European and External Relations Committee

Treaty of Lisbon inquiry

Written submission from the Basque Parliament

I attach two documents. One document is the ‘General Resolution from Presidency: Procedure to be Followed in the Early Warning System to Check Compliance of European Union Legislative Initiatives with the Principle of Subsidiarity’, that was approved in December.

Another document is a working paper prepared in 2008 in which there were analysed the role of regions in the early warning system and also the work of the COR in terms of subsidiarity.

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GENERAL RESOLUTION FROM PRESIDENCY: PROCEDURE TO BE FOLLOWED IN THE EARLY WARNING SYSTEM TO CHECK COMPLIANCE OF EUROPEAN UNION LEGISLATIVE INITIATIVES WITH THE PRINCIPLE OF SUBSIDIARITY (DRAFT).

With the coming into force of the Lisbon Treaty, the “Protocol on the application of the principles of subsidiarity and proportionality” annex to this Treaty, will also come into force.

Article 6 of the above-mentioned protocol lays down the following: “Any national Parliament or any chamber of a national Parliament may, within six weeks from the date of transmission of a draft European legislative act, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

If the draft European legislative act originates from a group of Member States, the President of the Council shall forward the opinion to the governments of those Member States.

If the draft European legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the opinion to the institution or body concerned”.

In the case of Spain, the Spanish Parliament has already decided to consult autonomous regional parliaments every time a European Institution asks for the sending of a statement on a draft European legislative act.

So far, since the Treaty has yet to come into force, only a series of “test cases” have been carried out. During these tests, once the Basque Parliament had been asked by the Spanish Parliament to send its opinion regarding compliance by draft European legislative acts with the principle of subsidiarity, the Parliament has been able to carry out its work satisfactorily and within the very brief stipulated time frame of around four weeks.

This system to check compliance with the principle of subsidiarity, known as the “early warning” system (because of the very limited time-frame offered) requires that we set up a procedure in which to receive, classify and transfer all the requests that are received in as brief, open and efficient a manner as possible (always of course with the required legal safety). It is this GENERAL RESOLUTION that sets out this procedure that will have the following steps:

1. Once the initiative has been received at the Parliament’s main register, a file will be opened for it and all the necessary documents will be sent to Presidency and the Parliament’s Bureau.
2. The Bureau, during its next session, will classify the initiative and send it out to the parliamentary groups at the same time as setting a deadline for these groups to make any observations they feel necessary. It will also send the initiative to the corresponding sectoral commission. What is more, it will have documents sent to the Basque Government and the provincial councils of the three Basque provinces in those cases in which the competences of the provinces are specifically affected by the initiative.

3. If the nearest meeting of the Bureau is not going to be held until more than 2 working days after receiving the documents at the register, the task mentioned in point 2 will be carried out by the Speaker of Parliament, without this precluding any ratification by the Bureau in its corresponding session of the decisions taken.

4. The chairperson of the corresponding sectoral commission, will call a meeting of said commission in as short a space of time as possible and will take all the necessary steps to facilitate the appearance before the commission of those people it deems necessary.

5. Once the commission’s session has finalized, together with any necessary appearances before it, and in the light of any observations made by parliamentary groups, and, where necessary by the Government and/or provincial councils, the commission will prepare a statement of reasons stating whether the European initiative complies with the principle of subsidiarity, as is stipulated in the European treaties in force.

6. The Parliament’s bureau will ensure that the procedure is carried out correctly and that the opinion is sent before the stipulated finalization date.

7. Finally, the statement will be sent to the Parliament’s Bureau which will send it to be published in the Basque Parliament’s Gazette and to the Spanish Parliament via Presidency.
THE ROLE OF REGIONS IN CONTROLLING THE PRINCIPLE OF SUBSIDIARITY AFTER THE LISBON TREATY: THE EARLY WARNING SYSTEM AND APPEALS FOR INFRINGEMENT OF SUBSIDIARITY.

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I  Introduction

There are several sections to this document. The first looks at how the principle of subsidiarity has evolved in the European Union’s treaties and provides us with a picture of where we are chronologically and the content of the subsidiarity and proportionality principles. The second explains how the subsidiarity Protocol’s Early Warning system (annexed to the Lisbon treaty) works. The third section looks at the positions that have been adopted by the EU’s legislative regions on the role of Parliaments, something that appears in different documents and declarations from the Conference of the European Regional Legislative Parliaments (CALRE) and the Conference of European Regions with Legislative Power (REGLEG) and their confrontation with what appears in the report written for the European Union by the working party of the Congress and Senate Joint Committee. A fourth section deals with the subsidiarity test and its practical application by the Basque Parliament within the monitoring network fostered by the Council of Regions and the final section is on the outlook for the proceedings for annulment at the Court of Justice for violation of the subsidiarity principle, which is linked to the regions’ classic *jus standi* debate before this court.

II  How the principles of subsidiarity and proportionality have evolved over time

The first traces of the principle of subsidiarity can be found in the Single European Act (referring to the environment) although perhaps the key moment for the principle came when it was included in the treaties for reforming Maastricht: it appeared as a “rule of operating” in the Treaty of the Functioning of the European Union and as a “good governance principle” in the EU Treaty.

Later, a Protocol on the application of the principles of subsidiarity and proportionality was added to the Amsterdam Treaty, and this was, until the effective coming into force of the Lisbon Treaty, the sum total of the inclusion of this principle in legal texts.

The Treaty establishing a constitution for Europe or the EU Constitution consecrated the principle of subsidiarity as a “fundamental principle” and established a new Protocol for the application of the principles of subsidiarity and proportionality that replaced the Amsterdam one. The major new addition to this Protocol was the Commission’s obligation, when taking action, to consider regional and local dimensions where appropriate.

It also established an early warning system. This means that any national Parliament or house within a Parliament can, within a six-week time frame from the moment when a Bill begins its journey to become European law, or for other political proposals, send to the Presidents of the European Parliament, Council and Commission a reasoned opinion with a well-reasoned explanation of the objections to the Bill/proposal that it considers infringe the principle of subsidiarity
Each Parliament or house should consult, where necessary, its regional Parliaments with legislative powers and it is each Member State that decides the procedure to be followed.

However, the EU Constitution was not approved at the referendums held in France and Holland and this put an end to the whole project, although the final “death certificate” of the Constitution was the Berlin declaration of 25th March 2007 and the 21st and 22nd June 2007 meeting of the Brussels European Council which started the process that led us to the Lisbon Treaty.

The idea of an EU Constitution to replace all the previous treaties was abandoned and instead of the Convention, a classic system of Intergovernmental Conference (IGC) was used together with a Reform Treaty containing the modifications of the existing treaties which remained in force. The Treaty on European Union (or EU Treaty) still exists in name and the European Constitution has now come to be known as the Treaty on the Functioning of the European Union (TFEU).

As Professor Mangas quite rightly explained, what the Lisbon Treaty has done is eliminate constitutionalist rhetoric with all its liturgy (such as a hymn, a flag and laws, etc.) and scatter part of its content, spinning it around and changing the place of some of its newer precepts to put them in to the EU Treaty and the TFEU.

The system to control the principle of subsidiarity and the role of Member State Parliaments and regional Parliaments are just two of the elements that have survived and have found their way in to the Lisbon Treaty. A similar survivor is the possibility to appeal to the Court of Justice in certain instances of infringement of the subsidiarity principle.

The Council introduced a series of modifications that ended up producing the Protocol on the functioning of national parliaments and the Protocol for the application of the principles of subsidiarity and proportionality. These replace the ones in the Amsterdam Treaty. At an experimental level they have been applied thanks to pro-active actions of the Commission and of bodies such as the Conference of European Affairs Committees (COSAC) and the Committee of the Regions (COR).

Let us not forget that the majority of powers are shared between the EU and Member States, meaning that both Protocols will be operational in the majority of cases that deal with legislative acts of the Union’s institutions. In other words, in order to appropriately develop this control system, parliaments are obliged to lay down a series of specific procedures, although it is also true that in the case of autonomous regional parliaments in Spain, we are subject to what is decided upon by the national Spanish Parliament.

In addition to this possibility, there are other existing, alternative mechanisms that make it possible for autonomous regional parliaments to take part in the process of approving European regulations, such as the subsidiarity monitoring network of the Committee of the Regions.
III The content of the principles of subsidiarity and proportionality

As I have already explained above, the EU Treaty was modified by the Lisbon Treaty and this affects the content and application of the principle of subsidiarity. Articles 4 and 5 lay down the rules of conferral and exercising of competences by the EU authorities.

Hence, Article 4, with a legislative technique that could be improved upon, establishes the inverse general rule on the express conferral of competences to the Union and therefore:

“1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, 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.”

In addition, article 5 of the EU Treaty (which is also former article 5 of the Treaty on the Functioning of the European Union) provides the content of the principle of conferral that limits Union competences and the principles of subsidiarity and proportionality. This article literally stipulates:

“1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. 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.

3. 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.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.
The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

The EU has exclusive competence in common commercial policy and in the conservation of fishery resources, meaning that the remaining competences are shared between the EU and Member States, and in these cases the principles of subsidiarity and proportionality can be applied since they are not a mechanism for conferral of competences.

The Commission’s own words (in its report on subsidiarity and proportionality of the 26th September 2008 - 2008/586 - within the 15th Report on Better Lawmaking) are:

“Subsidiarity is a guiding principle for defining the boundary between Member State and EU responsibilities - that is, who should act? If the Community has exclusive competence in the area concerned, there is no doubt about who should act, and subsidiarity does not apply. If the Community and the Member States share the competence, the principle clearly establishes a presumption in favour of decentralisation. The Community should only take action if the objectives cannot be achieved sufficiently by the Member States (necessity test) and if they can be better achieved by the Community (value-added test or compared effectiveness).

Subsidiarity is a dynamic concept, any assessment of which will evolve over time. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, it means that Community action should be restricted or discontinued where it no longer meets the subsidiarity test.

Proportionality is a guiding principle when defining how the Union should exercise its competences, both exclusive and shared (what should be the form and nature of EU action?). Both Article 5 TEC and the Protocol provide that the action should not go beyond what is necessary to achieve the objectives of the Treaty. Any decision must favour the least demanding option.”

In short we could simply say that the principle of subsidiarity exists within the Union’s competences and forces us to examine whether it is necessary for it to be applied to the field which is being dealt with. It equates to decisions being taken as near to the public as possible.

As for the principle of proportionality, this deals with how the Union should intervene. The idea is to see how far the intensity of a regulation should go. This can be summarised in the following axiom: the action should not go beyond what is necessary (minimum reach).

The following consequences can be drawn from the above regarding the application of these two principles and the way in which national and sub-state parliaments should intervene:

1. The principles are dynamic and evolve over time.
2. They govern the exercising of competences.

3. They are a kind of political control (not legal or technical) of the specific content of any proposal, i.e. of the legislative function. That is why Parliaments have a role in this control since the decision is a complete one, and whether or not the principle is complied with or not is analysed – in other words it is a political appraisal of the need for the measure and its intensity.

4. According to the Protocol, the control of these principles by national or possibly sub-state parliaments is exclusively for legislation (such as directives, regulations and some decisions), with non-legislative issues (such as white papers, green papers, reports, recommendations, rulings and consultations) being left out.

5. The Protocol only regulates ex ante control over subsidiarity through the early warning system and ex post via proceedings for an annulment appeal to the Court of Justice, but doesn’t say anything in this regard on proportionality. And yet in practice, as we will see later in relation to the experience coordinated by the Committee of the Regions, it is very difficult to systematically differentiate between the two principles since the are inextricably tied together.

IV The Early Warning system

According to article 3 of the Protocol on subsidiarity and proportionality, in general the early warning system is only applied to draft European legislative acts. This category includes proposals by the Commission and the Parliament, initiatives taken by a group of Member States, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank.

The Protocol also refers in its article 7 to the acts of the Council, although it does not specifically regulate any matter directly related to them – everything is just left in a bit of a haze- since in the Protocol the remaining mentions of interventions of the Council are simply as an intermediary of the proposals of the different institutions of the Commission and the Parliament.

The system envisaged in the Protocol differentiates between the various elements and processes that the Commission should follow when proposing a legislative act

Firstly an *ex ante* procedure, in which before proposing a legislative act the commission shall carry out wide consultation and take in to account, where appropriate the regional and local dimensions of the action envisaged.

What is more at this stage, all draft legislative acts shall contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality, this will be called a subsidiarity report. We will come back to this matter later on because it is the basis of the subsidiarity test, it suffices to indicate here that this file/report has to consider the impact of regulations on regional legislation.

And finally a criteria is established stating that all draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon
the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised using a system of impact assessment of the project.

In short, in the words of the Commission, it “...must consult widely before proposing legislation; state in the explanatory memorandum for each legislative proposal the reasons for concluding that the proposal complies with subsidiarity and proportionality; and take into account the burden falling on the Community, national governments, local authorities, economic operators and citizens”.

It is plain that when assessing the effects of any draft legislative act the regional dimension has to be considered, and this is nothing more nor nothing less than the application of the principle of subsidiarity.

We need to remember that when mentioning structured dialogue with the regions, the Commission lays down that consultation shall be carried out through national and European associations and regional (and local) communities. So we are not talking here about a one-to-one bilateral consultation in which the affected institutions can express their position independently, but rather that the parties being consulted are associations that have to be able to give a joint opinion that satisfies and represents all their member institutions.

After this first stage in which it is the services of the Commission where logically the legislative process is centred, we reach the part in which national Parliaments of the Member States intervene and at this moment the role of the regional and local Parliaments appears in the Protocol.

According to the Lisbon Treaty Protocols, all information shall be sent directly to national Parliaments. The Commission shall forward its draft European legislative acts and its amended drafts to national parliaments at the same time as to the Union legislator.

National Parliaments after consultation, where appropriate with regional Parliaments with legislative powers, will have eight weeks to make a reasoned opinion stating why they consider that the draft in question does not comply with the principle of subsidiarity.

The dies a quo after which the eight weeks are counted, is not the date of reception by the national Parliament, but the date upon which it is sent by the corresponding institution. This is determined by the moment at which the draft has been translated into all the languages of the Union (which is the time when it is sent to the Union legislator).

This introduces a degree of legal insecurity for those of us who are used to working at Parliament, because the time between a proposal being approved and it being ready to be sent may vary from one draft to another (from between 7 and 15 days). Although there is also the advantage of being able to work on the text before this period commences, this forces one to be attentive and also has the down side that not all the documents accompanying the proposal are translated (e.g. the Impact Assessment on the Directive for Cross-Border Health Care).
COSAC and other bodies have asked the Commission to look into the possibility of setting a fixed time from which to calculate the 8-week period, but for the moment nothing has been done in this regard and it will be difficult to change an on-going way of working of the Commission’s services, especially as this practice is established in article 4 of the text on the role of national Parliaments in the European Union.

It is only necessary to prepare and send a reasoned opinion if a Parliament considers that subsidiarity is not being respected. As is stated in legal doctrine and literature, the Early Warning system’s aim is that the Union’s legislative institutions pay attention to any possible repercussions of their legislation, and if several reasoned opinions are received, institutions review their proposals. Obviously Parliaments as representatives of citizens and a country’s legislature are neither consultative bodies nor institutions that assess measures and as such the only meaningful thing they can do is present reasoned opinions to make the system functional.

However a pronouncement is not sufficient, it must be a reasoned opinion, i.e. Parliaments must give the reasons why they feel the Union’s intervention is unnecessary because the objectives to be gained can be sufficiently attained by the Member States. Some authors warn of the danger of using this route to stop the development of the Union and Community legislation, since it is obvious that with a sufficient majority there is a huge margin for claiming the existence of infringement of subsidiarity.

But obviously, as I have already stated, Parliaments are institutions that represent and express the will of citizens and therefore any reasoned opinion they have is political and, if it is not used in a way that is in accordance with the spirit and purpose for which the early warning system was designed, the Commission has more than sufficient means to reply to the arguments put forward.

The Protocol provides each national Parliament with two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers has one vote. That gives us a total of 54 votes.

The general rule of operation means the Union’s proponent institutions will consider the reasoned opinions sent by a national Parliament or either of the chambers of a national Parliament. However, there is no formal obligation to inform the national Parliament affected of the way in which its reasoned opinion has been considered.

And yet the Protocol has designed a system that obliges the Community institution to re-examine the initiative following a procedure known as the “yellow card” “orange card” procedure.

1. Yellow card – only the initiative-maker has the duty to re-examine.

If 1/3 of the votes allocated to national Parliaments (18) are against a proposal, said proposal shall be reviewed and a decision shall be adopted as to its maintenance, modification or removal.
2. Orange card – the Union legislator has the duty to re-examine.

If half the votes of national Parliaments are against the proposal and the institution taking the initiative decides to maintain the proposal, it must produce a reasoned opinion to be sent together with the opinions of the national Parliaments to the Community legislator.

The initiative can be removed if 55% of the Council members or a majority vote of the European Parliament decide that the proposal is incompatible with the subsidiarity principle.

In reality this system leaves the Community legislator to decide whether to carry on with the proposal. What is more, obviously it is not only the number of opinions received but also the countries they are received from that are determinant in the future of any proposal or draft.

V The role of regional parliaments

I have already said that the Protocol envisages national Parliaments consulting regional Parliaments “where appropriate”. However, the participation of sub-state legislative assemblies in the procedure depends, according to EU law, upon their treatment and resolution by the national law of each Member State, according to each Member State’s legal structure and constitutional traditions.

Both CALRE and REGLEG have made several declarations on the participation of sub-state institutions in the Union’s legislative proceedings via the application of subsidiarity and the early warning mechanism.

Just as a reminder, it is a good idea to mention (in the case of CALRE) the declarations of Catalonia of the 25th October 2005, Venice of the 31st of October 2006 and the Basque Country of the 4th November 2008. In the case of REGLEG we have the declarations of Barcelona of the 16th November 2007 and Brussels of the 5th December 2008. What is more, CALRE has a working group on subsidiarity which has produced a series of documents on the subject.

The following series of general criteria can be drawn from these declarations and documents:

1. National and regional Parliaments should together agree upon the procedure and method for agreement.

2. The method for agreeing issues should be carried out together with national Parliaments whenever a draft legislative act refers to regional competences or imposes any kind of obligation on a region.

3. A consultation process should be such that regional Parliaments can formulate their position and express it to the national Parliament.

4. National Parliaments must take into consideration the position of regional Parliaments when producing an opinion and this consideration should be a
determining factor if the regions have exclusive competence in the area covered by the legislative proposal.

The Spanish Parliament’s Standing Committee on the European Union set up a working group to look into the national Parliament’s application of the early warning system considered in the Protocol on subsidiarity and proportionality and prepared a report. The conclusions of this report were published in the Official Gazette of the Cortes Generales on the 4th January 2008.

The regional Parliaments were not expressly consulted during this work, when the ultimate aim was to lay down a process that would directly affect them. Simple consultation does not imply that the Spanish Parliament is not sovereign to regulate and approve whatever system it deems appropriate, but it would have been a good idea, amongst other things, to look into protocols for administrative collaboration, the regulation of computer environments, etc.

However, within the very wide margin that the Protocol leaves for Member States, the report proposes the following series of recommendations what would be interesting to be included in the proposed legislative reform:

1. A procedure by which European legislative initiatives are automatically sent to regional Parliaments, - without looking in advance at whether regional competences are affected- because of the difficulties involved in individually classifying each initiative and also the very brief periods of time allowed by the Early Warning System.

2. A three-week period of time (from its sending date) for the Spanish Parliament to consider a reasoned opinion approved by a regional Parliament. Any longer and the national Parliament would not have time to deliberate and adopt a decision.

3. A reasoned opinion approved by a regional Parliament would be published and sent to a sub-committee (this sub-committee would be set up to study the opinion). Both this sub-committee and any other agents with the power to initiate a procedure, could either accept that reasoned opinion or present alternatives which would be debated together with the one sent by the regional Parliament.

4. If the Standing Committee were to approve a reasoned opinion it could agree with a 3/5 majority (if it believed that this could be used to politically strengthen its criteria), that one or any number of those reasoned opinions sent by a regional Parliament be sent alongside its own.

In any case there are still issues outstanding that need to be looked into such as:

1. Cases in which the legislative act affects competences exclusive to the regions or even a unique competence of a regions.

2. The possibility of making the reply to some extent binding, at least at the Senate level, if reasoned opinions from regional Parliaments are in their majority against a draft European legislative act.
VI The aim of the subsidiarity test

As I have already said above, control of subsidiarity and the subsidiarity test are both political controls. Their aims are to assess and check:

1. Whether regulations are necessary.
2. If they provide clear benefit.
3. If the regulations are proportional to the objectives of the Treaty.

And to this end, article five of the subsidiarity Protocol states that all legislative acts should include a detailed statement making it possible to appraise the degree of compliance with principles of subsidiarity and proportionality so as to analyse:

a) Their financial impact
b) The effects of a Directive on the rules to be put in place by Member States and, where necessary, regional legislation.

c) Qualitative and quantitative indicators that substantiate the need to legislate at Union level.
d) That financial and/or administrative burden falling upon the Union, national governments, regional or local authorities be minimised and commensurate with the objective to be achieved.

Having said all the above, how does Parliament carry out the specific test.? No model is given as to how to go about it, but let us remember that the aim is to present a reasoned parliamentary opinion only in the event of being against a European Legislative act, because it does not comply with the principle of subsidiarity. However, any analysis could perhaps follow the following method, proposed by the Committee of the Regions subsidiarity network.

1. Check that the principle of competence allocation has been respected, i.e. the draft piece of legislation’s legal basis and how this relates to the Treaty and the type of competences of the Union’s institutions.

2. Check all the conditions linked to the principle of subsidiarity. I.e. that the proposal’s aims cannot be sufficiently achieved by Member States, the advantages of the action, its trans-national aspect, the disadvantages of not adopting the measure at Community level and its effectiveness in comparison to Member State competences. All of these issues are centred around the three so-called “contrast” tests

a) Necessity test
b) Value-added test
c) Compared effectiveness test.

3. Check the conditions associated with the principle of proportionality. These reply to a more or less restrictive measure level depending upon the result, something that can be answered if the following questions are considered:
a).- Effectiveness test  
b).- Efficiency test  
c).- Minimum legal restriction test.  
d).- Minimum cost test  
e).- Value-added test  
f).- The consideration of local and regional factors when consulting upon and analysing impact.

European institutions are already searching for and setting up a series of mechanisms that allow us to apply some of the innovations present in legal texts during the legislative process without waiting for the Lisbon Treaty to come into force.

Since September 2006 the Commission has been sending its draft proposals to national Parliaments in whatever language they require so that, where necessary, these Parliaments can send back observations or opinions. In fact in 2007 the Commission received 166 opinions from national Parliaments. In a similar vein COSAC and the Committee of the Regions have carried out pilot tests.

VII The Committee of the Regions Subsidiarity Control Network

One of the political priorities of the Committee of the Regions is control over subsidiarity and with this in mind it has prepared much documentation on the matter and what is more, in collaboration with the CALRE has carried out a series of tests on the susidiarity Protocol.

The Committee has set up an interactive subsidiarity control network with a view to creating a “two-way” information space where it gains knowledge of the political proposals of the EU institutions and also sends out the regional or local authorities’ proposals and opinions which warrant consideration (the network currently has 97 members) The network will carry on functioning even when the Treaty becomes effective and even if it is only applied to those areas over which the COR has competences or those upon which it should be consulted, it will allow regional Parliaments a means of sending out their reasoned opinions so that in addition to national Parliaments they are also considered during this consultative stage.

The COR will use the reasoned opinions it receives to write its own appraisal and proposal document within a 6-week period and will also send this report to national Parliaments.

VIII The model applied to the Basque Parliament

The Basque Parliament participates in the application of the Protocol designed by the Committee of the Regions for the network of subsidiarity control and actually joined in 2006, under an agreement between the CALRE and the COR.

And so it has prepared a provisional procedure which is subject to review and as such is not yet in the rules of procedure of the Parliament nor has it adopted the form of an interpretative resolution.
The procedure has the following parts to it:

1. A parliamentary committee competent in the area debates and provides a resolution on the matter.

2. The government sends in reports and its members appear before the parliamentary committee.

3. The Parliament’s services write a report and table a motion for resolution.

4. Parliamentary groups are given a maximum of 7 days to present further arguments.

5. If no further arguments are received the resolution is approved by tacit consent.

6. If the need arises to overcome any possible discrepancies, a joint meeting between the bureau of the committee and the party spokespersons can be held.

7. The resolution is sent to the consultative body and the bureau to make them aware of it.

There are several comparative law models available and for the moment the Basque Parliament has opted for a system of referring study and decision to a committee that has expertise in the matter being dealt with – i.e. it is not a system that is concentrated in one single body (such as the Overseas Relations and European Affairs Commission) but is rather dealt with through a mechanism of disseminated control so that the greatest number of MPs possible participate.

Only very few Parliaments have regulated their internal rules of procedure to accommodate the early warning system and in the case of bicameral Parliaments, only one has done so. COSAC’s web-site shows the current state of affairs. Those countries that have full approved the procedure are Denmark, Holland and Lithuania. The following countries have designed a procedure but have not approved it, or have only partially designed it: Germany, Austria, Cyprus, Finland, Hungary, Malta, Portugal, the Czech Republic, the United Kingdom and Slovenia. A total of only 13 out of the 27 Member States.

A summary of the different models can be found in a detailed report of the Spanish Parliament’s Joint Committee for the European Union on the application of the principles of subsidiarity and proportionality that go with the Lisbon Treaty.

Of course it is difficult to establish an optimum model since they all have their pros and cons. The “sectoral” committee system is a problem if you want to give a quick reply since the committee members are not necessary specialists in the knowledge of European procedures or the concepts used by European institutions. But it does have one major advantage linked to the principle of “Guaranteeing that decisions are taken as near to citizens as possible”.

Without questioning the advantages of the system of specialist committees, if our aim is to get near to citizens, then simply limiting the subsidiarity test to a specialist
body does not really contribute towards citizens identifying with the decision-making process. Hence, involving as many MPs as possible is a way of making it easier for the public to have access to this kind of specialist procedure.

What is more, to get nearer to the public, initiatives have to be included in the Basque Parliament’s web-site, so that affected organizations or citizens can make suggestions or petitions. The Basque Parliament’s already existing participatory procedures via “e-democracy”, which appear in Article 108 of the internal rules of procedure may be a channel for activating citizen participation.

If our aim is to match the specialization required because of the very nature of European legislation to the need of being close to the public, then the Dutch system could be a solution worth looking into by regional parliaments. In this model, a joint committee is set up (the members of which may vary) which includes members of the European Affairs Commission and members of the sectoral Committee.

However, the extremely brief periods of time allowed mean it is very difficult for the plenary to intervene in these processes, even when in the best of cases it has 4 weeks. Whenever the Basque Parliament has intervened in these kinds of procedures it has needed the maximum 6 weeks between receiving the documents and sending its reasoned opinion to the Committee of the Regions.

The Government has a role to play in the whole process, since it has to send in as brief a period as possible: the information about the European legislative initiative, its effect on the rights and interests of the autonomous region and its opinion on compliance with subsidiarity.

And to this end reports on subsidiarity and proportionality written by the Department for European Affairs and the Department with expertise in the matter are sent. Any reports written by the Department for European Affairs include an assessment (with the European perspective) made by the Basque Government’s Delegation in Brussels and a report from the Basque Government’s legal services, regarding how regional competences are affected. The report from the sectoral department basically deals with the material scope of any modification and the effect the project may have on the management or provision of services.

In addition to this, if we consider the internal organizational structure of the Basque Autonomous Region, it may be necessary to transfer this information to the provincial councils in the three Basque provinces, if their competences are to be effected, so that they can make any reasoned opinions they may deem appropriate.

Once the necessary reports have been received from the Basque Government, representatives of the Government appear before the Committee to explain the report’s contents and answer any questions, clarifications or additional information that MPs may request.

It is then up to the Bureau to ask the Parliament’s services to prepare a draft resolution which is sent to the Bureau and to the parliamentary groups so that they can make the necessary remarks. If there are no objections, the resolution is taken as approved and it is forwarded to the COR and the Parliamentary Bureau. If any observations are made, these are added as annexes to the resolution.
If there are any discrepancies or doubts on the content of the resolution, a meeting of the Committee’s Bureau is called together with the spokespeople to try and reach a common position and if this is impossible it is voted upon, with each vote having a specific weight.

As an example, the procedure used by the Basque Parliament in each of the 3 processes fostered by the COR in which there has been participation was the following.

I The first test on the energy policy package. (3 Regulations and 2 Directives).

This whole process needed to be dealt with during a 6-week period between 12th October 2007 and 23rd November 2007.

The necessary documents were received on the 17th October, i.e. after 5 days had elapsed.

The Government reports were received between the 30th October and the 6th November.

Government representatives appeared before the Industry Committee on 12th November, meaning that 1 month had gone by since the whole procedure had started.

The Parliament’s draft resolution was sent to the parliamentary groups on the 13th November.

Once 7 days had gone by without receiving any comments, tacit consent for the resolution (which concluded that the Community proposal complied with the principle of subsidiarity) was assumed.

On the 22nd of November the resolution was sent to the COR and the Basque Parliament’s Bureau was informed.

II Test on immigration issues (3 Directives and 1 Communication from the Commission).

This whole process needed to be dealt with during a 6-week period between 21st November 2007 and 11th January 2008.

The documentation was received on the 23rd November 2007, i.e. 2 days had elapsed.

Government reports were received on the 3rd December 2007. In this case the documents were also sent to the provincial councils of the Basque Region, for them to give their opinion. The only reply received (on the 21st December) was from the Gipuzkoa Provincial Council.
Government representatives appeared before the Labour and Social Affairs Committee on the 26th December, less than a month after the procedure had been started.

The draft resolution prepared by the Parliament’s services was sent to all the Parliamentary groups on the 27th December.

Once 7 days had gone by without receiving any comments, tacit consent for the resolution (which concluded that the Community proposal complied with the principle of subsidiarity) was assumed.

On the 7th January 2008, the Resolution was sent to the COR and the Basque Parliament’s Bureau was informed on the 15th January.

This test was notoriously difficult to carry out since it was done in December, a month when most parliamentary activity centres around the approval of budgets. What is more several holidays coincide at this time.

According to the COR, 49 of the subsidiarity network’s members participated in this process and only 7 made a resolution.

III Test on the Council’s Directive regarding the application of patient’s rights in cross-border health care (1 Directive).

I am going to spend some time over this test because two very special situations coincided. Firstly, the outcome: - it was concluded that the proposal infringed subsidiarity and secondly, the whole process took only 4 weeks, which is probably the amount of time that will be available once the Lisbon Treaty comes into effect.

The whole process had to be completed over the 6 weeks between 1st September and 17th October 2008.

Although the Commission’s proposal was approved on the 2nd July, the COR, after listening to suggestions from the network’s members regarding the constitutional and political limitations of the month of August, which are not in force in the case of the Union (something that we will talk about later on) and given that the process was only a simulation, decided that the period of time would start on the 1st of September. Even so, documents were not received until 16th September 2008 and not all of them had been translated into Spanish.

In this specific case, the documents were not sent to the 3 provincial councils of the Basque Autonomous Region since under the competence-sharing system that exists, the provincial councils have no competences in health and therefore the proposal affected neither their functions nor their area of competence.

The subsidiarity assessment reports written by the Basque Government’s Health Department and European Affairs Department, were received on the 1st October 2008 and the government representatives appeared before the Health Commission on the 6th October. This meant that only 11 calendar days were left to meet the deadline.
The Health Commission’s Bureau, having listened to what the government representatives had said and read their reports, followed the practice of the previous tests and asked the Parliament’s legal services to prepare a draft statement.

The draft was sent the very next day after the government representatives’ appearances before the parliamentary groups and they were given 48 hours to express any opinions against it. If there was no opposition, the statement was to be considered as approved.

The reason for such a short space of time is obvious. If there had been any discrepancies with the content of the draft statement, it would have been necessary to initiate a procedure in which the Health Commission would finally have to accept or reject the text. What is more, before sending the text to the COR, it would have had to be translated into English, French or German.

Unlike the two previously-mentioned tests, in this case, the statement of reasons concluded that the draft directive did not comply with the principle of subsidiarity.

Before the deadline was reached, given that very little time was left and in the light of the statement’s content, the Commission’s bureau decided to call a meeting with the spokespersons on the 10th October. During this meeting a common position was reached, concluding that the Directive infringed the subsidiarity principle.

On the 14th of October the resolution was sent both to the COR and the Parliament’s bureau, which was informed about it during its meeting of the 30th October 2008.

I thought it might be worth mentioning that during its session held on the 25th September 2008 (since the limitation of the month of August does not affect the European Parliament), the European Parliament decided to reject the draft Directive, although the Basque Parliament did not receive this information until the whole process with the Health Commission had been finalised. Had they received that information in real time, it would of course have helped the parliamentary groups establish their position.

It is plain to see that if we add to the very brief periods of time stipulated by the early warning system, a complex legislative proposal, such as in the above-mentioned case, we get an idea of how difficult it is going to be to work with the means at our disposal and within the required time frame. Just as an example, only 17 members of the network comprised of 10 States made a statement in the final report written by the COR – 5 of them were sub-state parliaments: Catalonia, Emilia Romagna, the Basque Country, Schleswig Holstein and Vorarlberg.

IX A few words about possible future lines of work

The following are a series of considerations regarding possible lines of work available if we are to definitively implement the “Early Warning” mechanism.

Our experience has shown us that the standard procedures of the Parliament’s Regulations of Procedure and the way things are normally done will have great
difficulty adapting to the demands of the early warning mechanism to provide an on-time resolution of the subsidiarity test.

We need to consider that once the Lisbon Treaty has come into effect (this will probably happen on the 1st January 2010), regional Parliaments will intervene according to article 6 of the Protocol of Subsidiarity and although its legislative regulation by the Spanish Parliament is still outstanding, regional Parliaments will participate in whatever general consultation process is set up at a national level, as can be seen from the Protocol and as was unanimously concluded in the report of the working group set up to do so in the Joint Congress and Senate Committee for the European Union.

If new functions are to be developed, whatever administrative office at Parliament is finally commissioned to examine documents for making proposals, it will need sufficient human and material resources for its work.

Parliamentary procedure will have to be flexible and will have to guarantee at all times that documents are reliably transferred and correctly signed. All the procedures that the Bureau needs to go through when preparing a draft and even sending a statement to the Spanish Parliament could probably be done “virtually”, so long as a system is put in place to guarantee the regularity and validity of the actions that need to be taken to correctly transfer documents (for example computer environments with digital signatures).

When Parliaments are not in session, some sort of automatic mechanism needs to be designed so that a reply can be made to the Commission without the need for authorization.

This is a specially difficult problem when we come to the month of August. This fact was pointed out in the conclusions of the COSAC report of the 4th November 2008, according to which the Commission has informally hinted that it will not be considering the 4 weeks of the month of August when calculating the handing-in date for reasoned opinions. Only time will tell whether that is the position the Commission finally adopts and whether the Council and the European Parliament follow suit, although as things stand so far it looks unlikely to be so.

In theory it is the Permanent Committee that takes the necessary decisions when Parliament is dissolved, although in practice I think it will be difficult for this body to intervene in the Early Warning mechanism, unless some very glaring matter has been picked up previously, during the initial examination phase.

The Parliament is the appropriate organization and functions in an appropriate way, but it needs help and also the necessary technical assistance to do its work properly and effectively.

In addition to creating some sort of technical unit within Parliament, a standing sub-committee, in charge of examining draft European legislation, could also be set up. If the sub-committee sees that there is a draft piece of legislation that looks like it is not going to comply with the principle of subsidiarity, it could ask a working-group to
write a proposal to be presented at and approved by whatever Commission is in charge of making a definitive resolution.

It is common knowledge that if we are to be effective we need to act upon the legislative calendar and choose those proposals that the regional Parliament may be interested in monitoring and controlling. The problem of this system is that problems may arise when the selection made by the regional legislative assembly does not coincide with what the national Parliament has in mind, although it would seem that the Spanish Parliament has decided to indiscriminately send out all those proposals that correspond to a region’s competences.

Taking a brief look at the Commission’s legislative programme for 2009 (in COM 712/2008), we can see a whole series of legislative initiatives, non-legislative initiatives and all other kinds of documents and it is difficult to draw clear conclusions on which of those will be determinant and hence most in need of following.

Given the avalanche of draft European legislative acts (in 2006 the Commission alone produced 474 initiatives) or of documents such as reports, opinions, green and white papers and the material impossibility for regional parliaments to cope with them all, perhaps some sort of mechanism could be set up to facilitate Parliament’s control over Government. In fact, perhaps a Bill of law could be formulated regulating Government and Parliament relations in this area. Whether that happens or not, in any case some sort of conventional mechanism could be set up to regulate these relations, like the one already existing in Germany between the Government and the Bundestag.

Although the Basque Parliament and other regional assemblies can rely on the mechanisms of the CALRE and where necessary, the possibility of reaching agreements with the European Union to use the IPEX system, we should not forget that we need to make use of existing public resources and it is precisely the Government that has the most resources available which the Parliament and the citizens it represents could benefit from.

Hypothetically, we could develop a model with the following steps:

1. At the beginning of the year, once the Commission’s annual legislative calendar is published, the regional Basque Government could present a report to the Parliament with its opinion on the EU institutions legislative programme and which of the proposals should be assessed. A debate could be held in Plenary, or if not at a meeting of the European Affairs Commission, with draft resolutions being made on which proposals should be chosen.

2. A standing working-group would be set up to assess the Government’s report and to monitor the situation of the legislative proposals. This group would have the support of parliamentary services set up expressly for this purpose and to which parliamentary groups could present additional analysis and monitoring proposals on EU draft legislation that may differ from those in the Government’s report.
3. If the working group deems that a proposal infringes the principle of subsidiarity, when said legislative proposal officially arrives, the procedure decided upon by the Parliament could be followed, i.e. a joint meeting might be held between the European Affairs Commission and the sectoral committee having expertise in the area.

4. The way the reasoned opinion would then be dealt with would be the same as for non-legislative motions, only with some differences. If there were discrepancies, systems would have to be set up to overcome them, either using the traditional method of setting up an internal working-group, or via a debate and voting system with a vote taken in the Spokesmen’s Conference (weighted vote) or at a direct vote taken in the Joint Commission or via the Plenary’s power of retrieval.

5. In keeping with the aim of the principle of subsidiarity and to be as close to the citizens as possible, it would be a good idea to lay down specific causes for asking for public participation (e-democracy tools) in these matters, so that the public could express its opinion and where necessary present its position to parliamentary groups.

6. Information and co-ordination mechanisms need to be set up. Undoubtedly direct access to the IPEX system - i.e. the participation of regional parliaments with legislative powers in this system of information exchange, would enormously simplify the proposed screening process.

In addition, a network of regional Parliaments could be set up, using the channels of the Conference of Presidents of Autonomous Parliaments, so as to optimise resources that allow the sharing of diagnoses and assessments. Economies of scale would end up in a simplification of the work.

And it goes without question that there is a pressing need to implement a co-ordination and collaboration system with the Spanish national Parliament for document reception, computer environments, transaction safety, etc.

Finally, something which is linked to IPEX access is the need to establish means of collaboration with COSAC via an agreement with CALRE.

In this regard, we should not forget Article 10 of the Protocol, on the role of national Parliaments, which contemplates COSAC as:

“..A conference of Parliamentary Committees for Union Affairs may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission. That conference shall in addition promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees. It may also organise interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy. Contributions from the conference shall not bind national Parliaments and shall not prejudge their positions.
X Appeal to the European Court of Justice (The access of regional parliaments to the ECJ in defence of the principle of subsidiarity)

On the matter of disputes regarding the Union’s legislative acts, the Lisbon Treaty conserves the two provisions supporting the COR and national Parliaments that were originally in the failed Constitutional Treaty.

As far as the regions’ ius standi before the ECJ, several studies and reports have been written on this matter (to name but a few we have those written by Professors Maite Zelaya, Marta Sobrido and Martín y Perez de Nanclares) or even Miquel Palomares (in his report entitled “Relations between the Catalan Government and the EU in the 2006 Catalan Statute of Autonomy) and we refer exclusively to them.

Notwithstanding this, the provisions of the Lisbon Treaty may open up to the regions the possibilities of going to the ECJ to defend their interests and competences when facing Community actions that do not respect the principle of subsidiarity.

Article 8 of the Protocol on the Application of the Principle of subsidiarity and proportionality states:

“The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article III-365 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it.

In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted.”

Let us first take a look at the Committee of the Region’s possibilities of intervention. The COR can make an appeal to get the Court of Justice to declare void a series of provisions when two conditions are present:

a) Infringement of the principle of subsidiarity.

b) Consultation to the COR within ordinary legislative procedure is mandatory.

This is how (so long as the regions with legislative powers can impose their criteria within the COR) the regions can appeal to the Court of Justice to declare void a provision or provisions for infringing the principle of subsidiarity.

And yet this is a limited way of going about things, since two problems still exist:

a) Those legislative acts that infringe the principle of subsidiarity but in whose procedure for adoption the COR does not have to make a statement, remain outside.

b) The very different nature of all the members of the COR (regions, local authorities, etc.) which, of course, reflects the different internal constitutional
structure of the Union’s 27 Member States, is a limitation for the position of those regions that have legislative powers.

Even the COR stated at a meeting on the 16th September 2008 that, from a political viewpoint, an appeal to the Court of Justice on the grounds of subsidiarity infringement would be clearly more legitimate if the COR had already previously denounced problems relating to subsidiarity in its statements of reasons relating to these matters. And so statements made by the COR should normally include references to matters of subsidiarity and should inform its working groups of the legal problems raised by a specific matter that is being looked into.

For the moment it is the COR’s assembly, (once its President has presented a motion) that is the competent body to make appeals to the ECJ. If, for pressing organizational reasons, it is impossible to obtain a decision from the assembly within the necessary time frame, the Bureau could, exceptionally, adopt this kind of decision. It has yet to be decided whether this kind of decision needs to be adopted by a majority vote or whether a qualified percentage would be sufficient.

Whatever happens, for regional Parliaments this route leaves very little channel for action, since regional Parliaments with legislative powers are not members of the COR, except via the network of subsidiarity.

**Secondly, the possibility for a Member State to directly appeal to the ECJ for infringement of the principle of subsidiarity**, or of its national Parliament or one of the Houses of the Parliament to do so on its behalf.

A consequence of this provision in the Protocol is that national Parliaments (and indirectly the regions) have the possibility of having indirect jurisdictional control to solve the controversy in the event of there being an infringement of the principle of subsidiarity.

On this matter I would like to quote what Professor Mangas has written:

“We should take note of the fact that Article 8 of the Protocol, on jurisdictional control of subsidiarity, does not directly mention regional Parliaments, unlike the Early Warning or Political Mechanism which is open to regional Parliaments, if such is the will of national Parliaments. Of course there is a major difference between the position of national and regional Parliaments, which justifies the express mention of a request by national Parliaments. Only national Parliaments defend general interests and only they can authorize Community Treaties, precisely the place where the division of competences is set out together with how these should be exercised by European institutions. But internally, there is nothing preventing regions from asking a Member State to make an appeal”.

Both CALRE and REGLEG have taken a stand against this provision in the Protocol and have demanded direct access for the regions with legislative powers to the European Court of Justice so as to defend their rights and privileges and where necessary, the ability of regional Parliaments to challenge the legislative acts of national Parliaments in given cases.
In fact a mechanism could be set up so that regional Parliaments could propose to a national Parliament, or one of its houses, the challenging of a legislative act that the European Union has passed it it has been passed against a reasoned statement made by the Parliament. But whatever happens, for a challenge from a regional Parliament to be effective, it has to overcome two more hurdles before reaching the ECJ: a national Parliament and subsequently a national Government, which according to the Protocol is the Institution which the appeal has to be channelled through. For this mechanism to be effective, there needs to be an agreement between the three actors (regional Parliament, national Parliament and national Government)

And yet despite the fact that according to many authors the aim of the Protocol is that the Parliament makes a decision and then the Government implements it, the report I mentioned previously, written by the Spanish Parliament, limits the field of possibilities of this precept.

Firstly, it only looks at the proposal made by the Spanish Parliament, without proposing any mechanism for participation or channel for expressing the opinion of regional Parliaments in Spain. What is more, it states the competent body as the Joint Commission for the EU although it mentions the Congress and/or Senate’s right to call-back. Thirdly, and what is most striking about the proposal is that it concludes that the Government can reject the appeal made by either of the two Houses if there are reasons of clear national interest, although it must explain this decision to Parliament. Obviously, this rejection can have its political effects and responsibilities and if it still disagrees, the House can appeal to the Constitutional Court for conflict of powers, but undoubtedly, in this way of going about things, the provisions and virtues of the Protocol are reduced.

Basque Parliament
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