The Principle of Subsidiarity after Lisbon: Towards a Sustainable System of EU Multi-level Governance?

Anna-Lena Högenauer (University of Luxembourg)

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Abstract

Since the Treaty of Maastricht, the formal powers of regional actors in EU policy-making have been strengthened in successive rounds of treaty reform. In the process, the European Union has turned into a system of multi-level governance. However, in the case of legislative regions, the question is whether these participation rights offset the centralizing tendencies of integration and are sufficient to re-establish the balance between the member states and their regions. In addition, for a long time, European integration has had the effect of strengthening national and regional governments over national and regional parliaments, thereby risking the creation of a system of multi-level governance without multi-level parliamentarism. The chapter will therefore analyse the powers of both the governments and parliaments of strong legislative regions from four member states. It finds that regional governments have become active players, but also that regional parliaments are still largely excluded from EU decision-making and that the eurozone crisis has further exacerbated these trends.

Multi-level governance, subsidiarity, multi-level parliamentarism, legislative regions

Introduction

The principle of subsidiarity has been strengthened in successive rounds of Treaty reform, a process that has gone hand in hand with the recognition of the political legitimacy of regions in the decision-making of the European Union. While the Treaty of Maastricht first accorded subnational actors a formal role in EU decision-making through the creation of the consultative Committee of the Regions and officially allowed regional representatives to be involved in the Council of Ministers, the Treaty of Lisbon has now allocated the role of "watchdog of subsidiarity" to various subnational actors (Högenauer 2008). The Committee of the Regions can now bring cases on grounds of a breach of subsidiarity before the European Court of Justice, while regional parliaments with legislative powers can participate in subsidiarity control via the national parliaments and the Early Warning System.

The increasing recognition of subnational actors has been the result of pressures from subnational actors themselves. Legislative regions, i.e. the regions of federal or strongly decentralized states, have played a leading role in this context, as European integration involved a transfer of competences from the regional to the European level (Große Hüttmann and Knodt 2006: 595). However, as channels for subnational participation in EU policy-making are mostly consultative or indirect even today, the central question of this paper is whether the Lisbon reforms with their emphasis on subsidiarity have been able to effectively re-empower strong legislative regions in EU decision-making, thereby creating a sustainable system of multi-level governance?

This question is all the more important in the light of the two consultations on independence that took place in 2014. The officially recognized referendum for Scottish independence was narrowly lost by the "yes"-side (44.7 percent), but also saw a record-breaking voter turn-out of 84.6 percent - the highest in the UK for an election or referendum since the introduction of universal suffrage (Koplowitz 2014). On 9 November 2014, the Catalan government organized a popular consultation on Catalan independence in defiance of the Spanish Constitutional Court, after the Constitutional Court suspended plans for a referendum on independence and a also a consultation on independence. The

population registered an overwhelming support for independence (around 80 percent), but with a turn out that is below 50 percent (BBC 2014). The Catalan results are also difficult to interpret, because of an anti-independence boycott of the consultation (Gyldenkerne and Sanz 2014). Nevertheless, both the hotly contested referendum in Scotland and the acrimonious political battle in Catalonia raise the question of whether European multi-level governance provides a satisfactory setting for strong legislative regions. Neither of the two independence movements is anti-European – in fact both would like to see their regions become EU member states. Thus, are Europe's legislative regions getting enough decision-making power *as regions* in the current Treaty framework? Otherwise, there is a risk that the EU will have to seriously confront the question whether or not former regions can be admitted as newly-formed member states – and it will have to face the consequence of far-reaching institutional reforms due to the changing number and size of member states.

Taking into account the legal and political science literatures and drawing on past research into the regions of federal and strongly decentralized states, notably Germany, Belgium, Austria and the UK, the chapter will assess this question from a comparative perspective, taking into account both regional governments and regional parliaments as actors. The analysis will be based on a discussion of the formal (constitutional) powers of these actors, of their actual capacity to act, as well as on the use that they make of these powers in practice. It argues that both regional governments and parliaments have been strengthened in terms of formal powers, but that only regional governments have reached a level of activity that allows them to make an impact. Regional parliaments generally still have few powers and lack the capacity to use those powers effectively in practice. As a result, the system of multi-level governance is sustainable on the level of the executives, but the EU has not managed to stop the trend of deparliamentarization and a truly multi-level system of parliamentarism has failed to emerge despite the greater emphasis on parliaments in the Lisbon Treaty. Policy-making during the eurozone crisis has further exacerbated the trend toward executive governance beyond the control of parliaments. If policy-making by means of intergovernmental

negotiations becomes the norm, there is a risk that the democratic credibility of the EU will in fact further decrease despite the attempts of the Lisbon Treaty to involve parliaments on all levels more systematically.

Multi-level Governance and European Regions in the Literature

The multi-level governance (MLG) literature fosters the dominant approaches to regional interest representation in European policy-making. The conceptualization of the EU as a multi-level system became particularly prominent through the writings of Gary Marks and Liesbeth Hooghe. According to Hooghe (1995: 178), MLG 'is the only model where regions would be a governmental level of importance next to national, European and local arenas. This Europe cannot be one of the national states, nor of regions, but only a Europe with the Regions'. The approach argues that the EU is 'a system of continuous negotiation among nested governments at several territorial tiers – supranational, national, regional and local - as the result of a broad process of institutional creation and decisional reallocation that has pulled some previously centralised functions of the state up to the supranational level and some down to the local/regional level' (Marks 1993: 392; Hooghe and Marks 2001: 12).

In the 1990s, the MLG approach embodied an optimistic outlook on the evolving role of regions in EU policy-making. Inspired by the increasing recognition of regions in the Treaty of Maastricht (cf. next section), authors argued that the EU was moving towards being a "Europe of the Regions" or "Europe with the Regions" (e.g. Hooghe 1995; Hooghe and Marks 1996). The European Parliament and the European Commission were seen as actors with their own agendas, who would try to mobilize regions as part of an alliance that would allow the supranational and subnational level to strengthen their negotiating position vis-à-vis the member states (Benz and Eberlein 1999: 331; McCarthy 1997: 443, Tömmel 1998: 72). However, the enthusiasm of the mid-1990s ebbed soon and was replaced by the recognition that central governments were still the strongest actors and the precise level of

influence of regions in European policy-making became something of an open question (cf. Hooghe and Marks 2001; Jeffery 2000).

Part of the disillusionment stemmed from the realization that Europe's regions are not uniform entities, but very diverse in terms of size, wealth, strength of identity and – most importantly – in terms of their position with in political system of their member state. Consequently they have different levels of resources, different patterns of mobilization and are affected by integration in different ways (e.g. Tatham 2010; Marks, Haesly and Mbaye 2001; Nielsen and Salk 1998). Thus, while traditionally weak regions stand to benefit from EU integration in the form of funding (e.g. Structural Funds) and consultation practices, constitutionally strong regions have seen some of their competences shift to the European level – with the risk of (co-)decision powers being replaced by mere consultation. As a result, strong legislative regions have in the past been pushing for a greater role in EU decision-making. In addition, there are a number of cases where legislative regions felt constrained by EU policy-making (cf. Jeffery 1998; Streb 2007: 222-3).

According to Jeffery, strong legislative regions – and the German regions in particular – have adopted a strategy whereby they try to protect the nation-state and its competences and even attempt to roll-back European integration as a strong nation-sate is seen as the best guarantor of regional authority (Jeffery 2005; GroßeHüttmann and Knodt 2006: 596-7). According to this view, the regions would prefer separate competences – in contrast to the Commission's emphasis in its White Paper on European Governance on sharing competences (European Commission Communication 2001: 35). Indeed, looking at the European Constitutional debate and the Treaty of Lisbon, the focus was no longer lying on *sharing* powers, but on *defining* the EU's competences more clearly. Thus, one of the questions is whether Lisbon has reinforced the role of strong legislative regions in EU policy-making thereby creating a satisfactory balance of power that makes EU integration sustainable in the long term? After all, one of the risk of permanently frustrated regions is that they may eventually wish to become full member states rather than regions, thereby threatening the internal stability of the EU.

Another concern is the state of multi-level parliamentarism in the European Union. In the past, European integration has generally been seen as carrying the risk of de-parliamentarization for the member states. The European Parliament does of course provide parliamentary control over decision-making at the European level, but, national interests are represented in the Council of Ministers, by *national governments*. If the national parliaments are unwilling or unable to scrutinize closely how those interests are represented by their governments, there is a risk of deparliamentarization (O'Brennan 2007).

For the parliaments of legislative regions, the challenge is even greater, as they are one step further removed from EU policy-making. There are nowadays eight member states with regions with legislative competences: Germany, Austria, Belgium, the United Kingdom, Spain, Italy, Portugal and Finland. Yet, until the Treaty of Lisbon, regional parliaments had practically no formal role to play in EU policy-making. They had at best one or two representatives in the consultative Committee of the Regions. Domestically, their control function was limited by the fact that they would have had to scrutinize what their regional government negotiated with the national government and other regional governments, which would then be represented – usually by the national government – in the Council of Ministers. At the same time, they could not directly scrutinize the actions of the national government, as the national government is only accountable to the national parliament. As a result, the emerging multi-level system of inter*governmenta*l negotiation in the EU has – in the past – not been accompanied by a comparable system of multi-level *parliamentarism*.

The Treaty of Lisbon has, however, recognized regional parliaments for the first time and created new mechanisms of consultation for national and regional parliaments. It is thus worth investigating to what extent the current system of multi-level governance involves a balanced representation of regional governments and parliaments.

EU Treaties: Multi-level Governance through the Ages

The European Treaties had a regional dimension from the start. However, in the Treaties of Rome of 1957, regions were seen purely as an object of policy-making, not as one of the potential policy makers. Thus, the preamble of these treaties emphasized the objective of economic integration, including the aim to reduce the gap between regions and to help weaker regions catch up. This objective was a recurrent theme that was picked up again in the context of agricultural policy (art. 39), the free movement of workers (art. 49), transport policy (art. 75) and the principles guiding the work of the Commission (art. 80), to name but a few examples. The Treaties also created the European Investment Bank that could now grant loans on a non-profit basis to stimulate the development of economically weaker regions (Art. 129).

The regional dimension of EU policy-making was further strengthened through the creation of the European Regional Development Fund in 1975 and its recognition in the Single European Act in 1986 (art. 130b, art. 130c). However, at this stage regions were still not recognized as policy-makers in the Treaties, except in the framework of the Structural Funds as stakeholders.

The first change in that regard took place in the Treaty of Maastricht in 1993. This Treaty gave regions for the first time a formal role in EU policy-making, in the form of the new Committee of the Regions (Chapter 4, TEC). This advisory body was to consist of representatives of regional and local authorities and had to be consulted on a range of policies before the Council of Ministers and the European Parliament reached their conclusions. It could also adopt opinions of its own initiative. Regional and local actors were thus recognized for the first time in the Treaties as potential policy-makers.

The Treaty of Maastricht also introduced for the first time the principle of subsidiarity. The aim of this principle is to take decisions on the most appropriate level, while trying to take them as closely as possible to the citizens. It would thus later help regions defend their competences. However, in the Treaty of Maastricht, subsidiarity was defined as follows:

> "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."(art. 3b TEU)

It was therefore still defined as a question of competence between the member states and the European Union, and regions were not explicitly mentioned at that point in time.

In addition, the Art. 146 (TEC) of the Treaty of Maastricht made it possible for member states to be represented by the member of a regional government. The formulation "The Council shall consist of a representative of each Member State at ministerial level, authorized to commit the government of that Member State" allows any minister – including a regional minister – to speak for the member states provided that that person can represent the position of the member state as a whole. This change was particularly important for strong legislative regions, as it meant that they could potentially represent their country in the Council of Ministers in those cases where their exclusive competences were affected. Belgium, for example, is usually represented by a minister from the Flemish, Walloon or Brussels regional governments on matters related to environment policy, fisheries, agriculture and many more. Germany is represented by a regional minister on issues related to education, culture and broadcasting.

The Treaty of Amsterdam and the Treaty of Nice made only incremental changes to the position of regional governments, for example by extending the powers of the Committee of the Regions and by defining the principle of subsidiarity in more detail in the *Protocol on the application of the principles of subsidiarity and proportionality*. This protocol also mentions the need for the Commission to consider the cost impact on the subnational level, and thus officially recognizes the existence of a multiple levels of government within member states.

Most recently, the Treaty of Lisbon introduced three changes that could have an impact on the ability of legislative regions to represent their interests on the European level. Firstly, the subsidiarity clause was reworded, with article 5(3)TEU now referring explicitly to the regional level in the definition of the principle of subsidiarity:

> "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." (Art. 5(3) TEU)

Secondly, while the rewording of the subsidiarity principle could be seen as being merely a symbolic concession, the Treaty of Lisbon also introduces two new procedures for the monitoring of the implementation of the principle. The Committee of the Regions was given the right to appeal to the European Court of Justice on grounds of a breach of the subsidiarity principle or to defend its consultation rights. In addition, the consultation of the CoR is now also mandatory for the European Parliament in certain areas. While the Opinions of the CoR are non-binding, it is worth remembering that the European Parliament's rise to power went through the same stage (Stahl 2009: 138-9; McCown 2003: 974, 977). As the breach of the principle of subsidiarity or failure to consult the CoR may lead to the annulment of EU legislation, regions have now, for the first time, gained 'hard' powers at the European level. A clever use of the threat of an appeal could force the Commission and Council to take subsidiarity seriously and to give it a broad definition and might even serve as a bargaining chip on points of substance. One promising step towards the effective use of the new rights is the Subsidiarity Monitoring Network that the CoR has developed with a variety of regional and local partners (subsidiarity.cor.europa.eu/objreseau/tabid/81/Default.aspx). However, the effectiveness of this tool will also depend on the ECJ's view on the matter (Högenauer 2008: 548-554).

The third change gives national parliaments more influence in European policy-making in two instances. On the one hand, each parliament can veto a decision of the European Council to move from unanimity to qualified majority voting in a policy area (Art. 48(7) TEU). On the other hand, the *Protocol on the Role of National Parliaments in the EU* and the *Protocol on the Application of the Principles of Subsidiarity and Proportionality* assign national parliaments a role in monitoring subsidiarity though an 'early warning system' (EWS). This affects strong legislative regions in two ways: In the case of bicameral systems, the EWS includes a chamber representing regional governments, such as the German Bundesrat. In addition, national parliaments are asked to consult regional parliaments where appropriate.

The basis of the new procedure is that national legislatures now obtain all documents of legislative planning and draft legislation. Then, parliaments have eight weeks during which each national parliament or chamber of a national parliament can submit a reasoned opinion to the Presidents of the European Parliament, the Commission and the Council of Ministers if it finds the draft to be in breach of the principle of subsidiarity. If reasoned opinions amounting to at least one third of the total number of votes find the legislation in breach of the principle of subsidiarity, the draft must be reviewed (at least a quarter of votes in the case of issues in the area of freedom, security and justice). The initiator of the draft may then decide to confirm, amend or withdraw the draft. If objections amount to at least a simple majority of the votes allocated to national parliaments (28 out of 54), the Commission has to decide whether to confirm, amend or withdraw the draft. If it decides to confirm it, it has to issue a reasoned opinion on the matter. If 55 percent of the members of the Council or a simple majority of votes cast in the EP decide that the proposal is not in line with subsidiarity, it shall not be further considered.

However, while Cooper sees the early warning system as potentially leading to a "virtual third chamber" of national legislatures, the impact is likely to be very limited for regions (Cooper 2006: 283). Most importantly, only few regions will be represented in a national chamber like the

Bundesrat. All other regions have to rely on the consultation of the regional parliaments by the national parliament. Secondly the system is still mainly advisory. Only the Council of Ministers or the European Parliament can force the Commission to withdraw a proposal. Finally, in order for the procedure to work, a large number of parliaments have to follow European affairs actively and invest resources into the monitoring and evaluation of proposed legislation. Parliaments also regret the fact that they can only block European proposal, but there is no formal mechanism that allows them to have a more positive and constructive impact on EU policy-making. For example, they cannot ask for a new European proposal, if they feel that there is *more* need for cooperation in a policy are.

On the whole, the Treaty of Lisbon is thus unlikely to have much impact on the regions' policy-shaping rights on the European level, but it does provide them with a new opportunity to block legislation and challenge the Commission's interpretation of the principle of subsidiarity (Sturm 2009: 17). As before, the Committee of the Regions is the only formal representation of regions on the European level, a role that has been emphasised by the fact that most changes affected its role and powers (16-17). At the same time, any real improvement in the unmediated influence of regions is likely to depend on the extent and quality of coordination of parliaments across member states (Chardon and Eppler 2009: 28).

Regional Governments as Multi-level Players

Regional governments were recognized as stakeholders in EU policy-making almost two decades before Lisbon. The governments of legislative regions in particular started to lobby for the European recognition of their status in the late 1980s, including the creation of the Committee of the Regions. In the process, they carved out a role for themselves in EU policy-making. They were also among the first regions to establish offices in Brussels that would help them to gather information and devise lobbying strategies (Hüttmann and Knodt 2006: 595). The 1990s then saw an exponential rise in the

number of regional offices in Brussels, going hand-in-hand with demands for a "Europe of the Regions" (Ruge 2003). Even though this optimism soon abated, this extended period of activism meant that the governments of strong legislative regions had established ways of contributing to EU policy-making long before the Lisbon Treaty.

On the European level, the main channels of interest representation for regional governments are the Council of Ministers, the Committee of the Regions, the lobbying of MEPs from the region, regional offices for lobbying and regional networks on the European level. The Council of Ministers theoretically provides regions with the most formal and substantial means to influence EU policy-making. In those cases where regional ministers attend the Council, they become part of the key legislator at the EU level and – in some cases – can cast a vote. There are, however, some drawbacks: Firstly, whoever sits in the Council has to be able 'to commit the government of that member state' (Art. 203 TEC), which means that regional ministers cannot represent purely regional concerns. Instead, a common, national position has to be agreed prior to the Council meeting. Secondly, only strong legislative regions have the opportunity to send ministers, and even in that case there are differences between member states depending on whether regional officials can be present as observers, as speakers or even as chairs.

The Belgian regions have the most extensive representation rights in the Council of Ministers, in line with the Belgian constitutional principle (art. 167) that each part of the state (the central state, the regions and the communities) has foreign policy competences in the policy areas that fall under its domestic competences (Hogwood et al. 2003: 3). Based on the Cooperation Agreement Act of 8 March 1994 and the Lambermont Agreement, regional ministers sit in the Council in the case of exclusive regional competences. When predominantly central competences are concerned, a national minister is being assisted by a regional representative and for predominantly regional matters, a regional minister is assisted by a representative of the national level (Kovziridze 2002: 149). By comparison, the German regions can only represent Germany in the Council in education,

culture and broadcasting policy, i.e. a much narrower range of policies (Chardon and Eppler 2009: 29-30). The regional representation in Austria is even more limited: a regions-nominated representative can participate in the Council, if the domestic legislative competences of the regions are concerned, but only if the national government agrees (Art. 23d Federal Constitution). While ministerial participation in the Council is relatively rare, the option to include a representative of the regions in the Austrian delegation to Council working groups under article 8 of the Federal-Regional Agreement has been frequently used (Bußjäger and Djanani 2009: 64). The situation in the UK is somewhat similar to the Austrian case, in that the decision on whether or not to include a Scottish minister or expert in the UK delegation rests with the UK lead. Once they are part of the delegation, Scottish ministers and officials require the permission of the UK lead before they can take the floor (Swenden 2009). Thus, while there are differences in the extent of participation of strong legislative regions in the Council of Ministers, most of them have some level of access to it.

All of the regions have access to the Committee of the Regions, which is the most institutionalized channel of regional interest representation. However, after lobbying for its creation, the legislative regions – with the possible exception of the Austrian regions – soon lost interest in it as it contained too many representatives from weak regions or local authorities (McCarthy 1997; Nergelius 2005: 126). There is also an ideological element to this: Scotland under the government of the Scottish National Party, for example, sees itself as a nation, not as a region, and therefore feels that the CoR is not the right channel for it. It even stopped sending ministers to the CoR and instead now only sends Members of the Scottish Parliament and local councilors.[1] Similarly, the Belgian regions feel that their presence in the Council is more important than the work of the CoR.[2] Some of the German regions also don't send a representative – Mecklenburg-West Pomerania, for example, because they feel tha the Committee of the Regions is too weak to have a real impact.[3]

[1]Interview with the Head of the SGOEU and a policy officer of the SGOEU, Brussels, 8/04/2014.
[2]Interview with an attaché Wallon in the Permanent Representation of Belgium in Brussels, 7/04/2014.
[3]Interview with the Director of the Brussels Office of Mecklenburg-West Pomerania, Brussels, 2/04/2014.

Instead of using the CoR, regional government often resort to lobbying strategies (cf. Högenauer 2014, 2015). One of the main targets are MEPs from the country or region. The advantage of this type of lobbying are the low costs involved – all it takes is a letter or phone call. Even if the MEPs are not directly involved in the workings of a key committee, they may be able to introduce amendments that reflect the region's concerns (cf. Tatham 2008: 504-6). However, one of the problems with this channel is that some regions have very few MEPs in the European parliament, especially where country-wide lists are used for the elections. The East German regions are currently in that position and therefore organize coordination meetings between all East German regional offices in Brussels and the MEPs.[4]

Finally, almost all legislative regions – with the exception of the Austrian region of Vorarlberg – have a Brussels office that helps with the direct lobbying of the European Commission and the organization of events. The most important functions of these offices including information gathering for the regional government at home, networking, assisting private actors at home (e.g. in applications for funding), active attempts at influencing policies and the general improvement of relations with other tiers of governments (Moore 2006). Moore furthermore distinguishes a 'promotional' role, where regions serve as showcases for economic and cultural elements of the region (Moore 2006). The offices also help with the creation and organization of regional networks on priority issues, such as the VANGUARD network on economic and industrial policy that brings together around 20 regions.[5]

In addition, federal and strongly devolved member states have developed coordination mechanisms that allow regional governments to contribute to the formulation of the national position. As in the case of representation in the Council, there are substantial differences in the consultation or co-decision rights of regions in the negotiation of member state positions.

[4]Interview with the Director of the Brussels Office of Mecklenburg-West Pomerania, Brussels, 2/04/2014.
[5]Interview with a Walloon attaché in the Permanent Representation of Belgium in Brussels, 7/04/2014.

The Belgian regions are again in the most advantageous position. On the one hand, there are only three regions, which facilitates coordination and makes it easier for individual voices to be heard. On the other hand, they have obtained veto rights over the national position (Lambertz and Förster 2009: 24). The central coordinating role for Belgium's official position in the European Union is played by the Directorate for European Affairs of the Federal Public Service of Foreign Affairs (DEA). It is an administrative body composed of representatives of the federal, regional and community ministries and headed by a federal representative. Decisions are taken by consensus, which gives each entity veto powers.

By contrast, the German regions do not have an individual voice in the coordination process, but instead have to formulate a collective regional position in the Bundesrat (Art. 23 of the Basic Law (BL) and the Law on Cooperation (LC) between the Bund and the regions Concerning European Matters of 12 March 1993). In addition, the Bundesrat does not have genuine veto powers over the national position: If the European measure predominantly concerns the legislative and administrative competences of the regions, the position of the Bundesrat has to be decisively taken into account ("massgeblich zu berücksichtigen") by the federal government. In case of disagreement, the Bundesrat can ultimately confirm its original opinion with a two-thirds majority ("Beharrungsbeschluss") and appeal to the Federal Constitutional Court, but it rarely fully exploits these options. In the case of legislative projects that touch upon predominantly federal competences or concurrent federal-regional competences when the federal government has already previously legislated in the area, the federal government has to take the position of the Bundesrat into account, but is not obliged to incorporate it into the national position (see Müller-Graff 2005; Art.23 BL and §5(2) LC). Overall, this means that the input of each individual region into European policy-making is thus diluted at three stages: twice internally, during the negotiations among regions and during the negotiations with the central government, and again at the European level in negotiations with other member states and European institutions. In fact, the greatest risk for a Land is to become isolated (and outvoted) at an early stage.

The Austrian system is similar to the German system (see Art. 23d of the federal constitution and the Vereinbarung zwischen dem Bund und den Regionen gemäss Art. 15a B-VG über die Mitwirkungsrechte der regions und Gemeinden in Angelegenheiten der europäischen Integration, 1992). In cases of European legislation that affect their exclusive competences, the regions can adopt a 'unified position' that binds the federal government except if there are compelling reasons of integration or foreign policy that require adaptation. As the definition of this exception is rather vague, the federal government has some leeway in practice.[6]Unified positions have to be adopted by a majority of regions (at least five) with no opposition from the remaining regions. As the Austrian regions have only few exclusive competences, only 75 unified positions were adopted between 1993 and 2008, an average of about five a year (Bußjäger and Djanani 2009: 61). In all other policy areas, the regions can adopt 'simple positions' individually or coordinate horizontally to achieve a common position – but these are not binding.

Finally, in the UK, Scotland, Wales and Northern Ireland have even less formal powers. They benefit from the fact that there are only three devolved governments and thus relatively few regions need to be consulted. However, the UK government retains the responsibility for EU policy and thus only has to consult the regions – even in policy areas that are otherwise completely devolved (Cairney 2006: 439). The consultation generally takes place on the level of civil servants, through letters between ministers or in Joint Ministerial Committees (Swenden 2009).

Thus, overall, the governments of legislative regions managed to develop a variety of ways of influencing EU policy-making long before the Treaty of Lisbon. While the formal powers of regions vary considerable between member states even for strong legislative regions, they all have multiple mechanisms of consultation and lobbying in place. The Treaty of Lisbon has therefore had practically no effect on multi-level governance in that regard. The regions seem to generally welcome the new focus of the CoR on subsidiarity, but even the new powers have not fundamentally changed their sceptical perception of this body. They also feel the need to engage more with their regional

[6]Interview with an official, Liaison Office of the Austrian Länder, Vienna, 2/04/2009.

parliaments, which have been empowered somewhat by Lisbon. But the general impression is that their approach to EU policy-making has not been changed by the Treaty. [7] One could generally argue that multi-level governance on the level of the executives works well. Where it needs strengthening, this is not so much a task for the European level, but for the member states, as some national coordination procedures do not yet adequately reflect the power that regions would have in purely domestic policy-making.

Regional Parliaments Struggling to Keep up

While the governments of strong legislative regions have thus managed to carve out a role for themselves in EU policy-making – be it through formal mechanisms of intra-state coordination or through investments in lobbying – regional parliaments have gained official recognition in EU policy-making only recently. It is here that the greatest problems with multi-level governance arise.

While many regional parliaments tried to adapt to the new opportunities offered by the Lisbon Treaty, their level of activity remains modest (e.g. in the case of the Scottish Parliament, cf. Högenauer 2011). We can measure the mobilization of regional parliaments on EU issues by counting the number of opinions/reasoned opinions that they upload into databases such as REGPEX, which is used by regional parliaments and governments to collect and exchange their positions on subsidiarity. According to Fleischer's analysis of the REGPEX database, only 34 reasoned opinions (EWS) and 44 opinions (political dialogue) were recorded by regional parliaments between 2008 and 2013. However, as regional parliaments do not always upload their documents, this data probably somewhat underestimates the real level of activity (Fleischer 2014). The numbers are, however, an indication of the fact that regional parliaments have used the Early Warning System only to a very

[7]Interview with an attaché Wallon in the Permanent Representation of Belgium in Brussels, 7/04/2014.Interview with the Director of the Brussels Office of Mecklenburg-West Pomerania, Brussels, 2/04/2014.Interview with the Head of the SGOEU and a policy officer of the SGOEU, Brussels, 8/04/2014.

limited extent. By comparison, national parliaments submitted 2431 opinions under the political dialogue and 319 reasoned opinions between 2008 and 2013.

Part of this problem may be the very short deadline under the EWS combined with a lack of resources. In order for regional parliaments to use the EWS, they have to forward their opinion to the national parliament within six to seven weeks after receiving the legislative proposal, in order to give the national parliament enough time to take their position on board. They thus have to work faster than national parliaments. At the same time, they have much lower staff levels. The average regional parliament has about 1.7 members of staff working on EU affairs, whereas the average national parliament has almost ten (Christiansen et al. 2015)

Furthermore, if a regional parliament has objections on grounds of subsidiarity, but the national parliament of the member state is happy with the legislative proposal of the Commission, there will most likely not be a reasoned opinion, which means that the position of the regional parliament may in fact not be passed on.

An example of how difficult it is for the position of a regional parliament to reach the European level is the legislative initiative on e-invoicing. It was one of the priorities identified by the CoR for subsidiarity monitoring in 2013 and should thus have received special attention by regional parliaments. Furthermore, in order to facilitate scrutiny, the CoR launched a consultation through its REGPEX website. In parallel, at the 16th Plenary Assembly of the Conference of European Regional Legislative Assemblies (CALRE) in 2012, a working group on subsidiarity was set up to monitor subsidiarity compliance on the priorities of the CoR, including the proposal on e-invoicing.

As Vara Arribas and Högenauer (2015) note, the consultation received critical replies for the Austrian regions, the legislative assembly of Emilia Romagna and the Abruzzo regional government. The level of activity of regional parliaments was again limited to a few active voices. However, Italy and Austria did not adopt a reasoned opinion. Spain adopted an opinion confirming the *conformity* of the proposal with the principle of subsidiarity. Thus none of the national parliaments followed the views

of the regional parliaments. The Assembly of Emilia Romagna also addressed its opinion to its members of the European Parliament, and may thus have gained visibility by way of lobbying efforts. But in general the case illustrates that there is a great risk that the opinions of regional assemblies will not reach the Commission under the EWS.

In addition to the EWS, a number of regional parliaments are also directly represented in the Committee of the Regions. However, apart from being a purely consultative assembly, the Committee of Regions has also a number of other drawbacks. Due to regressive proportionality larger member states, which are more likely to have legislative regions, are underrepresented. Furthermore, some of its member represent local authorities rather than regions. Thus, in May 2013, only about 10% of the CoR's members represented legislative assemblies. That makes it difficult for legislative regions to build majorities (Nergelius 2005: 126; Müller-Graff 2005: 110). That said after the Lisbon Treaty, the Committee of the Regions appears to have found a new focus in the protection and promotion of the principle of subsidiarity. Already in 2005, the Committee of the Regions created a Subsidiarity Monitoring Network (SMN) that ran a number of subsidiarity tests starting in 2006. The SMN tests allowed regional actors to build capacity and expertise and start the process of reform and adaptation. The Committee of the Regions also developed REGPEX as a database of documents relating to legislative scrutiny. It is connected to OEIL and PreLex, thus allowing members to check the current state of legislation (Stahl 2009: 139-40). Regional parliaments can upload their documents and can sign up for thematic updates. More than half of the regional parliaments with legislative competences of the EU currently participate in these activities (extranet.cor.europa.eu/subsidiarity/regpex/Pages/partners.aspx).

In addition, the Conference of European Regional Legislative Assemblies (CALRE), which represents 74 regions from all eight member states with legislative regions, aims to protect the subsidiarity principle and foster cooperation between the regional and national parliaments and the European parliament (http://www.calrenet.irisnet.be/index.php/what-is-calre/history). Like the CoR, it has also

made subsidiarity monitoring and the political dialogue with the European Commission its priority (CALRE 2011).

Apart from these organs and networks, regional parliaments could also follow the example of regional governments and set up offices in Brussels in order to lobby the EU institutions. In practice, few regional parliaments have chosen this path – probably in part due to their comparatively low staffing levels. The responses to a recent survey showed that out of 23 regional parliaments with legislative powers from 6 member states only two currently have a representative or office in Brussels. Many regional parliaments appear to receive at least some information from the office of the regional executive in Brussels, but this usually does not involve active lobbying on their behalf (Christiansen et al. 2015).

Overall, it seems that the Treaty of Lisbon has failed to substantially empower regional parliaments in EU policy-making. On the one hand, regional parliaments appear to lack the capacity to become systematically active across a large number of issues. On the other hand, even when they do use the new mechanisms, such as the EWS, it is far from certain that their opinions will have any impact on outcomes. Nevertheless, the Lisbon changes do seem to have motivated regional parliaments to adapt their procedures and to try and become more active. This can best be seen in the revival of the CoR and of CALRE, which have found a new purpose in the monitoring of subsidiarity. If regional parliaments were to be given more substantial formal powers in the future, we might indeed see the development of genuine multi-level parliamentarism to match the multi-level governance on the level of executives. However, the resource limitations of regional parliaments would still have to be overcome.

Outlook: The Return of Executive Dominance in Times of Crisis?

As we have seen, during the first decades of European integration, the effect of integration was a centralizing one, especially for federal and decentralized states. Competences that had been regional

competences or shared competences were increasingly pulled up the European level, where regions could no longer participate in decision-making. In addition, only governments had a place in EU decision-making, and parliamentarism only existed in the form of a fledgling European Parliament. This trend risked creating a European political system that de facto reformed member state constitutions from above – shifting the power balance between executives and legislatures and between governments and regions in the absence of conscious deliberation. However, with the increasing activism of legislative regions in the 1980s, the role of regions started to be recognized and regional governments were increasingly given a role in EU policy-making and in the coordination of national positions. While legislative regions are still weaker in EU policy-making than in domestic policy-making, some member states – like Belgium or Germany – created systems of internal coordination of national positions that reflected the process of domestic policy-making. However, in other member states, like the UK, it is still the case that a region that has exclusive competences in domestic policy-making is only consulted in EU policy-making. As a result, for some legislative regions, such as Scotland, the status of a *region* is very disadvantageous in EU policy-making and has the potential to breed resentment.

Nevertheless, legislative regions have by and large started to adapt to European integration, have developed channels of participation and are actively mobilizing when policies affect them. By contrast, regional parliaments were only recognized as relevant actors in EU policy-making in the Treaty of Lisbon. Even then, their role in the Early Warning System is weak and it is extremely difficult for their opinions to become visible.

However, not only is multi-level parliamentarism still underdeveloped, but the eurozone crisis has set-off a new trend towards intergovernmental agreements and executive policy-making that largely bypasses parliaments. Many of the crisis-related mechanisms are almost completely beyond the formal control powers of parliaments. For instance, the European Central Bank has assumed an increasingly important role in the management of the debt crisis, especially since its controversial

decision to purchase bonds to provide more liquidity to the markets (especially of countries in crisis). Yet, the European Central Bank was designed to be politically neutral, parliaments – regional, national and European – have few means to control or influence these decisions, despite the fact that the decisions of the Central Bank are very political and widely debated in the media. Similarly, the creation of the new banking union provides little room for manoeuvre for parliaments. The European Parliament did not have to approve the Framework Regulation for the Single Supervisory Mechanism (Regulation No 468/2014 of the Central Bank). Similarly, the famous "Troika", the cooperation of European Commission, European Central Bank and International Monetary Fund that negotiates with Eurozone states in crisis – like Greece – about reform programmes, is notoriously difficult to subject to parliamentary scrutiny due to the fact that it is composed of different organizations. The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), one of the central pillars of crisis management in the EU, was also the result of negotiation between governments. Parliaments were only involved in its ratification, but even then there was no room for the regional level, despite the fact that the treay substantially reduces the ability of member states to decide independently on spending policies.

The crisis has thus triggered a new trend towards de-parliamentarization, despite the attempts of the Lisbon Treaty to involve parliaments on all levels more systematically on EU policy-making. This trend is particularly difficult for regions, as they are not perceived as a key actor in these times of crisis. However, regions do in fact play an important role in the implementation of the European growth objectives. The are often responsible for innovation, the promotion of small and medium enterprises, training and education, employment etc. (Stahl and Kuby 2015). Yet, while member states are expected to involve regional authorities in the preparation of national documents in relation to the European Semester, which involves the checking of national budgets by the European Commission, the regional level has so far been consulted only sporadically (ibid.). If the European Union wishes to maintain a healthy balance between different levels of government and between governments and parliaments, it is therefore important that it revises its approach to policy-making once again after

the crisis to address some of these democratic short-comings. Otherwise, there is a risk that the EU will drift ever further away from its citizens.

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