of regional entities in EU affairs	Decision-making stage: involvement of the regional Councils (individually) in the national procedures for the subsidiarity monitoring. No other form of direct participation Stage of the implementation of the EU decisions: Direct involvement/responsibility of each Region in the adjustment to EU norms and duties (according to national procedures)	Decision-making stage: Participation of the Conferences in the EU decision-making process according to the rules regulated by national legislation (which tend to introduce a plurality of procedures and forms of involvement) Stage of the implementation of EU decisions: Role of the Conferences in monitoring/coordinating the implementation of EU decisions at regional level
Direct involvement of the regional entities at EU level	Decision-making stage: Relations developed by the connection offices created in Brussels by each Region with the EU institutions Stage of the implementation of EU decisions: No participation	Decision-making stage: Role of the Conferences in selecting the representatives of the regional Councils/executives at the CoR Stage of the implementation of EU decisions: No participation

Table 1 - A comparison of different forms of regional involvement in European affairs

A further distinction to be made concerns the identity of regional bodies participating in EU decision-making. Generally speaking, in fact, the European integration process has been interpreted by most scholars as a trend strongly centred on the involvement of executive bodies at all competent policy-making levels (Lupo 2005: 43). This implies that also at regional level the participation in the decision-making process (both at the national and European level) has mainly fallen within the responsibility of executive bodies (Weiler, Haltern and Mayer 1995: 7; Schmidt 1999: 25).

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However, in countries where regional entities are endowed with legislative powers, the representative assemblies have slowly become interested by a process of Europeanisation which enabled them to expand their areas of intervention, for instance by participating in Community and European regional development policies (Fasone 2009; Rivosecchi 2009; Fasone 2010: 163 ff.). This process has for a long time found the regional councils unable to identify new patterns for the accomplishment of such responsibilities[VII], affirming innovative methods of involvement in policy-making (Liebert 2002: 12). Most recently, though, the upturn of the ascending subsidiarity dimension seems to have re-invigorated regional assemblies' attempts to be active in the representative arena on EU issues. In these latter cases, the legitimisation of regional parliaments is based, above all, upon their capability to give space to the opposition as well as to majority rights in EU affairs (Strøm 1998; Holzhacker 2005) and to co-ordinate and compose different forms of territorial, political and corporative representation (Manzella 2002: 36).

As a consequence, regional assemblies can be considered privileged actors in EU affairs, since they are not only in charge of implementing (through the adoption of regional laws) most EU decisions, but - after the Treaty of Lisbon - they also participate in the decision-making process by being involved in the subsidiarity monitoring mechanism.

Having regard to this overview of different patterns of regional participation in EU affairs, the present contribution focuses on the Italian experience of the 'collective' representation of regional interests through the State-Regions Conference and the other 'horizontal' interregional Conferences representing either regional *executive* bodies (the Conference of the Regional Presidents, better known as "Conference of the Regions") or their *legislative* assemblies (the Conference of the Presidents of the Regional Councils). Although such Conferences have, over time, conquered a well-defined institutional position also in the stage consisting of the implementation of EU norms, the present analysis centres on the role exercised by such bodies in the EU decision-making process. As previously observed, in fact, it is above all at this stage that the Conferences tend to affirm their role as authentic institutional actors, endowed with specific duties and powers.

As a consequence, after a general overview over the main organisational and functional features characterising the activity of these bodies in EU affairs (section 2), section 3 describes the most relevant reforms which have affected the Italian legislation on the participation in the EU integration process. This diachronic analysis is critically assessed in

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section 4. It is argued that some challenges still remain open in the coordination of the functions of intergovernmental Conferences - also due to a confusion of roles between the State-Regions Conference and the Conference of the Regions - and in the promotion of a reinforced synergy between this latter and the Conference of the Presidents of Regional Councils.

2. The interregional Conferences and their institutional role in European affairs: the experience of Italy

2.1. The Conference system: a general overview

The Italian network of relationships between the State and territorial entities is characterised by the existence of a plurality of Conferences operating, in a 'vertical sense, as cooperative organisms for the comparison of national and local interests[VIII]. It consists of the permanent State-Regions-Autonomous Provinces Conference (hereinafter State-Regions Conference, *Conferenza permanente per i rapporti tra lo Stato, le Regioni e le Province autonome di Trento e Bolzano)*, the State-Municipalities-Local Autonomies Conference (*Conferenza Stato, Città, Autonomie locali*), and the State-Regions-Autonomous Provinces-Municipalities-Local Autonomies Conference (also known as Unified Conference, *Conferenza unificata)*. All these bodies are composed by representatives of the executive branch of the different territorial levels.

This Conference system is the result of a longstanding process[IX], whose beginning is to be found in the informal practice of relations between the Regions and the national Government, which in turn started with the creation of ordinary Regions in 1970. In 1980, upon the conclusion of the parliamentary hearing promoted by the Joint Parliamentary Commission on Regional Affairs, an investigative committee, known as Bassanini Committee, was created[X]; the Committee's findings advocated the creation of a State-Regions Conference, considering it a strategic factor for State-Regions relations, and identified EU affairs as a privileged area of activity for this cooperative organism (Ceccherini 2009).

The proposals of the Bassanini Committee were not implemented; however, the Prime Minister Decree of 12 October 1983 established a provisional and non-permanent form of State-Regions Conference, regarded as an inter-ministerial organism and composed of the

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Prime Minister and of the other subject-competent Ministers, while regional representatives could attend only upon invitation by the Prime Minister. The Conference was then given legislative status by art. 12 of law n. 400 of 1988, which in particular completed the structure of the organism, conceiving it as a permanent and joint body, chaired by the Prime Minister and composed of the Presidents of all Region and Autonomous Provinces[XI]. Legislative decree n. 418 of 1989 moreover reunified within the Conference all the functions previously conferred by law to sectoral joint bodies.

A further significant step in the development of this organism was promoted by art. 9 of law n. 69 of 1997, which strengthened the role of the State-Regions Conference, delegating to the Government the task to adopt a systematic regulation of its functions. This provision was implemented by legislative decree n. 281 of 1997, which can be considered as the founding norm of the Conference system, since it redefined the discipline of the State-Municipalities-Local Autonomies Conference, established by Prime Minister Decree of 2 July 1996, and also introduced the Unified Conference.

The reforms of 1997 significantly expanded the role and functions of the Conferences: they strengthened the authority of such organisms, supporting their involvement in all decision-making activities affecting regional matters. They can adopt resolutions, promote agreements, voice opinions, and designate representatives connected to subject matters and duties that are relevant to territorial autonomies. Apart from the advisory role, the decision-making authority of the Conferences is mainly exercised through the adoption of agreements, which however have shown themselves to be only 'weak' tools of cooperation (Agosta 2004: 703 ff.), which does not necessarily require the adhesion of all parts (as the government can operate even without the agreement of the Regions). Given the possibility of weak agreements, the difference between the advisory and the cooperative activity of the Conferences clearly fades away.

The evolution of this vertical form of cooperation among different territorial entities was accompanied by the gradual emerging of forms of horizontal cooperation among bodies belonging to the same levels of government. The two most relevant interregional Conferences are the Conference of Regions (*Conferenza delle Regioni*), composed of representatives of the regional executives and acting as a part of the intergovernmental State-Regions Conference, and the Conference of Presidents of Regional Councils (*Conferenza dei Presidenti dei Consigli regionali)*, whose membership is instead reserved for the

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Chairmen of regional legislative assemblies. This latter Conference still lacks a correspondent form of vertical cooperation, as the Italian bicameral Parliament, notwithstanding the reform proposals and attempts of the last 25 years, does not offer any form of structural representation to the autonomies.

The involvement of these two bodies in EU policy-making has been characterised by a different timing and a distinct evolution, mostly due to the tardiness of the Italian legislation in recognising the role of the Conference of Presidents of Regional Councils as a due interlocutor for the Government in the EU decision-making process.

2.2. The Conference of the Regions

The need for a coordination of regional interests through a permanent body gathering all regional Presidents was perceived a necessity by Italian regional entities starting from the beginning of the 1980's[XII] (Cassese - Serrani 1980: 398 ff.) and sponsored the creation, on 15-16 January 1981, of the Conference of the Regions. The Conference was established on the basis of a political interregional agreement, signed in Pomezia, deprived of any legal binding force.

Scholarship (Comelli 1981: 1144; Ruggeri 1984: 714 f.) argued that this organism, which anticipated the establishment of the State-Regions Conference in 1983, was meant from the beginning to be an instrumental body, whose main aim was to foster future patterns of vertical cooperation with the central authority. Over the decades, however, and specifically after the reform of Part II - Title V of the Constitution, approved in 2001, the Conference of the Regions was able to develop autonomous forms of horizontal cooperation[XIII].

The main feature of this organism is probably to be found in the informality of its internal organisation and procedures (Bifulco 2006: 238), which explains why the Conference could find a formal discipline through the adoption of an internal Regulation only in 2005. Also, the functions exercised by the Conference of the Regions can be considered the result of a practice stratified over decades rather than arising from legal assignments.

As for the organisational profile, the Conference is composed of 11 standing committees, one of which is entitled to examine European and international affairs. Moreover, the internal regulation adopted on 9 June 2005 provides (in art. 4.2) that the

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Assembly of the Conference is summoned at least twice a year for a special session entirely dedicated to international and European affairs. The daily management of European issues is however entrusted to the specialised Committee on international and European affairs, regulated by art. 7.1.c) of the Conference's internal regulation.

The extremely low level of institutionalisation of the Conference of the Regions is to be referred also to the activity carried out by that body in EU affairs. For a long time, in fact, the participation of the Conference in European decision-making took place primarily on a voluntary basis and was regarded by regional entities themselves as a due process of the self-coordination of their respective interests. Moreover, the involvement of the Conference in EU affairs has been extremely gradual (Bifulco 2006: 243).

Generally speaking, one of the most relevant tasks characterising the involvement of the Conference in EU affairs can be found in the participation at open consultations of the Committee of the Regions (CoR)[XIV]. The Conference itself, moreover, appoints a part of the members of the regional delegation to the Committee and decides on the position to be represented by such members at CoR meetings.

Apart from the participation at the CoR, the Conference has over the time promoted an institutional cooperation with the EU Commission. This was favoured by the possibility given to the Regions by art. 58 of the Law n. 52/96 to have four regional officials and one expert taking part in the Italian permanent representation. These regional representatives are proposed by the Conference of the Regions and appointed by the Minister for Foreign Affairs. The Conference, moreover, can indicate to the Government the issues of specific interest for the regional administrations to be taken into consideration in the formulation of the guidelines directed by the Minister for Foreign Affairs for the Italian permanent representation.

At national level, the Italian Conference of the Regions has developed an institutional cooperation with the governmental Department for European Policies, and in particular with the CIACE, the inter-ministerial Committee for European and Community Affairs, a dedicated body created by Law n. 11 of 4 February 2005 and specialised on issues concerning the participation of Italy at the EU (see *infra*). Regions and local autonomies participate at the meetings of the CIACE dealing with questions of regional and local interest. This cooperation with the Department, moreover, gave birth, in July 2007, to the

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database Europ@, whose aim is to facilitate the participation of Italian Regions in the decision-making process leading to the approval of EU norms.

If the activities carried out by the Conference of the Regions in EU affairs are to be considered as the manifestation of a spontaneous adaptation to the EU integration process, a higher level of formality characterises the functions exercised by this body as regards the participation at the State-Regions Conference. Over the decades, in fact, the Conference of the Regions has affirmed itself also as a preparatory body whose aim is to coordinate the regional position to be presented at the meetings of the State-Regions Conference. This intertwining of roles seems to have favoured an approach - accidentally supported by the Italian legislator itself (see *infra)* - which, rather than capturing the specificity of each body, tends to consider them as equivalents and fully interchangeable.

2.3. The Conference of the Presidents of Regional Councils

The Conference of the Presidents of Regional Councils was created in 1994 on the basis of mutual arrangements by the regional assemblies, which regulated their participation at the Conference through the adoption of dedicated regional laws[XV]. It was charged with the task of promoting the institutional role of regional legislative assemblies and coordinating their interests and common areas of activities. Participation at the Conference is referred to each Region, which decides in compliance with its own internal regulation. The organisational and functional features of the Conference have been formally regulated by the internal Statute, initially approved in 1994 and most recently modified on 5 October 2006.

The activity carried out by the Conference in the European affairs sector can be appreciated both in terms of the coordination of regional assemblies' activities at supranational level and in terms of cooperation with national institutions on European issues (Conference of the Presidents of Regional Councils 2010b).

As for the supranational perspective of intervention, the Conference has, over the last few decades, promoted a stable cooperation with European institutions (above all with the Commission and the Committee of the Regions) and with the CALRE, the Conference of European Regional Legislative Assemblies created in Oviedo in October 1997.

In particular, the Conference of the Presidents of Regional Councils participated in many occasions at the structured dialogue promoted by the EU Commission, presenting its

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position on those issues more directly related to the role of regional legislative assemblies. Moreover, in order to strengthen its position within the European architecture, on 18 May 2009 the Conference of the Presidents of Regional Councils signed a Memorandum of understanding with the Representation of the EU Commission in Italy that recognises regional entities as a fundamental element for the democratic legitimisation of the EU and promotes the role of regional institutions as channels for getting European citizens involved in EU policy-making (Conference of the Presidents of Regional Councils 2010a: 10).

Its more structural involvement at supranational level is however to be found in the participation in the activity of the Committee of the Regions. The number of members representing regional councils within the Italian delegation to the CoR is not too significant (22 of the 48 members of the CoR represent regional entities, but only 5 are appointed by the regional councils[XVI]) and such members are still appointed by the regional executives (Iurlato 2007: 245 ff.); however, some attempts to promote the role of the Conference of the Presidents of Regional Councils in the above mentioned appointing procedures have been made recently[XVII].

Starting from October 2005, moreover, the Conference of the Presidents of Regional Councils has adhered to the network on subsidiarity promoted by the Committee of the Regions, involving three pilot Italian Regional Councils in the assessment of the subsidiarity tests; the participation in the Committee's subsidiarity network - which is not yet over - has enabled the Conference to participate in some of the most relevant supranational events, such as the meeting on susbidiarity organised in Luxembourg in October 2008.

Apart from the structural cooperation with the EU Commission and with the Committee of the Regions, the Conference of the Presidents of Regional Councils has tried to reinforce its interaction with the EU Parliament by developing a more structural cooperation with the Italian members of the EU Parliament[XVIII].

At supranational level, moreover, the Conference of the Presidents of Regional Councils is involved in the activity of the CALRE at the plenary sessions summoned once a year (involving all the Presidents of Parliaments adhering to the Conference) and at the meetings of the Standing Committee - composed of eight Presidents of Regional Parliaments, one for each Member States that has joined -, taking place every three months.

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With regard to the national perspective of intervention, manifold are the initiatives taken and the activities promoted - mostly on a voluntary basis - by the Conference. Two areas of intervention that are structurally activated by the Conference involve the cooperation, respectively, with the two Houses of the Italian Parliament and with the governmental Department for European Policies.

The cooperation with the Italian Parliament, in particular, gave birth to the creation of an *ad hoc* Joint Committee, which coordinates the participation of the legislative assemblies (those at regional and national level) in the EU decision-making process (with specific regard to the subsidiarity monitoring mechanism) and the implementation of EU law. One of the most significant projects promoted by the Joint Committee is the creation of a database dedicated to the regional acts and documents dealing with EU affairs, known as Reg-IPEX, whose main aim is to strengthen interparliamentary information exchange and support the coordination of regional assemblies' initiatives in the subsidiarity monitoring. The Conference of the Presidents of Regional Councils, moreover, regularly participates at the hearings of the European Affairs Standing Committees of the Chamber of Deputies and of the Senate of the Republic. The most common issues discussed in such hearings include the yearly legislative programmes of the EU Commission, the legislative bills concerning the participation of Italy in the EU legislative process, and the subsidiarity monitoring reports.

Finally, on 20 July 2009[XIX] the Conference of the Presidents of Regional Councils signed an inter-institutional agreement with the Italian Department for European Policies regulating the submission of European acts and proposals from the Government to Regional Councils. The purpose of such an agreement was to ease the access of regional legislative assemblies to EU documents, preventing the generic submission of all documents to every Council and promoting the role of the Conference in filtering out relevant proposals. Moreover, the Conference has actively cooperated with the Department for European Policies in the creation of the database Europ@.

Apart from these institutional activities, the involvement of the Conference in EU affairs is developed through daily contacts with regional legislative assemblies; it is in fact mainly through these contacts that the Conference can inform the Regional Councils about what is going on at EU level, soliciting a debate on specific issues and promoting the

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introduction of common procedures for debate and the examination of EU acts and proposals.

3. The evolving role of the Conferences in the Italian legislation concerning the participation in the EU integration process

3.1. From the marginalisation of regional entities to the involvement of the State-Regions Conference in Community affairs (Law n. 86/89)

In the 1970's and 1980's, Italian Regions were confined to an extremely limited role in the European Communities' decision-making process (Ferrari 1992: 1248; Pastori 1992: 1217; Onida - Cartabia 1997: 603): the marginalisation of regional entities - which at that time characterised also other highly decentralised EU Member States (Bourne 2003: 609 ff.)[XX] - was due to a variety of reasons, in part related to the Community system (and in particular to the general neutrality of the European Communities with regard to Member States' internal organisation) and in part to the specific situation of Italian regionalism (among other factors, it is possible to mention the relative weakness of regional entities in the Italian architecture, and the absence of institutional bodies able to represent their interests at central level). The choice operated by the Decree of the President of the Republic n. 616/1977 - which shaped the relations of Regions with the European Communities on the basis of the scheme applied to the foreign relations of the State (Chiti 1994: 559) - clearly mirrored this situation.

One of the first attempts to regulate the participation of Italian Regions in EU decision-making can be found in Law n. 86/89, which regulated the role of regional entities both in the decision-making process and in the implementation of Community norms[XXI]. In particular, art. 10 of Law n. 86/89 created a dedicated Communitarian Session of the State-Regions Conference, providing that the Conference should exercise an advisory role on general guidelines regulating the implementation of Community Acts with a regional interest. Due to the fact that such advisory powers were absolutely not binding upon the Government, part of the literature expressed some doubts about the effectiveness of this advisory function, stressing the fact that, on the one hand, its object was absolutely generic as it referred not to single proposals but only to general directives of governmental policy; and that, on the other hand, the relative weakness of the advisory power of the State-

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Regions Conference also derived from its complete dependence on the information and documents submitted by the Government itself (Anzon 2001).

Starting from the mid-1990's, some innovations were introduced in the Italian primary and secondary legislation[XXII], the aim of which was to promote the direct representation of regional interests at EU level through the creation of regional representative structures in Brussels, the development of direct relationships with Community authorities, and the participation at the Italian Permanent Representation of members and experts appointed by the State-Regions Conference. Moreover, the role of the State-Regions Conference was extended to the selection of issues of particular interest for regional administrations to be signalled to the Ministry of Foreign Affairs for the drafting of guidelines addressing the Permanent Representation. These forms of direct representation have assumed, over the decades, a strategic relevance for regional entities, as they have undoubtedly reinforced the awareness of regional bodies of Community duties.

A step forward in the direction of the reinforcement of the filtering role of the State-Regions Conference in the representation of regional interests was made with the reform process occurred in the biennium 1997-1998, known as "Bassanini reforms": a series of laws and decrees that regulate the relations between the central State and the territorial autonomies. These reforms significantly strengthened the position and powers of the State-Regions Conference, attributing to it an advisory role not only as regards the general directives of State policies, but also certain State acts, such as drafting the yearly Community law, provided by art. 5.1.b) of the legislative decree n. 281/1997, and the draft laws, governmental decrees, and regulations adopted in compliance with Community obligations and affecting regional competences [XXIII]. The Conference, moreover, was given the power to express its position also on draft administrative acts concerning subjects falling within the competence of the regions and adopted in order to adjust to Community directives and decisions of the Court of Justice[XXIV]. This advisory role of the Conference was conditioned upon the explicit request of the President of the Regions and the consent of the Government; nevertheless, the possibility offered to the Regions to express their opinion on the content of those acts impacting their competences represented an important step forward in the direction towards a more proactive involvement of regional entities in European affairs.

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3.2. The reforms of 2003-2005: the introduction of a three-step-based process of regional participation in the EU decision-making process

The reform of Title V - Part II of the Constitution approved with constitutional law n. 3/2001 has considerably enriched regional entities' competences and powers in the external and European affairs sector. In particular, the reformed art. 117.5 of the Constitution explicitly provided for the participation of Italian Regions, in subjects falling within their competence, in decisions directed to the preparation of European normative acts. Notwithstanding its ambiguity, or rather mainly thanks to its principle-based content (Pizzetti 2001: 808; Parodi 2003: 470), the new formulation introduced in the Constitution has opened up a large variety of strategic choices for the ordinary legislator (Caravita 2002: 123; D'Atena 2002: 920-921; Ferrari - Parodi 2003: 445-446).

Nevertheless, this relevant constitutional change has not been accompanied by a reform of the pre-existing patterns for regional participation in the European Union: part of the scholarship (Parodi - Puoti 2006), in fact, affirmed that, after the constitutional reform of 2001, the participatory procedures for the involvement of regional entities in EU affairs have remained far more limited compared to the experience of federal Member States, such as Germany[XXV], Austria[XXVI] and Belgium[XXVII]. The constitutional reform of 2001, moreover, has not fulfilled the expectations concerning the conferral of a constitutional status to the Conference system, thus substantially confirming their pre-existent role, which is mostly based on daily practice and the evolution of constitutional jurisprudence, apart from some normative provisions. The institutionalisation of these organisms would probably have favoured the establishment of formalised procedures of vertical cooperation also on EU issues.

What has been observed is not incompatible with the idea that, mainly thanks to primary legislation executing the constitutional reform of 2001, the role of regional entities in the EU decision-making process has been significantly strengthened over the last decade. Two main features seem to characterise the normative evolution marked, in particular, by Law n. 131/2003 (adopted in order to implement part of the constitutional reform of 2001) and by Law n. 11/2005 (which repealed Law n. 86/89 on the general rules concerning the participation of Italy in the Community and European Affairs): on the one hand, the introduction of a plurality of forms of representation and participation of regional entities, complementary to the traditional intervention of the State-Regions

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Conference (Cartabia - Violini 2005: 477) and, on the other hand, the reinforcement of the information flow towards the Regions, now directed not only to regional executives but also to regional councils (Scino 2005: 48).

The outcome of these normative changes is, generally speaking, the introduction of a new path for the collective participation of Regions in the EU decision-making process[XXVIII]. This new path represented the result of a three-step process of the involvement of regional entities, where all the steps were characterised by the decisive role attributed to the inter-regional Conferences in coordinating and representing regional interests (Marini 2001: 649 ff.).

The first step was based on the strengthening of the information and documents submitted by the central government to the regional entities through thee Conferences (Gambale 2003; Cafari Panico 2004). Art. 5.1. of Law n. 11/2005, in fact, expanded the informative duties of the executive by requiring the immediate submission of Community and EU acts[XXIX] to the attention of the Regions and, at the same time, by stating that the Government itself should grant the Regions a qualified information on affairs falling within their area of competence. In both cases, in order to simplify and coordinate the information flow directed to the Regions, the interlocutor of the Government was identified to be the State-Regions Conference.

A second step in the 'regional' path of participation in the EU decision-making process, as regulated by Laws n. 131/2003 and n. 11/2005, is represented by the introduction of a plurality of forms of representation of regional interests.

Generally speaking, in fact, Law n. 131/2003 has not formally provided that regional entities be endowed with a structural representation at European level, as it usually happens in other highly decentralised EU Member States[XXX]. Art. 5 of Law n. 131/2003, however, recognised the direct participation of regional entities' representatives, in subjects falling within their legislative competences, in the activity of the working teams and committees of the Council and of the EU Committee, specifying that the criteria for coordinating such a participation shall be decided within the State-Regions Conference[XXXI] and that the unity of the Italian position shall in any case be assured by the Chair of the governmental delegation. The solution provided by Law n. 131/2003 was therefore considered a form of "direct" participation of regional entities in EU affairs, even if mediated by the State-Regions Conference (Violini 2003: 111).

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By contrast, a strategy of "indirect" (and internal) promotion of the role of Regions in the EU decision-making process was pursued by the reform of the legislation concerning the participation of Italy in the EU, approved by Law n. 11/2005; the reform, in fact, did not change the mechanisms regulating the direct representation of regional interests at EU level, but instead affected the procedures for the definition of the Italian position in EU affairs. In particular, as previously mentioned, art. 2 of Law n. 11/2005 promoted the creation of the CIACE[XXXII]. The establishment of such a Committee was strongly opposed by the Italian Regions, as they feared that the newly established organism would challenge the role of the State-Regions Conference and introduce a new pattern for regional participation in EU affairs, one exclusively based on the involvement of the President of the Conference of the Regions (which in case of necessity could delegate another member of the Conference of the Regions)[XXXIII]. However, this doubt was erased by the coordinated interpretation of different provisions of law n. 11/2005, which clearly seemed to confirm the coexistence of a plurality of patterns for regional participation in the EU decision-making process[XXXIV].

The involvement of the Regions at the meetings of the CIACE, in fact, was not to be considered structural, as it could be activated only when the discussion involved "specific issues" of regional interest (art. 2 of Law n. 11/2005)[XXXV]. Mainly due to the generic formulation adopted by that Law, part of the literature (Parodi - Puoti 2006) affirmed that the participation of Regions in the CIACE could be requested by regional representatives even for discussing issues of general political relevance, such as the financial perspective of the EU or the enlargement of the Union itself; and that, in any case, it was not subject to a previous assent of the CIACE (Paterniti 2005).

By contrast, art. 5 of Law n. 131/2003 - as previously observed - delimited the direct participation of the Italian Regions in the EU decision-making process, constricting it to subjects falling under their legislative competence[XXXVI]. The literature wondered about the difference between these two forms of regional involvement in EU affairs coming, in the end, to the conclusion that the role attributed to the CIACE and to the State-Regions Conference did not determine an overlapping of functions[XXXVII].

Finally, the last step of the revised pattern for regional participation in EU decision-making was represented by the procedures introduced - in particular - by Law n. 11/2005 for enabling the Regions not only to represent their interest, but above all to express a

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position on those affairs of respective interest.

According to art. 3.1. and 3.2. of Law n. 11/2005, in fact, the Regions, in the subjects falling within their competence, could express an opinion about EU acts by means of the State-Regions Conference or the Conference of the Presidents of Regional Councils within 20 days of their submission; this advisory procedure was considered to form a part of the more general procedure for the definition of the Italian position on EU acts. If the opinion was not formulated by the Regions or was not sent in due course, the Government was allowed to continue the activity directed toward the formation of the Italian position. This specification confirmed that the regional opinion was not binding, but was rather to be considered a mere suggestion directed to the national executive; nevertheless, the involvement also of regional Councils in this advisory procedure represented a first significant advancement in the direction of a more participatory decision-making process.

A second opportunity of intervention was offered to the Regions by art. 5.4. of Law n. 11/2005, which provided that the Government should summon the State-Regions Conference in order to reach an agreement on draft EU normative acts falling within the competence of the Regions when at least one Region demanded it. The deadline for reaching an agreement was fixed to 20 days; after this, or in case of urgency, the Government was allowed to go ahead alone[XXXVIII]. This reinforced cooperative procedure attributed to the Regions a more effective tool for influencing the definition of the Italian position on specific draft EU acts.

Finally, probably the sharpest faculty attributed to the Regions by Law n. 11/2005 is to be found in the procedure regulated by art. 5.5. which, in the above mentioned hypothesis of art. 5.4., conferred to the State-Regions Conference the power to place a scrutiny reserve clause obliging the central Government to delay voting in the Council of Ministers at EU level. The aim of this procedure was to freeze the Italian position on European acts and proposals in order to enable the finding of a unitary position between the central State and the decentralised entities. During this period, the State-Regions Conference was supposed to meet in order to define a common orientation for the examination of the draft acts under scrutiny reserve; if the Conference was unable to reach a common position within 20 days, the Government was allowed to adopt its own decisions at EU level[XXXIX].

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3.3. Law n. 234/2012: rationalising the patterns for regional participation in EU affairs through the Conferences

The Italian legislation regulating participation in EU affairs has most recently been reformed by Law n. 234/2012, which repealed Law n. 11/2005, adapting its procedures and rules to the novelties introduced, in particular, by the Treaty of Lisbon (Fasone 2010).

The reform has not radically altered the pre-existing procedures and rules concerning the participation of Regions in the EU decision-making process. It has rather resulted in a rationalisation of the cooperative patterns between the State and the regional entities, now referring not only to the formulation of normative acts, but rather to any political choice related to EU affairs[XL].

The first rationalisation impacts upon the internal structure of the CIACE, now renamed CIAE (Intergovernmental Committee for European Affairs), in order to ratify the novelties generated by the Treaty of Lisbon with regard to the architecture of the European Union. Art. 2 of Law n. 234/2012 confirms the participation of the President of the Conference of Regions (or another delegated member) in the meetings of the CIAE dedicated to the discussion of issues of regional interest. At the same time, it contributes to solve pre-existing doubts about potentially overlapping functions between the CIAE and the State-Regions Conference: art. 2.3., in fact, specifies that the CIAE exercises its duties respecting the competences attributed by the Constitution or by the legislation to the Parliament, the Council of the Ministers *and the State-Regions Conference*. If this provision apparently represents a mere ratification of what was already carved out in the practice of inter-institutional relations between these two bodies, its formalisation can be considered a confirmation of the role acquired by the State-Regions Conference over time.

The revised legislation does however not mention the technical Committee any more which, according to Law n. 11/2005, had been integrated with representatives of the Regions. This innovation is motivated by the necessity to simplify the procedures for the joint definition of the Italian position on EU issues.

The daily cooperation between the representatives of the State and of regional administrations on draft EU acts and issues is in fact to be continued through the activity of the sectoral working groups summoned by the governmental Department for European Policies and now regulated by art. 24.7 of Law n. 234/2012; the institutional purpose of such working groups is to promote a structural cooperation involving all relevant subjects

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in order to define the Italian position to be presented at EU level.

The second form of rationalisation provided by Law n.234/2012 involves the redefinition of the time limits for the proactive participation of the interregional Conferences in the EU decision-making process. The deadline for the submission of opinions by the Regions on draft EU acts and proposals, originally fixed to twenty days, is now redefined into thirty days by art. 24.3. of Law n. 234/2012[XLI]. The same change of the time limits is governed by arts. 24.4 and 24.5 respectively for achieving an agreement within the State-Regions Conference on draft EU normative acts impacting regional competences and for defining the position of the State-Regions Conference after having voiced a scrutiny reserve. The redefinition of the above mentioned terms represents an adaptation of the national legislation to a longstanding request by the regional entities, which on many occasions have condemned the inadequacy of such institutional deadlines for an effective cooperation between territorial administrations.

The third form of rationalisation introduced by Law n. 234/2012 affects the roles assigned to the Conference of the Regions and the Conference of the Presidents of Regional Councils in the appointment of regional representatives for the CoR. The solution ratified by the new art. 27 of Law n. 234 completely overcomes the pre-existing legislative partition of seats between regional and local representatives (and between representatives of the regional executives and assemblies). The criteria for the composition of the Italian delegation to the CoR are in fact entirely delegated to a Decree of the President of the Councils of Ministers, to be adopted in agreement with the Unified Conference (the conference representing Italian local, regional and State administrations). Moreover, art. 27.2. of Law n. 234 explicitly recognises the role of the Conference of Regional Councils in the appointing procedures by specifying that it is up to this Conference to indicate Regional Councils' representatives within the CoR (while the representatives of the regional executives are appointed by the Conference of the Regions).

Finally, the real novelty introduced by Law n. 234/2012 is related to the participation of regional councils in the early warning mechanism, regulated by art.6.1. of Protocol 2 annexed to the Treaty of Lisbon. Up to this moment, in fact, the involvement of regional assemblies in the subsidiarity scrutiny has not been formally regulated by the two Chambers, which have tried to reform their internal procedures by adapting them to the new institutional context[XLII]. In order to institutionalise these rules, the combination of arts.

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8.3. and 25 of Law n. 234 reaffirms the participation of regional assemblies in the early warning mechanism, providing (art. 25) that the regional assemblies can submit their remarks within eight weeks by sending a notification to the Conference of the Presidents of Regional Councils. The solution provided for by this legislative reform seems to respect the participatory rights belonging to each Regional Council, promoting at the same time the role of the interregional Conference as an organism in charge of coordinating regional initiatives and informing all regional councils of the decisions adopted by the other assemblies.

Moreover, art. 8.3. of the new Law provides that, with regard to the procedure for the participation of the Parliament in the early warning mechanism, each House can hear the regional assemblies, in compliance with their internal Rules of Procedure. According to a part of the literature (Esposito 2013), this reference implicitly seems to legitimise a reform of the Rules of Procedures of the two Chambers whose purpose would be the redefinition of the deadlines for the submission of regional opinions and of the criteria regulating the hearings of regional assemblies or of the Conference of the Presidents of Regional Councils.

Apart from these novelties, Law n. 234/2012 confirms much of the procedures introduced by Law n. 86/89 and involving the State-Regions Conference: in particular, art. 22 regulates the EU session of the State-Regions Conference and reiterates its advisory powers on the governmental guidelines concerning the preparation and the implementation of EU acts which affect regional competences; on the criteria for the adjustment of regional norms to EU legislation; and on the annual national draft laws for the adaptation of the internal legislation to EU norms and duties (art. 22.3.).

The reaffirmation of these proceedings determines once more the coexistence of a plurality of forms for the regional participation in the EU affairs and of patterns for the cooperation between different territorial entities.

4. The need for better coordination of regional interests in EU affairs as a challenge for the Italian Conferences

The role exercised by interregional Conferences in EU affairs can be fully appreciated by isolating the participation of regional entities in the EU decision-making process from

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the activity carried out in the implementation of EU norms and obligations. This statement can easily be substantiated in considering that the channels for regional involvement tend to vary consistently across these two stages. At the stage of EU decision-making, in fact, the dimension of collective representation of regional interests tends to prevail over the participation of a single Region[XLIII]. After the constitutional reform of 2001, this collective dimension is visible both in the so called "direct" forms of participation in EU activities (art. 5 of Law n. 131/2003) and in the "indirect" forms of participation (art. 2 of Law n. 11/2005). This implies that the role exercised by the interregional Conferences at this stage is a strategic one, as it is up to such organisms to coordinate the position of the different Regions and present a unitary position both at national and EU level.

By contrast, the single Region still play a determinant role in the implementation of EU norms and duties. At this stage, the interregional Conferences tend to offer a contribution which is much less relevant for the functioning of national adjustments to EU legislation but which is still significant for the coordination of regional activities. The Conferences, in fact, are responsible for the prompt submission of all relevant documents to the regional bodies, for the selection of pertinent information, and for the monitoring of regional adaptations to EU norms. But the responsibility for the adjustments to EU norms still lies with each Region (Parodi - Puoti 2006).

In other words, the interregional Conferences have affirmed themselves as real institutional interlocutors in the EU decision-making process, whereas they tend to operate as mere facilitators in the subsequent stage of implementing EU norms and duties.

Given this asymmetry in the institutional position of the interregional Conferences, it has been argued that the role played by such organisms in the decision-making stage has varied consistently over the time, also due to some significant changes in the national legislation on the participation of the regional entities in Community and European affairs.

After the initial hesitancy of the Italian State to grant the Regions the right to effectively get involved in European affairs, thus neutralising the impact of the participation in the European Communities on the internal distribution of competences, the Italian legislation has regulated this process of regional participation by promoting the role of the interregional Conferences as institutional subjects in charge of coordinating the activity of regional entities in the European processes. This change, which occurred in the

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second half of the 1980's, being related to the overarching role of the executives in EU affairs, has at first affected only the State-Regions Conference.

Starting from the reform approved with Law n. 11/2005, however, the procedures and structures for regional (collective) participation in the European decision-making process have significantly increased in number. On the one hand, also regional assemblies have been granted informative and participatory right in the European processes, filtered by the intervention of the Conference of the Presidents of Regional Councils. On the other hand, apart from the interregional Conferences, also other forms of cooperation between State and regional administrations - based on the collective representation of regional interests - have been introduced. This trend seems to have found its definitive form of rationalisation in the latest reform, approved with Law n. 234/2012, which ratified the institutional position of the Conference of the Presidents of Regional Councils and adapted the participatory procedures to some of the institutional needs pointed out by regional entities.

This reform course has resulted in a threefold procedure for the collective participation of Regions in the EU decision-making, consisting of: a) the information of regional bodies (executives and councils) about EU draft acts and more generally EU policies; b) the representation of regional interests within the cooperative procedures involving different territorial entities on specific EU issues; and c) the formulation of regional input with regard to the definition of the national position in EU matters.

All these three stages of participation find their focal point in the interregional Conferences. The results achieved here do not exclude that some challenges are still opened from the perspective of the rationalisation and full implementation of interregional cooperation in EU affairs.

The first challenge involves the role of the intergovernmental Conferences. It is possible to argue, in fact, that a sort of confusion of roles between the State-Regions Conference and the Conference of the Regions (Carpani 2012) still exists. If the latest reforms of the legislation on the participation in the EU have come to recognise the specificity of the role exercised by the Conference of the Regions in the coordination of regional interests and initiatives in EU affairs, the revised legislation has not completely rethought the pre-existing rules involving the State-Regions Conference. In particular, some doubts can be raised on the choice made by art. 22.3. of Law n. 234/2012 which reassigns to the State-Regions Conference the advisory powers concerning some of the

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most strategic decisions of the Government in EU affairs; similar doubts can be voiced about the powers reserved by art. 24.4. and 24.5. to the State-Regions Conference.

As the above-mentioned advisory role of the State-Regions Conference formally refers to governmental acts and proposals, it could be objected that such procedures should instead involve the Conference of the Regions (it is obvious, in fact, that the position of the national Government could only be a favourable one). In other words, the revised procedures for the regional participation in the EU could have been much more innovative in promoting the role of the Conference of the Regions as an institutional subject which could promote an effective horizontal cooperation on EU affairs between regional entities[XLIV]. As correctly observed by a part of the literature (Bifulco 1995: 423; Carpani 2009: 16), in fact, horizontal cooperation proves to be strategic for the fulfilment of an effective vertical cooperation across different territorial levels.

The second challenge is instead represented by the promotion of a reinforced synergy between the Conferences representing the regional executives and the regional legislative assemblies, respectively. A strengthened cooperation between the Conference of the Regions and the Conference of the Presidents of Regional Councils as regards their participation in the Committee of the Regions and more generally about their role in the implementation of EU law is, in fact, highly desirable[XLV]. The efficiency of the Regions in the implementation of EU law is directly related to the degree of regional involvement in the decision-making process. Based on this statement, it is possible to affirm that the capacity of the interregional Conferences representing the regional executives and the regional councils to coordinate their position in the political dialogue leading to the definition of the Italian position on EU proposals is to be considered strategic also for the adjustment to EU norms and duties. In this sense, a stronger cooperation between the Conference of the Regions and the Conference of the Presidents of Regional Councils should ideally be based on a daily exchange of information, analytical support, and opinions.

In conclusion, regional involvement in the EU decision-making process has sometimes been considered if not as an obstacle, then at least as a brake to an efficient decision-making process. In order to avoid this risk, transforming regional participation as a real key factor for the democratisation of national procedures related to EU affairs, it is important to safeguard the rationality of such procedures. Some steps forward in this direction have

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recently been taken thanks to the latest reforms of the Italian legislation on participation in the EU. But some weaknesses still remain and it is mainly through the initiative of regional actors and on the basis of daily practice that such risks will be avoided.

The longstanding tension towards the recognition of a legitimacy criterion for the EU architecture has recently grown in importance, as the Eurozone crisis started questioning the "output legitimacy" of the EU institutional system and its policies. The need to counterbalance the effects of the financial and economic crisis has led the European institutions to urge for the adoption of quick and intrusive measures, investing some of the core competences of the Member States, in particular those relating to the budgetary and financial decision-making. This situation boosts the need for democratic legitimacy of the EU institutions, due to the fact that the increased risk of a possible divergence between European budgetary and financial policies and voters' preference makes it more difficult to justify the autonomy of the EU legal order.

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[I] For an overview of the difficulties characterising this institutional evolution, see D'Atena 2000: 555 ff.

[II] On the enormous differences which have characterised regional mobilisation in EU affairs across Europe, see Loughlin 1996a: 141 ff. and Marks - Nielsen - Ray - Salk 1996: 164 ff.

[III] Part of the literature (D'Atena 1985: 789 ff.; Marini 2003: 158 ff.) has instead distinguished between two forms of regional cooperation at the State decision-making stage in EU affairs: the procedure-based cooperation, which is characterised by a process of consultation by the central authority with each regional entity; and the structure-based cooperation, which instead ends in the establishment of an organism representative of the interests of territorial autonomies. On this point, see also Parodi 2003: 420 ff.

[IV] In compliance with art. 58.4 of the Law n. 52/96, all the Italian Regions have in fact promoted the creation of connection offices in Bruxelles; such offices are legitimised to develop direct relations with EU institutions in subjects falling within their area of competence.

[V] For a general overview of the main tools and procedures adopted by Italian Regions with regard to regional participation at the stage of the implementation of EU decisions, see Bini 2011: 825 ff.

[VI] Apart from these institutional channels of representation, part of the literature has analysed the lobbying activity carried out by regional entities both collectively (through organisms such as the Assembly of the Regions of Europe, the Council of the Regions and of the Municipalities of Europe, or through associations linking the regions located in the same geographic area or assimilated by common economic interests) and individually, which is considered as a form of 'informal' channel of representation (Hooge - Marks 1996: 73 ff.; Brunazzo 2005).

[VII] For an overview of the main functions of regional assemblies in EU affairs (legislative function; control of the executive; subsidiarity monitoring procedures; co-operation with other regional assemblies; information of citizens), see Álvarez Conde 2006: 26; Fasone 2009: 420.

[VIII] On the difference between the vertical and the horizontal forms of cooperation, see Bifulco 1995: 257 ff.

[IX] On the role and origins of the intergovernmental conferences, see, in the Italian literature, Pastori 1994; Azzena 1999; Pizzetti 2000; Carpani 2006, *passim:* Ceccherini 2009.

[X] The Committee was established by the decree of the Prime Minister dated 20 November 1980.

[XI] Subject-competent ministers and administrative representatives of central and local administrations were moreover admitted to participate to the meetings of the Conference.

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[XII] See Mangiameli 2010: 262. On the pre-existing experiences of horizontal cooperation among Regions, see Covino 2006: 2316 ff.

[XIII] This evolution in the institutional role and position of the Conference has been accompanied by the achievement of new forms of functional autonomy by the organism and has given place to the approval of common statements, representing the position of all Regions. For further details, see Ferraro 2007: 712 ff.

[XIV] On the origins and powers of the CoR, see, among others, Calabrese 1997: 481 ff.; Loughlin 1996b: 417 ff.; McCarthy 1997: 439 ff.; Bindi Calussi 1998: 225 ff.

[XV] Each Regional Council, in fact, approved in 1994 a regional law in order to regulate its participation in the activity of the Conference, including the financial profiles (since the Conference depends for its funding on the annual conferral resources provided by regional assemblies).

[XVI] Falcon 2001: 327 ff. has criticised the fact that not all the Regions participate at the CoR, which prevents the development of specific regional interests, ending in a generic representation of the levels of government.

[XVII] Art. 6 *bis* of the Law n. 11/2005 has in fact provided that also regional legislative assemblies must be involved in the procedure for the appointment of the Italian representatives within the Committee of the Regions; moreover, the Government, with statement n. 9/2320, has specified that this norm must be interpreted as a commitment to appoint Regional Councils' representatives within the Committee of the Regions through the Conference of the Presidents of Regional Councils.
The Conference of the Presidents of Regional Councils itself has adopted, on 20 September 2012, a statement fostering the introduction, in agreement with the Conference of the Regions, of a common procedure enabling the definition of a shared position before the EU institutions, and in particular before the Committee of the Regions.

[XVIII] The Conference has in fact approved, before the elections of the EU Parliament of 6-7 June 2009, a Memorandum of Understanding directed to the Italian representatives in the EU Parliament in order to raise awareness for the strategic role of regional parliaments in the EU architecture. Moreover, the Conference has promoted the involvement of Italian MEPs at the meetings of the Joint Committee of the Italian Chamber of Deputies, the Senate, and the Conference of the Presidents of Regional Councils.
A dialogue with the EU Parliament has been searched by the Conference also through the approval of statements on specific issues; see for instance the statement approved on 20 September 2012 on the EU economy's sustainable development. For further details, see Conference of the Presidents of Regional Councils 2013.

[XIX] *Accordo interistituzionale*, signed on 20 July 2009 by the Minister for European Policies and the Conference of the Presidents of Regional Councils.

[XX] In the long period, however, the capacity of the Italian Regions to ascertain their domestic power in the EU affairs sector has been much weaker compared to their European counterparts; on this point, see Börzel - Risse 2000: 6-7.

[XXI] An attempt to reguate the participation of Regions in the European decision-making process can be found also in the previous Law n. 183/1987, the so called "Legge Fabbri". See Cattarino 1991: 969 ff.

[XXII] See in particular law n. 52/1996, legislative decree n. 281/1997, and law n. 128/1998.
Art. 2.3 of the legislative decree n. 281/1997.

[XXIV] Art. 5.2 of the legislative decree n. 281/1997.

[XXV] See art. 23 of the German Constitution.

[XXVI] See art. 23d of the Austrian Constitution.

[XXVII] See the *'Accord de coopération entre l'Etat fédérale, les Communautés et les Régions, relatif à la représentation du Royaume de Belgique au sein du Conseil de Ministres de l'Union Européenne'*, signed on 8 March 1994.

[XXVIII] These innovations aside, Law n. 11/2005 confirmed much of the procedures already regulated by Law n. 86/89, including (in art. 17) the creation of a dedicated Community Session of the State-Regions Conference, the recognition of the Conference's entitlement to express its opinion on general directives concerning the implementation of Community Acts affecting regional competences and on the Community Law, and so on. On the relationship of Law n. 11/2005 with the pre-existing legislation, see Cannizzaro 2005: 153 ff.

[XXIX] The literature (see Paterniti 2005) has expressed an overall satisfaction about the extension of the informative duties of the Government, evidencing, on the one hand, that all EU acts (and not just EU acts of regional relevance) must now be submitted to the Regions and, on the other hand, that such a submission is supposed to be immediate (thus avoiding the risk of a belated dispatch of EU acts, by large measure

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implicit in the system regulated by Law n. 86/89 - on this point, see Caranta 1997, 1234). For an overview of the informative deadlines introduced by Law n. 11/2005, see Pocar 2005: 32 ff.

[xxx] According to part of the literature, the constitutional reform of 2001 could have enabled a revision of the pre-existing mechanisms for the participation of regional entities in the EU directed at promoting the representation of regional entities both in the EU decision-making process and in the definition of the national position on EU issues; see, among others, Chiti 2002: 1401 ff.; Anzon 2003, *passim*; Califano 2005: 8 ff.

[xxxi] This provision was implemented by the Agreement signed by the State-Regions Conference on 16 March 2006.

[xxxii] The internal organisation and functioning of CIACE is regulated by the Decree of the President of the Council of Ministers of 9 January 2009, 'Regulation of the internal functioning of the Interministerial Committee for Community and European Affairs, established by the Chair of the Council of the Ministers, in compliance with art. 2 of the Law 4 February 2005, n. 11', and by the Decree of the Ministry for Community Policies of 9 January 2006, 'Regulation of the internal functioning of the Technical Standing Committee established by the Department for the coordination of the Community policies in compliance with art. 2.4. of the Law 4 February 2005, n. 11'. Both Decrees are published on the *Gazzetta ufficiale* of 3 February 2006 - General Series, n. 28. For more information on the institutional functions of the CIACE, see Cartabia - Violini 2005: 482 ff.; Puoti 2006: 481 ff.

[xxxiii] The representation of regional interests within the CIACE is granted also by art. 2.4, which provides for the establishment of a technical Committee whose main task is to prepare the meetings of the CIACE. The technical Committee is chaired by the Ministry for Community Policies and is composed of senior officials specialised on the subjects to be discussed. When the technical Committee deals with issues of regional interest, its composition is integrated with competent regional ministries and its meetings take place at the headquarters of the State-Regions Conference. Literature (Paterniti 2005) observed that the regional integration of the technical Committee is potentially more effective than regional participation at the CIACE.

[xxxiv] Moreover, art. 4 of the above mentioned Decree of the Ministry for Community Policies of 9 January 2006 recognises that the effective participation of Regions in the definition of the Italian position in EU affairs is to be executed through the procedures of art. 5 of Law n. 11/2005, which implies that the State-Regions Conference confirms itself as a privileged organism for the cooperation between different territorial entities.

[xxxv] A more structural form of State-Regions cooperation was offered by art. 5.7 of Law n. 11/2005, which entitled the Department for Community policies to create, for the subjects falling under the competence of the Regions, sectoral national cooperation working groups which could include representatives of the Regions, selected on the basis of criteria decided by the State-Regions Conference, in order to predefine the position to be upheld at EU level. Part of the literature (Cafari Panico 2004) has criticised this new form of cooperation, assuming that it is not clear how it could possibly be coordinated with the other procedures.

[xxxvi] Part of the literature (Cartabia - Violini 2005: 480) evidenced the asymmetry existing between the extension of the informative prerogative of the Regions (which does not suffer specific limitations) and their participatory rights (limited to subject matters falling within a region's competence).

[xxxvii] Doubts on the risk that the CIACE could deprive the State-Regions Conference of its powers and role in the EU decision-making process have been raised by Tripodi 2004 and Cafari Panico 2004. On the contrary, Parodi and Puoti 2006 have argued that the roles attributed to the CIACE and the State-Regions Conference are rather complementary.

[xxxviii] On the 'weak' nature of this agreement, see Bifulco 2006: 250 f.

[xxxix] Some criticism of the short term assigned to the State-Regions Conference in order to define its position has been expressed by Cannizzaro 2006: 153 ff.

[xl] Part of the literature (Esposito, 2013) has in fact argued that the title itself of Law n. 243/2012 mentions the participation of Italy "in the definition and implementation of the norms and policies of the EU".

[xli] This shift is in line with the redefinition to thirty days of the duration of the parliamentary scrutiny reserved, now regulated by art. 10 of the Law n. 243/2012.

[xlii] In particular, the subsidiarity opinions submitted by the regional councils to the Chamber of Deputies have been considered by the Committee for European Affairs according to art. 127 of the Rules of Procedure. The cooperation with regional assemblies is moreover connected to the ordinary fact-finding proceedings of the preliminary inquiry conducted by the Standing Committees and disciplined by art. 79.4-5-

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6 of the Rules of Procedure. This framework implies that the Committee for European Affairs or the other standing Committees can hear a Regional Council or the Conference of the Presidents of Regional Councils. A different solution has been adopted by the Senate of the Republic, which has rather framed the subsidiarity opinions of the regional assemblies within the procedure of the "vote of the Regions", regulated by art. 138.1. of its Rules of Procedure. As a consequence, the subsidiarity opinions of the Regions are announced to the floor and are then assigned to the competent standing committees.

[XLIII] As correctly observed (Bini 2011: 830), in fact, every Region has its own representation in Bruxelles, but this institutional presence does not always enable a Region to effectively participate in the EU decision-making; what should be taken into consideration, above all, is in fact the capacity of a Region to truly exercise the powers claimed.

[XLIV] In the last decade, in fact, the Conference of the Regions itself has tried to promote its autonomous role in the coordination of regional interests. An example of this is to be found in the creation, in 2005, of an *ad hoc* cooperative organism, representing the Presidents of the Regions of South Italy, whose main aim is the definition of a common strategy on European and Mediterranean policies (see 'La prima Conferenza dei Presidenti delle Regioni centro-meridionali' (Pescara, 4 luglio 2005), in *Documenti della Rivista giuridica del Mezzogiorno*, n. 2-3, 2005: 467).

[XLV] This perspective is envisaged in particular in the statement approved on 5 December 2012 by the Conference of the Presidents of Regional Councils.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Towards New Procedures between State and Regional Legislatures in Italy, Exploiting the Tool of the Early Warning Mechanism

by

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Perspectives on Federalism, Vol. 5, issue 2, 2013

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Abstract

The early warning mechanism represents an opportunity for building new and direct relationships between regional councils and the national parliament, which to date have been substantially lacking in Italy. Relying on the provision of Art. 6 of Protocol no 2 annexed to the Treaty of Lisbon, the new law on the participation of Italy in EU affairs provides, for the first time, a bottom-up process of transmission of regional opinions (also from the regional executives, by means of a 'political dialogue') to the Italian parliament, thus indirectly also enhancing the ties between the regional and national levels of government.

Key-words

Italian parliament, regional councils, participation in EU affairs, early warning mechanism, political dialogue

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1. Foreword: Is there a shift from the European to an Italian 'regional blindness', after the Treaty of Lisbon?

The European Community (EC) has often been accused of remaining 'blind' towards the territorial organization of its federal and regional Member States (Ipsen 1966; D'Atena 1998; Weatherill 2005a; Borońska-Hryniewieka 2013).[I] However, the traditional EC indifference for the constitutional structure of Member States has been gradually attenuated and, with the Treaty of Lisbon, which entered into force on 1 December 2009, it seems that it has almost disappeared from the European Union (EU).[II]

The 'regional blindness' started to be effectively overcome since the Treaty of Maastricht (1993), when the principle of subsidiarity[III] was introduced into EC primary law with regard to non exclusive competences (*ex multis*, Toth 1992: 1072-1105; Massa Pinto 2003; Ippolito 2007) and when the Committee of the Regions, as an EC advisory body entitled to territorial representation at EC level, was established (Loughlin 1996: 141-162; Iurato 2006: 679-710). Other significant steps towards the acknowledgement of the regional dimension of the EU have been: the strengthening of EU cohesion policy (Martinico 2013); the White Paper of the European Commission on European Governance (COM(2001)428) and the launch of wide-ranging consultations among sub-national actors on European dossiers and draft legislative acts (Plutino 2003: 61-94; Groppi 2007: 155-214); the acknowledgment of the *locus standi* of regions before the Court of Justice in matter of state aids (Porchia 1999: 1674-1680; Caruso 2011: 804-827; Raspadori 2012: 69-72);[IV] and, finally, the Laeken Declaration that put the territorial question firmly within the agenda of the Convention on the Future of Europe (Loughlin 2005; Weatherill 2005b; Kiiver 2006; Domenichelli, 2007).

The Treaty of Lisbon substantially extinguished the problem of 'regional blindness', at least legally speaking. This Treaty touches upon the regional issue through four groups of provisions: firstly, the constitutional identity of Member States, which must be taken into account by EU institutions when acting, by referring to 'their fundamental structure, political and constitutional, *inclusive of regional and local self-government*' (Article 4(2) TEU) (Di Salvatore 2008; Guastaferro 2012: 305-318); secondly, the principle of subsidiarity has been restyled (Article 5(3) TEU) in order to assess whether the objectives of a proposed action

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can be sufficiently achieved at regional and local level (Schütze 2009: 525-536); thirdly, as an expansion of the duty of the European Commission to launch wide-ranging consultations before any draft legislative act is proposed (Article 2, Protocol no. 2), also regions, although not directly mentioned, can have a say at the pre-legislative stage (Morelli 2011: 109-124; Fasone and Lupo: 2013); and, finally, regions are enabled to control the compliance of draft legislative acts with the principle of subsidiarity (Articles 6 and 8, Protocol no. 2).

Regions have become the guardians of the principle of subsidiarity by means of two procedures (Bußjäger 2010: 51-71). On the one hand, '*regional parliaments with legislative power*' (Article 6) can be consulted by the relevant national legislature as part of the early warning mechanism, that is during the eight-week period when parliaments can address reasoned – i.e. negative – opinions to the EU institutions claiming a breach of the principle of subsidiarity before the beginning of the legislative process; provided certain thresholds are reached, that can lead to a delay or even to a locking of the process (Article 7).[V] On the other hand (Article 8), the Committee of the Regions can now bring an action for annulment before the Court of Justice when a legislative act is deemed to be adopted in violation of the principle of subsidiarity (Porchia 2009: 223-232; Piattoni 2012: 59-73).

In particular, the involvement of regional parliaments with legislative powers in the early warning mechanism, although indirectly (through the national parliaments) can be welcomed as a 'revolutionary' result. In fact, this new provision not only requires the participation of regions in a euro-national procedure, but also imposes that regions will be consulted at parliamentary level. In other words, the EU makes a clear option for a regional institution, the regional legislature, to be involved. This norm marks a sort of abandonment of the EU's 'regional blindness' and also sanctions the rise of an EU interest in the institutional dimension and form of government of regions with legislative powers.

Moreover, the EU has reached the point to shape directly the inter-institutional relations between levels of government within the Member States. By asking national parliaments to consult, where appropriate, regional parliaments in the early warning mechanism, Article 6 of Protocol no. 2 has made the consultation of regional legislatures compulsory whenever a draft legislative act (or an EU document) falls within the regional remit (Álvarez Conde 2006: 51 ff.; Fasone 2009). Thus a European obligation to introduce

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a procedure linking regional and national parliaments in the early warning mechanism seems to exist after the Treaty of Lisbon.

Starting from this assumption, this essay aims at analyzing how the Italian legal system has regulated and, if so, enforced this new inter-institutional and multilevel procedure shaped by Article 6 of Protocol no. 2. In this regard, Italy seems an interesting case study, given the lack of any official form of involvement of regional councils in the activity and procedures of the national parliament, with very few exceptions (see section 2). Because of this institutional and constitutional constraint, this essay argues that the procedure provided by the Treaty of Lisbon could affect the relationship between the regional and national levels of government in Italy and foster a brand new form of cooperation amongst legislatures – one which the Italian parliament itself has not been able to design or reform over the last ten years. In fact, compared to the results achieved by the EU, the state level in Italy has shown itself to be affected by a two-tier 'regional blindness'. First of all internally because, in spite of some failed attempts, no direct relationships between the Italian parliament and regional councils have been established after the constitutional reform of 2001, nor have the relevant provisions of Constitutional Law no. 3/2001 been implemented to this purpose. Therefore regions are either substantially kept apart from the decision-making processes of the national parliament or, instead, can intervene indirectly through their regional executives as part of the inter-governmental State-Regions Conference, which is consulted on most parliamentary bills. Secondly, the Italian 'regional blindness' emerges with regard to the participation of regions in the national procedures dealing with EU affairs. Here the implementation of the provisions of the Treaty of Lisbon, in particular that on the involvement of regional councils based on Article 6, took a long time before it was regulated (see Law no. 234/2012, finally passed on 27 November 2012). Nor does it not seem that at the national level, particularly within the executive, there is awareness about the difference, legally speaking and in practice, to be made for the participation of regional institutions – governments or councils – in EU affairs at national level. Apparently the EU has thus become more conscious than some Member States of the inherent distinction, as regards the nature of institutions and the scope of their involvement, between different forms of regional participation in Euro-national procedures. By contrast, the quality and the significance of involving regional councils, the directly elected legislatures acting most closely to citizens and representing also political

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minorities, rather than simply regional governments, is worth mentioning, since Article 6 of Protocol no. 2 does not refer to 'regional parliaments' by chance (section 3).

The essay is structured as follows: after a very brief overview of (or, rather, the lack of) the tools of cooperation between the Italian national parliament and the regional councils, the relationship between the Italian legislatures on EU affairs is examined in light of the provisions in force before, only recently, a new Law entered into force. Then, the content of this Law no. 234/2012 is analysed, focusing in particular on the early warning mechanism and on its collateral procedures. Finally, before the conclusion, a few observations on the prospects for strengthening the relationship between the national parliament and the regional councils are presented.

2. Brief introduction to a complicated story: on the relationship between State and regional legislatures in the Italian constitutional system

The relationship between the national parliament and the regional councils in Italy has always been quite weak (Manzella 2003: 19-20). Contrary to what happens in other decentralized EU Member States, for example in Austria or in Germany, the Italian regions are not represented in a national second chamber, neither at executive nor at parliamentary level.

The delayed establishment of the regions,[VI] in the 1970s, when the (renewed) Italian parliament had already functioned for more than twenty years, and the limited legislative competences initially attributed to the regional councils, have not favoured the creation of an inter-institutional cooperation between the regional and national legislatures. The idea of establishing a Senate of the Regions has recurred several times throughout the Italian Republican history,[VII] in particular after the revision of Title V of the Constitution (Const. Law no. 3/2001), in 2001, when the legislative competences of the regions have been significantly extended and their exercise has become more autonomous from the control of the State (Article 117, sect. 3 and 4 Const.) (*ex multis*, Martines *et al* 2008).[VIII]

The persistent failure of setting up a Senate of the Regions and the weakening of regional councils following the reform of regional statutes and forms of government from 1999 onwards (Olivetti 2002: 308-310) have made the cooperation between the State and regions a matter for inter-governmental relations only (Ruggiu 2006; Rivosecchi 2010; and

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Griglio in this *Issue*). Thus this cooperation has been modeled on conferences that bring together representatives of the State and of regional governments (as well as of local self-government, depending on the issue at stake), although some tools of inter-parliamentary cooperation have been provided in the renewed constitutional framework.

Possibly the most significant example consisted (and still consists) in the provisions of Constitutional Law no. 3/2001 that require to complement the parliamentary Committee on Regional Affairs (Article 11), which is a bicameral committee usually exercising advisory powers (Article 126 Const.), through representatives of the regions (and of local units of self-government), to be chosen at 'parliamentary level', either from within the regional council or appointed by them (Gianfrancesco 2004: 111 ff; Bifulco 2007: 88 ff.; Lupo 2007: 357 ff; Mangiameli 2007: 111 ff.). Article 11, which also increases the powers of this Committee since its opinions on certain issues would have become somewhat binding for the committee responsible on the subject matter, has never been enforced. Although this was a provisional solution waiting for a more comprehensive constitutional revision, the rules of procedure of the two Chambers have not been amended so far. Amendments would have been particularly crucial, given the difficult coordination between national and regional legislators in the aftermath of the 2001 revision and the confusing situation arising from the new division of legislative competences. Thus it is exactly after 2001 that the first level of 'regional blindness' of the state has become exacerbated: the Italian Parliament refrained from taking any action for bridging the gap between national and regional legislators and often kept on legislating as if the constitutional amendments had not been approved (D'Andrea 2002: 253 ff.; Rosa 2003: 54).

Until recently a sort of apathy has characterised the attitude of the Italian Parliament towards the regional councils and their new competences. In addition to the lack of commitment to modify the composition of the bicameral Committee on Regional Affairs, not even the 'jurisdictions' (i.e. the subject matters) of the standing committees have been updated and reformed to accommodate the expansion of the regional legislative competences and the simultaneous restriction of the State ones (Midiri 2007: 123-140). Likewise, some outdated provisions of the parliamentary rules of procedure stemming from the pre-2001 constitutional setting, like those on parliamentary approval of regional statutes or on the parliamentary control of regional laws on the ground of the merit

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(Paladin 1957: 623-666; Gianfrancesco 1994), have not been repealed yet – more than ten years after the constitutional revision.

Apart from some minor legislative provisions, like those of Law no. 42/2009 on the bicameral Committee on the Enforcement of Fiscal Federalism (Lupo 2009), which however have not changed the landscape of the relationship between regional councils and the parliament, until 2012 only two formal and official channels of cooperation have effectively been in force, the others being informal tools not provided by law. These two officials channels are regional initiatives of national bills and the so-called 'votes' of the regional councils. However, while the former show a low degree of success in spite of a certain regional activism,[IX] the latter are likely to experience a sort of 'revival'. Indeed, these 'votes', which are provided only by the Rules of the Senate (Article 138), are petitions or contributions submitted by regional councils to the Senate on issues of their interest. These are then examined by the competent standing committee, possibly jointly with a bill dealing with the same subject-matter, if existing. The number of such 'votes' has increased since the entry into force of the Treaty of Lisbon because, lacking any other provision that could regulate the participation of regional councils in the early warning mechanism (see above, section 1), regional legislatures have started to transmit their opinions and observations in particular to the Senate by means of this pre-existing tool.

Moreover, also informal instruments of cooperation have increasingly been used in the last few years, such as hearings of regional councilors before national parliamentary committees, even though they take place in the same way as hearings of interest groups, i.e. without any explicit recognition of the constitutional status of regional councils, in particular with regard to their relationship with parliament. Finally, in order to compensate for the lack of a Senate of the Regions, by means of an inter-institutional agreement of 28 June 2007 between the Presidents of the Chambers of the Italian Parliament and the Coordinator of the Conference of the Presidents of Regional Councils, a Joint Committee composed of an equal number of deputies, senators and regional councilors, plus the President of the parliamentary Committee on Regional Affairs, has been established. This Joint Committee, which is the result of an informal process of cooperation that had started in 2002 as a joint working group, saw its composition and functions enlarged in 2009, but it has been rarely summoned to date. Indeed, in order to organize a meeting – to which also Italian members of the European Parliament can be invited – of this Joint Committee the

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activities of several assemblies have to be coordinated and outcomes of such meetings suffer from an uncertain legal status and effectiveness.

Given the weakness of existing cooperation between Parliament and regional councils in terms both of legal and more informal instruments, the Treaty of Lisbon and in particular Protocol no. 2 can probably bring new blood to this exhausted relationship. In other words, the early warning mechanism, by imposing a direct dialogue among the legislatures of the Member States, could be the starting point to reshape such a relationship beyond the 'borders' of a mere coordinated participation in EU affairs and to counteract the first level of the state's 'regional blindness'.

3. The relationship between the Italian Parliament and the regional councils on EU affairs before Law no. 234/2012

The second level of 'regional blindness' of the Italian state affects regional participation in the EU decision-making and consists of two dimension. The first deals with the fact that national bodies have perceived the involvement of regions in national procedures related to EU matters as a burden, instead of taking advantage of it as a further source of legitimation for their national position, which should arise from the accommodation of different points of view, including regional ones. The second dimension of 'blindness', which anyway is connected to the first, stems from the age-old assumption that regions must be considered as parts of a unitary approach towards EU affairs, thus not only disregarding regional diversities, but also neglecting that regional councils and governments can play a distinctive, though coordinated, role in EU affairs.

As pointed out by many scholars (Pérez Tremps 1991: 93-110; Berti 2002: 9-20; Antonelli 2010: 246-247), as a general trend of the process of EU integration the role of executives, both at national and supranational levels, has been strongly reinforced whereas national legislatures have been weakened (Cartabia 2007: 1081-1104; Spadacini 2007: 353-430; Girotto 2009: 95-100). Because of the progressive conferral of more and more competences to the EU, legislatures have been deprived, with their consent, of the power to regulate many issues that once fell under the 'jurisdiction' of Member States. This has caused a sort of competition between legislatures located at different levels aiming to preserve their legislative powers (Zuddas 2010).

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However, the revision of Title V of the Italian Constitution in 2001 provided a broader room for manoeuvre for regional legislatures compared to the past and simultaneously enhanced their position in the 'preparatory decision-making process of EU legislative acts' and in the implementation of EU measures (Article 117, sect. 5 Const.), provided the areas concerned fall within their responsibility and subject to the rules set out in state law. Thus these new provisions seem to run in favour of a more active involvement of the regions and possibly of the regional councils, both in the preparatory stage, which deals with law-making, and in the execution of EU obligations, which often requires adaptation by means of legislation (Plutino 2003: 61-94; Paterniti 2012: 51-79).

However, although it allows regions to take part in EU policy-making also on behalf of the Italian Republic and in the place of the State, here the Constitution does not identify the regional body or bodies entitled to step in this procedure. In fact, two new ordinary laws approved in the aftermath of the constitutional revision, Law no. 131/2003 and Law no. 11/2005, seem to further strengthen the position of regional executives in EU affairs (in principle, since some provisions have remained unenforced),[X] individually and through their Conferences (Bilancia *et al*: 2010: 140 ff.), and, what is more important for the aim of this contribution, avoid the creation of any mechanism of direct cooperation between parliament and the regional councils. The only provision establishing a sort of coordination between the legislatures of the two levels of government concerns the implementation of EU obligations and, in particular, in matters of shared competences (Article 117, sect. 3), the setting of fundamental principles of legislation to be developed by the State and then specified by the regions – namely by the regional councils (Cartabia and Violini 2005: 475-512).

By contrast, according to Article 5 of Law no. 11/2005, regional councils, like regional executives, enjoye a direct relationship only with the State government, particularly with the Department on EC (then EU) policies. Indeed, the State government transmitted and still transmits all EU draft legislative acts and documents also to regional councils, by means of the Conference of their Presidents (see above, section 2). In turn, within twenty days regional councils submit their observations to the Department on EC policies. The Italian Parliament has remained excluded from this cycle of top-down and then bottom-up interaction between regions and the State government.

The lack of any direct relationship between parliament and regional legislatures has

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appeared to be even more serious after the ratification of the Treaty of Lisbon, which in Italy was done unanimously already in 2008. From then and until the end of 2012, passing through the entry into force of the Treaty in 2009, no change has occurred with regard to the direct cooperation between the parliament and the regional councils on EU matters (neither in other fields) in terms of national legislation – i.e. no amendments to State laws or the parliamentary Rules of procedure took place (Bifulco 2012: 10 ff.).

Although Law no. 11/2005 was amended in several provisions in order to guarantee the transmission of a broader flow of information from the government to the parliament and to regulate its involvement in the early warning mechanism (while postponing until Law no. 234/2012 the effective enforcement of the other Treaty provisions concerning the national parliament), no mention of the regional councils was made. In the light of Article 6 of Protocol no 2 annexed to the Treaty of Lisbon (see above, section 1), the lack of any reference to regional legislatures and to their mandatory consultation by parliament appeared very ambiguous, above all because a brand new article, Article 4-*quater*, was introduced *ad hoc* on the early warning mechanism.

Rather, regional councils have only indirectly benefited from the strengthening of parliament's position as regards the executive's duty of information, thus also receiving the government's Annual Report and Programme[XI] about, on the one hand, prospective actions of the Republic in the EU and, on the other, the implementation of EU obligations, the outcomes of the Italian participation in the meetings of EU institutions, and the follow up of parliamentary resolutions and regional observations (Article 15, Law no. 11/2005).[XII]

Although the two Chambers, in particular the Chamber of Deputies expressly,[XIII] have recognised the need to adjust their Rules towards establishing direct contacts with regional councils regarding their consultation during the early warning mechanism, neither have their Rules of procedure been reformed to date nor has the involvement of regional legislatures been provided for in the new experimental and temporary procedures fixed through two decisions by the Committee on Rules of the Chamber and in a letter of the President of the Senate.[XIV]

Nevertheless, if until 2012 both the Italian parliament and government have substantially ignored the regional dimension of the Treaty of Lisbon – confirming, once more, the thesis of the 'regional blindness' of Italy – regions, and particularly regional councils, have shown a great commitment to revise their own statutes, laws and rules of

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procedure. In other words, regional councils have succeeded where the State has failed, with most of them adopting updated rules even before the Treaty of Lisbon entry into force. To date all the regional councils, with only few exceptions,[XV] have adopted new rules allowing them, in principle, to take part in the early warning mechanism, although parliament has not approved symmetrical provisions.

Indeed, in spite of the absence of legal provisions at national level, the cooperation between regional councils and the two chambers in the early warning mechanism has *de facto* started to develop intensively ever since the 16th parliamentary term (2008-2013) (Olivetti 2012: 551-552). Some regional legislatures, especially those of Abruzzo, Emilia-Romagna and Marche (Sardella 2007: 431-477; Voltan 2010: 135:141), have begun to transmit their observations to both chambers on the basis on the combined provisions of Article 6 of Protocol no. 2 with Articles 4-*quarter* and 5 of Law no. 5/2005: in fact, in the observations regional councils inserted not only their assessment on the compliance with the principle of subsidiarity, but also their concerns about the principle of proportionality and on the substance of draft legislative acts and documents. Albeit initially these observations have been ignored, since the Chamber and the Senate do not even known how to deal with them, by which existing procedures, and how to catalogue them, the situation later has changed. Already in 2009 the Regional Assembly of Emilia-Romagna submitted its observations to the parliament on a draft Directive concerning the application of patients' rights in cross-border healthcare and, subsequently, because of the regional competence on the matter, the Chairman of the Committee on Budget, General and Institutional Affairs of this Regional Assembly was heard before the Committee on EU Policies of the Chamber of Deputies.[XVI]

Later on this inter-parliamentary relationship has developed further into institutional practice, given the fact that the flow of observations from regional legislatures to parliament has constantly grown. The Senate has revitalized the procedure on the 'votes' of regional councils (see above, section 2) treating regional observations under the early warning mechanism as if they were votes and starting to inform the regional legislatures, by means of the Conference of their Presidents, on EU draft legislative acts and documents to be examined by the Senate, whatever the competence affected (national or regional) and before the deadline of eight weeks has expired (Capuano 2011: 519-550).

Even though the deadline has almost never been respected, which in the end is

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important in terms of the effectiveness of the whole early warning mechanism carried out at national level, the cooperation amongst legislatures has led to unexpected results, given the lack of legal guarantees in the national legislation. Since 2012 the standing committees of the Senate responsible on the subject matter, when examining within the early warning mechanism EU draft legislative acts falling within regional competences and on which regional observations had been submitted, have publicly acknowledged the contributions sent by regional councils and cited them in their resolutions that are also the acts where possibly a reasoned opinion is expressed, according to Protocol no. 2. Moreover, by way of the Conference of their Presidents, regional councils have developed an enhanced cooperation amongst themselves,[XVII] starting to agree, whenever possible, on a common and unitary position to be submitted to parliament. Therefore both the single submission by each regional council and the collective position that they express are examined by the national legislature.[XVIII] An interesting case was that of the common position adopted on 16 December 2011 by the Conference of the Presidents of Regional Councils, on the input of the regional councils of Calabria, Emilia-Romagna, Marche, Sardegna and Veneto, on the EU legislative package dealing with the reform of the cohesion policy and of the common agricultural policy for 2014–2020, later cited by the Senate in its resolution.[XIX]

Although these developments by means of institutional practice have not at all solved the problem of 'regional blindness' by the State as regards participation in EU affairs, they demonstrate an active engagement by regional councils in the early warning mechanism and have produced one of the most dedicated attempt on the part of the regions to create a direct and stable cooperation with parliament.

4. Is Law no. 234/2012 a turning point? Lights and shadows for Regional Councils

Institutional practice alone is not able to ensure the effective enforcement of the Treaty of Lisbon and of the early warning mechanism and Article 4-*quater*, which only refers to parliament (Capuano 2011), must be complemented by provisions that consider also regional legislatures otherwise marginalized in breach of the Treaty itself. In the other Member States where all the regions are provided with legislative powers (Austria, Belgium, Germany, Spain and the UK) this issue has been already addressed, sometimes after long

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and complicated negotiations, such as in Belgium (Popelier and Vandenbruwaene 2011: 204-228), while in others it has been a priority to maintain the participation of the executives of the *Länder* in EU affairs (Müller 2010: 75-96).

Following a cumbersome *iter legis* that began in 2010, originating from several parliamentary bills then merged with a government bill and overcoming the change of the parliamentary majority and of the executive in November 2011, on 27 November 2012 finally Law no. 234/2012 was approved. It entirely repealed Law no. 11/2005 and indeed contains many innovative provisions (Esposito 2013: 14 ff.). Most of all, Law no. 234/2012 introduces, for the first time, into ordinary legislation a direct form of cooperation, that is a channel of inter-institutional relations,[XX] between the parliament and regional councils that is compulsory according to EU obligations. The fact that such an obligation arises from outside the nation-state, i.e. from a Treaty provision, possibly limits the risk of repeating unsuccessful experiences like that of Article 11 of Const. Law no. 3/2001 on the parliamentary Committee on Regional Affairs.

4.1. The early warning mechanism

The participation of the Italian 'regional parliaments with legislative powers' or, rather, according to the jurisprudence of the Constitutional Court (Lupo 2002: 1209-1224),[XXI] of regional councils or assemblies, in the early warning mechanism is now provided by Article 8, section 3, and Article 25 of Law no. 234/2012. The former takes the perspective of the Italian Parliament, locating the consultation of regional councils within the national parliamentary scrutiny of subsidiarity, while the latter considers it from the standpoint of the regions and thus constitutes the 'legal basis' for the submission of observations on the subsidiarity principle by the assemblies to parliament. This is reflected also in the location of Article 8 within Title II that deals with the participation of parliament in the formation of the Italian position on EU policies and in EU decision-making, and of Article 25 within Title IV that instead deals with the participation of regions and local self-government in EU law-making.

The option to split the regulation of a unitary procedure, as it is conceived by Article 6 of Protocol no. 2, into two articles, however, either appears as a duplication or remains unclear at first sight. The early warning mechanism is, in fact, a procedure where all the players involved at either the national or the supranational level interact repeatedly, in

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particular those located inside the same Member State, i.e. the national and regional parliaments. However, analysing the two articles more in depth, it appears that the *ratio* behind them is the guarantee a real participation of regional councils in this process.

Since Article 8, section 3, which follows the provisions on the adoption of reasoned opinions by parliament, states that the two Chambers *can* ('*possono*'), and not *shall*, consult the regional councils in compliance with Protocol no. 2, the carrying out of an effective consultation does not seem to be ensured in any case. Instead it results from the discretionary choice of each Chamber, this being an individual prerogative of each branch of parliament. For example, in principle the Senate could proceed to consult regional legislatures, whereas the Chamber does not. Moreover, if shaped within the format of a request of opinions to the presidents of the 20 regional councils (plus the councils of the two autonomous provinces), the consultation could become quite complex, although an alternative would be to address such a request of opinions to the Coordinator of the Conference of Presidents of regional councils. Even more cumbersome is the hypothesis of summoning a bargaining table ('*tavolo negoziale*') among all the legislatures concerned aimed at making the consultation effective.

However, in order to prevent any possible hurdle that could discourage parliament from undertaking this consultation, as a precaution Article 25 entitles regional councils to directly submit to Parliament, either upon its request or not, their observations on the principle of subsidiarity in due time for the conclusion of the parliamentary scrutiny within the eight-week deadline. Therefore, Article 25 ensures that the positions adopted by the regional legislatures are taken into account by the two chambers. In other words, a sort of 'double-flow' procedure is established: whenever the top-down consultation is not accomplished, a bottom-up flow of observations emanating from the regional councils can reach the parliament anyway. This contributes to the prospects of creating a long-term cooperation among the legislatures.

This procedure reveals another advantage of regional legislatures, as the submission of their observations under the early warning mechanism is not constrained by a rigid division of competences between regions and State. If regional councils would have been allowed to express their positions only upon the summoning of a consultation on the part of each chamber, then it would have been likely that such consultation was arranged only with regard to draft legislative acts falling within the regional remit. By contrast, the wording of

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Article 25 guarantees that regional councils can transmit observations on the principle of subsidiarity within the national stage of the early warning mechanism also on EU proposals that primarily affect state competences: examples are EU draft legislative acts concerning immigration which have a deep impact also on the regions (e.g. on health care or social services), although according to Article 117, section 2, lit. b), immigration formally is a State competence.

In light of the above, the institutional practice already followed by parliament and regional councils is confirmed. However, the fact that now this practice has been codified into ordinary legislation should not be underestimated. The mere behavior of institutional actors – like national legislatures – or the attempt to connect their conduct to existing general rules of procedure or to 'experimental and provisional procedures' – which would imply stretching parliamentary rules beyond their scope – aiming at regulating a completely new subject-matter (the idea of a direct relationship between parliament and European institutions or between parliament and regional councils on EU affairs has never been contemplated before the Treaty of Lisbon) do not enjoy the same degree of legal certainty accorded to an ordinary law, nor do they appear as fully correct from a legal point of view. Therefore it can be questionably argued that the provisions of Law no. 324/2012 on the early warning mechanism are devoid of autonomous legal value (Esposito 2013: 48).[XXII] On the contrary, they provide, for the first time, a national legal basis for the effective implementation of the early warning mechanism that takes into account not only the parliament (as in the former Article 4-*quarter*) but also regional legislatures, as provided by Protocol no. 2.

Nor can the thesis be supported according to which the provisions of EU Treaties and Protocols are sufficient to enforce the new mechanism at national level (Capuano 2011). To some extent these European provisions need to be 'nationalised', according to the constitutional and institutional identity and the parliamentary tradition of each Member State. The EU only establishes a minimum common standard for the early warning mechanism, in order to leave room for manoeuvre to Member States, which, for example, are free to make the effects of the consultation of regional legislatures more or less binding as well as to define further conditions.

Law no. 234/2012 has somewhat abdicated from this function with regard to the role of regional legislatures in the early warning mechanism and this is why Article 8, section 3,

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has been depicted in the literature as a 'programmatic rule' (*norma programmatica*) (Esposito 2013: 48). Indeed it fails to define the duty of the parliament with regard to effects and frequency – i.e. when such a consultation must occur – of regional consultation, simply referring to the rules of procedure for a detailed regulation of the matter. While according to Article 6 of Protocol no. 2 national Parliaments seem to be bound to consult their regional legislatures when the issue at stake affects regional competences, quite understandably EU provisions have not fixed any further obligations for national parliamentary procedures. Indeed, this matter should be regulated either by means of constitutional law – as it was done in 2001 regarding the participation of regions in the Committee on Regional Affairs –, since it concerns the relationship between parliamentary institutions enjoying a constitutional status and located at different levels of government within the Italian Republic or, as it seems preferable, by means of ordinary legislation. In the end, it would not be the first time that an ordinary law defines in great detail the effects of parliamentary procedures or the activity of parliamentary bodies (see, e.g., Law no. 124/2007 and Law no. 42/2009), nor can such legislation be deemed to impair the autonomy of parliament. By contrast, much less can be done through the rules of each chamber because the whole process concerns a national multi-level and inter-institutional procedure and there exists the risk to undermine the prerogatives conferred by the Treaty of Lisbon upon regional legislatures. What parliamentary rules of procedure could rationally establish, instead, are certain procedural but equally fundamental aspects, like the introduction of the 'votes' of regional councils also in the Chamber and formal and televised hearings of regional councilors during the early warning mechanism or to regulate the status of regional 'votes' within the parliamentary scrutiny on subsidiarity (which committee is entitled to examine them, whether they are annexed to the opinions or to the reasoned opinions, etc.).

As much as Article 8, also Article 25 remains deliberately silent on certain issues. For example, it is worth mentioning the lack of a further deadline for the transmission of the observations on the part of regional councils. This seems consistent with the fact that the main deadline has already been fixed, for everybody, in the eight weeks laid down by Protocol no. 2 itself. However, mentioning as the only time limit for regional legislatures the submission 'in due time as for the conclusion of the parliamentary scrutiny' (thus within the eight-week period), the provision remains too vague. Indeed, practice reveals

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that whenever one or both chambers are able to send their opinions or reasoned opinions in advance (sometimes they do not, and thus this case falls into the category of the 'political dialogue', see section 4.2.),[XXIII] they do not wait for the submission of regional observations until the expiration of deadline. Instead, as soon as the opinion is supposed to be finalized, it is voted by the committee concerned or by the House and immediately transmitted to the EU institutions and the executive. Article 25 does not prevent such a hypothesis from happening. In other words, what 'due time' means is likely to be decided by the parliament every time (20, 30, 40 days), thus giving it great discretion and damaging the predictability of the whole procedure.

Moreover, relying on the rules of procedure (Articles 125 R.C. and 144 R.S.) and on the experimental procedures in force, the time limit also differs from one chamber to the other (40 days, 15 days etc.). Not only would a fixed deadline give legal certainty to the procedure, stimulating more promptly a reaction on the part of regional councils, but it would also solve a possible mismatch which could occur with regard to the deadline of 30 days, fixed in Article 24 and concerning the submission of regional observations, either by legislatures or executives, to the State government. The content of these latter observations is not clarified by the Law, but in principle they should not deal with the principle of subsidiarity in order to avoid overlapping with Article 25.

Law no. 234/2012 does not solve the problem, which has existed since the entry into force of the Treaty of Lisbon, of coordinating multiple procedures involving the same players, i.e. the regional councils, and dealing with the same subject, i.e. an identical EU draft legislative act, but having different:

- recipients at national level, i.e. government and parliament;

- scopes, i.e. issues arising from the proposal or the principle of subsidiarity (or, within the 'political dialogue', any other issue); and

- deadlines, i.e. eight weeks, 30 days or the undefined parliamentary schedule, to be fixed for each draft legislative act.

With regards to the problem of accommodating the early warning mechanism, which by definition is a parliament-based procedure, with the relationship between regions – regional councils included – and the State government, provided by Article 24, Law no. 234/2012 fails to establish an additional but autonomous flow of information from parliament to the regional legislatures or to their Conference (as it is developing in practice:

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see above, section 3).[XXIV] In fact, if the government is possibly the best institution to provide also regional councils with specialized and timely information on EU draft legislative acts (Article 24, section 2), nonetheless the State legislature seems the most appropriate institution for sending draft legislative acts to regional councils and to fix, at the same time, the deadline for the early warning mechanism.[XXV]

However, in contrast to this criticism emerging from the analysis of Articles 8 and 25, a positive element deriving from the new provisions deals with a clarification of the relationship within the 'triangle' identified by parliament, regional councils and the Conference of their presidents. Here Article 25 opts for setting up individual relationships between each regional legislature and parliament within the early warning mechanism, a choice which mirrors that of the EU Treaties for an individual participation of every parliament or chamber thereof, without however excluding the exchange of views and coordination amongst parliaments (Louis 2009: 131 ff).

The ratio is the following and seconds the asymmetry of Italian regionalism (Bilancia *et al.* 2010: 124): in fact, a different degree of commitment and engagement can emerge across the councils when participating in the early warning mechanism and the same EU draft legislative act can raise a harsh debate in a certain region while passing ignored in another. Thus, it is not convenient to force regional councils to agree on a common position within the Conference of their Presidents, thereby blocking the submission of regional observations in case of diverging views. Rather, as in other Member States like Austria (Kiefer 2010: 143-160; Weiss 2010: 97-106), Spain (Auzmendi del Solar 2010: 21-28; Palomares Amat 2011: 19-58; Alonso de León 2012: 305-322) and the UK (Carter and McLeod 2005; Fasone 2009; Bruno 2012), the submission is conceived by Article 25 as an individual prerogative of every regional council, which in principle does not forbid them to adopt common observations within the Conference – being always informed by regional legislatures – and transmit them to the Parliament. This is a flexible solution which intends to simplify the procedure whenever possible: for instance, the top-down flow of information reaches the regional legislatures through their Conference, while the bottom-up flow of information ensures the highest level of pluralism possible, allowing the expression of all regional positions unless a compromise amongst them is feasible.

4.1. The 'political dialogue'

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The most 'revolutionary' provisions of Law no. 234/2012 dealing with the relationship between regional councils and parliament in EU policy-making are those concerning the 'political dialogue'. This is a mechanism not regulated by the EU Treaties but invented by the European Commission in 2006, and confirmed in 2009, that enables national parliaments to directly transmit to the Commission any opinion or contribution on whatever EU draft legislative act or documents and raising any kind of concerns (on the legal basis, on the principles of subsidiarity or proportionality, or on the substance) outside the early warning mechanism and its deadline. The 'political dialogue' was actually conceived as a tool for legitimizing a direct channel between the Commission and parliaments to remedy the rigidity of the early warning mechanism, and in particular to broaden the focus of the scrutiny and to minimize time-constraints that could limit parliamentary participation.

Indeed, as it is shown also by the European Commission, the 'political dialogue' has enhanced the position of parliaments in the EU constitutional architecture much more than the early warning mechanism (European Commission 2012: 4).[XXVI] Furthermore, the Italian Parliament has become one of the most active parliaments in this 'political dialogue' and thus it is not surprising that Law no. 234/2012 has regulated this fact, although it is quite a unique case in comparative perspective.

In particular, the decision of the Italian legislator to include also regional councils into the 'political dialogue' is extremely important as regards the cooperation between national and regional legislatures. Italy is the only Member State to have adopted legal provisions which enable regional legislatures to participate in this EU mechanism. However, this does not mean that, outside of launching open consultations during pre-legislative stage (see above, section 1), regional councils are entitled to send their observations directly to the Commission, as the Italian chambers can (Article 9, section 1). Instead, the same mechanism that is in force between the national legislature and the Commission is now 'transplanted' into the Italian Republic with regard to the relationship between regional councils and parliament. The submission of regional observations takes place under the same conditions as provided by Article 25 on the early warning mechanism, but the impact is more far-reaching in a twofold sense.

First of all, since it has become evident that legislatures, as political bodies, are possibly not the best equipped institutions to accomplish a strictly legal scrutiny of the principle of

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subsidiarity (Schütze 2009; Martinico 2011; *contra* Kiiver 2012), both national parliaments and regional assemblies are used to adopt opinions or contributions that also deal with the choice of the legal basis, the compliance with the principle of proportionality and, most of all, with the substance or the merit of a prospective measure, that also concern EU draft legislative acts falling within the exclusive competence of the Union (as it notably happened on the draft Regulation of the European citizens' initiative) or simply EU documents, which sometimes are crucial (like the Annual Commission Work Programme). The 'political dialogue' has anticipated such trends and Article 9 of Law no. 234/2012 has seconded it, creating a chain between regional, State and European institutions. Indeed, regional legislatures can now submit to the two chambers observations on any draft legislative act or document, on any ground, and in principle without a deadline, but of course respecting the parliamentary schedule, thus intervening before the opinions of parliament are transmitted to the Commission. In prospect, an interesting example could be that of the scrutiny of the Annual Commission Work Programme which, according to Article 13, section 1 of Law no. 234/2012, shall be examined jointly with the Annual Programme of the government on the future participation of Italy in EU affairs, and which are both transmitted to the regional councils through the Conference of their Presidents (Article 24 and Article 13, section 3).[XXVII] So by way of the (national) 'political dialogue', each regional council can now make its voice heard by parliament on both documents, thus submitting observations on the Annual Programme of the government in light of the Commission Work Programme (or *vice versa*), and identifying its own priorities also on EU legislative proposals, which is particularly important during the planning stage. Therefore, regional councils can have a say both at the national planning stage and, indirectly, also with regards to the EU planning stage, since their observations are taken into account by parliament when it transmit its opinions on the Commission Work Programme within the (European) 'political dialogue' (see *infra*).

Secondly, the impact of the 'political dialogue' on regional councils is deeper if compared to the early warning mechanism because Article 9 expressly mandates parliament to take into consideration regional observations in its own opinions. Regional legislatures have been entitled to influence parliamentary procedures and to guide the content of parliamentary deliberations, at least when a residual or a shared competence of the regions was concerned. Therefore parliament is bound by regional observations, while again (see

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above, section 4.1.) no specific limitations are posed upon regional councils as for the submission of observations to parliament, which can, in theory at least, pertain to any issue, no matter if it falls within the regional or the State remit. Although Article 9 marks a breakthrough with regard to the cooperation between national and regional legislatures – since, in principle, the observations of the latter can to some extent not be disregarded by the former – it is a paradox that such a result is achieved on a procedure which is not even provided by the Treaties, whereas the early warning mechanism, regarded as one of the main innovations of the Treaty of Lisbon (Kiiver 2012: 19 ff.),[XXVIII] according to Law no. 234/2012, only limitedly strengthens the tie between the national and the regional legislatures.

In spite of the significance of the provisions on the 'parliamentary dialogue' for regional councils, also in comparative perspective, Article 9 also contains an ambiguous and maybe erroneous reference to the 'regions and autonomous provinces', besides regional legislatures, as if the latter were not part of the regions themselves. The norm is actually meant to involve also regional executives into the 'political dialogue' with parliament, with the same binding effects as accorded to the observations submitted by the regional councils, and aims to increase the information flow from regional political bodies to the national legislature. However, this new provision once more demonstrates the 'regional blindness' of the Italian state, which ignores how the early warning mechanism is designed at the regional level and how complicated the relationship between each regional legislature and executive is on this issue.[XXIX] Indeed, nowadays most regional laws that regulate this matter try to foster the adoption of a unitary position involving both the regional councils and the regional executives (Fasone 2010: 163-190). This happens either by means of a case-by-case inter-institutional agreement between the regional councils and the executive, which assigns to the council the power to submit observations – in particular on the principle of subsidiarity– on EU draft legislative acts to parliament and to the regional executive that to submit observations to the State government, thus establishing two parallel but consistent channels: one inter-parliamentary, the other inter-governmental. Or, as it is provided for in some other regions, like Marche, on the basis of a framework inter-institutional agreement it is the regional legislative Assembly that is entitled to adopt a position, also on behalf of the executive, which is then submitted to both the national parliament and government.[XXX]

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By contrast, as mentioned above (section 4.1.), these regional provisions and practices have been neglected by the national legislator, who has tried to establish procedures where there are multiple, confusing and overlapping interactions:

- between the regional Ccuncils, on the one hand, and the regional executives, on the other, with the State executive, on potentially any issue arising from an EU proposal, within 30 days since its transmission;

- between regional councils and the parliament, only on the compliance with the principle of subsidiarity in the early warning mechanism and in due time, within the eight-week period; and, finally,

- between regional councils and regional executives, on the one hand, and the parliament, on the other, within the 'political dialogue', again in due time but considering the parliamentary schedule.

These several procedures, instead of enhancing regional participation in shaping the national position on EU policies, could contribute to exacerbate tensions and to a deadlock within the regions on who, whether the council or the regional executive, is finally entitled to interact with the national parliament and the national government, as well as between the national legislature and the national executive, which to date have often acted independently from another on EU draft legislative acts (Esposito 2013: 41). Furthermore, despite the delayed adoption of Law no. 234/2012, it has ignored regional legislative provisions and practice in force for several years in order to arrange the most suitable regional institutional balance after the Treaty of Lisbon (since before regional participation in EU affairs was dominated by the executives) and it seems to complicate the inter-institutional and multi-level relationships.

5. In prospect: what else can strengthen the relationship between the Italian State and regional legislatures on EU matters?

In spite of the expectations placed on Law no. 234/2012, this Law has missed the opportunity to define the relationship between regional councils and parliament as a long-term and structured cooperation, inspired by the model of the early warning mechanism and potentially enforceable in many other circumstances dealing with Italian participation in EU affairs. Although it appears unlikely, from a political point of view, that Law no.

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234/2012, approved after a long parliamentary process and three years after the entry into force of the Treaty of Lisbon, will be substantially amended in the near future, in prospect some adjustments could be provided in order to establish a more direct and effective channel of interaction between the regional and the national legislatures.

A first example of such an improvement consists in involving regional councils in the operation of the parliamentary scrutiny reserve, which gives parliament a guaranteed time-frame – 30 days – to accomplish its scrutiny of an EU draft legislative act or document before any position is taken by the Italian Government in the Council of Ministers of the EU (Article 10). In particular, it could be provided that a scrutiny reserve, when activated by parliament, could be raised upon request of a minimum threshold of regional councils (e.g. at least one fourth, the same as the threshold for the early warning mechanism on criminal matters), if the issue at stake is of great concern for the region, if it affects the substance of a regional competence or if it compels crucial cross-regional interest. A regional scrutiny reserve is already in place and can be activated by the State-Regions Conference (Article 25, section 5). However, there only executives are represented and any direct relations between this body and parliament is inexistent. By contrast, the activation of the parliamentary scrutiny reserve upon a request of regional councils could also be convenient for parliament in order to understand how national legislative competences are affected by an EU measure.

A similar input on the part of a consistent number of regional councils could also be provided with regards to the ex-post subsidiarity scrutiny, that is the procedure whereby one or both chambers can request the government to bring an action for annulment of a legislative act which is deemed to be inconsistent with the principle of subsidiarity before the Court of Justice of the EU (Article 8, Protocol no. 2, and Article 42, section 4, Law no. 234/2012). The give such a role, which should concern just the initiation of the procedure without further binding parliament, to the regional councils seems coherent with the whole design of the ex-ante subsidiarity scrutiny, i.e. the participation of regional legislatures in the early warning mechanism by means of the consultation of parliament. In other words, since regional councils are entitled to step into the early warning mechanism, likewise they should be allowed to claim before parliament a violation of the principle of subsidiarity once the contested act, which violates regional legislative competences, has entered into force, although the decision to activate the procedure should lay firmly with parliament.[xxxi]

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Finally, other examples of prospective provisions to be accommodated to the need of creating a more enduring relationship between national and regional legislatures are those concerning the involvement of the Italian Parliament in the simplified revision procedures of the EU Treaties – in particular, Article 48, sections 6 and 7 TEU, and Article 11, Law no. 234/2012 – and in the enforcement of the emergency brake mechanism (Article 12, Law no. 234/2012). Here both chambers are required to agree, either by way of a law or joint resolution. Given the impact of a Treaties revision on policies and policy-making in the long term and because, if it is simplified, it takes place without the solemn process of the ordinary revision procedure and of a proper national ratification, enhancing the participation of regions in the process at national level could contribute to making the revision more legitimate and shared. Each regional council could be allowed to send observations to parliament about the necessity of such a revision and its implications at regional level. The same procedure could apply in the event of an enforcement of the emergency brake procedure with regard to Article 48, section 2 TEU that deals with the adoption of measures by the European Parliament and the Council in the field of social security, particularly regarding the benefits of employed and self-employed workers and their dependants. Within this procedure each government in the Council can complain about an impairment of its social security system or its financial sustainability deriving from the measure proposed, thus suspending the procedure for its adoption. Consequently, Article 12 of Law no. 234/2012 entitles parliament to raise such an objection – the 'emergency brake' – which then is binding for the Government in the Council. Since the measures adopted according to Article 48, section 2 TEU could produce a deep impact on social services provided within the regions as well as on their financial burdens, the possibility for regional councils to submit observations to parliament on whether the use of the emergency brake is suitable appears appropriate.

In the end, fostering the tie between regional councils and parliament is not only convenient in terms of the protection of regional autonomy and competences, but it also improves the (democratic) quality of multi-level decision-making and provides parliament with information and observations – necessary for achieving a weighted decision – of which it would otherwise be devoid.

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6. Conclusion. Will the early warning mechanism act as stimulus for a turn in the relationship between Italian legislatures?

After decades of national uncertainty, the EU seems finally to have succeeded in establishing a direct and long-lasting relationship between the Italian parliament and regional councils by way of the early warning mechanism. In fact, in spite of the need to set up a stable cooperation between the national and regional legislatures, particularly after the extension of the legislative competences of the regions in 2001, Italy has failed to address this issue properly because of the lack of political agreement and willingness (section 2).

The Treaty of Lisbon and its Protocol no. 2 (Article 6) provide for a first step in overcoming the lack of an enduring and institutionalized relationship amongst Italian assemblies. It is significant that the EU, the legal order traditionally accused to remain 'blind' towards the regional or federal dimension of its Member States, is now likely to offer a first solution to the abovementioned problem: through the consultation of regional 'parliaments' by the national legislature on the compliance of EU draft legislative acts with the principle of subsidiarity (section 1). Deprived of its long-standing 'regional blindness', since the entry into force of the Treaty of Lisbon, the EU seems rather to be supporting – more or less consciously – the creation of an effective 'multi-level parliamentary field' (Crum and Fossum 2009: 249-271) even within Member States, as in Italy.

However, in Italy the implementation of new EU provisions by the state level took a long time (contrary to what has happened at regional level, where several regional councils have proven to be quite active), in particular with regard to making the relationship between legislatures in the early warning mechanism effective, finally resulting in the adoption of Law no. 234/2012 on 27 November 2012 (section 3). Codifying the existing institutional practice with regards to inter-parliamentary relations, Art. 8 section 3 and Art. 25 of the new Law have not introduced very innovative provisions on the national early warning mechanism, mainly deferring their detailed regulation to the parliamentary rules of procedure, a choice that can definitely be contested (section 4.1.): neither the effects nor the subjects of regional councils' observations, nor the time-frame of the process, have been defined. A double-flow procedure is set up, whereby either the initiative for the consultation of regional councils can be taken by parliament (top-down), or the regional

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councils themselves can activate the procedure and submit their observations to parliament (bottom-up).

By contrast, the introduction of a 'political dialogue' between regional and national legislatures (Article 9, Law no. 234/2012), modeled on the European 'political dialogue' between national parliaments and the European Commission, appears 'revolutionary', also in comparative perspective (section 4.2.). Not only can regional councils send their observations to parliament on any EU draft legislative act or document, whatever the EU competence, but the two chambers are also bound to take them into consideration when adopting their opinions addressed to the European Commission.

However, also this latter procedure raises some concerns, since it does not clarify the complex network of inter-institutional and multi-level relationships that should shape the position of the Italian Republic on EU affairs. Regardless of the institutional and legislative arrangements in force at regional level, which have been consolidated over the past few years, Law no. 234/2012 arguably also includes regional executives into the 'political dialogue' and thereby creates confusing and overlapping flows of information between governments and parliaments at national and regional level (section 4.2.).

Although Protocol no. 2 annexed to the Treaty of Lisbon could have foreseen an overall transformation of the national-regional legislatures relationship, starting from the provisions of its Article 6 on the early warning mechanism, Law no. 234/2012 has not exploited these norms in full and refrained from providing more effective and structured channels of inter-parliamentary cooperation. Inspired by what Protocol no. 2 states, the national legislator could have established further mechanisms of coordination between parliament and regional councils, for example with regards to the initiative for ex-post subsidiarity scrutiny before the Court of Justice of the EU, the activation of the parliamentary scrutiny reserve upon request of a certain number of regional councils, or parliamentary consultation of regional councils on provisions dealing with the simplified revision procedures of the Treaties or with the emergency brake.

To conclude, the shift from the 'regional blindness' of the EU to the 'regional blindness' of Italy, as for regional participation in both the national parliamentary procedures in general and on EU affairs in particular, has only partially been recomposed by Law no. 234/2012, in spite of the potential impact of the Treaty of Lisbon, which could have provided an impetus for a more comprehensive reform of inter-parliamentary

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relations in Italy– or rather, for its first introduction and proper regulation. However, possibly by way of institutional practice developed for the implementation of the national provisions on the early warning mechanism and on the 'political dialogue' as well as by way of further amendments to the Law, an effective inter-parliamentary cooperation, on EU inputs, will take place also in Italy and will expand beyond the EU related procedures, too.

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I would like to thank Eduardo Gianfrancesco and Nicola Lupo for the opportunity to present an earlier version of this article at the seminar on *"Le assemble legislative regionali italiane e spagnole e le nuove frontiere del parlamentarismo: apertura dei procedimenti legislativi e controllo sulla sussidiarietà"* (LUMSA-Rome, 11 May 2012) and for their invaluable directions and Giuseppe Martinico, Giovanni Piccirilli and two anonimous reviewers for their insightful comments and suggestions. The usual disclaimer applies.

I To date 8 Member States of the European Union give legislative powers to all or some of their regions or states (in the case of federal system): Austria, Belgium, Finland, Germany, Italy, Portugal, Spain, and the United Kingdom. On the whole, in the EU there are 72 regional parliaments with legislative power.

II However, as it has been underlined by some scholars, much more can be done in order to overcome the problem of the EU 'regional blindness', starting from the reshaping of the cohesion policy (Martinico 2013).

III Article 5(2) of the TEC, as modified by the Treaty of Maastricht stated: 'In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.'

IV See, in particular, the decision of the Court of First Instance (now General Court) on the case *Regione autonoma Friuli Venezia Giulia v Commission of the European Communities*, of 15 June 1999, case T-288/97 [ECR II-01871], when the Court admitted for the first time an action for annulment brought against a decision of the Commission by a sub-State body. However, while the standards applied by the General Court for the recognition of a 'regional direct concern' are more flexible, to date the European Court of Justice has shown a more conservative approach (Caruso 2011).

V According to Article 7, Protocol no 2, 'Each national Parliament shall have two votes, shared 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. 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'. Moreover, if the simple majority of the vote cast to parliaments is expressed by means of reasoned opinions before the beginning of the ordinary legislative procedure and if the Commission decides to maintain the proposal unmodified, then the Council, by a majority of 55% of its member, or the European Parliament, by a majority of the votes cast, can block the legislative process, considering such proposal in breach of the principle of subsidiarity.

VI Italy has 20 Regions (and 2 autonomous provinces): 5 of them were acknowledged by the Constitution itself and established in the aftermath of the adoption of the new Constitution. They enjoy a special status, meaning a greater fiscal autonomy and also broader legislative competences until 2001, usually because they are historical regions or because of the minorities living there. The remaining 15 Regions, instead, were established in the 1970s and where originally provided with less significant autonomy and legislative powers, although the constitutional reform of 2001 has significantly moved the position of the ordinary Regions closer to those having a special status.

VII Perhaps the most notable attempt to create a 'federal' Senate or a Senate of the Regions in Italy was that

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pursued by the Constitutional Law which intended to amend the Second Part of the Constitution, 'Modifiche alla Parte II della Costituzione', published on the Official Journal on 18 November 2005 (Gazzetta Ufficiale n. 269) and then rejected on the occasion of the constitutional referendum held on 25 and 26 June 2006.

[VIII] In fact, nowadays Regions can legislate in all matters not expressly listed in Article 117 Const. (residual clause) and in those listed in section 3 of Article 117 Const., provided that the State fixes the fundamental principles of the subject-matter. By contrast, the State, in principle (since the Constitutional Court has interpreted the catalogue of competences aiming at broadening the scope of action of the State), can intervene strictly in the matters listed in section 2. Moreover before the constitutional revision of 2001 regional laws must pass the preventive control of the State Government (former Article 127 Const.), which, under certain conditions, could challenge the constitutionality of the law before the Constitutional Court or the merit of the law before the State Parliament (although the latter procedure was never applied) (Gianfrancesco 1994).

[IX] In the 16th Italian parliamentary term, 68 regional initiatives of national bills have been presented, 41 in the Chamber and 27 in the Senate (including those for amending the Statutes of the Regions enjoying special status), but only 5 of them (mostly constitutional law amending those special regional Statutes) have been enacted into law (source: websites of the Italian Chamber of Deputies, http://www.camera.it, and of the Senate, http://www.senato.it).

[X] An example of a provision which has not been applied, although it would have enhanced the role of the Italian Regions in EU affairs, concerns the participation of members of regional governments in the national delegation to the Council of Ministers of the EU instead of State Ministers, when the draft legislative act to be examined falls in the within the regional remit (Paterniti 2012: 89-93). This can count as a further example of the 'regional blindness' of the State.

[XI] Whose transmission has always been delayed by the Government with regard to the deadlines fixed by Law no. 11/2005, respectively, 31 December and 31 January.

[XII] Article 15 of Law no. 11/2005 was entirely substituted by Article 8 of Law no. 96/2010, the annual Community Law for 2009, thus after the entry into force of the Treaty of Lisbon.

[XIII] See the Report of the meeting of the Committee on Rules of the Chamber of Deputies held on 6 October 2009 about the new procedures of cooperation between the Chamber and the EU institutions (www.camera.it) .

[XIV] See the decisions adopted by the Committee on Rules of the Chamber of Deputies on 6 October 2009 and on 14 July 2010, as well as the letter sent on the same day when the new Treaty entered into force, on 1 December 2009, by the President of the Senate to the Chairmen of the standing committees.

[XV] These are the cases of the two autonomous Provinces of Bolzano and Trento, of Calabria, Campania, Friuli-Venezia Giulia, Lazio, and Piemonte.

[XVI] See Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare, COM (2008) 414 final, 2 July 2008, then become Directive 2011/24/EU of 9 March 2011. The hearing of the councilor of the Assembly of Emilia-Romagna took place on 26 February 2009, as an informal hearing. From the adoption of the first decision by the Committee on Rules of the Chamber about the provisional procedure to be follow within the early warning mechanism, thus from 6 October 2009 onwards and until the revision of the Rules of procedure, regional councilors can be heard during this procedure according to Article 79, section 4, 5, and 6 on pre-legislative scrutiny. Therefore these hearings, if relying on these provisions can enjoy a higher level of publicity.

[XVII] The term enhanced cooperation here is not used with the meaning it has according to Article 20 TEU, as a form of differentiated integration or of multi-speed Europe, but rather as a strengthened form of cooperation amongst all regional councils, with all of them agreeing on a common position.

[XVIII] Of course those observations are currently transmitted also to the Government (in particular to the Minister on EU affairs and to the Permanent Representation of Italy at the EU), to the Conference of the Presidents of the Regions, and to the Committee of the Regions besides the Parliament.

[XIX] See resolution of the Italian Senate, doc. XVIII-bis no. 65, of 8 May 2012, on a package of five draft Regulations, COM (2011) 610 def., COM (2011) 611 def., COM (2011) 612 def., COM (2011) 614 def., COM (2011) 615 def.

[XX] Antonio Esposito (2013: 14) has underlined that Law no. 234/2012 aims at fostering the participation of Italy in the EU decision-making and in the implementation of EU as a system, that is inter-institutional coordination between the Parliament and the Government, between the Parliament and the Regional Councils, between Regions and local self-government and within the Executive itself. This standpoint is also

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shared by Jens Woelk (2010: 11-24).

[xxi] Indeed, when describing regional legislatures, Article 6 of Protocol no. 2 annexed to the Treaty of Lisbon uses a formulation which has been banned by the Italian constitutional jurisprudence in two decisions (no. 106 and no. 306 of 2002): Regional Councils cannot be assimilated, as for their nature, to the national legislature, which alone can be named as 'Parliament'. It is not clear whether the formula 'regional parliaments with legislative powers' has been included in Protocol no. 2 following an inappropriate translation from the original French and English version of the Treaty (that refer to *Parlements* and *Parliaments*), or, rather, as it seems more plausible, no specific attention has been paid to the *nomen* used, since the distinctive features of this sub-national assemblies are substantially two: their inclusion within the regional level of government and the circumstance of being provided with legislative powers. By contrast, the formula used does not appear to design a 'model' of Parliament in the EU and to identify which these Parliaments are.

[xxii] This statement, however, can find a reasonable explanation in the need to design the prospective procedure implementing the early warning mechanism by means of a fine-tuning of the initial procedure introduced provisionally and on a experimental basis. In other words, there was a need to test the procedure before it was codified.

[xxiii] See further, section 4.2.

[xxiv] According to Article 24, section 1, as soon as it receives them, the State Government transmits EU draft legislative acts and documents to the Conference of the Presidents of the Regional Councils (and to the Conference of the regional executives), which take care to forward them to very regional legislature. Thus, in the top-down procedure there is no direct flow of information between the Government and each Council.

[xxv] Since 1 December 2009 (and even before, on the basis of a choice made by the European Commission in 2006 and seconded by the European Council), national Parliaments have received all EU draft legislative acts and documents, thus they could easily forward them to the Regional Councils.

[xxvi] The number of opinions sent by national Parliaments, according to the 'political dialogue' has increased of about 60%, from 387 in 2010 to 622 in 2011.

[xxvii] Article 16 of Law no. 234/2012 adds a new document to be transmitted by the Government to the Regional Councils through the Conference of their Presidents (as well as to the Regional Executives through their Conference): the Report on the trend of the financial flow between Italy and the EU, which was already transmitted to the Parliament, according to Law no. 11/2005, and which contains very significant information for Regional Councils, for example on the incoming cohesion funds.

[xxviii] For the first time ever in 2012 the threshold of one third of reasoned opinions from national parliaments, sufficient for triggering the re-examination of an EU draft legislative act by the Commission, has been reached on the draft Regulation on the right to take collective action with regard to the freedom of establishment and the freedom to provide services in the EU (COM (2012) 130 final). In September 2012 the Commission decided to withdraw the proposal. See Russo (2012) and Fabbrini and Granat (2013: 115-144).

[xxix] I am grateful to Barbara Sardella for having raised this point to my attention.

[xxx] The opposite solution, i.e. that of enabling the Regional Executive to adopt a binding position for the whole Region, also on behalf of the Council, which some Regions, like Campania (Article 2, regional law no. 18/2008), still use, does not seem consistent with the new framework provided by EU law, in particular with the early warning mechanism where there is a direct call for the participation or regional legislatures.

[xxxi] According to Article 8 of Protocol no. 2, annexed to the Treaty of Lisbon, an action for annulment on the same ground can be brought also by the Committee of the Regions (CoR), where Regional Councils are represented on the basis of Article 27 of Law no. 234/2012. However, the position of Regional Councils is quite different in the Committee of the Regions, compared to the status acquired in the early warning mechanism *vis-à-vis* the national Parliament. Indeed, within the CoR Italian Regional Councils are only a minor component, next to local self-government and regions from other EU Member States, the executives moreover being the largest component of the CoR.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

State accountability for violations of EU law by Regions: infringement proceedings and the right of recourse

by

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Perspectives on Federalism, Vol. 5, issue 2, 2013

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Abstract

The 2001 constitutional reform in Italy has promoted a more active participation of the Italian Regions in the law-making process and, even more significantly, also in the implementation of EU law. However, the EU system continues to be characterised by the liability of a Member State before the EU institutions for violations of EU obligations even when these violations are ultimately ascribable to its Regions. This paper aims to investigate the Italian domestic legal order to identify the procedures and/or instruments that make infra-State bodies accountable for violations of EU obligations; and to analyse the EU infringement proceeding, its impact on the Italian domestic legal order, the introduction of a right of recourse that allows the State to request damages to non-compliant Regions, its effectiveness and concrete application.

Key-words

Right of recourse, infringement proceeding, liability of State and Regions, violation of EU law

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1. Foreword

In the framework of European integration, over the past few years the role of Regions and other sub-State bodies has become more prominent (Bullmann 1997: 3 ss.). This trend is rooted in the institutional and functional transformation of the European Union that has called for greater participation of sub-State governments (Pizzetti 2002: 936). Thus, sub-State bodies are now not only the target of EU policy-making, but also the very instruments of its implementation.

The participation of sub-State levels of government in the law-making and implementation processes is further encouraged through a general tendency towards territorial decentralisation (Mastromarino 2010: 79 ss.) that can be observed in all EU Member States.

It should be noted that the European Union itself partly contributed to this decentralisation process: for example, EU policies concerning Structural Funds – that are allocated to Regions – have contributed, over the past decades, to a progressive decentralisation of States. Also, with regard to compliance with the Copenhagen criteria laid down in 1993 for the accession of new EU Members, the EU Commission has placed special emphasis on territorial decentralisation (that was not, however, a binding criterion).

It appears that the EU is no longer completely and utterly "blind" (Ipsen 1966: 228 ss.) towards a State's internal levels of governments, and it should be acknowledged that the latter have acquired a more active role at EU level. It could be said that today, Member States have a '*duty*' to recognize the more significant role of sub-State bodies.

In this sense, the 2001 constitutional reform in Italy marked an important step forward towards the recognition of Regions in their "EU dimension" (Sardella 2007: 431). As a consequence of the radical changes to Art. 117, paras. I and V, of the Italian Constitution, the relation between EU and domestic law has evolved significantly to comprise the regional level of government as well. From a constitutional perspective, the role of the Regions in terms of relations with the EU has certainly been 'strengthened' through the formal recognition of their 'constitutionally sanctioned right' (*diritto costituzionalmente qualificato*) to participate in the making and implementation of EU law on matters within

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regional competence: the participation of Regions in EU processes is no longer "granted" (*ottriata*) but has become "compulsory" (*dovuta*) (D'Atena 2002: 921).

As a result of the more active involvement of Regions in EU law-making and particularly in the implementation phase, Regions have also become accountable – exclusively, from an national viewpoint – for correctly and promptly complying with EU obligations.

From a European perspective, it is a fundamental principle that the responsibility for violations of EU law lies entirely with Member States. Pursuant to Art. 4.3 TEU, States "shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union".

Similarly, the obligation to cooperate (Porchia 2008) laid down in Art. 4.3 TEU is now a consolidated tenet of the jurisprudence of the Court of Justice. While the Court has sanctioned the obligation for all the levels of government of the Member States, all the judges, the administration and local institutions[I] to implement EU regulations promptly and efficiently, it has also repeatedly stressed that the only subject accountable for violations of EU law is the State[II]. It is therefore immaterial for the purpose of EU law that any violation may be attributable to other State institutions – be they public or territorial entities[III] – and no relevance is attached to the constitutional distribution of competences within that State. EU law provides for the principle whereby the Union, while recognising the national identities of Member States "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government" (Art. 4.2 TEU), is indifferent to such distinctions. The responsibility of Regions or other forms of local government does not apply to infringement proceedings started by EU institutions.

However, on the internal level, the question is rather more complex. It is undeniable that, based on Italy's constitutional distribution of competences, particularly pursuant to the amended Art. 117 Const., the principle of cooperation under Art. 4.3 TEU is a binding obligation that applies also to Regions. Therefore Regions, in their areas of competence, are expected to adopt measures that ensure the enforcement of all the obligations arising out of the Treaties and other Community law and to avoid actions that may compromise the achievement of EU objectives.

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However, when EU institutions launch infringements proceedings against a Member State, it is interesting to investigate whether, and how, that State is entitled to request compensation, based on domestic law, from its Regions and/or other local institutions that are 'materially' responsible for the non-fulfilment or infringement of EU obligations. This paper aims to investigate the existence, in the Italian domestic legal order, of procedures and/or instruments that, in light of the current distribution of competences at constitutional level, would make sub-state bodies accountable for violations of EU law and obligations.

2. The infringement proceeding in EU Law

EU institutions oversee the fulfilment on the part of Member States of obligations that arise out of EU membership as laid down in Arts. 258-260 TFEU (*ex* Arts. 226-228 TEC). To this end, EU regulations envisage the possibility for the EU Commission or any Member State to launch a special procedure known as 'infringement proceeding' that, with some exceptions, consists of three phases: *prelitigation*, *litigation* and *execution*.

It should be noted that sub-State institutions are not legally entitled to participate in any of these phases, because only the State can be held accountable. EU law does not envisage the possibility for sub-State bodies to appear before the EU Commission or the Court of Justice to justify the adoption of – or failure to adopt – specific measures.

In the *pre-litigation phase*, as laid down in the Treaties, the EU Commission is charged with ensuring "the application of the Treaties, and of measures adopted by the institutions pursuant to them", as well as with overseeing "the application of Union law" (Art. 17.1 TEU). The Commission is therefore entitled to start an infringement proceeding against any Member State and to perform the preliminary judicial investigation required to establish the alleged violation of EU law. Then the Commission shall deliver a reasoned opinion on the matter "after giving the State concerned the opportunity to submit its observations". According to Art. 258 TFEU, at this point "if the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union". Thus the second phase – if necessary – begins: to establish by judicial means the infringement reported in the reasoned opinion issued by the Commission.

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The Commission is also in charge when the pre-litigation phase is initiated by a complaint lodged by one Member State against another Member State presumed to have violated EU obligations (Art. 259 TFEU). In fact, before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission. The Commission shall deliver a reasoned opinion after each of the States concerned has been given "the opportunity to submit its own case and its observations on the other party's case both orally and in writing". However, "if the Commission has not delivered an opinion within three months of the date on which the matter was brought before it", the absence of such an opinion shall not prevent the matter from being brought before the Court.

It should be stressed that the aim of the pre-litigation phase is not to punish a Member State, but to "restore the violated legality of the EU law" (Fumagalli 2000: 29), in that the State is given the opportunity to remedy the violation, thus preventing a sanction by the Court of Justice and, at the same time, being allowed to justify its position. This point makes clear that EU law does not envisage the possibility for sub-State bodies to address the EU institutions directly to argue in favour of their actions and to motivate their stance with regard to EU obligations.

As regards the *litigation phase*, no specific norms are contained in the Treaties. The Court of Justice shall therefore apply the general norms concerning the role, the make-up and the functioning of the Court.

Conversely, the *executive* phase (Art. 260 TFEU) is regulated in greater detail and some new elements were introduced by the Treaty of Lisbon (Porchia 2009: 224 ss.) that are particularly relevant for the purpose of this paper. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, "the State shall be required to take the necessary measures to comply with the judgment of the Court".

If subsequently the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court "after giving that State the opportunity to submit its observations". It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

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Lastly, "if the Court finds that the Member State concerned has not complied with its judgment" it may impose a lump sum or penalty payment on it.

One of the new elements introduced by the Treaty of Lisbon concerns the fact that in case of "double infringement" (Porchia 2009: 224) – that is a violation of EU obligations followed by the failure to comply with the judgement of the Court of Justice – the Commission's reasoned opinion is no longer required, thus significantly speeding up the procedure.

Another provision (Art. 260.3 TFUE) was also introduced whereby, even in the prelitigation phase, when the Commission brings a case before the Court pursuant to Article 258 on the grounds that a Member State has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, "it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances". If the Court finds that there is an infringement "it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission". The payment obligation shall take effect on the date set by the Court in its judgment. Consequently, a lump sum or penalty payment may be imposed on a Member State as early as at the end of the prelitigation phase[IV].

The changes introduced by the Lisbon Treaty undoubtedly aim to encourage greater rigour – as requested by the EU Commission[V] – in addressing violations of EU obligations by Member States through speeding up the infringement proceeding, increasing financial sanctions and acquiring greater relevance as deterrents.

3. The effects of the infringement proceeding on the domestic legal order

Given the considerable number of infringement proceedings launched by the EU Commission against Italy – mostly related to violations of EU law on the part of Regions – and considering the more stringent attitude of EU institutions towards non-compliant Member States, over the past few years efforts have been channelled to amend the Italian domestic legal system on two aspects.

First, it was decided to ensure a more active engagement in the pre-litigation phase before the EU Commission so as to prevent and limit the appearance of the State before

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the Court of Justice.

Second, the State introduced a right of recourse to be exercised against non-compliant Regions and local institutions mainly for the purpose of creating a deterrent that would encourage prompt adherence to EU obligations by the Regions and other local institutions in terms of promptly enforcing EU norms and preventing violations of EU law in its implementation.

As regards the first measure adopted, it should be noted that several infringement proceedings were started not as a consequence of delay in the implementation of EU law, but with regard to a clear violation of EU norms due to "scarce attention to EU obligations", the "complexity of EU law" (Parodi and Puoti 2006: 12), but also because of the uncertainty generated by the new distribution of competences laid down in the Constitution and the consequent difficulties in coordinating the actions of the State and sub-State bodies, particularly the Regions.

However, it was in the past that the Italian domestic legal order tended to lag behind when implementing EU law and violations of EU obligations were much more frequent. In recent years Italy has shown a growing commitment and greater attention to the enforcement and implementation of EU law.

In the Nineties, Italy was in a state of "*total* non-compliance" (Boncinelli 2008: 203 ss.), when only 67% of EU directives were correctly transposed and enforced in the internal legal order. The number of infringement proceedings against Italy rose exponentially in the following years: 201 proceedings were still open in 2002; 212 in 2003; and 247 in 2005. Starting from 2006, the scenario improved significantly: 226 infringement proceedings were launched in 2006, 159 in 2008, and 136 by 31 December 2011[VI].

This decrease is due, first, to the attempts that were made to improve collaboration between the State and the Regions, setting procedures and processes that would ensure a more timely and comprehensive exchange of *information*, and envisaging the active participation of the Regions in the various phases of the infringement proceeding – especially in the pre-litigation phase.

Significantly, in this sense an Agreement was signed at the Unified Conference (*Conferenza Unificata*) of 24 January 2008[VII], when the Government committed to informing Regions "in a timely and comprehensive manner", "for the duration of the proceeding", every time the EU Commission would launch an infringement proceeding against the State

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for aspects that are relevant for the Regions by virtue of their constitutional competence or simply when the Commission requests information on issues concerning the Regions (Art. 2). The Regions, for their part, committed to providing the Government, also "in a timely and comprehensive manner", the information requested by the EU Commission.

More specifically, the Government committed to requesting an extension of the deadline to respond as laid down by the EU Commission if a request in this sense would be filed with the State's European Policy Department by a Region and supported by solid arguments in favour of a postponement. If necessary, the Government would summon the Regions for a "rapid definition of the position to be argued and the actions deemed useful to settle the relevant infringement procedure, considering the competences of each party with regard to the object of the infringement proceeding" (Art. 3). The Agreement also provides for the Regions, after meeting with the European Policy Department and the relevant State Administration, to participate in meetings with EU Commission representatives and to contribute actively to the closing of the proceeding.

Moreover, according to the same Agreement, in cases when the Court of Justice is addressed for violations of EU law (Arts. 258 and 260 TFEU), the Regions can collaborate with the Ministry of Foreign Affairs "for the purpose of drafting a defence strategy, providing elements that fall within their competence that may be relevant to the defence documentation prepared by the State Attorney's Office". A Region may also participate in coordination meetings convened for that purpose by the Regions (Art. 4).

In case the infringement proceeding reaches the executive phase, the Agreement requires the interested Regions to be "promptly notified" and consulted "on which measures they have adopted or intend to adopt to remedy the violation" (Art. 5).

Lastly, the Provinces (*Province*), Municipalities (*Comuni*) and Mountain Communities (*Comunità montane*) also committed to "implementing immediately and in full the actions required with reference to infringement proceedings for actions attributable to them, collaborating loyally and in full with the Government throughout the phases of the infringement proceedings and complying with any formal requirements related to the submission of documents and to communication between the State and the EU Commission" (Art. 6).

The Agreement clearly aims to ensure the participation of Regions and local bodies in the prelitigation and possibly also in the executive phase of an infringement proceeding, in

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an attempt to fill a gap of legitimacy at the EU level. In particular, it aims to prevent that measures are undertaken against the State as a consequence of a violation or non-compliance with EU obligations on the part of sub-State bodies.

In this sense it is interesting to note that the recent Law no. 234 of 24 December 2012, concerning "General norms on the participation of Italy in EU policy-making and the implementation of EU law and policies", aims to strengthen the prerogatives of *information* and *control* on jurisdictional procedures and infringement proceedings against Italy, partially sanctioned by Law 11/2005 and the 2008 Agreement.

The recent Law reiterated the need for the Prime Minister (*Presidente del Consiglio dei ministri*) or the Minister of European Affairs to "send quarterly reports to the Chambers, the Court of Auditors", as well as to "the Regions and the Autonomous Provinces" – thus introducing an element of considerable innovation[VIII] – that include information on "infringement proceedings launched against Italy pursuant to Arts. 258 and 260 TFEU, and an outline of the object and the state of the proceeding, as well as on any violations reported against Italy" (Art. 14, para. I, lit. *c*).

Additionally, the Prime Minister or the Minister of European Affairs are required to "inform the Chambers, upon reception of notification from the European Commission, of the decisions adopted by the EU Commission concerning the start of an infringement proceeding pursuant to Arts. 258 and 260 TFEU". This communication shall be notified also to "any other public body whose behaviour makes the object of the action or the infringement proceeding" (Art. 15). Thus, Regions and other local bodies shall be informed so as to allow them to cooperate with the State with reference to the proceeding.

Furthermore, the current Law 234/2012 envisages the possibility for the State to adopt measures, including urgent measures, not only pursuant to "normative measures adopted by the European Union or judgements passed by the Court of Justice", but also in case "infringement proceedings are launched against Italy that entail obligations for the State to ensure compliance" with EU law, if the deadline for compliance predates the date presumed for the coming into force of the 'European delegation law' (*legge di delegazione europea*) or the 'EU law' (*legge europea*)[IX] for the year of reference (Art. 37).

Lastly, as regards improving the information flow between different levels of government, Law 234/2012 provides for the obligation for Regions to "immediately" send by certified mail to the European Policy Department information on the measures that

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they have adopted to implement the directives in the sectors that fall within their competence (Art. 40, para. I). Additionally, the State-Regions Conference (*Conferenza Stato-Regioni*) shall provide to the said Department, "in good time and no later than 15 January of every year", the list of regional provisions through which EU directives have been enforced (Art. 29, para. VII, lit. *f*).

There is no doubt that over the past few years the Italian legal order, in spite of the 'silence' of EU law[X], has promoted and increased the cooperation and exchange of information between State, Regions, and local bodies. The participation of sub-State bodies – at least at the national level – has been encouraged and attempts at formalizing it have been put in place with reference to infringement proceedings, thus contributing to a reduction in the number of proceedings brought before the EU Commission and the Court of Justice and to the closing of several ongoing infringement proceedings.

3.1. The 'EU Pilot' project and its outcome

Another useful instrument to reduce, and particularly to prevent, the start of proceedings before the Court of Justice is the 'EU Pilot' project. The project began in April 2008, following a communication by the EU Commission[XI] that recommended the creation of an experimental instrument to ensure greater commitment, closer collaboration and partnership relations between the Commission and the Member States in the application of EU law. The envisaged procedure would be activated promptly to remedy the violation of EU obligations, thus preventing the start of an infringement proceeding. According to the 'EU Pilot' project, every time an infringement proceeding may be launched, a request for clarification is sent to the interested Member State. The national authorities are expected to reply in full and to propose a solution to the problem that is in line with EU law. Member States can apply to the EU Commission for an extension of the deadline to submit their response. Within the next ten weeks, a State's response is examined and the evaluation is then uploaded into the 'EU Pilot' database. If the solution proposed is not compatible with EU law, the infringement proceeding is launched under Art. 258 TFUE.

This procedure has *de facto* replaced another practice whereby the Commission, before launching the infringement proceeding, would send an administrative letter to the national authority to discuss aspects of domestic law that raised doubts about their conformity with EU law.

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Fifteen Member States have participated in the project since its inception on a voluntary basis, including Italy. Today, twenty-five Member States participate in the project and the results have been highly satisfactory. In the last project evaluation report[XII], the Commission stated that during the period April 2008 – September 2011 a total of 2'121 files were submitted to EU Pilot. Of these, 1'410 files completed the process in EU Pilot: that means that responses to the files have been provided by Member States and assessed by the Commission as compatible or not with EU law. The issues that were brought up[XIII] under EU Pilot concern sectors in which Member States most often encounter interpretation and enforcement problems: "some 33% of files concerned environmental issues, 15% internal market, 10.5% taxation, 8% mobility and transport and 6% health and consumer protection". As regards the 'success rate', "nearly 80% of the responses provided by the Member States were assessed as acceptable", enabling the file to be closed without the need to launch an infringement procedure.

The impact of EU Pilot has therefore been positive: the project contributes to clarifying aspects related to the application of EU law, particularly in those sectors where EU law is most complex, and to solving problems related to violations of EU obligations without resorting to the infringement proceeding.

Participation in 'EU Pilot' by the European Policy Department requires information to be sent to the interested regional and local administrations, thus allowing the establishment of collaboration between the institutional subjects involved and a more correct implementation of EU law by sub-State levels of government.

4. The State's right of recourse: analysis and critique

Since under EU law the State bears sole liability for violations of or failure to enforce EU regulations, regardless of the domestic distribution of competences between the State and local institutions, the Italian legal order has tried to intervene on a more substantial level of the law, with the introduction and definition of the terms and limitations of contributory fault with reference to the responsibility of the State and the relevant sub-State bodies.

The 2007 financial law[XIV] first introduced the possibility for the State to request indemnities from the Regions and territorial institutions that are responsible for the non-

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fulfilment and infractions of EU law. This provision envisaged the possibility for the State to request payments for monetary sanctions imposed by judgements of the Court of Justice, while maintaining the obligation for the territorial entities – including Regions – to remedy their violations in a timely fashion.

The provision thus aimed to provide a deterrent by encouraging regional and local levels of government to take their responsibilities with regard to compliance with the obligations that arise out of Italy's EU membership more seriously, particularly in the light of the greater competences entrusted to them by Title V of the Constitution.

The provision contained in the 2007 financial law was also included in Italy's State Community Law (*legge comunitaria statale*) for 2007[XV], with the addition of Art. 16*bis* to Law 11/2005. Lastly, the right of recourse has been regulated in detail under Art. 43 of the recent Law 234/2012 that repealed in full Law 11/2005. Based on the new norms, the State "has the right to subrogate against Regions, Autonomous Provinces, territorial entities, other public entities and similar bodies that are responsible for violations of obligations related to EU law for the financial penalties imposed by the Court of Justice of the European Union pursuant to Art. 260, paragraphs 2 and 3, TFEU"[XVI].

The amount of the damage payment owed to the State shall not exceed the overall amount to be paid by the State as penalty and is determined through a decree issued by the Ministry of Economy and Finance no later than three months after notification of the enforceable judgement against the Italian Republic.

The ministerial decree is an enforceable order and shall be issued upon agreement on the terms of payment for damages with the interested bodies no later than four months after notification to the interested body of the enforceable judgement passed by the Court. The agreement aims to set the amount to be paid to the State and the terms and timing of that payment (also by instalments). If no agreement is reached with the territorial body the Prime Minister shall issue an executive order within the next four months, after consulting with the Unified Conference (*Conferenza Unificata*).

This provision, while certainly innovative, does raise a number of questions.

First, there are problems concerning the compatibility of the right of recourse with the possibility for the State to act in lieu of sub-State bodies as laid down in the revised Title V of 2001, Arts. 117, para. V, and 120, para. II.

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As regards the exercise of the State's 'substitutive power' (*potere sostitutivo*) under Art. 117, para. V Const., the implementing regulation (Art. 10 of Law 11/2005, now Art. 41 of Law 234/2012) provides for the Government to adopt measures, also of an urgent nature, to comply with EU legal obligations on matters of regional competence. The interested Regions shall be informed in advance and a deadline shall be set to allow them to remedy the situation autonomously. If necessary, the question may also be submitted for evaluation to the State-Regions Conference.

In case the substitutive power is exercised by the State under Art. 120, para. II, however, the implementing regulations (Art. 8 of Law 131/2003) allow the State to set a reasonable term for the territorial body to adopt the measures requested or necessary to remedy the violation of EU law. Once the deadline has expired, the Council of Ministers, after consulting with the interested body, may adopt the necessary measures, also of a normative nature, or appoint an *ad hoc* commissioner. In cases of absolute urgency, when the exercise of the substitutive power cannot be delayed, the Council of Ministers may adopt the measures required without delay. However, the State-Regions Conference or the State-Towns and local autonomies Conference (*Conferenza Stato-Città e autonomie locali*) shall be informed promptly and may request a review.

In both cases the substitutive procedure then first requires collaboration with the non-compliant body – which allows the latter to remedy the situation within a set timeframe, according to the distribution of competences and a necessary and greater coordination between different levels of government – and subsequently allows the State to act to prevent non-compliance and therefore to avoid being held responsible for it.

So the right of recourse and the State's substitutive power appear to be in contradiction: the State, by acting in place of Regions and local bodies, has the possibility to prevent non-compliance in the enforcement of EU law (Bientinesi 2008: 170; Bertolino 2009: 1302). Therefore in case of inquiries concerning the violation of EU law by sub-State bodies, the State would not be in a position to request *full* compensation from them: on the contrary, since the State has failed to exercise its substitutive power, it would bear responsibility for the violation according to both EU and domestic law (Bientinesi 2010: 194).

This objection was rejected by legal theorists, who argue that "the State cannot always make up for regional non-compliance, as shown for example with regard to regulations on

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public funding to business enterprises" (Porchia 2011: 423). Considering that it is not possible to foresee all the occurrences that may lead to violations of EU law by sub-State bodies, and in the light of the State's responsibility for failure to exercise its substitutive power, it would not be unreasonable to envisage a right of recourse for the latter.

Moreover, while this matter falls outside the scope of this paper, it would be advisable to pre-emptively consider the State's *obligation* to exercise its substitutive power in cases of regional non-compliance. Should this obligation be in force, both EU and domestic law would recognize that the responsibility for violations of EU law rests solely with the State. Consequently, the right of recourse would lose its legitimacy. It could be argued, in addition to the objections above, that the constitutional recognition of a regional competence in the implementation of EU law does not relieve the Regions of their responsibility, therefore a joint responsibility of State and Regions should be envisaged.

Other perplexities arise with regard to the fact that in the pre-litigation phase the State – who bears full liability as regards EU law – is allowed to learn about non-compliance and to adopt the measures that would prevent the start of infringement proceedings and the subsequent judgement (Bini 2010: 853). In the case of litigation with EU institutions, a number of instruments are available to the State to prevent the proceedings from reaching the judgement stage: failure to do so would therefore probably be attributable solely to the State.

In recent years the domestic legal order has introduced a number of provisions that provide for greater participation by and collaboration with non-compliant sub-State bodies also in the pre-litigation phase. These procedures serve to fill, at least in part, the existing gap of legitimacy. In this sense the right of recourse is available only as a measure of last resort.

Another aspect contributes to creating uncertainty on the use and effectiveness of the right of recourse as a deterrent. At a time of financial difficulty such as the one Italy is going through at the moment, how can the State receive payment for damages from Regions and other local bodies whose budgets are already shrinking? Therefore, the 'principle of reality' appears to take primacy over the principles of law, posing significant limitations to the implementation of domestic policies. Furthermore, it can be agreed that until a derivative financial system is in place, it would be difficult "for the State to use the right of recourse as a powerful deterrent tool" (Boncinelli 2008: 225).

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Lastly, it is true that the provisions regulating the right of recourse envisage an agreement between the State and the non-compliant body or, in lack thereof, an opinion of the Unified Conference. No matter how desirable this may appear, it is doubtful that an agreement could be reached: in abstract terms it is almost impossible to pre-set the criteria to distribute responsibilities. Given the weakness of such an agreement, the State would always be entitled to 'distribute' responsibilities and, more significantly, to set the amount of damages to be paid by the Region. The non-compliant body, however, may appeal to the competent courts to challenge any such decision.

5. The application of the right of recourse

The instrument available to the State to request compensation from sub-State bodies responsible for non-compliance with EU law for sanctions imposed by the Court of Justice has not attracted much attention among legal theorists and it has remained largely neglected, in spite of its innovative character.

In legal practice this instrument, that functions as a deterrent, has proven scarcely effective since Regions continue to remain largely non-compliant in the enforcement of EU law. Very few Regions have taken on a 'proactive' role in the enforcement of EU law, while most remain non-compliant particularly in the adoption of Regional Community Law (*legge comunitaria regionale*). It is only upon direct 'prodding' by the State that Regions appear to cooperate for an adequate 'transposition' of EU obligations into the domestic legal order.

It should be noted that the State itself has appeared quite cautious in the use of this instrument. In the rare instances in which the State has exercised its right of recourse, the matter concerned compensation from municipalities following a judgement by the European Court of Human Rights (ECtHR) for violations of the European Convention on Human Rights (ECHR) (Art. 43, para. X, Law 234/2012). To date, the State has never exercised the right of recourse for judgements passed by the Court of Justice for violations of EU obligations by sub-State bodies.

Nevertheless, considering the parallels between the two cases, it is possible to examine these cases to draw some preliminary conclusions.

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First, in all the instances that have occurred, the State has acted against a municipality – not a Region[XVII] – to request, jointly with the competent Region, the payment of a large sum related to the violation of the ECHR. More specifically, following the judgment by the European Court of Human Rights, the State had been ordered to pay a sum to a private citizen as just satisfaction for violation of Art. 1 of Additional Protocol 1 of the ECHR.

All the local institutions involved have appealed to the Regional Administrative Court (*Tribunale amministrativo regionale*) against this exercise of the right of recourse, claiming excessive power of the State based on "misunderstanding of the facts, wrong assumptions, faults in motivation and patent incongruity". The claimants maintained that before exercising its right of recourse the State should have investigated in detail the actual responsibilities of the individual municipalities involved in violating the rights of an individual as ruled by the ECtHR.

Interestingly, according to the complaint filed by the local institutions, the order of payment issued by the Presidency of the Council of Ministers diverged from the opinion filed by the Unified Conference without justifying that decision. On two occasions, after failing to reach an agreement with the interested local body, the State – under Art. 16*bis*, paras. VIII and IX, Law 11/2005 (now Art. 43, paras. VII and VIII, Law 234/2012) – had been required to request the opinion of the Unified Conference. The latter, in both cases, expressed a negative opinion[XVIII], asking the Government to set up a working group to determine which procedure, if any, should be followed to request compensation payments, possibly through an agreement to be recognised by the Conference itself, in order to determine the actual degree of responsibility of the various entities involved.

It is interesting to note that since the early applications of the right of recourse the Unified Conference has raised perplexities on the possibility to determine the actual responsibility of each body involved and suggested the establishment of a consultation committee with the State. Moreover, the opinion issued by the Conference expresses concern about the fact that the amount to be paid is neither proportional to the size nor the limited financial capacity of the local bodies involved, and this particularly at a time of economic crisis which Italy is going through at the moment.

On 20 April 2011, the State-Regions Conference[XIX] also expressed its doubts on the application of the right of recourse, through the approval of an act that contained an amendment to the then Art. 16*bis* of Law 11/2005. This Conference also recommended a

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political meeting with the Government to reach an agreement on the exercise of the right of recourse.

Both proposals were disregarded at the time and have not figured in the recent reform operated through Law 234/2012.

Significantly, all the instances in which the State has claimed the right of recourse have been judged as inadmissible for jurisdictional reasons by the Regional Administrative Courts involved. In the controversies about the exercise of the right of recourse by the Prime Minister, the Courts have ruled that the matter falls within the jurisdiction of ordinary courts.

Thus it appears to be too early to pass a final judgement on this instrument. It is certainly interesting that, so far, it has not been applied against a Region or a local body for violations of EU law to question their responsibility. It is true that, as noted, violations have decreased sharply over the past few years, but it is also evident that this is mostly due to other instruments that ensure a constant flow of information between the different levels of government and a greater participation of infra-State bodies in the prelitigation phase of infringement proceedings. However, there is room for doubts on the effectiveness of the right of recourse as a deterrent in the eyes of sub-State bodies, particularly – as facts have shown – with regard to its application, the way it is regulated, and the lack of preventive and correct concertation with the interested body.

6. Conclusions

Regardless of the greater regional autonomy recognised at EU level through reforms undertaken in recent years, today the Italian domestic legal order is characterised by persistent '*vicious*' practices that lead all too often to the launch of infringement proceedings against Italy by the EU Commission. Several instruments have been made available to the Regions to ensure their participation both in policy-making and the implementation of EU law, but the results remain to be seen.

This situation is partly due to at least two factors. First, the complexity of EU law, particularly in some sectors, that combines with the "physiological elasticity" (Anzon 2002: 232) of matters regulated under the revised Art. 117 of the Italian Constitution. Over the past decade, the Italian State and Regions have been called to discuss – at times quite

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heatedly – a new distribution of competences that has often led to violations of EU law as a consequence of jurisdictional doubts and uncertainties on the possibility to exercise certain competences in specific areas.

Secondly, another element that contributed to the 'vicious' circle that appears to have set in concerns the substitutive power of the State. This applies chiefly to the practical level: the exercise of the substitutive power by the State may ultimately have to 'cede' or give way to subsequent measures adopted by the Regions on matters falling within their competence, according to the principle of '*cedevolezza*', thus losing its effectiveness. However, this fact is seldom explicitly mentioned by the State. Consequently, the overall system is characterised by uncertainties that have led Regions not to comply with EU obligations. Several Regions have regulated EU regional law (Bertolino 2009: 1249 ss.) in their regional legal order, but the State's substitutive power has invalidated provisions that have become an ordinary rather than an extraordinary instrument. Most Regions have abstained from approving EU Regional Law annually, which would ensure a timely and efficient implementation of EU law. The Regions continue to appear rather "cold" (Bientinesi 2008: 139 ss.) towards a more active participation in EU law making and implementation.

This analysis has shown that in recent years the EU Commission and the Court of Justice, on the European front, and the State, on the domestic front, have sharpened the instruments available to repress violations of EU obligations by Regions and local bodies.

Many perplexities have been raised on the actual effectiveness of such instruments as deterrents, *in primis* the right of recourse. Therefore, the overall functioning of the system would require a determined and consistent effort to transform this '*vicious*' circle into a '*virtuous*' one. As noted, several steps forward have been taken in this sense, particularly in the form of provisions that require the State, Regions and local bodies to ensure a constant flow of information. Both law making and implementation are "connected in fact to the acquisition of information: the driver of efficiency" (Pastore 2008: 268) depends therefore largely on the quantity and the quality of 'incoming' and 'outgoing' information.

Much remains to be done in this sense. In particular, in light of the territorial decentralisation that has taken place over the past twenty years – in spite of the global economic crisis that is pushing towards re-centralisation – it should be recognized that the State "is no longer the unrivalled king of the hill" (Peters and Pierre 2001: 132), that is has

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lost the 'baton of command'. However the State can, and *must*, leverage the 'baton' of dialogue and negotiation. In this sense, special emphasis should be placed upon shared normative provisions and loyal collaboration between the State and Regions not only on the organisational and procedural, but also on political and cultural levels.

It is the only way for Italy – and the territorial bodies that make up the domestic legal system – to achieve 'full maturity' in a European perspective and, particularly, to ensure greater efficiency in Italy's participation in the European integration process and the use of the instruments available for its application.

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[I] See Court of Justice, case C-224/97, 29 April 1999, *Erich Ciola v. Land Vorarlberg*, in *ECR*, I-2517; case C-438/99, 4 October 2001, *Jiménez Melgar*, in *ECR*, I-6915; case C-198/01, 9 September 2003, *Consorzio Ind. Fiammiferi v. AGCM*, in *ECR*, I-8055.

[II] Court of Justice, case C-33/90, 13 December 1991, *Commission v. Italy*, in *ECR*, I-5987.

[III] See Court of Justice, case C-211/91, *Commission v. Belgium*, in *ECR*, I-6757; case C-503/06, 15 May 2008, *Commission v. Italy*, in *ECR*, I-74; case C-516/07, 7 May 2009, *Commission v. Spain*, in *ECR*, I-76; case C-573/08, 15 July 2010, *Commission v. Italy*, in *ECR*, I-95.

[IV] Currently, sanctions against Italy imposed by the European Commission amount to a minimum lump sum of 8,854,000 euros and between 10,880 and 652,800 euros per day in penalty payments. The lump sum is to be paid also when the situation has been remedied while the case was heard before the Court of Justice, while the penalty is applied when violations persist after a judgement is passed; it is calculated on a daily basis starting from the day of the Court's judgement.

[V] See Communications from the European Commission SEC (2005) 1658; SEC (2010) 923/3; SEC (2010) 1371. The first one in particular was adopted following the judgement passed by the Court of Justice on 12 July 2005 (case C-304/02, *Commission v. France*, in *ECR*., I-6263), where for the first time the possibility was envisaged for the cumulative application of a lump sum and a penalty based on delayed compliance. The Court specified that while Art. 260 TFEU provides for lump sums and penalties to be regarded as alternatives, both may be applied by the Court of Justice in case of persistent and ongoing non-compliance.

[VI] See Presidenza del Consiglio dei ministri, Dipartimento per le politiche europee, *La partecipazione dell'Italia all'Unione europea, Relazione programmatica 2012*, 109; European Commission, *Annual report on monitoring the application of EU Law*, 30 November 2012, COM (2012) 714 final, 10.

[VII] Agreement between the Government, the Regions and the Autonomous Provinces, the Provinces, the Municipalities and the Mountain Communities "on the terms of application of obligations arising out of Italy's membership of the European Union and on information guarantees from the Government" dated 24 January 2008, in *Repertorio atti* no. 3/CU of 24.01.2008.

[VIII] This law, which entered into force on 28 January 2013, repealed Art. 15*bis* of the Buttiglione Law no. 11/2005, that required reports to be provided only every six months and did not regulate in any way the terms for the provision of information to Regions and Autonomous Provinces.

[IX] The recent Law 234/2012 aims to reorganise the transposition of EU law, providing in particular for the implementation of EU law into two separate measures (Art. 37): the EU delegation law (*legge di delegazione europea*) concerning delegation provisions required to enforce EU directives; and the EU law (*legge europea*) that, in more general terms, contains provisions to ensure the adherence of domestic law to EU law.

[X] It should be noted that as early as July 2004 the EU Commission issued a Recommendation to provide Member States with "good practices" to facilitate the correct and timely enforcement of EU law into domestic law, particularly directives. These included the recommendation for *close cooperation* not only between the Government and the national Parliaments, but also with "*regional and devolved Parliaments* responsible for transposition" of EU law, particularly through a constant and mutual exchange of information (Recommendation 2005/309/CE of 12 July 2004, in *JO L* of 16.4.2005, on "The transposition into national law of Directives affecting the internal market").

[XI] COM (2007) 502 final, on "A Europe of results – Applying Community Law".

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[XII] So far only two evaluation reports have been presented on EU Pilot from the European Commission: the first one on 3.3.2010 (COM (2010) 70 final) and the second one on 21.12.2011 (COM (2011) 930 final).
[XIII] EU Pilot cases have different origins: 49% of these files originated from complaints, 7% were enquiries by citizens or businesses, and a further 44% were files created by the Commission on its own initiative.
[XIV] Law no. 296 of 27 December 2006, Art. 1, paras. 1213-1223.
[XV] Law no. 34 of 25 February 2008, Art. 6, para. I., lit. *e*), and par. II
[XVI] Two other instances are envisaged for the State's right of recourse. The first concerns financial charges "imposed on Italy under the European Agricultural Guarantee Fund (EAGF), the European Agricultural Fund for Rural Development (EAFRD) and other Funds of a structural nature". The second concerns the right of recourse against subjects who are responsible for violations of the European Convention on Human Rights and of the additional Protocols, for "charges paid to enforce judgements passed by the European Court of Human Rights against the State as a consequence of the said violations".
[XVII] See TAR Calabria, Reggio Calabria, judgement 24 May 2012, no. 378; TAR Puglia, Bari, sect. II, judgement 16 July 2012, no. 1461; TAR Veneto, Venice, sect. II, judgement 12 December 2012, no. 1546.
[XVIII] Opinions of the Unified Conference of 16 December 2010 and 29 July 2010.
[XIX] www.regioni.it/upload/Diritto-rivalsa-200411.pdf.

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