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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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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

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

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

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.

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.

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.

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

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

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,

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

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

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

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

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.

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

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

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

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

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

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

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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