

“Influence of European law on sub-national lawmaking

Analysis of case studies focusing on the public procurement reform”

Seminar organised by the European Region Tyrol-South Tyrol-Trentino

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**The interaction between EU law and sub national lawmaking
in the light of the subsidiarity principle**

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Introduction:

"Interaction" is in principle two-ways. Representatives of regional parliaments invited to speak today will be able to report on the impact of EU law on sub national legislation. Talking from the point of view of the Committee of the Regions (CoR), an EU body that is providing input in the EU law making, I will focus here on the way sub-national tiers of government – regions with legislative powers in particular- influence or may influence the EU law-making process, and what role the CoR plays in this respect.

I will first briefly recall the novelties of the Lisbon Treaty regarding the subsidiarity principle and their significance for sub national levels of governance and the Committee of the Regions (1). I will turn then to the practice over the last two or three years, since the entry into force of these new provisions, and see where are the improvements and shortcomings (2). Finally, I will focus on how the Committee of the Regions can assist regions with legislative powers in having a stronger say in EU lawmaking, so that we can really talk about "interaction" instead of a top-down process (3).

1. Legal background – novelties of the Lisbon Treaty regarding subsidiarity monitoring for sub-national tiers of governance

Brief reminder:

- Explicit reference to the local and regional dimension in the subsidiarity principle as laid down in the Treaty: local and regional levels do matter for assessing compliance with the principle.

Article 5(3) Treaty on European Union:

"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."

- New possibility for regional parliaments to be somewhat involved in the EU legislative procedure through the early warning system:
Within the early warning system, which allows national parliaments to rebuff EU legislative proposals for non-compliance with the subsidiarity principle within the first 8 weeks of the process, regional parliaments with legislative powers may be consulted by their national parliament.
"It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers". (Art. 6 Protocol No 2 on the application of the principles of subsidiarity and proportionality).
- At the end of the legislative procedure, when the EU act is adopted, the CoR has the possibility to bring an action before the European Court of Justice on subsidiarity grounds (Art. 8 of Protocol No 2) = de facto, the CoR is a "guardian" of the subsidiarity principle.

2. Practice since entry into force of Lisbon Treaty

- So far, no judicial action was carried out yet by the CoR on subsidiarity grounds against an EU piece of legislation. The CoR strategy, as recently renewed by its Bureau¹, is to use the right to seize the European Court of Justice as a deterrent weapon. It is a right, which the CoR may use when and if all other means are exhausted. On this basis, the CoR is setting up a comprehensive subsidiarity monitoring system to follow the whole EU decision-making process – from the early stages of the legislative process, but even before, at the impact assessment stage.
- Regarding the early warning system, national parliaments have managed to use the "yellow card" for the first time concerning the Commission's Proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, ("Monti II-regulation"). 12 national Parliaments have expressed subsidiarity concerns and reached the necessary threshold to oblige the Commission to review its proposal and to decide whether to maintain, amend or withdraw it, justifying its decision. Eventually, the Commission withdrew its proposal. However, in this case regional parliaments have not been part of the process: no subsidiarity objection expressed nor formally forwarded to the Commission (as part of a national position).
- Altogether, the treaties do not give much room to sub national law-making institutions to have a say in EU law making. Some may have such powers through their national constitutional orders (e.g. in Finland – Åland islands), but most regional parliaments are subject to the discretion of their national parliaments. The way in which regional

¹ CdR 606/2012, item 7 a)

Parliaments with legislative powers are consulted by their national Parliaments varies and in this regard, the eight-week deadline poses a major challenge.

- The coordination among regions with legislative powers is difficult. Associations do exist to this aim (CALRE for parliaments, REGLEG for governments), but time to react within the early warning system is tight (8 weeks for national parliaments, hence even less for regional parliaments).
- Still, there is potential and support for more involvement of regions with legislative powers in the EU law making.
Cf. recent resolution of the EP on the Report from the Commission on Subsidiarity and Proportionality (18th report on Better Law Making)², which states:
"Calls on the national parliaments, in accordance with the Subsidiarity Protocol, to consult the regional parliaments with legislative powers; calls on the Commission, in the scrutiny of subsidiarity and particularly in its annual reports on subsidiarity and proportionality, to pay attention to the role of the regional parliaments with legislative powers;"
- A few regional Parliaments have started to send their subsidiarity opinions directly to the Commission for information. This is stressed in the Report from the Commission on Subsidiarity and Proportionality (19th report on Better Law Making).
- The CoR is offering another way for regions to voice concerns.

3. The CoR's added value: coordinating and amplifying the regional parliaments' voice in the EU law-making process, through its subsidiarity monitoring activities

- The CoR has set up in 2007 a network of regional and local authorities particularly interested and active in the field of subsidiarity monitoring: the Subsidiarity Monitoring Network (of which Bolzano –the South Tyrol Provincial Government is a member).
- To date, it includes 139 partners, of which 39 regional parliaments and 28 regional executives. All these contacts are actually experts that may be consulted on EU initiatives.
- This year, launch of special section of the Network website, REGPEX, dedicated to regions with legislative powers. Regional parliaments may find information there on EU legislative proposals being scrutinised during the early warning phase. They can also publish their own positions and share them with other regional parliaments, within or outside their country.
- Through REGPEX, regions with legislative powers do not only gain publicity or information. Their position gets also the chance to be reflected in CoR opinions.
- A good example is the "test-file" on public procurement that was organised on REGPEX around the draft directives submitted by the Commission on public procurement and concessions at the end of last year. Input has been collected from several regional parliaments, as well as regional governments and associations of local governments. These positions have been analysed in a report, which was forwarded to the two CoR rapporteurs (Mr Henk Kool, NL/PES for concessions and Ms Segersten-Larsson, SV/EPP for public procurement).

² Resolution on the 18th report on Better legislation - Application of the principles of subsidiarity and proportionality (2010) (2011/2276(INI))(A7-0251/2012 - Rapporteur: Sajjad Karim, adopted on 13 September 2012.

The CoR draft opinion on public procurement in particular is now submitted to the next Plenary Session of the CoR on 9-10 October 2012. It includes an amendment towards the deletion of the "single national oversight body" which raised many subsidiarity objections from regional and national parliaments.

- Consultations for impact assessment:
The CoR is also promoting input from local and regional authorities at the pre-legislative stage, working closely with the Commission to develop special consultations to this aim. The strategy is being refined now; however, there is a clear willingness to act as early as possible in the policy-making cycle.
- Subsidiarity Expert Group – work ahead of the law-making process:
The Expert group is one of the new features of the CoR strategy for subsidiarity monitoring. 15 selected experts from local and regional authorities all over Europe, from the Subsidiarity Monitoring Network, will soon meet to scan through the Commission Work Programme for 2013 and establish a list of priority files.
The CoR will adopt its Subsidiarity Work Programme on this basis. This will allow for more coordination with CoR thematic commissions and a better input in the opinions with regard to compliance of EU initiatives with the subsidiarity principle.

Conclusions:

- The institutional context is moving. Institutional players are embracing the new procedures established by the Lisbon Treaty. CoR provides alternatives ways – at pre-legislative level, but also during the legislative phase, after the 8-week early warning phase, which is a way to release the pressure during the early warning phase, which is rather short for regional parliaments.
- We are entering a new phase of European integration. New proposals are brought in on Treaty reform. The new financial provisions have an impact on local and regional authorities. The CoR will see that subsidiarity is being rejected in the course of the negotiations.
- The present institutional debate could be an opportunity to raise the question of a stronger role for sub national lawmaking bodies and the CoR in the EU law making. Asking for more power for regional parliaments during the early warning phase may infringe on internal constitutional orders. Another avenue could be to ask for a role for the CoR during the early warning phase – towards CoR "reasoned opinions"?
- In any case, at present, we are working on the implementation of new CoR strategy. The CoR subsidiarity expert group will be meeting for the first time on 25 October. Proposals for the CoR Subsidiarity Work Programme will come out of this meeting and the REGPEX database will also focus on some of the priority files. This will surely support the interaction between the EU and subnational lawmaking.
- I invite you to follow developments in the months to come. The next CoR Subsidiarity Conference will be organised in 2013 and will allow for a first assessment of the CoR new subsidiarity monitoring strategy.
- Meanwhile, I am pleased to welcome your seminar here at the CoR and I wish you a fruitful meeting.