THE PROTECTION OF SUBSIDIARITY IN THE EU: THE ROLE OF NATIONAL PARLIAMENTS AND THE COMMITTEE OF THE REGIONS

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RESUMEN: La subsidiariedad es un concepto central en el derecho de la Unión Europea: se considera esencial desde 1986 y se rige por disposiciones específicas de los Tratados de la UE. Para proteger la subsidiariedad, varios organismos pueden actuar *ex ante*, durante el *iter* legislativo, y *ex post*, interponiendo una acción ante el Tribunal de Justicia de la Unión Europea alegando la vulneración del principio de subsidiariedad. Este documento examina el papel que los parlamentos nacionales y el Comité de las Regiones pueden desempeñar en la protección y promoción de la subsidiariedad y analiza los instrumentos disponibles y las iniciativas propuestas para la implementación de mecanismos más incisivos.

ABSTRACT: Subsidiarity is a core concept in European Union law: it was considered essential since 1986 and is governed by specific provisions in the EU Treaties. In order to protect subsidiarity, several organisms can act *ex ante*, during the legislative *iter*, and *ex post*, by filing an action before the Court of Justice of the European Union claiming the breach of the subsidiarity principle. This paper examines the role that national parliaments and the Committee of the Regions can play in the protection and promotion of subsidiarity and analyses the available instruments and the proposed initiatives for the implementation of more incisive mechanisms.

PALABRAS CLAVE: Competencias de la UE, competencias de los Estados miembros, Protocolo n.º 2 sobre la aplicación de los principios de subsidiariedad y proporcionalidad, Sistema de alerta temprana, Cámara de los Lores, Bundesverfassungsgericht.

KEYWORDS: EU competences, Member States' competences, Protocol 2 on the application of the principles of subsidiarity and proportionality, Early Warning System, House of Lords, Bundesverfassungsgericht.

Introduction

Subsidiarity is a political theory originated in the 17th century and it found application in the norms governing the relationship between the European Union and Member States. This paper aims to illustrate the role that national parliaments and EU regions can play in safeguarding the principle of subsidiarity. The study is composed by six sections. Section one retraces the history of subsidiarity as a political theory; Section two examines how the protection of subsidiarity was gradually developed in the EU; Section three focuses on the allocation of competences between the EU and Member States, Section four

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analyses the mechanisms in the hands of National Parliaments to supervise subsidiarity; Section five discusses the role of the Committee of the Regions in monitoring subsidiarity and finally Section six draws concluding remarks.

1. History of subsidiarity as a political theory

The etymology of the term "subsidiarity" comes from the Latin terms "sub" and "sido", which meant to provide a service as close as possible to the place where there is a need for that service. Nowadays, the multifaceted concept of subsidiarity is widely used: in the political, legal, administrative, and philosophical fields[1].

From a general point of view, the idea of subsidiarity originated from the concept of decentralization. It suggests that the closest level of governance is the one that should emanate the measures, in order to promote efficiency, consistency, transparency and accountability, and with the aim to include civil society in a participative decision-making. Subsidiarity lies at the heart of the division of competences between central and local levels of public authority[2]. The reason is to ensure that a certain degree of independence is afforded to a lower public authority *vis-à-vis* a higher one[3].

Even though the concept of subsidiarity has been widely discussed in the last years, its history dates centuries back. Already Johannes Althusius (1563ca.–1638) affirmed that intermediary social bodies such as families, cities, and provinces played an important role in defining the relationship between the person and the state[4].

Even John Locke (1632–1704) discussed about the principle of subsidiarity as founding the liberal concept of the modern state. Locke wrote that political authority finds its origin in voluntary and partial entrustment of personal rights and powers by single individuals to the state. The delegation of personal rights and powers is only limited to the objectives of the state, decided by its citizens at the moment of its founding. In this way, citizens will not receive any interference by the state in areas not listed as objectives[5].

Alexis de Tocqueville (1805–1859) stressed that, through associative experiences, the United States were able to succeed in dealing with ever-changing social needs, ensuring both the development of the spiritual skills and free initiative. De Tocqueville wrote that the tasks of the public authority will

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[1] Barbulescu, I. G. 2015. *Noua Europa: Identitate ¸si Model European* [The New Europe: Identity and European Model], Polirom, vol. 1, 242.

[2] Petrić, D. 2017. 'The Principle Of Subsidiarity In The European Union: 'Gobbledygook' Entrapped Between Justiciability And Political Scrutiny? The Way Forward', *Zagrebačka pravna revija,* Vol. 6 No. 3, 287-318**.**

[3] Raffaelli, R. 2016. 'The Principle of Subsidiarity', European Parliament - Fact Sheets on the EU, 2016, https://www.europarl.europa.eu/RegData/etudes/fiches_techniques/2013/010202/ 04A_ FT%282013%29010202_EN.pdf accessed 26.10.2020

[4] Althusius, J. 1603/1932. *Politica metodice digesta, n 3*, reprinted from the third edition of 1614, augmented by the preface to the first edition of 1603 and by 21 hitherto unpublished letters of the author, Carl J. Friedrich ed., Cambridge Harvard University Press.

[5] Locke, J. 1956. *The Second Treatise of Government,* Blackwell, 44-46.

extend more and more, replacing associations. Individuals will hence demand the government's assistance, granting it increasing power[6].

In the same years, Luigi Taparelli d'Azeglio S.J. published his Saggio Teoretico di Diritto Naturale [Theoretical Essay on Natural Law/Right] (1840-43). Taparelli d'Azeglio claimed that the state should not replace the associations under it, and that it should instead protect their existence and thriving[7], organized in a system of mutually subordinated associations, defined as "*ipotattico*".

The term "ipotattico" comes from the Greek hypo-taxis [under-placed] and appears to be a loyal translation from the Latin word "sub-sidium", indicating a reserve line of troops in the order of battle or, more broadly, the auxiliary forces. It was therefore indicated as support, assistance, protection.

Even Pope Pius XI, in his 1931 encyclical *Quadragesimo anno*, described the principle of hypo-taxis as a central concept in Catholic teaching: "it is an injustice and at the same time a grave evil and a disturbance of right order, to transfer to the larger and higher collectivity functions which can be performed and provided for by lesser and subordinate bodies. Inasmuch as every social activity should, by its very nature, prove a help to members of the body social, it should never destroy or absorb them"[8].

On the same line, we can find the *Libertatis Conscientia*, issued by the Church's Congregation for the Doctrine of Faith in 1986, which highlights that "[subsidiarity] refers to the responsibility of people and intermediary communities, and implies a rejection of collectivism"[9], and John Paul II's encyclical *Centesimus annus* (1991), which stresses that subsidiarity avoids the risks deriving from a centralized management of the state. A centralized management, in fact, could probably not only incorrectly interpret the territory's needs, but also lead "to an inordinate increase of public agencies, which are dominated more by bureaucratic ways of thinking than by concern for serving their clients, and which are accompanied by an enormous increase in spending"[10].

For these reasons, religious thinkers stress that the decentralization of power should only occur delegating responsibility to selected entities, including existing government bodies such as regions, provinces, and cities, and can in some cases, include also families, Churches, NGOs, and workplaces[11]. It emerges that the concept of subsidiarity has grabbed the attention of several scholars and thinkers in the philosophical and religious fields.

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[6] De Tocqueville, A. 1954. *Democracy in America,* Vintage Books), 117.
[7] Taparelli, L. 1851. *Saggio Teoretico di Dritto Naturale Appoggiato sul Fatto*, 2d ed. Mansi, 694-697, 713-714.
[8] Pope Pius XI. 1931. *Quadragesimo Anno*, Encyclical Letter on Reconstruction of the Social Order, May 15, 1931, para. 79.
[9] Verstraeten, J. 1998. 'Solidarity and Subsidiarity in Principles of Catholic Social Teaching', 14 Marquette Studies in Theology, 133–147, 133.
[10] Pope John Paul II. 1991. *Centesimus annus,* Encyclical Letter, para. 48.
[11] Blank, Y. 2010. 'Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance', 37 Fordham Urb. L.J. 509, https://ir.lawnet.fordham.edu/ulj/vol37/iss2/1 accessed 26.10.2020.

Other experts have examined the issue from an economic standpoint[12]. From this perspective, subsidiarity draws a point of convergence between the need to delegate public functions to the closest unit and the need to manage centrally those functions requiring economic integration[13]. The entities that can perform public tasks can be unlimited. On the other side, subsidiarity does not answer the question "who should decide what?". Moreover, since interests of a civil society group could clash with those of another group, it should be considered that if the decision-making entities are numerous, it may be more difficult to reach a decision[14].

2. Subsidiarity in EU law

The Single European Act (1986) marked the origin of subsidiarity in the EU, although with reference to environmental protection only, and without any explicit reference to the term 'subsidiarity'[15]. As EU policies expanded, the principle of subsidiarity found a more solid ground in EU law[16]. The subsequent treaty amendments introduced the "qualified majority" voting in the Council, and a strengthened role for the European Parliament in the legislative procedure[17]. Political safeguard clauses were introduced to compensate for the abrogation of the Member States' right to veto.

In 1993, the Centre for Economic Policy Research (a European-based research confederation) published its Annual Report *Making Sense of Subsidiarity: How Much Centralization for Europe?*, finding that "Subsidiarity presupposes that decentralized allocations of power are to be preferred unless there are good reasons for centralization"[18].

In 1997, Protocol 30 to the *Amsterdam Treaty* on the application of the principles of subsidiarity and proportionality ("Protocol 30") set out procedural norms requiring institutions to grant due attention to subsidiarity and proportionality in the proposal, adoption, or amendment phase of any legislative act. The European Commission, when proposing a piece of legislation, shall launch a public consultation, explain why the proposal is relevant and whether it meets the criterion of subsidiarity, keep the financial and administrative burden of the new piece of legislation at minimum and provide the other institutions with a yearly report on the implementation (Art. 9 Protocol 30). Both the European Parliament and the Council of Ministers assess whether the proposal from the

[12] Cooter, R. D. 2000. *The Strategic Constitution*, Princeton University Press.
[13] Tiebout, C. M. 1956. 'A Pure Theory of Local Expenditures', 64 J. Pol. Econ. 416.
[14] Blank, supra note 11.
[15] Constantin, S. 2008. 'Rethinking Subsidiarity and the Balance of Powers in the EU in Light of the Lisbon Treaty and Beyond', *Croatian Yearbook of European Law and Policy*, Vol. 4, 151, 154.
[16] de Burca, G. 2000. 'Reappraising Subsidiarity's Significance after Amsterdam', Harvard Jean Monnet Working Paper, No. 7/99, 20, https://jeanmonnetprogram.org/archive/papers/99/990701.html accessed 26.10.2020.
[17] Lenaerts, K. 1993. 'The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism', Fordham Journal of International Law, Vol. 17, No. 4, 851.
[18] Begg, D. 1993. 'Making sense of subsidiarity: How Much Centralization for Europe?', Centre for Economic Policy Research, 2.

European Commission and its suggested amendments are compatible with Article 3b (Art. 11 Protocol 30)[19].

It emerges that, although Protocol 30 included guidelines for national parliaments to follow in their assessment of the respect of the principle of subsidiarity, it did not grant national parliaments with any scrutinizing rights. Pursuant to Protocol 30, the following norms had to be complied with:

- 'the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;
- action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.'

Moreover, the European Commission had the duty to consult widely before proposing new legislation and publish the results of the public consultation. Pursuant to Article 9, the European Commission had to: 'take duly into account the need for any burden, whether financial or administrative, falling upon the Community, national governments, local authorities, economic operators and citizens, to be minimised and proportionate to the objective to be achieved'.

It emerges that Protocol 30 established a clear legal basis for subsidiarity. Research has stressed that an equally clear legal basis cannot be found in the Lisbon Treaty.

However, since the Maastricht Treaty, not only did amendments add new competences to the EU: they also clearly defined their limits. After the Laeken Declaration had identified the competence issue as one of the concerns affecting the legitimacy of the Union, and key to bringing the Union closer to its citizens[20] the Treaty establishing a Constitution for Europe included a section on the issue of competence[21]. In the Lisbon Treaties, an accent is placed on the limits that define the principle of conferral: 'The limits of Union competences are governed by the principle of conferral' (Art. 5(1) TEU).

Art. 4(1) TEU provides that competences not conferred upon the Union in the Treaties remain with the Member States: this wording is very similar to Art. 5(2) TEU and Declaration No. 8 in relation to the delimitation of competences. Art. 51(2) Charter of Fundamental Rights as well provides that: '[t]he Charter does

[19] Cooper, I. 2006. 'The watchdogs of subsidiarity: national parliaments and the logic of arguing in the EU', Journal of Common Market Studies 44(2), 281-304, 283, 285-286.

[20] Laeken Declaration on the future of the European Union (15 December 2001), https://www.cvce.eu/content/publication/2002/9/26/a76801d5-4bf0-4483-9000-e6df94b07a55/publishable_en.pdf accessed 09.09.2020.

[21] Treaty establishing a Constitution for Europe, 2004/C 310/01, http://publications.europa.eu/resource/cellar/7ae3fd7e-8820-413e-8350b85f9daaab0c.0005.02/DOC 1. Accessed 09.09.2020.

not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'. This is repeated in Art. 6(2) TEU, and in Declaration No. 1 concerning the Charter of Fundamental Rights of the European Union.

Furthermore, the Lisbon Treaty draws a distinction between: (i) areas falling under the exclusive competence of the EU, for instance common commercial policy and customs union policy; (ii) areas whose competence is shared between the Member States of the EU and the EU, for instance environmental protection and social policy; (iii) areas remaining under the exclusive competence of Member States, for instance healthcare policy and defence.

It is noteworthy that, in application of the principle of subsidiarity, in areas that do not fall under the listed exclusive competence, the EU shall "act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level" (Article 5(3) TEU). It can be inferred that it is only in the areas falling under shared competence that the question on who can better achieve an objective shall be asked.

The Protocol on subsidiarity and proportionality[22] attached to the Treaty of Lisbon included guidelines on the evaluation of the compliance with the principle of subsidiarity in EU action. It ordered the EU institutions to ensure that the requirement of subsidiarity is fulfilled at every step of the legislative process[23].

The European Commission shall include justifications and "substantiate reasons for concluding that a determined objective can better be achieved at the Union level"[24].

This includes both the choice of legislative instrument, the structure and the content of the proposal[25]. Similarly, the Rules of Procedure of the European Parliament provide that "during the examination of a proposal for a legislative act, Parliament shall pay particular attention to respect for the principle of subsidiarity"[26].

The relationship between institutions is regulated by several interinstitutional agreements. One of these is the 2016 agreement on "Better Law-making", which orders to the Commission to clarify "in its explanatory memoranda how the proposed measures are justified in the light of the principle of subsidiarity" as well

[22] Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union by the Treaty of Lisbon of 13 December 2007 (2012) OJ C 326, 206-209.

[23] Wyatt, D. 2006. 'Could a "Yellow Card" for National Parliaments Strengthen Judicial as well as Political Policing of Subsidiarity?', Croatian Yearbook of European Law and Policy, Vol. 2, 1-17, 9-10.

[24] Louis, J. V. 2008. 'National Parliaments and the Principle of Subsidiarity - Legal Options and Practical Limits', Europea/Constitutional Law Review, Vol. 4, No. 3, 436.

[25] Raffaelli, supra note 3.

[26] Ibidem.

as to “take this into account in its impact assessments”.[27] In these impact assessments, the Commission shall give “justification for EU action in terms of the need for harmonization, and the [explicit] subsidiarity calculus”,[28] which “should in turn facilitate judicial review”[29].

3. The allocation of competences between the EU and Member States

Currently, subsidiarity is firstly addressed in Article 5(3) Treaty on the European Union (TEU), which establishes that: “in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”[30]. By listing the exclusive competences, the notion of subsidiarity favours decentralizazion[31].

Article 5(2) TUE delimits the scope of EU action: “Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States”[32].

The importance of the subsidiarity principle is not only shown by the allocation of powers between different levels of government, which aims at making decisions as close as possible to the citizens[33], but also by other aspects of subsidiarity, such as “executive subsidiarity” and “utilitarian subsidiarity”[34].

Nevertheless, some experts argue that in certain policy areas centralization has instead increased, since the codification of the principle of subsidiarity in 1992[35]. Research has not justified this trend with the goals of each policy area, but rather it identified it as a response to crises[36]. In the view of these

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[27] Interinstitutional Agreement Between The European Parliament, The Council Of The European Union And The European Commission On Better Law-Making, 13 April 2016, L 123/1.
[28] Craig, P. 2012. ‘Subsidiarity: A Political and Legal Analysis’, Journal of Common Market Studies, Vol. 50, No 1, 72-87, 78.
[29] Ibidem.
[30] Consolidated Version Of The Treaty On European Union, C326/13, 2012.
[31] Cygan, A. 2011. ‘The Parliamentarisation of EU Decision-making? The Impact of the Treaty of Lisbon on National Parliaments’, European Law Review, Vol. 36, No. 4, 483.
[32] Consolidated Version Of The Treaty On European Union, C326/13, 2012.
[33] Arribas, G. V. & Bourdin, D. 2012. ‘What Does the Lisbon Treaty Change Regarding Subsidiarity within the EU Institutional Framework?’, European Institute of Public Administration Bulletin, Vol. 2, 13, 15, http://aei.pitt.edu/43477/1/20121213145031_GVA_Eipascope2012_ 2.pdf accessed 23.11.2020.
[34] De Burca, supra note 16.
[35] Alesina, A., Angeloni I. and Schuknecht L. 2005. ‘What does the European Union do?’, 123 Public Choice 123, 275-319.
[36] Van Zeben, J. 2013. ‘Research Agenda For a Polycentric European Union’, The Vincent and Elinor Ostrom 2013. Workshop in Political Theory and Policy Analysis Working Paper Series No. W13-13, 2013, 7.

commentators the application of the proportionality principle is not as straightforward, notwithstanding the language of the TUE[37].

Some scholars claim that the principle of subsidiarity does not only affect the distribution of competences[38], but increasingly expands EU competences to the detriment of national, regional, sub-regional, and local competences[39], especially in newly emerged policy areas such as environmental protection, energy and climate change.

3.1. Categories of Competences

Already in 2002, the Praesidium of the Convention on the Future of the Union (the 'Convention'), in a note to the Member States of the Convention, had presented three types of EU competence: exclusive, shared, and complementary, and listed them together with the corresponding policy areas[40].

This division of competences does not concern administrative competences and focuses on the distribution of legislative and treaty-making competences. In the Treaty of Lisbon, the expression 'shared competences' is used instead of 'concurrent competences'[41]. The expression 'competence to carry out actions to support, coordinate or supplement the actions of the Member States' in Art. 6 TFEU replaced the term 'complementary competence', and Art. 2(3) and (4) TFEU now comprise competences defined *sui generis*: economic and employment policies and the common foreign and security policy.

3.1.1. Exclusive EU competences

Exclusive competences of the EU are listed in Article 3(1) TFEU:

Article 3 1. The Union shall have exclusive competence in the following areas:

(a) customs union;

(b) the establishing of the competition rules necessary for the functioning of the internal market;

(c) monetary policy for the Member States whose currency is the euro;

(d) the conservation of marine biological resources under the common fisheries policy;

(e) common commercial policy.[42]

Even though the amplitude of the exclusive competences of the EU determine policy-making at the EU level in these areas, some researchers have highlighted that important lawmaking and enforcement powers remain at the national level[43].

3.1.2. Shared competences

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[37] Petrić, supra note 2, 293.

[38] Toth, A. G. 1994. 'Is Subsidiarity Justiciable?' European Law Review, Vol. 19, No. 3, 272.

[39] Petrić, supra note 2, 294.

[40] Claes M. and de Witte B. 2016. 'Competences: codification and contestation', in Lazowski A. and Blockmans S. R*esearch Handbook on EU Institutional Law*, Elgar, 46-87, 50.

[41] Ibidem, 51.

[42] Consolidated Version Of The Treaty On The Functioning Of The European Union, C 326/47, 2012.

[43] Monti, G. 2014. 'Legislative and Executive Competences in Competition Law', in Azoulai, L. (ed), *The Question of Competence in the European Union*, Oxford University Press, 101.

The largest category of EU policies is comprised in the area of shared competences. They include environmental protection, consumer and social policy. Pursuant to Article 2(2) TFEU, the national legislator can only regulate that subject-matter in so far as the EU has not legislated in that area.[44] In practice, when a domain falling under shared competence is regulated by the EU in an exhaustive way, Article 2(2) TFEU could be interpreted as if a shared competence became exclusive in practice[45].

3.1.3. "Supporting" competences

Article 6 TFEU lists "supporting competences"[46] and includes the following areas: human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection, and administrative cooperation.

The areas of "supporting competences"[47], as defined by research, listed in Art. 6, include the following areas: human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection, and administrative cooperation.

The negative competence clause is laid down in general terms for all areas of supporting competence in Art. 2 (5) TFEU: 'Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations'[48].

3.1.4. Member States exclusive competences

The EU Treaties do not include a list of competences reserved to the Member States.

3.1.5. Uncategorised Competences

Beyond the discussed competences, there are others that do not fall under the categories listed in the Treaties: the complexity of some domains leads certain aspects of these policies to fall under a shared competence,[49] and other aspects to fall under a supporting competence.[50]

3.1.6. 'Forgotten' Competences

There are other competences that were not been included in any category. Art. 14 TFEU establishes EU competence for services of general economic interest. Article 19 TFEU creates EU competence on combating discrimination. Articles

[44] Consolidated Version Of The Treaty On The Functioning Of The European Union, C 326/47, 2012.
[45] Claes and de Witte, supra note 40, 53
[46] Claes and de Witte, supra note 40, 54
[47] Claes and de Witte, supra note 40, 54
[48] Consolidated Version Of The Treaty On The Functioning Of The European Union, C 326/47, 2012.
[49] For instance, concerning social policy, Art. 4(2) TEU establishes that: "Shared competence between the Union and the Member States applies in the following principal areas: (…) (b) social policy, for the aspects defined in this Treaty", Consolidated Version Of The Treaty On The Functioning Of The European Union, C 326/47, 2012.
[50] For instance, concerning social policy, Art. 5(3) TFEU provides that: "The Union may take initiatives to ensure coordination of Member States' social policies", Consolidated Version Of The Treaty On The Functioning Of The European Union, C 326/47, 2012.

21, 24, and 25 TFEU include EU competences aimed to develop citizenship rights. Article 352 TFEU, as part of the 'general and final provisions', represents the most debated and controversial competence: the so-called 'flexibility clause'.

3.1.7. The 'Flexibility Clause'

Art. 352(1) provides that: "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament".

As provided by Article 352 TFEU, the EU has residual competence to complete the voids in the system of competences: the Flexibility Clause has been used as legal basis for around 700 pieces of legislation until 2000, for external sanctions and for the establishment of certain EU agencies, such as the Fundamental Rights Agency in 2007 in Vienna[51].

The 1993 Decision of the German Federal Constitutional Court, *In Re* Maastricht Treaty, considered the Flexibility Clause as a 'competence extension clause' (*Kompetenzerweiterungsvorschrift).* In order to avoid that Art. 352 TFEU could be used to turn a competence extension in a shared competence, the Treaty clarified that Art. 352 TFEU cannot be used as a legal basis for harmonisation provisions in areas where other Treaty provisions exclude harmonization[52].

3.1.8. The Internal Market Competence

The EU competence on internal market is defined by the intrinsic purpose of the EU to improve the functioning of the internal market, as opposed to being identified by a sector of activity or a policy field. Article 114 TFEU is often perceived as a source of 'competence creep'[53], as it refers to non-economic interests that can be protected through internal market legislation, such as environmental concerns and public health and safety. Beyond these, other public policy concerns can be pursued through internal market legislation. Indeed, a wide variety of seemingly disparate legislative measures have been enacted, in the course of time, on the foundation of the EU's internal market legal basis[54].

3.2. The EU Treaties provisions on competences

[51] Regulation 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ 2007 L 53/1.
[52] Claes and de Witte, supra note 40, 62.
[53] Pollack, M.A. 1994. 'Creeping Competence: The Expanding Agenda of the European Community', 14 JEPP, 95.
[54] Claes and de Witte, supra note 40, 64.

Some scholars have highlighted that under the legal framework currently in force, and because of the passage from unanimity to qualified majority vote in the Council and from special to ordinary legislative procedure, the subsidiarity principle does not attribute importance to the work of national parliaments, which hence remains marginal[55].

Some commentators claim that the EU competences touch upon sensitive areas of national policy, such as criminal law, social security, and family law. The same experts argue that, beyond this, the application by the Court of Justice of the EU doctrines such as implied powers and the effectiveness of EU law contribute to the tendency towards the expansion of EU competences, together with a broad interpretation of Article 114 TFEU on the internal market and the flexibility clause of Article 352 TFEU[56].

Some scholars, politicians, national courts and civil society raised concerns about whether the Court of Justice of the EU was monitoring the limits of EU competences[57]. In further policy areas, more competences must be assigned to the EU, such as external borders, digitalization, and defence. On the other side, the application of the principle of subsidiarity entails that the EU will not legislate in areas where there is no added value for EU action, and that, *vice-versa*, the EU will issue norms in fields where only EU-wide collaboration will be able to address common battles[58]. For these reasons, Member States have researched and applied methods to limit EU competences.

3.3. Limits on competences

A first set of initiatives comes from the Member States acting jointly as Masters of the Treaties. In truth, there is an 'overabundance of provisions limiting the Union's competences in the treaties'[59]. The same principle of conferral is worded based on its limits. In fact, Art. 5(1) TEU provides that: 'The limits of Union competences are governed by the principle of conferral' (Art. 5(1) TEU).

Article 4(1) TEU provides that the competences not conferred upon the Union in the Treaties remain with the Member States. This is reiterated in Article 5(1) TEU and in first paragraph of the Declaration in relation to the delimitation of competences (No. 18). Even the Charter of Fundamental Rights, in Article 51(2), states that '[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties', and this is repeated in Art. 6(2) TEU as well as in paragraph 2 of the Declaration concerning the Charter of Fundamental Rights of the European Union (No. 1).

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[55] Cygan, A. 2016. 'National parliaments as guardians of the principle of subsidiarity' in Lazowski A. and Blockmans S. R*esearch Handbook on EU Institutional Law*, Elgar, 114-138, 120.

[56] Claes and de Witte, supra note 40, 74

[57] Huber speaks of a 'poor performance of the principle of conferral': Huber, P.M. 2015. 'The Federal Constitutional Court and European Integration', 21 EPL, 83, at 106

[58] Lopatka, R. 2019. 'Subsidiarity: Bridging the gap between the ideal and reality', European View, Vol. 18(1) 26–36.

[59] Azoulai, L. 2011. 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?', 4 EJLS (2011) 192, at 196.

3.4. Essential state functions and retained competences in EU law

It is important to recall that Art. 4(2) TEU provides that Member States shall respect the "national identities [of the Member States], inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State"[60].

Moreover, certain Treaty provisions aim to define specific Member State competences and delimit EU competences in especially sensitive areas, including the maintenance of law and order and the safeguarding of internal security, which are reserved to the Member States by Art. 72 TFEU; the volumes of admission of third-country nationals, as provided by Art. 79(5) TFEU; energy policy, covered by Art. 194(2) TFEU; the system of property ownership, governed by Art. 345 TFEU; the competence to grant nationality, regulated by Art. 20(1) TFEU; pay, the right of association, the right to strike and the right to impose lock-outs, whose competence belongs to the Member States pursuant to Art. 153(5) TFEU.

However, several judgments of the Court of Justice of the EU, such as *Laval* and *Viking Line*, have found that no 'nucleus of sovereignty that the Member States can invoke' exists[61]. Also when powers to legislate in certain areas have remained with the Member States, these can only exercise these powers in a manner consistent with EU law[62].

Some scholars conclude that EU law suffuses all policy fields, including areas assigned to the competence of Member States by Art. 4(2) TEU. It derives that, in practice, the impact of EU law goes beyond the powers assigned to the EU, and that individual rights attributed by EU law can be invoked also those areas[63].

3.5. The Repatriation of Competences to the Member States

Lately, scholarly discussions focused on a potential return of powers from the EU to Member States. Several options have been assessed: (i) limiting EU legislative action through a stricter application of the principle of subsidiarity[64], (ii) policy reform, (iii) abstaining from exercising EU competences[65], (iv) amendment of the EU Treaties, that, pursuant to Article 48(2) TEU, can be used with the aim to "reduce the competences conferred on the Union in the Treaties", escalating to (v) withdrawal from the EU.

4. The National parliaments' mechanisms to protect subsidiarity

[60] Consolidated Version Of The Treaty On European Union, C326/13, 2012.
[61] Lenaerts, K. 1990. 'Constitutionalism and the Many Faces of Federalism', 38 AJCL, 205, at 220.
[62] Claes and de Witte, supra note 40, 77.
[63] Claes and de Witte, supra note 40, 78.
[64] Claes and de Witte, supra note 40, 83.
[65] Zbíral, R. 2015. 'Restoring Tasks from the European Union to Member States: A Bumpy Road to an Unclear Destination?', 52(1) CMLRev, 51-84, 51.

Certain competences remain at the national level: they are decentralized vis-à-vis Brussels[66]. After the entry into force of the Treaty of Lisbon, national parliaments hold dual tools to guard subsidiarity: they can exercise both an *ex-ante* control thanks to the Early Warning System ("EWS"), and an *ex-post* control thanks to the possibility to start infringements proceedings before the CJEU through the government. The attribution of a twofold control mechanism to national parliaments is an important step, all the more so that they suffered from the loss of legislative power following the EU integration[67].

The national parliaments in the EU Member States can exercise the EWS collectively.[68] In the ordinary legislative procedure, after receiving the draft legislative proposal, national parliaments have eight weeks to object by filing a reasoned opinion, in which they need to specify the reasons why they deem the proposal not to satisfy the subsidiarity criterion.

Each national parliament has two votes, and in those Member States with bicameralism, each parliamentary chamber has one vote[69]. This voting system attributes the power to file an action for the infringement of the subsidiarity principle to any Member State, its national parliament, or one of the two parliamentary chambers. This mechanism grants the standing of "indirect semi-privileged applicants" to national parliaments: they are "indirect applicants" because they can only file an action through the government, and they are "semi-privileged applicants" because the only grounds they can base their objection to the draft proposal is the non-respect of the subsidiarity principle[70]. If the votes in all national parliaments collectively reach the threshold, the EU Institution that introduced the proposal shall revise it.

The *ex-post* control is provided by Article 8 of Protocol 2 on the application of the principles of subsidiarity and proportionality, which allows Member States to bring an action for judicial review of legal acts adopted by the ordinary or a special legislative procedure[71].

One more possibility of judicial control is granted to the Committee of the Regions, which can bring an action for annulment before the CJEU in cases where it was not consulted on legislative acts requiring its consultation[72].

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[66] Kiiver, P. 2011. 'The Early-warning System for the Principle of Subsidiarity: the National Parliaments as a Conseil d'Etat for Europe', European Law Review, Vol. 36, No. 1, 100.
[67] Cygan, supra note 55, 127.
[68] Kiiver, supra note 66, at 102-103.
[69] Article 7(1)(2) Protocol 2; Raunio, T., 'National Parliaments and European Integration: What We Know and What We Should Know', ARENA Working Paper, No. 2, 2009, 23, https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2001-2010/2009/WP09_02.pdf accessed 23.11.2020.
[70] Granat, K. 2014. National Parliaments and the Policing of the Subsidiarity Principle, dissertation, European University Institute, 188. This author performs a systematic comparison of the national parliaments' arrangements for ex-post subsidiarity review, finding that "parliaments that are perceived as strong scrutinisers have been granted much more independence in the subsidiarity action".
[71] Article 289(3) TFEU.
[72] European Union, Committee of the Regions, https://portal.cor.europa.eu/subsidiarity/Publications/Documents/Guide%20on%20SubsidiarityFINAL.pdf accessed 23.11.2020; Constantin, supra note 15, 163-164.

The function of the CJEU is established by Article 8 of Protocol 2:

> *Article 8*
>
> *The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.*

Pursuant to Article 8, national parliaments can require their governments to bring action before the CJEU, challenging an EU legislative act based on compliance with the subsidiarity requirement. However, to date the CJEU view upheld the validity of legislative acts challenged on the basis of subsidiarity[73].

We will now examine more in detail the actions that national parliaments can take based on the principle of subsidiarity, and their effect in the dialogue between national and EU institutions.

4.1. Ex-ante political control

When the European Commission issues a legislative proposal, it joins the "Subsidiarity Sheet", which includes the evaluation of the financial impact of the proposed piece of legislation and demonstrated evidence that the objective pursued by the legislative act will be better achieved at the EU level[74]. The European Commission sends its legislative proposals to national parliaments at the same time as to the other Institutions.

National parliaments receive as well legislative resolutions of the European Parliament and positions adopted by the Council.

4.1.1. Yellow Card

If one third of the total number of votes are cast for the subsidiarity objection to the proposal, then a Yellow Card is issued. If the legislative proposal covers

[73] An example thereof is Case C-491/01 REFERENCE to the Court under Article 234 EC by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), for a preliminary ruling in the proceedings pending before that court between The Queen and Secretary of State for Health, ex parte: British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd, supported by Japan Tobacco Inc. and JT International SA, on the validity and interpretation of Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, OJ 2001 L 194, 26.

[74] Craig, P. and de Búrca, G. 2011. *EU Law: Text, Cases, and Materials*. Oxford University Press; Davies, G. 2003. 'The post-Laeken division of competences', European Law Review 28: 686–98, at 696.

judicial cooperation in criminal matters[75], or administrative cooperation according to Article 74 TFEU[76], the threshold is reduced to 25%. The lower threshold shows that the areas of justice and home affairs are particularly sensitive, and highlights Member States' reluctance to transfer the competence on these sectors to the EU.

Some commentators argue that this mechanism is able to counterbalance the shift from consensus to Qualified Majority Voting ('QMV') in the Council of the EU[77], which was introduced by the Treaty of Lisbon in listed areas of EU competence[78]. If the threshold is met, the Commission decides whether to amend the proposal, withdraw it, or continue with an unaltered version of it[79]. Its decision must be reasoned and supported by justification.

For the time being, three Yellow Cards have been issued[80]. The first Yellow Card was issued in 2012, regarding the Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, with the subsequent withdrawal of the proposal by the European Commission. The second Yellow Card concerned the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office (EPPO): in this case, the European Commission retained its proposal. The EPPO is currently being established in Luxembourg with the competence to investigate, prosecute and bring to judgment crimes against the EU budget, such as fraud, corruption or serious cross-border VAT fraud. It will become operational by the end of 2020. The third Yellow Card was issued in June 2016 against the Revision of the Posting of Workers Directive. The European Commission, following a subsidiarity review, maintained its proposal as it concluded that it fully respected the subsidiarity principle.

4.1.2. Orange Card

The Orange Card is issued when the votes of the national parliaments for the subsidiarity-based objection reach a simple majority[81].

After an Orange Card is issued, the European Parliament and the Council vote to reject the proposal: the former can reject it with the majority of votes, and the latter with a vote of 55% of its members. No Orange Card has been issued to date.

The possibility to launch the Orange Card procedure has strengthened the role of national parliaments in the EU legislative *iter*, since it can lead to the rejection

[75] Article 82 TFEU.
[76] Article 7(2) Protocol 2 in conjunction with Article 76 TFEU.
[77] Cygan, supra note 55, 124.
[78] Among them there are measures of judicial cooperation in criminal matters (Article 82 TFEU), police cooperation (Article 87 TFEU), and administrative cooperation under Article 74 TFEU (Article 7(2) Protocol 2 in conjunction with Article 76 TFEU).
[79] Article 7(2) Protocol 2.
[80] Auel, K., and Neuhold, C. 2018. *'Europeanisation' of national parliaments in European Union member states: Experiences and best practices*. Study for the European Parliament's Greens/EFA Group. https://reinhardbuetikofer.eu/wp-content/uploads/2018/07/Study_Europeanisation_June-2018.pdf accessed 23.11.2020
[81] Article 7(3) Protocol 2.

of a proposal with the agreement of the European Parliament or the Council. In this way, national parliaments have gained the name of “virtual third chamber” in the EU legislative process. The Orange Card also strengthened the political character of the EWS[82].

4.1.3. Red Card

National parliaments do not have the power to veto EU legislation, therefore there is no ‘Red Card’. According to some commentators, “a veto power vested in national Parliaments would distort the proper distribution of power and responsibility in the EU’s complex but remarkably successful system of transnational governance by conceding too much to State control”[83]. It can be agreed that it seems unnecessary to attribute the veto to national parliaments when the European Parliament has the power to reject a legislative proposal or suggest amendments to it.

4.1.4. Green Card

In its 23-25 June 2013 plenary meeting, the Conference of Parliamentary Committees for Union Affairs (COSAC) has found that national parliaments should play a greater role as active contributors of the EU legislative process[84].

In the United Kingdom, the House of Lords’ ninth Report of session 2013-2014 on the role of national parliaments in the EU included a proposal called ‘Green Card’ procedure[85], which was informally used from the following year. On 22 July 2015, 16 national chambers sent a letter to the President of the European Commission, where they suggested that the EU take action on reducing food waste[86].

Pursuant to the proposal by the House of Lords, national parliaments grouped together would have the right to prepare a Green Card – an invitation for a legislative proposal in an area that, according to them requires regulation. Even though the European Commission included some of the House of Lords’ suggestions[87], it omitted any reference to the Green Card[88].

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[82] Cooper, I., 2016. ‘Is the Subsidiarity Early Warning Mechanism a Legal or a Political Procedure? Three Questions and a Typology’, EUI Working Papers 2016/18, 7.

[83] Weatherill, S. 2003. ‘Using National Parliaments to improve Scrutiny of the limits of EU Action’, 28 European Law Review 909, at 912.

[84] Contribution of the XLIX COSAC, Dublin, 23-25 June 2013, Official Journal of the European Union, 2013/C 305/01.

[85] HL 151 (Session 2013–14) *The Role of National Parliaments in the European Union,* 24 March 2014*,* para 55.

[86] Priestley, S., 2016. ‘Food Waste. House of Commons Library’, Briefing Paper Number CBP07552, 30 August 2016, 40-41. http://researchbriefings.files.parliament.uk/documents/CBP-7552/CBP-7552.pdf accessed 23.11.2020.

[87] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Closing the loop - An EU action plan for the Circular Economy, Brussels, 2.12.2015 COM(2015) 614 final.

[88] Gostyńska-Jakubowska, A. 2019. ‘Boosting the Role of National Parliaments in EU Democrac’y, Carnegie Europe, September 2019, https://carnegieendowment.org/files/7-17-19_Gostynska-Jakubowska_Parliaments.pdf accessed 23.11.2020.

In February 2017, the Resolution of the European Parliament "Possible evolutions of and adjustments to the current institutional set-up of the European Union" supported the establishment of a Green Card; however, the European Commission dismissed other proposals by national parliaments between 2015 and 2018, including a green card on corporate social responsibility[89].

4.2. Ex-post judicial control

Protocol 2 on the application of the principles of subsidiarity and proportionality establishes that, beyond the *ex-ante* political control on subsidiarity, which is carried out during the legislative process, there is a further judicial control, exercised *ex post* – after the adoption of the legislative act. It is worth to highlight that pursuing to Article 8 of Protocol 2, a Member State's vote in favour of the legislative proposal in the Council does not prevent the same Member State to file a subsidiarity-based objection to that legislative proposal[90].

The Court of Justice has, under the Treaties, the power to review the legality[91] and validity of EU legal acts[92], and even though the Treaties do not specify that it is the only institution with such prerogative, in practice it has exclusive jurisdiction to declare EU secondary legislation invalid[93].

However, thus far the Court has not adopted an overly protective approach vis-à-vis the autonomy of the Member States. Instead, it has interpreted broadly the EU competences, has established the doctrine of implied powers, and has granted the application of Article 352 TFEU, which overall allowed an expansive interpretation of EU competences. This, according to some scholars, includes the area of free movement of people and citizenship, beyond what was originally written in the Treaties.[94]

Some commentators highlight that the decisions of the CJEU, both on the expansion of EU competencies and on the creative interpretation of EU law, have exposed the CJEU to allegations of acting ultra vires. The German *Bundesverfassungsgericht* (BVerfG) stressed that an excessive centralization can be prevented through the control of the application of the principle of subsidiarity, which is exercised by national parliaments, who are granted control mechanisms by the Treaty.

However, there are still some doubts on the effectiveness of subsidiarity monitoring, also considering that consensus is no longer required in the EU ordinary legislative procedure, and that certain competences have been assigned to the EU[95].

On several occasions, the BVerfG has adopted a critical stand against the judgments of the CJEU, expressing its reservations on how the CJEU stroke a

[89] Ibidem
[90] Cygan, supra note 55, 127.
[91] Art. 263 TFEU (direct actions for annulment) speaks of 'legality'.
[92] Art. 267 TFEU (preliminary reference procedure) speaks of 'validity'.
[93] Case 314/85, *Foto-Frost v Hauptzollamt Lübeck* [1987] ECR 4199.
[94] Claes and de Witte, supra note 40, 69
[95] Judgment of 20 June 2009 *Bundesverfassungsgerich*t, BVerfG, 2 BvE 2/08, at para 251.

balance between the position of the Member States and that of the EU on the *Maastricht Treaty*[96]*.*

Other commentators have instead contended that the CJEU would risk being considered a judicial activist if it decided to invalidate the legislative act, overruling the views of the other EU institutions[97]. They have argued that, when the CJEU did not support the national parliaments' claims that the challenged piece of EU legislation breached the subsidiarity principle, the CJEU accepted the interpretation of subsidiarity supported by the Commission, the Council, and the European Parliament[98].

5. The role of the Committee of the Regions in the protection of subsidiarity

Over time, in some countries and in some ages, national governments had the tendency to make decisions at a central level, without consulting the citizens and residents. Now, considerable decisions are taken at the EU level99, however there are several mechanisms in place to ensure that consultation with the wider public, local entities, and industries takes place, and that sufficient representation is ensured[100].

The European Committee of the Regions (CoR) represents local and regional authorities across the European Union and advises on new laws that have an impact on regions and cities[101]. The CoR is the most recently established EU constitutional body. It is composed of representatives of local entities and regions from all Member States, and, pursuant to Articles 300, 305-307 TFEU, can be involved in the legislative *iter* through three types of opinions: (i) mandatory, (ii) requested, and (iii) own-initiative, when the legislative proposal includes matters related to local and regional government. The CoR has advisory capacity without voting powers, as its opinions are non-binding.

It was founded as a political assembly of regional and local representatives[102], and involves local governments in the EU decision-making process, promoting the participation of citizens.

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[96] The *Bundesverfassungsgericht* developed its position on *ultra vires* review mainly in the following cases: 58 BVerfGE 1, 30 (*Eurocontrol I)*; 75 BVerfGE 223, 235, 242 (*Kloppenburg*); 89 BVerfGE 155, 188 (*Maastricht*); 123 BVerfGE 267, 354 (*Lisbon*); BVerfGE 126, 286 (*Honeywell*); BVerfGE 133, 277, at para 91 (*Antiterrordatei*).

[97] Toth, A. 1994. 'A Legal Analysis of Subsidiarity,' in O'Keeffe D. and Twomey P. (eds), *Legal Issues of the Maastricht Treaty,* Chancery, 48.

[98] Cooper, supra note 81, at 9.

[99] Carroll, W.E. 2011. 'The Committee of the Regions: A Functional Analysis of the CoR's Institutional Capacity', 21 Federal Studies, 348.

[100] For a broader discussion see in particular, Piattoni, S. (ed.) 2015. *The European Union: democratic principles and institutional architectures in times of crisis*, OUP.

[101] The EU's Assembly of Regional and Local Representatives, https://cor.europa.eu/en/about, accessed 29.10.2020.

[102] Tatham, M. 2015. 'Regional Voices in the European Union: Subnational Influence in Multilevel Politics', 59 International Studies Quarterly, 387. See also Cole, T. 2005. 'The Committee of the Regions and Subnational Representation to the European Union', 12 Maastricht Journal of European and Comparative Law, 49-72.

Its establishment followed the Intergovernmental Conference for the Maastricht Treaty, which enabled the creation of an advisory body through a protocol to the Treaties[103] 'to reinforce the democratic legitimacy of the Union'[104]. In this way, the role of the Consultative Council of Regional and Local Authorities was broadened[105].

The mission of the CoR is to contribute to EU integration by representing the needs and conveying the messages of regional and local entities[106]. The CoR must be consulted 'where the Treaties so provide and in all other cases, in particular those which concern cross-border cooperation'[107]. An opinion can also be issued whenever the CoR deems it appropriate[108].

According to Article 307 TFEU, the prerogatives attributed to the CoR are merely consultative. They can be exercised during the legislative process, or at the proposal drafting phase at the European Commission. In particular, the CoR can write its opinion as a response to White Papers and Green Papers, even before the Commission files its proposal.

Additionally, the CoR can perform its advisory tasks during the public consultation[109]. Pursuant to Article 294 TFEU, the CoR is involved in the ordinary legislative procedure by issuing opinions on the proposals filed by the European Commission to the European Parliament and the Council[110].

The importance to promote territorial vicinity can be found in the historical origins of the CoR, and the subject-matters it works on. The Treaties demand mandatory consultation of the CoR in policies with an effect on the territory, such as policies that create markets and policies that correct markets. These include transport (Articles 91 TEU), employment (Article 148 TEU), social policy (Article 153 TEU), health (Article 168 TEU), environment (Article 192 TEU) and energy (Article 194 TEU).

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[103] Protocol on the Economic and Social Committee and the Committee of the Regions, annexed to the Treaty of Maastricht on the European Union, 7 February 1992. This protocol was repealed by the Treaty of Amsterdam of 2 October 1997.

[104] Delors, J. 1994. President of the Commission at the inaugural plenary session of the Committee of the Regions in Brussels, 9 March 1994.

[105] See Commission Decision 88/487/EEC of 24 June 1988 setting up a Consultative Council of Regional and Local
Authorities, OJ L 247/23, 6 September 1988. In 1988, the Consultative Council of Regional and Local Authorities (CCRLA) was attached to DG REGIO. The members of CCRLA were appointed by the Assembly of EU Regions (AER) and the Council for EU Municipalities and Regions (CEMR). It was expected that the CCRLA would provide greater legitimacy to the reform of the cohesion policy carried out by the European Commission, but it was abolished in 1993.

[106] Sturm, R. 1995. 'Participation and Representation: The Experience of Second Chambers and the Committee of the Regions', in Dehousse R. and Christiansen T. (eds.), *What model for the Committee of the Regions?: Past Experiences and Future Perspectives*, European University Institute, 119.

[107] Article 307 TFEU.

[108] Ibidem

[109] Tatham, supra note 100, at 501.

[110] See also: Hönnige, C. and Panke, D. 2016. 'Is anybody listening? The Committee of the Regions and the European Economic and Social Committee and their quest for awareness', 23 Journal of European Public Policy, 626.

The creation of the CoR brought more legitimacy to the EU, without adding a burden to the legislative *iter*[111]*.* The Treaty provides for the duty to take into consideration territorial dimensions in any action under Article 2 of the Protocol.[112] This is a distinctive characteristic that enriches the role of supervision of the principle of subsidiarity.

5.1. Prelegislative phase.

Article 307 TFEU provides that the European Parliament, the Council or the Commission consult the CoR 'where the Treaties so provide and in all other cases, in particular those which concern cross-border cooperation, in which one of these institutions considers it appropriate.' This prerogative derives from the ability of the CoR to gather information from the regional and local entities and to contribute to accommodating territorial interests in EU legislation.

The value of consultation is highlighted by the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty, where it is underlined that: 'before proposing legislative acts, the Commission shall consult widely' and that 'such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged'[113].

Moreover, the Protocol provides that: '(…) any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality'[114].

The detailed statement referred to by the Protocol includes the proposal's financial impact that considers the implications at regional level as well. It emerges that territorial vicinity is a constituent of the principle of subsidiarity[115].

5.2 Legislative phase.

The CoR has privileged access to the ordinary legislative procedure, as provided by Article 294 TFEU. The CoR can intervene *sua sponte* in the legislative procedure, without the need for the European Commission to ask for its advice[116].

From a procedural perspective, the CoR develops its opinion and simultaneously the European Parliament and the Council start deliberating. Hönnige and Panke highlighted that a well-timed delivery of CoR opinions to the European Parliament and the Permanent Representations plays an important

[111] Christiansen, T. 1995. 'Second Thoughts: The Committee of the Regions after its First Year', in Dehousse R. and Christiansen T. (eds.), *What model for the Committee of the Regions?: Past Experiences and Future Perspectives*, EUI Working Paper 95/2, 34-64, at 36.
[112] Van den Brink, T. 2012. 'The Substance of Subsidiarity: The Interpretation and Meaning of the Principle after Lisbon', in Trybus, M. and Rubini, L. (eds.), *The Treaty of Lisbon and the Future of European Law and Policy*, Elgar, 160.
[113] Article 2 Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality.
[114] Ibidem, Article 5.
[115] Green paper on territorial cohesion: Turning territorial diversity into strength, COM(2008) 616 final.
[116] Feral, P.A. 2004. 'Retour en force du principe de subsidiarité dans le traite constitutionnel: de Nouvelles responsabilités pour les parlements nationaux et pour le Comité des Régions?, 481 Revue du marchée commun et de l'Union Européenne, 422.

role in increasing the weight of the CoR[117]. Beyond the temporal aspect, the policy fields have an impact on the influence of CoR opinions over the legislative process: research has shown that in the areas of regional policy, environmental protection, infrastructure, and culture, the CoR opinions are awarded a greater weight.

The CoR Annual Report discusses further aspects of subsidiarity: it analyzes the financial and administrative burden that new EU legislative acts place upon local public authorities. To address this issue, pursuant to Rule 51 of the CoR Rules of Procedure, each CoR opinion must include a discussion on the expected impact of the new piece of legislation on the regional local finances[118].

5.3 Access to the judiciary.

The Lisbon Treaty has granted, in Article 263 TFEU, standing to the CoR to file an action for annulment before the CJEU of a legislative act alleging the breach of the principle of subsidiarity, in policy areas where prior consultation of the CoR is mandatory. *Locus standi* is also provided by Article 8 Protocol No. 2 on the application of the principles of subsidiarity and proportionality, and its procedure is outlined in Rule 58 of the CoR Rules of Procedure, which establishes that: "'an action or an action to intervene may be brought before the CJEU for an infringement of the subsidiarity principle by a legislative act on which the TFEU provides that the Committee be consulted'[119].

This additional role of the CoR should be coordinated with the role of national parliaments, in particular considering the EWM which allows national parliaments to file a reasoned opinion if they deem a proposed EU legislative act to breach the principle of subsidiarity[120].

The CoR joined 12 national parliaments that issued a Yellow Card against the 'Monti II Regulation', which aimed to ensure the free movement of goods in the EU even at the expense of limiting the right to strike. The group of national parliaments claimed that the draft legislation infringed the principle of subsidiarity, since introducing an alert mechanism aimed to provide other Member States and the European Commission with timely and transparent information on acts or circumstances affecting the exercise of the freedom of establishment or the freedom to provide services, and this would restrict the right to strike, which is guaranteed by several constitutions of Member States[121].

[117] Hönnige and Panke, supra note 108.
[118] Carroll, supra note 97, at 351.
[119] Committee of the Regions, Rules of Procedure on the basis of Article 306(2) TFEU, [2014] OJ L 65/41.
[120] See in this regard Kiiver, P. 2012, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality*, Routledge.
[121] Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final. For further details see Fromage D. and Kreilinger, V. 2017. 'National Parliaments' Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive', 10 European Journal of Legal Studies, 125-160.

The right of the CoR to seek for annulment of EU legislation based on the principle of subsidiarity has not been exercised to date[122]. In an interview given to Lisette Mustert, Dr. Gsodam, Head of Cabinet of the Secretary-General of the CoR declared that the CoR's major interest is to be involved in the political negotiations within the EU, as opposed to being a disputing party in a case before the CJEU[123], and concludes that the CoR *locus standi* is an ultimate tool to make sure that the principle of subsidiarity is observed.

6. Concluding remarks.

Several commentators agree in considering the establishment of the CoR as an important effort to increase the legitimacy of EU decision making, enrich the quality of legislation by involving regional communities and civil society and protect their interests[124]. These experts highlight that the role of national parliaments and the CoR as 'guardians of subsidiarity' entails a close connection between EU legislation and its inhabitants.

Other experts cast doubt on the incisiveness of the CoR action and claim the lack of adequate institutional awareness of the role and potential of the CoR as an institutional body[125]. It should be recalled that it is not mandatory for the Members of the European Parliament and the Council to read the opinions of the CoR.

With the aim to strengthen the role of the CoR, some scholars have hypothesized that the CoR could be granted legislative powers, in particular the power to veto proposals or to hold them up. However, this may be a source of stagnation or delayed decision-making, which has led these commentators to conclude that assigning the role of additional legislative chamber to the CoR could be a source of backlog and paralysis in EU decision making[126].

It is important to highlight that, beyond the institutional role of national parliaments and the CoR, some regional parliaments have started a dialogue with the European Commission with the aim to express their positions and bring forward their requests. Examples thereof are the initiatives of some regional parliaments in Germany, such as the Landtag of Bavaria, which commented on subsidiarity, and the Landtag of Baden-Württemberg, which commented on the future of Europe. These regional Parliaments have voiced their interest in contributing to the EU decision making process. In 2019, the Regional Parliamentary Council of the Greater Region of Luxembourg filed a resolution to the European Commission addressing several cross-border issues such as

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[122] Nicolosi S.F. and Mustert, L. 2020. 'The European Committee of the Regions as a watchdog of the principle of subsidiarity, Maastricht Journal of European and Comparative Law 2020, Vol. 27(3) 284–301, at 296.

[123] Interview held on 30 May 2018. See Nicolosi and Mustert, supra note 122.

[124] Nicolosi and Mustert, supra note 122, at 300; Schönlau, J. 2017.' Beyond mere "consultation": Expanding the European Committee of the Regions' role', Journal of Contemporary European Research Volume 13, Issue 2, 1166-1184, at 1169.

[125] Cole, supra note 100, at 56.

[126] Järviniemi, J. 2019. *A Europe Of (The) Regions: What Do We Mean When We Speak Of Subsidiarity?,* 7 December 2019, https://www.thenewfederalist.eu/a-europe-of-the-regions-what-do-we-mean-when-we-speak-of-subsidiarity?lang=fr accessed 29.10.2020

cohesion policy and rail transport. The European Commission duly responded to this resolution and others received from regional Parliaments[127].

It can be concluded that the protection of subsidiarity can be monitored by several public institutions and bodies (national parliaments, regionals parliaments, CoR), and that cooperation between them and EU institutions can ensure a balance between subsidiarity, effectiveness, and efficiency of EU decision making.

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