The Subsidiarity Mechanism as a Tool for Inter-Level Dialogue in Belgium: On 'Regional Blindness' and Co-operative Flaws

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Subsidiarity in the Treaty on the European Union and the Protocol on the application of the principles of subsidiarity and proportionality – Multi-level governance in federal and regional states – Belgian federalism – Necessity of dialogue – Difficulty of applying subsidiarity principle in a federal system based on exclusivity

Introduction

The mechanism enshrined in Article 5(3) TEU and the Protocol on the application of the principles of subsidiarity and proportionality (Protocol No. 2) forms a concretization of the subsidiarity principle. This principle becomes especially complex when applied to federal and regional states. It is striking that the European construction mainly focuses on the national member states rather than regional levels, denoted by Weatherill as 'regional blindness.'[1] This proves also true for the new subsidiarity procedure. Protocol No. 2 identifies the national parliaments as the exclusive discussion partners, leaving it to the national parliaments to consult regional parliaments with legislative powers. This underlines the new challenge for national states as 'the only structure that can integrate all the strands of multilevel governance.'[2]

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[1] S. Weatherill, 'The Challenge of the Regional Dimension in the European Union', in S. Weatherill and U. Bernitz (eds.), *The Role of Regions and Sub-National Actors in Europe* (Hart 2005) at p. 1.

[2] B. Guy Peeters, 'The Future of the State: Comparative Perspectives', 1 *RGDPC* (2007) at p. 3; B. Rittberger, 'Multi-level Governance and Parliaments in the European Union', in H. Enderlein et

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In this article, we will argue, firstly, that for legitimacy-related reasons, the subsidiarity principle requires the integration of subnational levels in a multi-level institutional dialogue. Secondly, we will argue that a co-operative attitude is essential to the successful integration of the subnational levels. We will also underline the importance of impact assessments as instruments of institutional dialogue. In that respect, the dual nature of Belgian federalism and the aversion against inter-regional dialogue hinder the effective application of the subsidiarity mechanism, whereas federal states such as Germany and Austria exhibit far less problems with the implementation of the subsidiarity mechanism.

The subsidiarity mechanism as a tool for legitimising EU laws

As Craig has aptly put it, 'the difficulty of dividing power between different levels of government is an endemic problem within any non-unitary polity.'[3] The principle of subsidiarity has taken priority in this exercise as it combines both legitimacy and efficiency as rationales.[4] The importance of both legitimacy and efficiency increases in the complex environment of multi-level governance.[5]

The concretisation of the subsidiarity principle in EU law concerns the exercise of shared competences, and not the attribution. This relates to two concepts of

al. (eds.), *Handbook on Multi-level Governance* (E. Elgar 2010) at p. 247: 'parliaments as sources of authorization and control in vertical and horizontal policy networks.' *See*, however, A.J. Menéndez, 'The European Democratic Challenge: The Forging of a Supranational *Volonté Générale*', *E.L.J.* (2009) at p. 300-301 criticizing the central position of national governments *vis-à-vis* the European institutions.

[3] P. Craig, 'Competence: Clarity, Conferral, Containment and Consideration', 29 *E. L. Rev.* (2004) at p. 344. Applied to the EU, similar observation by T. Konstadinides, *Division of Powers in EU Law* (Kluwer 2009) at p. 117.

[4] A. Gamper, 'Subsidiarität und Kompetenztheorie', in A. Gamper and P. Bußjäger (eds.), *Subsidiarität anwenden: Regionen, Staaten, Europäische Union* (Institut für Föderalismus 2006) p. 109-110; E. Pache, 'Verantwortung und Effizienz in der Mehrebenenverwaltung', in S. Kadelbach et al. (eds.), *Bundesstaat und Europäische Union zwischen Konflikt und Kooperation* (De Gruyter 2007) p. 145-151; I. Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action', *Columbia J. Eur. L.* (2009) p. 379-380. In particular focusing on the legitimizing aspects of subsidiarity as prerequisite for a democratic society, N. MacCormick, 'Democracy, Subsidiarity and Citizenship in the "European Commonwealth"', 16 *Law and Philosophy* (1997) p. 331, at p. 350; V. Skouris, 'Das Subsidiaritätsprinzip und seine Bedeutung in der Rechtsprechung des Gerichtshofes der EuropäischenGemeinschaft', S. Breitenmoser et al. (eds.), *Human Rights, Democracy and the Rule of Law: Liber Amicorum L. Wildhaber* (Nomos 2007) p. 1550-1551.

[5] An excellent description of a number of confluent tendencies, can be found at R. Howse and K. Nicolaidis, 'Introduction: the federal vision, levels of governance and legitimacy' in Howse and Nicolaidis (eds.), *The Federal Vision* (Oxford University Press 2001) p. 1-10; N. Bamforth and P. Leyland, 'Public Law in a Multi-layered Constitution', in N. Bamforth and P. Leyland (eds.), *Public Law in a Multi-layered Constitution* (Hart 2003), p. 1-10.

subsidiarity: a fundamental and an instrumental one.[6] Fundamental subsidiarity determines the most competent governmental level to define objectives or aims. Instrumental subsidiarity warrants a more rational-technical approach in order to determine the best-suited level in terms of a given objective. Thus, the subsidiarity mechanism in EU law, which requires an added-value test and an insufficiency of Member States action test in the case of shared competences, lays down a collision rule in the form of instrumental subsidiarity.[7]

In this section we will display how the subsidiarity mechanism laid down in Protocol No. 2[8] embraces an alternative concept of legitimacy defined in the Commission's White Paper on European Governance, and how it combines different methods to effectuate the subsidiarity principle in this respect.

The legitimacy concept implied in the subsidiarity mechanism

In the Commission's White Paper on European Governance,[9] subsidiarity is named as a key principle in the search for an alternative conception of legitimacy in the multilevel EU structure.[10] According to the subsidiarity principle, the decision-making process should be undertaken at the most appropriate level. This is consistent with the wording of Article 5(3) TEU, stating that

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

According to this definition, optimising the allocation of competences necessitates an inquiry into efficiency and efficacy. This economic rationale links with a legitimacy rationale. Efficiency and efficacy of decisions define output legitimacy, which complements the traditional parliamentary model of democracy. This corresponds with the concept of 'governance' as defined in the *White Paper on Euro-*

[6] J. Vanpraet, 'De beginselen van de bevoegdheidsverdeling in het federale België' [*Principles of Division of Competences in the Federal State of Belgium*] (doctoral thesis, University of Antwerp 2011) at p. 57-58.

[7] Art. 5(3) TEU, Art. 5 of Protocol No. 2, as applied: e.g., ECJ Case C-491/01, *British American Tobacco* [2002], § 180-182; GC, T-263/07, *Estonia* v. *Commission* [2009], § 52.

[8] Protocol on the application of the principles of subsidiarity and proportionality, *OJ* [2007] C.306/150-152, 17 Dec. 2007. Henceforth: 'the Protocol'.

[9] COM(2001)428 of 25 July 2001.

[10] *Supra n. 9*, p. 10-11. *See also* A. Verhoeven, 'Democratic Life in the European Union, According to Its Constitution', in D.M. Curtin and R.A. Wessel (eds.), *Good Governance and the European Union* (Intersentia 2005) p. 167-168.

pean Governance, where the European Commission associates legitimacy with the idea of both 'involvement and participation' (input legitimacy) and 'efficiency and effectiveness' (output legitimacy). Next, the White Paper on European Governance identifies a third strand of legitimacy, namely 'multi-level' or 'vertical inter-level' legitimacy referring to the balancing of the interests of European, national and subnational entities.[11] This fits with a dynamic approach to multilevel organisations, borrowed from federal theories, that defines federal states in terms of a tension between, on the one hand, the region's quest for autonomy, and, on the other hand, the requirement of efficiency and coherence at the federal level. The subsidiarity principle serves as primary tool to maintain this balance between the regional, the national, and the federal interests.

The subsidiarity mechanism comprises each of the three alternative concepts of legitimacy identified in the White Paper on European Governance: input legitimacy, output legitimacy and vertical inter-level legitimacy.[12] The protocol not only involves the national parliaments in the decision-making procedure (input legitimacy) but also makes the subsidiarity test part of European impact assessments, thereby enforcing the need to justify EU interference (output legitimacy).[13] In its *White Paper on Multilevel Governance,* the Committee of Regions stresses the importance of these tools for legitimate multilevel governance based on partnership amongst the European, national, regional and local levels (vertical inter-level legitimacy). In its paper it recommends strengthening the subnational aspect by making territorial impact analysis standard practice.[14]

[11] On federal or multi-level legitimacy, *see* R. Schütze, 'Subsidiarity after Lisbon', in *Cambridge LJ* (2009) p. 528-529; R. Scholz, 'Art. 23 GG', in T. Maunz et al. (eds.), *Grundgesetz, Kommentar* (Beck 2008), no. 16; A. Estella, *The EU Principle of Subsidiarity* (Oxford University Press 2002) p. 48-49. On the three strands of legitimacy in the White Paper on European Governance, *see* P. Popelier, 'Governance and Better Regulation: Dealing with the Legitimacy Paradox', *European Public Law* (2011) p. 3. Specifically on the regional dimension of the White Paper on European Governance, *see* C. Mandrino, 'The Lisbon Treaty and the New Powers of the Regions', 10 *Eur. J. of Law Reform* (2008) at p. 517.

[12] For an analysis of the three criteria and the Treaty of Lisbon, *see* K. Lenaerts and N. Cambien, 'The Democratic Legitimacy of the EU after the Treaty of Lisbon', in J. Wouters et al. (eds.), *European Constitutionalism beyond Lisbon* (Intersentia 2009) p. 185-207.

[13] *See* for an overview of models of law making and legitimacy concepts, and their confluence in impact assessments: A. Meuwese, *Impact Assessment in EU Lawmaking* (Kluwer 2008) p. 40-41. Similarly, Follesdal identifies the justification of a sufficient level of effectiveness and efficiency as inherent to democratic legitimacy: A. Follesdal, 'Toward More Legitimate Multilevel Regulation', in A. Follesdal et al. (eds.), *Multilevel Regulation and the EU* (Martinus Nijhoff 2008) p. 383, 386 and 390.

[14] The Committee of the Region's White Paper on Multilevel Governance, *OJ* [2009] C 211/2, 4 Sept. 2009.

Enforcement

Compliance with subsidiarity can be secured in multiple ways. In federal theories, which can be applied to multilevel organizations, three methods are distinguished: (a) *political* safeguards, implying the representation of subnational interests in the federal legislative process; (b) *procedural reinforcements* to help ensure the aforementioned objective; and (c) direct *judicial policing* of boundaries of competence divisions.[15]

In addition to political safeguards such as the position of the Council in the European decision-making process and the composition of the European Parliament,[16] the subsidiarity mechanism laid down in Protocol No. 2 relates to each of these methods.

Political safeguards

First, the subsidiarity mechanism institutionalises participation of national parliaments as a political safeguard. This rule is primarily designed to protect national autonomy. At the same time, by informing the Commission of national impact and interests, it allows for the EU to interfere in a complex environment which calls for the issuing of flexible and differentiated regulatory frameworks. In this respect, the 'early warning procedure' laid down in Protocol No. 2 furthers an institutional dialogue. With regard to the interaction between national courts and the ECJ, Torres Pérez has defined dialogue as 'an on-going exchange of arguments', pursuing better reasoned outcomes for the community as a whole and promoting 'participation in interpretive activity so that the outcome emerges from a collective communicative enterprise.' In an EU context, moreover, dialogue 'contributes to building a common 'constitutional identity' for this supranational community' with respect for the EU pluralist framework.[17] Likewise, the subsidiarity mechanism aims to create an institutional dialogue.[18] It allows for mutual influence, contrib-

[15] G. Bermann, 'The Role of Law in Federal Systems', in K. Nicolaidis and R. Howse, *The Federal Vision* (Oxford University Press 2001) p. 193; R. Schütze, *supra* n. 9, at p. 526-527.

[16] The national determinant in the composition of the European parliament, frequently quoted in the *no demos* literature, consists in the fixed number of MEP's for each member state and the organization of elections at the national level, according to national procedures: K. Lenaerts and A. Verhoeven, 'Institutional Balance and Democracy', in C. Joerges and R. Dehousse (eds.), *Good Governance in Europe's Integrated Markets* (Oxford University Press 2002) p. 58.

[17] A. Torres Pérez, *Conflicts of Rights in the European Union* (Oxford University Press 2009) p. 112-113. *See also* N. Bernard, *Multilevel Governance in the European Union* (Kluwer Law International 2002) p. 246-249.

[18] This relates to the concept of co-operative constitutionalism, where judicial dialogues among constitutional courts, and in relationship to the ECJ, can be supplemented where necessary by a dialogue between political institutions. *See* A. Albi, 'Supremacy of EC Law in the New MS', 3 *Eur. Const. L. Rev.* (2007) p. 65. However, the lack of co-ordination mechanisms provided in the Protocol casts a shadow of doubt on the practical influence of the mechanism. *See*, e.g., F. Tronchetti,

uting to EU decision-making while respecting the autonomy of the member states and taking into consideration their specific needs and concerns.[19] However, if rationality in a dialectic sense of 'better-reasoned outcomes'[20] is accepted as an overall purpose of the subsidiarity mechanism, this requires that the procedure allows the national parliaments to assess in qualitative and quantitative terms the impact of proposed regulation. In this regard, the eight-week period in which national parliaments conduct their subsidiarity scrutiny is rather short, especially when a dialogue with regional bodies is included.[21]

Procedural reinforcements

Secondly, the subsidiarity mechanism imposes several procedural requirements, including the duty for the Commission to consult widely,[22] a heightened obligation to give reasons,[23] the obligation to furnish an annual report[24] and the obligation to make impact assessments.[25] In turn, subsidiarity has been integrated as a standard test in the Commission's impact assessments.[26]

An example of the application of the mechanism illuminates the procedural emphasis and the crucial role of impact assessments. Concerning the directive on

'National Parliaments as Guardians of Subsidiarity: A Feasible Task or an Utopist Chimera?', 7 *Journal of US-China Public Administration* (2010) p. 16.

[19] Simultaneously respecting the institutional balance at the Union level. The Commission's prerogative is safeguarded due to the absence of any 'red card' procedure.

[20] The premise of rationality functions on two dimensions: internal and external. Legislation needs both to be derived from a rational justified set of normative principles, and also to be rational in the instrumental sense. *See* K. Meßerschmidt, *Gesetzgebungsermessen* (Nomos 2000) p. 798-799.

[21] J.-C. Piris, *The Lisbon Treaty* (Cambridge University Press 2010) p. 125; G. Bermann, 'National Parliaments and Subsidiarity: An Outsider's View', 4 *EuConst* (2008) p. 458. The mechanism demands considerable 'time and energy', P. Craig, 'The Treaty of Lisbon, Process, Architecture and Substance', 33 *E. L. Rev.* (2008) p. 150-151; Tronchetti, *supra* n. 18 at p. 16. Thus, the relative success of the mechanism depends both upon the national parliaments' intentions, resources, and the structure of relevant national law, and, at the EU level, on the willingness of European institutions to give full application to the provisions of the Protocol.

[22] Protocol No. 2, Art. 2.

[23] Which may exist separate from Art. 5 Protocol, and perhaps also from Art. 296 TFEU due to the constitutional nature of the principle of subsidiarity. Former Judge Timmermans alluded to this, before his tenure: C. Timmermans, 'Subsidiarity and Transparency', 22 *Fordham Int. L. J.* (1998-1999) p. 117-118.

[24] Protocol No. 2, Art. 9.

[25] Implicit in Art. 5 of the Protocol ('qualitative and quantitative indicators'). Impact assessment has been gradually institutionalised including the EC, the Council and the EP, *see* A. Meuwese, 'Inter-institutionalising EU Impact Assessment', in S. Weatherill (ed.), *Better Regulation* (Hart Publishing 2007). *See also* the 2003 Inter-Institutional Agreement on Better Lawmaking and the 2005 'Common Approach to Impact Assessment'.

[26] European Commission, *Impact Assessment Guidelines*, 15 January 2009, throughout the whole document but especially at p. 23.

the application of patient's rights in cross-border healthcare,[27] eighteen opinions from various national parliaments were submitted to the Commission, resulting in a reasoned answer in six instances.[28] The IPEX overview notes whether opinions from national parliaments contain specific arguments on subsidiarity and/or proportionality, which merit a reasoned response in light of the Protocol mechanism. Reviewing the answers of the Commission,[29] we notice the important role of the impact assessment[30] in this regard. In response to the various critiques or questions offered by the assemblies, the Commission uses the impact assessment as a justificatory instrument. E.g., the chambers of the Dutch parliament both raised the question on the compatibility of the directive with Article 168 TFEU, especially the concern for member states' autonomy for the organization and delivery of health services and medical care. The Commission referred to the Explanatory Memorandum and the impact assessment to justify compliance. The German *Bundesrat*, in turn, raised an issue of proportionality by inquiring into the extra administrative costs with regard to the system of data collection as envisaged in the directive.[31] The requirement of adoption of relevant data on cross-border health care in already existent systems seems to accomplish this objective. Again, the impact assessment is cited as an argument and primary source for facts.[32]

Judicial policing

The final mechanism, judicial policing of competence boundaries, proves to be challenging in the context of a subsidiarity assessment. Traditionally, marginal scrutiny results from the broad legislative discretion in matters of socio-economic complexity[33] and the political nature of the principle of subsidiarity.[34] In order

[27] COM(2008)414f.

[28] *See* the IPEX dossier for an overview, <www.ipex.eu/ipex/cms/home/Documents/dossier_COD20080142/lang/en>, visited 15 March 2011.

[29] All can be consulted at <www.ipex.eu/ipex/cms/home/op/edit/pid/4?matrix=2597yes#20080414>.

[30] The actual IA for this proposal can be found at SEC(2008)2163.

[31] Art. 18 of the Commission's proposal.

[32] Reply to the German Bundesrat on COM(2008)414, available at IPEX website, *supra* n. 28, *in fine*.

[33] P. Craig, *EU administrative Law* (Oxford University Press 2006) p. 433-434 and 466-470; J. Ziller, 'Le principe de subsidiarité', in J-B. Auby and J. Dutheil de la Rochere (eds.), *Droit administratif européen* (Bruylant 2007) p. 383.

[34] On the political nature of the principle, *see* W. Moersch, *Leistungsfähigkeit und Grenzen des Subsidiaritätsprinzips* (Duncker&Humblot 2001) p. 305-309; A. von Bogdandy and J. Bast, 'The Federal Order of Competences', in A. von Bogdandy and J. Bast, *Principles of European Constitutional Law* (Hart 2010) at p. 303. J.-V. Louis, 'Quelques remarques sur l'avenir du contrôle du principe de subsidiarité', in A. De Walsche (ed.), *Mélanges en hommage à G. Vandersanden* (Bruylant 2008) p. 283-284; M. Wathelet, 'La subsidiarité au sein de l'union européenne: le processusdécisionnel', in M. Verdussen (ed.), *L'Europe de la subsidiarité* (Bruylant 2000) p. 137; C. Callies, *Sub-*

to fill the gap of this wide legislative discretion, the Court turns to procedural measures, such as the obligation of providing reasons.[35] Next to this more traditional approach, the ECJ can address the substance of the subsidiarity principle via the instruments of impact assessments (IA).[36] In a preparatory document, the initial problem, the policy objectives and the policy options are identified and compared in terms of impact (economic, social, and environmental).[37]

Given the increasing importance of impact assessment in the reasoning of the ECJ, this instrument can build a useful bridge between *ex ante* and *ex post* scrutiny of subsidiarity.[38] No legally binding status is ascribed to the soft-law instrument of IA, but the principles of subsidiarity and proportionality do require a degree of reason-giving and fact-based lawmaking, which IA can testify to. Even in the absence of standardized IA and scientific evidence, the opinion on (non)compliance with subsidiarity of the national parliaments can provide useful arguments for the ECJ in an *ex post* proceeding.[39]

The addition of the regional dimension in Article 5(3) and the complementary *locus standi* for the Committee of the Regions (CoR)[40] may enhance the judicial scrutiny of subsidiarity, although next to the pre-emptive effect,[41] the actual value of these additions in function of the judicial scrutiny is to be doubted. The composition of the CoR, comprising 344 members along the several MS,[42]

sidiaritäts- und Solidiaritätsprinzip in der europäischen Union (Nomos 1999) p. 300-304; I. Cooper, 'The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU', 44 *JCMS* (2006) at p. 291; Konstadinides, *supra* n. 3 at p. 127. It is argued that the political and integrationist approach of the ECJ exacerbates this dysfunction of subsidiarity: *see* J. Snell, '"European Constitutional Settlement", an Ever Closing Union, and the Treaty of Lisbon', 33 *E. L. Rev.* (2008) at p. 627 and Konstadinides, *supra* n. 3, at p. 133, *in fine*.

[35] *See* ECJ Case C-58/08, *Vodafone Ltd* v. *Secretary of State for Business, enterprise and regulatory reform* [2010], § 72-80 for an example of the recently applied judicial scrutiny. *See also* K. Lenaerts and P. Van Yperseele, 'Le principe de subsidiarité et son contexte', *Cah. Dr. Eur.* (1994), p. 75-80; Craig, *supra* n. 17, at p. 426-27; T. von Danwitz, 'Vertikale Kompetenzkontrolle in föderalen Systemen', *Archiv des öffentliches Rechts* (2006) at p. 575.

[36] SEC(2009)92 state the impact assessment guidelines.

[37] See SEC(2009)92 at p. 5 for a general table of contents. *See also* Meuwese, *supra* n. 13, p. 57-70.

[38] A. Alemanno, 'The Better Regulation Initiative at the Judicial Gate', 15 *Eur. L. J.* (2009) p. 400; D. Keyaerts, 'Ex Ante Evaluation of EU Legislation Intertwined with Judicial Review? Comment on Vodafone C-58/08', 35 *Eur. L. Rev.* (2010) p. 869 at p. 883; Meuwese, *supra* n. 13, p. 159, 163-164; von Bogdandy and Bast, *supra* n. 34, at p. 304.

[39] G. Bermann, 'National Parliaments and Subsidiarity: An Outsider's View', 4 *Eur. Const. L. Rev.* (2008) at p. 458.

[40] Art. 8 of the Protocol.

[41] The legal standing may serve as a warning mechanism, raising the value of the input provided by the Committee at the stage of consultation.

[42] Maximum 350 members according to Art. 305 TFEU.

hinders an effective consideration of regional legislative interests.[43] For example, Belgium has the same number of representatives as do the Netherlands (i.e., twelve). Furthermore, regions differ greatly in their scope and depth of authority,[44] making consensus-building rather difficult.[45]

The subsidiarity mechanism as a tool for multilevel balancing

Regional aspects as an expansion of the subsidiarity analysis

Very few mechanisms at the European level ensure the regional input in a subsidiarity assessment. Therefore, it is left to the national parliaments to interact with regional levels and contribute to consensus-building in a co-operative manner.[46] Aside from the formal incorporation of the regional dimension, both in Article 5(3) and Article 4(2), the actual implementation is missing.[47] It has even been argued that with respect to the subsidiarity mechanism, such attention to regional and local matters is superfluous, since it does not matter at which level a comparison with EU action is undertaken.[48] In either case there is a breach, but one cannot imagine a breach of regional and local autonomy in terms of subsidiarity by an EU measure when no such breach would exist at the national – EU level.[49] Nevertheless, it can be argued that the taking into account of regional aspects in a member state's subsidiarity analysis is indispensable.

First, the argument that attention to regional and local matters is superfluous rests on a demand-side analysis of subsidiarity, as envisioned in the Edinburgh guidelines.[50] The demand for EU action in this understanding is triggered by

[43] Heterogenous membership is inevitable, according to Mandrino, but too fragmented to find a useful common position: Mandrino, *supra* n. 11, at p. 523.

[44] L. Hooghe et al., *The Rise of Regional Authority* (Routledge 2010) p. 63-68 for an overview of the conclusions.

[45] Procedurally, it is also unclear how exactly this proceeding should take place: *see* A. Kees, 'Die Rechtsnatur der Subsidiaritätsklage nach der Europäischen Verfassung', *Zeitschrift für europarechtliche Studien* (2006) p. 436-437. Indeed, the most recent reports of the CoR on subsidiarity monitoring do not mention a procedure for this complaint.

[46] R. Hrbek, 'Parliaments in EU Multi-level Governance', in R. Hrbek (ed.), *Legislatures in Federal Systems and Multi-level Governance* (Nomos 2010) p. 136-137.

[47] Although the regional dimension does get some attention in the IA documents and guidelines, the accompanying institutional link is rather weak. For example, the IA on the the directive on the application of patient's rights in cross-border healthcare, *see* supra n. 27, at p. 43-44 notes the *larger variations within countries* than between MS (emphasis added).

[48] K. Lenaerts and P. Van Nuffel, C*onstitutional Law of the European Union* (Sweet & Maxwell 2005) p. 104.

[49] Lenaerts and Van Nuffel, *supra* n. 48.

[50] Three criteria were put forward by the Edinburgh guidelines: the transnational dimension of the issue, the incompatibility with Treaty objectives or significant damage to MS interests, and the

reasons of scale or transnational effects, all stemming from the nature of the collective action problem at the base, without taking the administrative capacities of the national, regional or local level into account.[51] Public goods, which constitute an apt frame of thinking about these policy issues, do not evolve to a territorial linear model.[52] Thus, in a hypothetical situation of weak member states and relatively strong regions, when taking into account the 'government capacity', a situation could arise where regional action trumps EU action, which in turn trumps national action. Furthermore, regional interests could diverge from those expressed by the central institutions at European level.[53]

Secondly, legitimacy-related reasons argue in favour of the inclusion of regional aspects. Vertical inter-level legitimacy comprises the balancing of regional aspects, next to national and EU interests. In the same vein, Weatherill notes the potential adverse effect on the problem-solving capacity of EU action, source of legitimacy, of ignoring national constitutional arrangements.[54] The supply side, i.e., the capacity in legislative, administrative and fiscal terms, needs to form part of the subsidiarity analysis, necessarily differentiating between the national and regional level.[55]

Thirdly, the national authorities are not necessarily interested in operating the subsidiarity test and are not necessarily capable of doing so when the regions are (exclusively) competent to regulate a matter. In those cases, the regions should be able to carry out a subsidiarity test and enter into the institutional dialogue, either directly or through the national parliaments.

The early warning mechanism and the involvement of regional assemblies

The revision of Article 5(3) TEU due to the Lisbon Treaty does in fact introduce the regional and local levels as factors warranting attention. Complementary to

scale of the benefits. All thus relating to the policy matter at hand. *See* concisely Barnard, *supra* n. 17 at p. 88-89.

[51] F. Parisi, *The Economics of Lawmaking* (Oxford University Press 2009) p. 64-65, integrates this supply-side element, deriving as foremost conclusion the path-dependency of centralization, arguing that because switching costs decrease in light of the number of attributed competences.

[52] R. Cooter, *The Strategic Constitution* (Princeton University Press 2000) at p. 107; a symposium of economists on the optimal allocation of government authority bundles several examples of this 'extended' subsidiarity analysis – for an overview, *see* G. Triantis, 'Foreword: The Allocation of Government Authority,' 83 *Virginia L. Rev.* (1997) p. 1275-1282.

[53] A. Evans, 'Regional Dimensions to European Governance', 52 *Int. and Comp. L. Q.* (2003) p. 21 and 43.

[54] S. Weatherill, 'The Challenge of the Regional Dimension in the European Union', in S. Weatherill and U. Bernitz, *supra* n. 1, at p. 30-31.

[55] A similar argument by R. Scholz, 'Art. 23 GG', in T. Maunz et al. (eds.), *Grundgesetz, Kommentar* (Beck 2008), no. 101, pointing out that the size of the different member states should be taken into account, and should be transposed in the voting procedure of the subsidiarity protocol.

the respect demanded for 'national identity' in Article 4(2) TEU,[56] 'regional mobilization'[57] was institutionally transposed by the Lisbon Treaty.[58] Thus, a safeguard needs to be implemented that sufficient consideration will be taken *vis-à-vis* the regional and local interests. However, aside from the relevant treaty provisions, little consideration is paid to the actual incorporation of regional and local concerns directly by the EU institutions.[59] For instance, Article 16(2) TEU, in determining the composition of the Council, leaves scant room for regional involvement. Regional participation in the policy formulation in this organ is left to the MS to decide and implement. In the same line, the extent to which regional assemblies are to be consulted in the subsidiarity scrutiny procedure is left for the national member states to decide.[60] Draft legislative proposals are to be submitted to national parliaments, which can in turn consult regional assemblies. Within eight weeks, substantive reasoning regarding the compliance with subsidiarity is to be submitted. With each national parliament having two votes, there is room for member states to allocate one vote to regional statements. Again, this is left for the member states to decide.

The EU functions in this respect more as a dual-layered system than a full-blown multi-level polity.[61] The direct participation of sub-state entities in EU decision-making is developed in national constitutional law, and relatively minor compared

[56] Art. 4(2) TEU requires the incorporation of considerations of 'national identity', which includes political and constitutional structures. In *Sayn-Wittgenstein*, the ECJ thus infers in subsidiary order, from the status as a republic that Austria furthered a legitimate objective by prohibiting the use of titles of nobility. ECJ Case C-208/09, *Sayn-Wittgenstein* [2010], § 92-93. It remains to be seen how this clause will be rendered judicially operable, and whether national constitutional arguments could be balanced against the requirement of uniform and effective application of EU law.

[57] Mandrino, *supra* n. 11, at p. 516.

[58] Mandrino, *supra* n. 11, at p. 533: Mandrino identifies three major instances of greater regional influence: the recognition of 'national identity', the right of appeal to the ECJ for the Committee of the Regions and stronger instruments ensuring the compliance with subsidiarity.

[59] A.J. Cygan, *National Parliaments in an Integrated Europe* (Kluwer Law 2002) p. 159, who gives as primary explanation the different methods of territorial decentralization which render a structured mechanism for regional participation rather difficult.

[60] Art. 6 TEU, curiously, the English ('it will be for each NP') and French wording ('il appartient à') seem to be less strict than the Dutch ('ieder parlement … raadpleegt') or the German ('obliegtes'). According to J.-V. Louis, this is to be understood as leaving the possibility of a constitutional obligation open, and not as an 'enabling clause'. *See* J.-V. Louis, 'National Parliaments and the Principle of Subsidiarity – Legal Options and Practical Limits', 4 *Eur. Const. L. Rev.* (2008) p. 440, ft. 22; likewise, Grabenwarter sees this as 'leaving the option open for a legal obligation under national (constitutional) law': C. Grabenwarter, 'National Constitutional Law Relating to the EU', in von Bogdandy and Bast, *supra* n. 34, p. 115.

[61] For a general overview Weatherill, *supra* n. 54, at p. 1-32; J. Dieringer, 'Regionen und Regionalismus im europäischen Kontext', in R. Dieringer and J. Sturm (eds.), *Regional Governance in EU-Staaten* (Verlag B. Budrich 2010) p. 347-352. Nuanced, with explorations of regional involvement: Callies, *supra* n. 34, at p. 168-183.

to indirect co-ordination and co-operation mechanisms.[62] Nevertheless, the subsidiarity mechanism can – and needs to – supplement this shortcoming.

This objective of institutional dialogue between national and subnational entities requires instruments and safeguards for an adequate implementation. Especially in the Belgian constitutional distribution of powers, where exclusivity is the guiding paradigm,[63] regional assemblies function on equal footing with national parliaments.[64] This renders the participation in EU decision-making even more urgent. In the next part we will investigate existing measures for implementation of the subsidiarity mechanism, and the institutional dialogue which this mechanism requires.

However, limitations arise from the European early warning system, with implications for the national-subnational parliamentary dialogue. Firstly, as noted above, the period of eight weeks that the national parliaments have to conduct a subsidiarity inquiry leaves insufficient time for regional involvement, especially when combined with the necessary technical expertise to assess the subsidiarity compliance. Secondly, the two votes granted to each parliament assume a strong representation of regional interests in the second federal legislative chamber. The primary example is the German *Bundesrat* which consists of members of the regional executive governments.[65] Furthermore, the *Bundesrat* controls[66] federal legislation, primarily to the extent that *Länder* administrative implementation is needed.[67] Other provisions require the consent of the *Bundesrat* too. Focusing on the participation by the *Länder* in EU decision-making concerning regional matters, the *Bundesrat* plays a pivotal role. Via Article 23 GG, the second chamber functions as the most important channel of *Länder* participation to EU decision-

[62] *See* with respect to Germany: C. Panara, 'In the Name of Cooperation: The External Relations of the German Länder and Their Participation in the EU Decision-making', 6 *Eur. Const. L. Rev.* (2010) p. 70-80.

[63] See *infra*, 'The subsidiarity mechanism: The Belgian implementation (Procedural reinforcements)'.

[64] G. Craenen, 'Kingdom of Belgium', in L. Prakke and C.A.J.M. Kortmann (eds.), *Constitutional Law of 15 EU Member States* (Kluwer 2004) p. 78; F. Delpérée and M. Verdussen, 'L'égalité, mesure du fédéralisme', in J.-F. Gaudreault-Desbiens and F. Gélinas (eds.), *The States and Moods of Federalism: Governance, Identity and Methodology* (Montréal/Brussels 2005) p. 199.

[65] Who can only vote unanimously per *Land*, and are bound by instructions by their respective governments. *See* Arts. 51(3), 77(2) and 53a(1) GG.

[66] Limited veto power ex Art. 77 §§ 2-3 and Art. 80 GG, *see* J. Ipsen, *Staatsorganisationsrecht* (C. Heymans 2009) p. 107-109; W. Heun, *The Constitution of Germany* (Hart 2011) p. 69-70. *See* with specific application to EU affairs and the Law on Accountability for Integration: J.-U. Hahn, *'Die Mitwirkungsrechte von Bundestag und Bundesrat in EU-Angelegenheiten nach dem neuen Integrationsverantwortungsgesetz*', 20 *Europäische Zeitschrift für Wirtschaftsrecht* (2009) p. 758-763.

[67] Art. 84(1) GG. On the recent reform of this article, decreasing the scope of Bundesrat involvement, *see* K. Selg, *Die Mitwerkung des Bundesrates bei der Gesetzgebung des Bundes* (P. Lang 2008) p. 119-172.

making. 'Normal' bicameral systems also experience little trouble with the vote distribution *ex* Article 7 of the Protocol. Nevertheless, in federal and regional systems, the vote distribution is harder to implement. Should priority be given to the governmental level that conducts the actual negotiations? Should regional interests be represented at all time, or only when exclusive legislative competences of the sub-state entities are involved?

The subsidiarity mechanism: the Belgian implementation

The integration of regional aspects in the subsidiarity test requires a continuation of the institutional dialogue between the national and the regional level. Belgian federalism, however, is badly equipped for this kind of dialogue. In Belgium, the division of competences is founded on exclusivity, like in Austria, but displays a more dual character. This led to Declaration No. 51 to the Lisbon Treaty,[68] holding that when the EU uses the terminology 'national parliaments', Belgian constitutional law fosters an understanding according to national competence division, thus encompassing regional parliaments. How then to reconcile these different emphases?

Belgian federalism is characterised by its devolving or centrifugal nature aimed at safeguarding the autonomy of the sub-state entities (called 'Regions' and 'Communities'). Therefore, between the federal state and the sub-state entities, competences are divided according to a dual logic,[69] with a few relatively minor exceptions to the principle of exclusivity of competence.[70] The technique of decline in legislative autonomy in exchange for executive power or legislative co-operation,[71] frequently observed elsewhere, is not an option in the Belgian context. Executive power follows the legislative competence,[72] and, as will be explained below, the federal second chamber represents inadequately the several sub-state entities. This is often explained by the dual, overlapping and asymmetrical character of the federalist structure.[73] Furthermore, Belgian institutional setting is dominated by

[68] Declaration No. 51 of the Kingdom of Belgium on the national parliaments, 17 Dec. 2008, *PB* C 306, p. 287.

[69] W. Pas, 'The Belgian "National Parliament" from the Perspective of the EU Constitutional Treaty', in Ph. Kiiver (ed.), *National and Regional Parliaments in the European Constitutional Order* (Europa Law Publishing 2006) p. 57-59; P. Popelier, 'Social Federalism and the Allocations of Powers in a Comparative Law Perspective – the Case for Shared Powers', in P. Cantillon et al. (eds.), *Social Federalism* (Intersentia 2010) p. 104; J. Vanpraet, *supra* n. 6, at p. 54-55.

[70] P. Popelier, 'Social Federalism and the Allocations of Powers', *supra* n. 53, at p. 104-110.

[71] *See* Germany, where the Länder's strategy is described as *autonomy through participation*. *See* for the national aspect D. Currie, *The Constitution of the Federal Republic of Germany* (Chicago University Press 1994) p. 34; for the Länder – EU aspect: Zoller, *supra* n. 88, at p. 575.

[72] Vanpraet, *supra* n. 6, at p. 54-55.

[73] Pas, *supra* n. 53, at p. 57-59.

a linguistic division.[74] The social division based on language and culture, between Dutch- and French-speaking, influences to a large extent the institutional design of the Belgian government structure.[75] This dual or binary logic has its drawbacks, especially in intergovernmental bargaining.[76] Only two factors supplement this dual federalist logic, furthering a co-operative logic. First, a (limited) list of competences where an *ex ante* co-operation agreement,[77] ensuring co-operation on an equal basis, or other types of involvement are required. Secondly, the Constitutional Court may introduce in its case-law co-operative requirements on the basis of the proportionality principle, ranging from procedural involvement to co-operation agreements.[78] This, however, remains exceptional.

Political safeguards

Belgian federalism only inadequately provides for participation of the regions at the national level. Although the Belgian parliament is bicameral, the senate does not provide for a strong representation of the regions. Out of 71 senators, only 21 hold the double mandate of member of regional parliaments and member of the federal senate.[79] The selection of these 21 senators, instead of reflecting the regional balance of power, is based upon the results of federal elections.[80] On the other hand, the Dutch- and French-speaking communities are well represented at the federal level via language groups in both the house of representatives and the

[74] B. Guy Peeters, 'Consociationalism, Corruption and Chocolate: Belgian Exceptionalism', 25 *West Eur. Politics* (2006) p. 1082. The author is rather sceptic on the possibilities for effective governance of Belgium, noting the confluence of 'structural and behavioral mechanisms in reinforcing the differences among the communities' (at p. 1084).

[75] The German-speaking minority is marginalized in this respect, at least as regards its participation at the federal level. On the other hand, as a minority representing less than 1% of the overall population, the German speaking minority gained large autonomy in the wake of the federalisation process, including the establishment of an autonomous German speaking Community.

[76] Repartition of competences in political negotiations takes the form of a zero-sum game due to this dominance of exclusivity, making it harder to find a political compromise between various parties. *See* B. Cantillon et al., 'Allocation of Competences and Solidarity Circles in a Layered Welfare State', in Cantillon et al., *supra* n. 53, at p. 10-11.

[77] Art. 92*bis* §§ 2-3 Special Law on Institutional Reform; Vanpraet, *supra* n. 6, at p. 197-204.

[78] Interpreted as federal comity. E.g., in Case No. 33/2011 of 2 March 2011, the Court made the exercise of the exclusive competence in the matter air pollution is dependent upon a pre-existing co-operation agreement due to the requirement in the directive of a single administrative government, and the transboundary nature of the problem at hand. The Constitutional Court thus held that, even when the exclusive competence is territorially defined, the very nature of the issue might transgress these inner-state boundaries, urging co-operation between the various entities. See for another example, Cases No. 132/2004, No. 128/2005 and No. 163/2006, regarding telecommunication.

[79] Art. 67 Belgian Constitution.

[80] Art. 68 Belgian Constitution.

senate, veto rights and a government formed on the basis of language parity. This, however, necessitates political negotiations between language groups, not so much the taking into account of regional interests.

The federal parliament has established a mixed commission on European affairs, where members of the House of Representatives and the Senate meet with Belgian members of the European Parliament.[81] Again, regional interests are only represented in this federal committee, should some of the senators involved hold the double mandate of member of regional parliament and member of the federal senate.[82]

Hence, instead of installing the Senate as a forum for inter-level institutional dialogue, Belgium has opted for the involvement of regional assemblies in a direct way, on an equal footing with national parliaments. According to Declaration No. 51 to the Lisbon Treaty, 'national parliaments' also encloses regional parliaments.[83] However, as will be explained in the next section, no agreement has been reached on how the representation of the regional parliaments in this respect should be effectuated so as to fit in the Protocol No 2 subsidiarity procedure.

Procedural reinforcements

Several procedural tools involve the Belgian Regions and Communities in the subsidiarity mechanism. Here again, the procedural safeguards display some defects, hindering an effective institutional dialogue.

Information

First, involvement of the regional parliaments in the subsidiarity mechanism requires the distribution of information on EU decision-making. Regional parliaments have several ways of obtaining this information. First of all, the federal government is obliged to forward any useful information that it receives from the European institutions.[84] Secondly, internal services can be established, to co-ordinate the distribution and monitor the use of European documents. The Flemish parliament, for example, set up an administrative 'Europe Service' for that pur-

[81] *See* F. Delpérée and F. Dopagne, *Le dialogue parlementaire Belgique-Europe* (Bruylant 2010) p. 81. *See also* Art. 68 Regulations of the House of Representatives and Art. 85 Regulations of the Senate. The Federal Committee consists of ten members of the House, ten members of the Senate and ten Belgian members of the EP.

[82] The constitution provides for ten Dutch-speaking and ten French-speaking senators to be appointed by the regional assemblies to the federal senate. With the addition of one extra representative of the German-speaking assembly, these 21 regional representatives do not even form a majority of this body (71 in total). See Art. 67 of the Belgian Constitution.

[83] Declaration No. 51 of the Kingdom of Belgium on the national parliaments, 17 Dec. 2008, *PB* C 306, p. 287.

[84] Art. *92quater* of the Special Law on Institutional Reform; H. Vos et al., *supra* n. 86, p. 107.

pose.[85] Thirdly, in the case of Flanders, Flemish members of the European Parliament are invited to join the meetings of parliamentary standing committees.[86]As mentioned above, regional interests are only represented in the federal mixed commission on European affairs, should some of the senators involved hold the double mandate of regional member of parliaments and federal member of the senate. With respect to informational rights, the German *Länder* fare better: the German federal government is obligated to inform the *Länder* through the *Bundesrat*,[87] which has differentiated legal consequences, depending on the internal division of powers.[88]

Impact assessment

Secondly, as the subsidiarity mechanism enhances an institutional dialogue based upon reasoned arguments, the use of impact assessments is crucial in order to measure both the national and regional impact of draft EU legislation. For example, in the Netherlands, a specific standing committee on subsidiarity co-ordinates the parliamentary scrutiny.[89] So-called BNC-fiches have become the central informational instrument for the Second Chamber. Reference is systematically made to the European Impact Assessment, and enhances the quality of information with respect to compliance with subsidiarity.[90] Kiiver argues that the function of the national parliaments is not so much to enhance the quality of the European legislation in a technical sense, but to enhance the legitimacy through debate and

[85] H. Vos et al., 'Belgian Parliaments and EU Decision making', in O. Tans et al., (eds.), *National Parliaments and European Democracy* (Europa Law Publishing 2007) p. 107.

[86] H. Vos et al., *supra* n. 85, at p. 107, noting the rare occurrence.

[87] Art. 23(2) GG.

[88] When the matters at hand concern the essential interests of the Länder, or trigger the Bundestag competence due to German constitutional law, or touch upon the legislative competences of the Länder, the opinion of the Bundestag on de EU legislative proposal will be binding upon the German representative in the Council. P.-C. Müller-Graff, 'The German Länder: Involvement in EU Law and Policy Making', in Weatherill and Bernitz, *supra* n. 61, at p. 110-113; A. Zoller, 'Die Weiterentwicklung der Bund-Länder-Zusammenarbeit in EU-Angelegenheiten vor dem Hintergrund des Vertrags von Lissabon', in *Jahrbuch des Föderalismus* (2008), p. 575-576; D. Thym, 'Parliamentary Control of EU Decision-making in Germany', in O. Tans et al. (eds.), *supra* n. 85, at p. 66; Scholz, *supra* n. 11, at p. 152-158; Cygan, *supra* n. 59, at p. 172-176 and 184-186; Panara, *supra* n. 62, at p. 65, 75-78.

[89] J.J. Van Dijk, 'Juist zonder Europese Grondwet een subsidiariteitstoets', *Regelmaat* (2006), p. 7-8; L. Senden and T. Vandamme, 'Het Verdrag van Lissabon en het Europese mandaat van nationale parlementen', *SEW* (2009) p. 25.

[90] A. Meuwese, 'Impact assessment als onderdeel van een "gemeenschappelijke wetgevingscultuur" in Europa', in H. Schouten and L. Loeber (eds.), *Effectenanalyse in Europees en nationaal verband: Symposium Vereniging voor wetgeving en wetgevingsbeleid* (Wolf 2008) p. 66-68.

discourse.[91] A guardian rather than a co-legislator.[92] In the Belgian governmental context the doctrine of *better lawmaking* has only imperfectly been applied. Of the seven governments, only one has actually implemented a system of *ex ante* evaluation of lawmaking. Since January 2005, the Flemish government is required to conduct impact assessments for most of its draft primary and secondary regulations.[93] Moreover, it is recommended – although not required – to also conduct an impact assessment regarding EU draft Directives.[94] In practice, however, these impact assessments are of a poor methodological quality,[95] mainly due to a lack of political support.[96] At the federal level, a 'Kafka' test for administrative burdens and a Sustainability Impact Assessment apply, the implementation of which, however, is defective.[97]At the level of parliaments, impact assessments are practically unknown. The Flemish parliament is an exception, as it has confirmed its support in an institutional agreement on a joint approach to the Regulation Impact Analysis.[98] Nevertheless, impact assessments are hardly ever mentioned in parliamentary debates. The lack of political support for regulatory tools enhancing the output legitimacy of regulations may be imputed to the fact that these tools enhance transparency, while the governance of a divided and particratic polity sometimes benefits from opaqueness.[99] This stands in contrast to one of the aims of the Lisbon Treaty, enhancing transparency by more clearly dividing powers.[100]

Internal voting procedure

Thirdly, no agreement has been reached on how to effectuate the Declaration. Since the opportunity for greater involvement in EU matters for regional assemblies constitutes an important part of 'autonomy through participation', already in 2005

[91] Ph. Kiiver, 'The Early-warning System for the Principle of Subsidiarity: The National Parliaments as a Conseil d'Etat for Europe', 36 *E. L. Rev*. (2011) at p. 106-107. *See also supra* n. 2.

[92] Kiiver, *supra* n. 75 at p. 107.Which was the specific intention of the Working Groups preparing the Constitutional Treaty. *See* Cooper, *supra* n. 34, at p. 290; Contrary, noting the likely effect on policy initiatives: Konstadinides, *supra* n. 3, at p. 149.

[93] Decisions of the Flemish Government of 4 June and 17 Dec. 2004.

[94] Scenario for the implementation of European Directives in Flanders, <http://iv.vlaanderen.be/nlapps/data/docattachments/20051214_Draaiboek.pdf> at p. 7 and 8.

[95] K. Van Aeken, 'Pushing Evaluation Forward. Institutionalizing as a Means to Foster Methodological Growth of Legislative Ex Ante Evaluation', in J. Verschuuren (ed.), *The Impact of Legislation* (Martinus Nijhoff 2009) p. 117; P. Van Humbeeck, 'Regulatory Impact Analysis in Flanders and Belgium: An Update on the Experience and Challenges', ICW Working Paper, <www.centrumwetgeving.be/main.aspx?c=*ICW&n=52794&ct=52375>.

[96] Van Humbeeck, *supra* n. 118, at p. 26; SERV Reguleringsimpactanalyse. Evaluatie en Aanbevelingen. Recommendation of 22 Nov. 2006 (Brussels 2006).

[97] P. Van Humbeeck, *supra* n. 118.

[98] IIA of 4 Feb. 2009.

[99] Peeters, *supra* n. 58, at p. 1087.

[100] K. Lenaerts and N. Cambien, *supra* n. 12, p. 190.

steps were undertaken to implement a co-operation agreement in order to ensure a regional voice in the process of subsidiarity monitoring. On December 19th, 2005, a co-operation agreement[101] was signed by the eight chairs of the legislative bodies in the Belgian federal structure.[102] However, the agreement of 2005 was only endorsed by the plenum of the Flemish parliament.[103] Furthermore, the agreement drafted in 2005 stipulated to enter into force together with the Treaty establishing a Constitution for Europe, which in the end did not enter into force. As confirmed by the Constitutional Court,[104] there is at present no co-operation agreement in force to implement Protocol No. 2. At present negotiations are being conducted to draft a new co-operation agreement, which however, needs to be situated in the larger negotiations on Belgian constitutional reform.

The council of state expressed some doubts concerning the legal basis for parliaments to conclude a co-operation agreement.[105] It was not clear as a matter of national law whether parliaments (envisaged in the protocol) enjoy the competence to negotiate co-operation agreements, as opposed to executive governments (primary actors in Article 92*bis* of the Special Law on Institutional Reform[106]).[107] The Council's argument drew on the capacity to represent the sub-state entity, which is reserved to the executive.[108] However, an amendment to the Special Law on Institutional Reform of 2003 provided the regional assemblies with the capacity for legal and extra-legal representation 'in case it [the Parliament] enjoys competence over the subject-matter or act.'[109] We therefore conclude that this provides

[101] The agreement can be found in the parliamentary database of the Flemish Parliament: *Parl. Doc.* Flemish Parliament 2005-06, No. 628, p. 1-16.

[102] I.e., the Flemish parliament, the Brussels parliament, the parliament of the French community, the parliament of the Walloon Region, the parliament of the German community, the assembly of the French community commission, the federal chamber of representatives, and the federal senate. All have legislative powers, whether in community- or region-oriented subject-matter. There was no signature of the president of another assembly with legislative powers, i.e., the Common Assembly of the Dutch and French Community in Brussels.

[103] *Proceedings*, Flemish Parliament, 2005-06, 22 Dec. 2005, p. 7-12.

[104] Const. Court No. 58/2009 of 19 March 2009, § B.10-12, *see also* Delpérée and Dopagne, *supra* n. 81, at p. 75 for a commentary.

[105] Council of State, Division Legislation, Advice No. 44.028/AV of 29 Jan. 2008, *Parl. Doc.* Senate, 2007-08, No. 4-568/1, § 33.

[106] Art. 92*bis* of the Special Law on Institutional Reform (8 Aug. 1988) stipulates two categories of co-operation agreements, determined *ratione materiae*: the optional (§ 1) and the obligatory agreements (§§ 2-4*quater*).

[107] The Council of State for his parts, notes the 'division in the legal doctrine' and suggests a specific obligation for a co-operation agreement in the matter of the Subsidiarity Protocol, via an amendment to the Special Institutional law. *See* the advice, *supra* n. 89 at § 33, footnote 102.

[108] R. Moerenthout and J. Smets, De samenwerking tussen de federale staat, de Gemeenschappen en de Gewesten (Kluwer 1994) p. 156.

[109] Art. 48*bis* Special Law on Institutional Reform; K. Muylle and J. Van Nieuwenhove, 'De vertegenwoordiging in en buiten rechte van wetgevende vergaderingen', *Tijdschrift voor Bestuurs-*

a sufficient legal basis for a regional assembly to conclude a co-operation agreement. A recent Advice of the Council of State appears to support this conclusion.[110] As observed elsewhere, the wordings of the co-operation agreement 2005 may well inspire a new co-operation agreement that is to be concluded.[111] We will therefore discuss the content of the agreement and the procedure contained therein.

When the eight-week period from the protocol takes start, i.e., when the national parliament receives the necessary documents and has the opportunity to develop its own reasoning on the compliance with the principle of subsidiarity, regional assemblies have two weeks to *propriu motu* assert their involvement by communicating this intention to all other parliaments. Consultation and involvement thus depend on their own volition and therefore require preparation and expertise. When such a notice is delivered, the several legislative bodies have a limited period of one week to dispute this interest in terms of competence before the Council of State.[112] Appeal to their decision can be brought before a committee consisting of seven chairmen of the legislative bodies.[113]

By the end of a five-week period, each parliament submits its reasoned statement on the compliance of the draft of the European legislative act. At this point, an internal voting procedure should determine how the two national votes awarded in the Protocol No. 2 are to be cast. Three possible scenarios arise, determined by the national division of competence.[114]

First, when the federal state is exclusively competent in the domain of policy involved, the two national votes are determined by the opinions of the federal house of representatives and the federal senate.[115] They both dispose of their vote

wetenschappen en Publiekrecht (2003) p. 421-422.

[110] Council of State, Division Legislation, Advice No. 48.754/AG/2 and 48.755/AG/2 of 15 December 2010, *Parl. Doc.* Parl. Wallon, 2010-11, No. 347/1, § 7.

[111] K. Lenaerts and N. Cambien, 'Regions and the European Court: Giving Shape to the Regional Dimension of the Member States', *E. L. Rev.* (2010) p. 622.

[112] The Belgian Council of State has two divisions: one, the department of legislative affairs, gives ex ante legal and technical legislative advice to the lawmaker, the other, the department of executive affairs, is the highest administrative judicial body. As such, the department of legislative affairs deals frequently with questions of competence.

[113] The French Community Council and the Common Community Commission are not represented in this body. Although they are not recognised in the Constitution as full-fledged communities, they are both assemblies with legislative powers, competent to issue an opinion according to the co-operation agreement 2005.

[114] Note the analogy to the German and Austrian arrangement, Art. 23 GG and Art. 23 B-VG respectively.

[115] Theoretically, one may imagine a possibility, where the national legislator is solely competent, and this with exclusion of the Senate (so-called monocameral competences). Nevertheless, the subject-matter of these competences is rather limited, and confined to formal acts of daily political routine, like approving the annual budget. Therefore, a European legislative act on this matter is rather hard to fathom.

in an autonomous manner, i.e., without having to take the other's substantive position into account. Thus, hypothetically, the Belgian House may warn for a violation of subsidiarity, while the senate does not perceive any problem in this regard.[116]

Secondly, for the so-called mixed affairs,[117] two votes will be cast when at least one federal and one regional body issue an opinion. The two levels of government necessarily have to rely upon one another to be able to participate in the European voting procedure, thus maintaining an equilibrium.

Finally, when an issue corresponds exclusively to devolved matters, two votes will be cast when two parliaments issue an opinion. These assemblies need to belong to different language administrations, otherwise, only one vote will be cast. Contrary to the common theme in the Belgian institutional setting, not two, but four language administrations are installed in the co-operation agreement of 2005: French, Dutch, German, and the bilingual French-Dutch regime.[118] In the exceptional cases where only one region is competent (e.g., the Flemish Region regarding sea-fishery), this assembly disposes of two votes.

It is striking that this procedure aims at positioning federal and regional opinions next to each other, on an equal footing, rather than enhancing institutional dialogue in order to take a better reasoned and balanced stance. In the Belgian federal logic, however, based upon exclusivity and equality, this is perceived as the only credible procedure.

Judicial policing

In case of a subsidiarity infringement, regions have three routes at their disposal to appeal before the ECJ: as a private party, as a representative for the national member state, and via the Committee of the Regions.[119] As a regional authority they do not enjoy the same privileged status as their national counterparts.

The Belgian co-operation agreement of 2005 provides for representation of regional authorities via the federal government in order to file a complaint with

[116] *See* also Delpérée and Dopagne, *supra* n. 81, at p. 72.

[117] These mixed affairs are not to be understood as concurrent competences in a co-operative federal logic, but as a European policy act touching upon both the competences of the substate entities and the federal state. Pas, *supra* n. 53, at p. 63; Delpérée and Dopagne, *supra* n. 81, at p. 73.

[118] *See* the annex to the co-operation agreement, *Parl. Doc.* Flemish Parliament 2005-06, No. 628, p. 15-16; Pas, *supra* n. 53, at p. 72-73; Delpérée and Dopagne, *supra* n. 81, at p. 72-73. When only two assemblies of the same language regime would issue an opinion, only one vote will be cast in the procedure of the protocol.

[119] K. Lenaerts and N. Cambien, *supra* n. 94. The effectiveness of the route via the Committee of the Regions has been adressed above, see *supra* n. 40 and accompanying text.

the ECJ for a breach of the principle of subsidiarity.[120] It is stipulated that one legislative body can file such a complaint once given notice to the other assemblies. The latter only have a veto right in the sense that they can object to the competence of said assembly on the subject-matter at hand. This has to be decided by the Council of State. An appeal can be issued before a body of the seven chairs of the legislative bodies. The practical proceedings of the complaint are to be conducted by the federal executive.[121]

It was mentioned above that judicial policing of the subsidiarity principle has proven challenging. Impact assessments may provoke a more substantive subsidiarity test by the ECJ,[122] however, as mentioned above, the political culture in Belgium does not support the execution of regional or national impact assessments.

Observations on the envisaged subsidiarity mechanism

Turning to the substance of the subsidiarity monitoring, three further observations can be made.

First of all, no autonomous representation and direct communication of the regions with the EU institutions is provided for, neither in the Constitution, nor in the co-operation agreement. Also, the mechanism does not enhance debate between the assemblies in order to enhance reasoned opinions and to reach consensus, enabling the casting of two concurrent votes. This is important in view of the threshold inserted in Article 7(3) of Protocol No. 2, requiring, depending on the subject-matter, one third or one fourth of all the votes in order to force a review of the draft.

The Belgian mechanism can be viewed in contrast to the Austrian arrangement on regional involvement in EU decision-making, in particular the subsidiarity mechanism, which does provide for direct representation and debate. Austrian *Länder* depend heavily on executive co-operation in EU matters.[123] Several instruments guide this involvement: a duty for the federal government to inform the *Länder*, an inter-presidential conference on EU affairs, and an obligatory mechanism forcing the federal government to file suit for a breach of subsidiarity ex

[120] The Council of State, however, noted that the procedural clause in the co-operation agreement is too general and a more specific procedure should be elaborated, Advice No. 44.028/AV, *supra* n. 89, § 34.

[121] Co-operation agreement, *supra* n. 101, at p. 10.

[122] Given the increasing importance of impact assessment in the reasoning of the ECJ, this instrument can build a useful bridge between ex ante and ex post scrutiny of subsidiarity. *See* D. Keyaerts, 'Ex Ante Evaluation of EU Legislation Intertwined with Judicial Review? Comment on Vodafone C-58/08', 35 *E. L. Rev.* (2010) p. 869 at p. 883.

[123] M. Büchel-Germann, 'Probleme der Subsidiaritätsprüfung aus Sicht der österreichischen Länder', Gamper and Bußjäger, *supra* n. 2, at p. 19.

Article 8 of the Protocol at the behest of a *Land*. Next to these, specific measures are taken to adequately organize a subsidiarity scrutiny process. According to the distribution of competences, relevant cases are filtered at the national level by the *Bundesrat*[124] and a specific Land is appointed as 'responsible for subsidiarity' in the matter at hand.[125] A proposal is put forward on the compliance with subsidiarity, and the other *Länder* can adopt this as their position. According to Article 23d(2) of the Austrian Constitution, a uniform opinion of the nine *Länder* is binding for the Federation, both in negotiations and in voting. An exception or deviation from this binding opinion is possible for reasons of compelling foreign and integration policy reasons.[126] A co-operation agreement provides the necessary operational details.[127] The platform where interregional bargaining and consensus-building takes place is the *Integrationskonferenz der Länder* (IKL), consisting of the presidents of both legislative and executive bodies of the *Länder*.[128] For reasons of technical expertise however, the role of the regional legislatures is minimal.[129] Consensus is attained by the absence of opposition,[130] which gives considerable discretion to the reporting *Land* on subsidiarity. Kiefer distinguishes four phases in the process of evaluation of subsidiarity by the single responsible *Land*: (1) consultation with European Commission in the drafting stage; (2) preparation of an opinion in the Early Warning proceedings; (3) negotiations in the Council, European Parliament, and the Committee of the Regions; and (4) access to the ECJ.[131] The direct communication with EU institutions is the responsibility of the *Verbindungsstelle*, department of *Länder* affairs. Co-ordination is thus established at three levels: interregional, between the Austrian federation and the regions, and between the *Länder* and the EU. Participatory rights and information are

[124] Which consists of representatives of the several Länder executives, Art. 34 B-VG, *see* L. Prakke, 'The Republic of Austria', in Prakke and Kortmann, *supra* n. 64, at p. 39; R. Sturm, 'Austria', in A.L. Griffiths (ed.), *Handbook of Federal Countries* (McGill 2005) p. 49. On the filtering ex Art. 23d B-VG, *see* H. Mayer, *Das österreichische Bundes-Verfasssungsrecht* (Manzsche Verlags- und Universitätsbuchhandlung 2007) p. 186.

[125] *Subsidiaritätsverantwortliche Land*: Büchel-Germann, *supra* n. 81, at p. 22.

[126] Art. 23d(2) B-VG; P. Bußjäger, 'Die Beteiligung nationaler und regionaler Parlamente an der EU-Rechtsetzung – Chance oder Vortäuschung von Partizipation?', in Gamper and Bußjäger, *supra* n. 2, at p. 39.

[127] Vereinbarung zwischen dem Bund und den Länder gemäß Art. 15a B-VG über die Mitwirkungsrechte der Länder und Gemeinden in Angelegenheiten der europäischen Integration, *Bundesgesetzblatt* (Austrian Federal Gazette) 9 Dec. 1992, no. 775. Art. 6 of the agreement specifies when an interland consensus binds the federal government.

[128] Bußjäger, *supra* n. 84, at p. 40-41; Büchel-Germann, *supra* n. 81, at p. 19.

[129] Bußjäger, *supra* n. 84, at p. 41

[130] Bußjäger, *supra* n. 84, at p. 41

[131] A. Kiefer, 'The Practice of Subsidiarity Monitoring and the Provisions of the Treaty of Lisbon', CALRE, REGLEG and CoR seminar, Brussels, 19 May 2008, to be consulted at <www.cor.europa.eu>, visited on 7 March 2011.

constitutionally guaranteed.[132] However, the time limit of eight weeks remains quite short for meaningful regional input in the process.[133] As such, the Austrian implementation of subnational involvement in the process of subsidiarity can serve as 'better practice' towards the Belgian implementation. This would require however, that the Belgian entities approach this in a co-operative manner.[134]

Secondly, the computation of the national votes in Belgium is determined by a logic of language divisions, and there is no mentioning as to how this reasoned statement is to be compiled. The institutional philosophy seems more aimed at gathering the different opinions and sending them over to the Commission, than to build a common frame of reference on subsidiarity, in the function of reason-giving and co-ordination. This also explains the lack of conflict-resolving mechanisms in the co-operation agreement: conflicting opinions are merely gathered, instead of deliberatively compiled with a functional end product, in order to usefully cast a vote at the EU level.

Practice shows that, although occasionally useful, most debates on the compliance with subsidiarity address the principle of proportionality or the political opportunity of proposed European legislation.[135] Parliamentary practice needs improvement at this point, especially, as noted above, given the requirement of co-ordinated objections[136] in order to overcome the threshold of one-third of the votes at the European level. The instrument of impact assessment can prove its valour here, by simultaneously providing parliament with reasoned and scientific evidence, and allowing for co-ordination, e.g., via COSAC or the Committee of the Regions. The enforcement of the legal principle of subsidiarity need not to depend on a singular option, both *ex ante* democratic input and *ex post* judicial scrutiny can enhance its operational value.[137] Impact assessments play a key role in this respect.[138] Two solutions present themselves: either the regional entities use

[132] Art. 23a-f B-VG; Mayer, *supra* n. 80, at p. 186-187.

[133] P. Bußjäger, 'The Austrian Länder: The Relationship of Regional Parliaments to the Executive Power against the Background of Europeanization', in R. Hrbek (ed.), *Legislatures in Federal Systems and Multi-level Governance* (Nomos 2010) p. 21.

[134] *See supra* under 'The subsidiarity mechanism: The Belgian implementation (Procedural reinforcements)'.

[135] For example, the Belgian house of representatives issued six opinions on compliance with subsidiarity in the previous session (2007-2010). The substance of these discussions frequently touched upon subsidiarity-related criteria (such as transnational aspects), but was casuistic, and with little attention for legal aspects, or the European IA (no mention at all). *See Parl. Doc.*, *House of representatives*, session 52, No. 654, 1766, 2330, 2523, 2536, and 2544.

[136] *See also* M. Gennart, 'Les parlements nationaux et le Traité de Lisbonne' in *Cah. Dr. Eur.* (2010), p. 46; Louis, *supra* n. 60, p. 447-448.

[137] V. Constantinesco, 'Les compétences et le principe de subsidiarité', 41 *Rev. Trim. Dr. Eur.* (2005) p. 316.

[138] *See supra* under 'The subsidiarity mechanism as a tool for legitimising EU laws (Enforcement)'.

the IA's made by the European Commission, or they equip themselves with their own administration to conduct these inquiries.[139] Either way, the use of impact assessments would imply a drastic turn in the political culture of Belgian parliaments.

Thirdly, a political and institutional willingness to operate on this mechanism has yet to reveal itself in practice. Until today, no actual example of regional involvement in the subsidiarity scrutiny procedure can be found.[140]

Conclusion

It was argued in this paper that in a multi-level organization such as the EU, legitimacy implies input and output aspects as well as multilevel balancing. The subsidiarity mechanism enshrined in Article 5(3) TEU and Protocol No. 2 implements these three strands. However, as it regards the national parliaments as the main discussion partners, it is left to the national parliaments to integrate regions in the subsidiarity procedure. Thus, a co-operative attitude at the national level proves essential to the successful integration of the sub-national levels. As Belgian federalism is based on autonomy, equality and exclusivity, the implementation of the subsidiarity mechanism has proved problematic. The institutional participation of the regions at the federal level is inadequate. Moreover, the principle of exclusivity in the allocation and exercise of powers is aimed at autonomy, providing for only few instruments of co-operation and deliberation. Finally, the economic rationale or output legitimacy implied in the subsidiarity mechanism is not endorsed by Belgian decision making.

According to Vanpraet, the Belgian federalist paradigm, based upon exclusivity, does not warrant a subsidiarity provision within the domestic system.[141] Vanpraet maintains that fundamental subsidiarity is entirely accommodated through political negotiations, resulting in piecemeal additions or corrections to the division of competences.[142] Therefore, no rule of instrumental subsidiarity[143]

[139] Ph. Kiiver, *supra* n. 75, at p. 107 argues that the role of the national parliaments has to be understood from a perspective of legal accountability, thus enhancing democratic legitimacy through dialogue. Therefore, it is 'not necessary … to conduct economic analysis or regulatory impact assessment of their own' (p. 107).

[140] Based on a search in the database of the Flemish Parliament (most likely to engage in this proceeding), no results can be found for subsidiarity opinion. The Flemish Parliament did, however, express an opinion on subsidiarity, within the procedural framework of the Committee of the Region's subsidiarity monitoring network: e.g., *Parl. Doc.*, Flemish Parliament, 2006-07, No. 1022/1, 44 pp. On CALRE's initiative, likewise: *Parl. Doc.*, Flemish Parliament, 2005-06, No. 652/1, 68 pp.

[141] J. Vanpraet, *supra* n. 6, at p. 53.

[142] J. Vanpraet, *supra* n. 6, at p. 53.

[143] *Supra*, n. 6 and accompanying text.

functions. Instead, regional autonomy institutionalises fundamental subsidiarity as it is left to the regions to define policy objectives. This leaves rather little scope for an efficiency-oriented attitude and output-legitimacy.[144] Belgian federalism based upon exclusivity does not enhance a co-operative attitude nor does it support efficiency-driven decision making, essential to the adequate functioning of a multi-level network. Instead of enhancing the institutional dialogue aiming at better-reasoned outcomes and multi-level balancing, the Belgian system of competence allocation is based upon the eagerness to *escape* the need for dialogue and co-operation. As a result, the implementation of the subsidiarity mechanism in Belgium remains defective.

[144] *See supra* under 'The subsidiarity mechanism as a tool for legitimising EU laws (The legitimacy concept implied in the subsidiarity mechanism)'.

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