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| **Directorate E - Horizontal Policies and Networks**  **Unit E2***– Subsidiarity Network/Europe2020 Monitoring Platform/Covenant of Mayors/EGTC* |  |

**REPORT ON THE CONSULTATION OF**

**THE SUBSIDIARITY EXPERT GROUP**

**for the own-initiative opinion on**

**"DEVOLUTION IN THE EUROPEAN UNION**

**AND THE PLACE FOR LOCAL AND REGIONAL SELF-GOVERNMENT**

**IN EU POLICY MAKING AND DELIVERY"**

Rapporteur: Mr Schausberger (AT/EPP)

7 February 2013



<http://subsidiarity.cor.europa.eu>

**Disclaimer**:

*This report reproduces all the contributions to the consultation and aims to highlight their main points. The information it contains is purely for illustration* *purposes. The report is not binding on the CoR administration and does not prejudice the final content of the relevant CoR opinion.*

1. **Introduction**

At the end of 2012, members of the Subsidiarity Expert Group (SEG) of the Subsidiarity Monitoring Network were invited to participate in a consultation on "Devolution in the European Union and the place for local and regional self-government in EU policy making and delivery". The consultation was organised at the request of Mr Schausberger (AT/EPP), in the context of the preparation of an own-initiative opinion for which he had been appointed Rapporteur. It ran from 21 November 2012 to 3 January 2013.

Contributions were forwarded to the Rapporteur, who was able to use them to prepare his draft opinion. At the time of drafting of this report, the draft opinion was scheduled to be discussed and adopted by the CIVEX Commission on 11 February 2013. The final opinion was to be adopted by the CoR during the 11-12 April 2013 plenary session.

1. **Methodology**
   1. **A new type of consultation**

Given the tight schedule for preparing the draft opinion, the Rapporteur chose to test a new possibility made available within the Subsidiarity Monitoring Network, i.e. to consult the Subsidiarity Expert Group. On the basis of the Group's relatively small size and particular expertise, it was assumed that it could react more quickly than the whole network, the consultation of which generally runs for at least eight weeks.

The Subsidiarity Expert Group, set up in September 2012 as a result of the revised strategy adopted by the CoR Bureau in May 2012[[1]](#footnote-1), includes 16 local and regional experts[[2]](#footnote-2) from the Subsidiarity Monitoring Network. Appointed by the Subsidiarity Steering Group[[3]](#footnote-3), its role is to support the activities of the latter and the CoR's consultative activities in general. The Expert Group is to give input to the Subsidiarity Annual Work Programme and to be at the disposal of rapporteurs and CoR commissions if needed.

Given the topic of the planned opinion, it was felt that it could be very useful to seek the particular expertise of the Group within the Network. In his working document[[4]](#footnote-4), the Rapporteur raised questions related to the connection between subsidiarity and devolution. Members of the Subsidiarity Expert Group were therefore invited to participate in the general stakeholders' consultation at the CoR on 3 December 2012. However, since most of the experts are not based in Brussels, an electronic consultation was chosen in order to ensure broader participation and written contributions.

* 1. **A short and focused questionnaire**

On the basis of his working document[[5]](#footnote-5), which was to be presented to the CIVEX Commission on 4 December 2012, the Rapporteur sought the expertise and experience of members of the Group through the following questions:

*1. Do you agree with the thesis presented in the working document that a proper application of the subsidiarity principle, within the EU but also at national level, involves effective and functional self-governance at the local and regional level?*

*If yes, could you please provide empirical evidence from your Member State/ region, which supports this view?*

*2. Do you agree with the assumption that subsidiarity as a political and legal principle may act as a driver for decentralisation, in the sense that it can act as an incentive for central governments to locate powers and resources at the level where decision making would bring the optimal results?*

*If this is the case, can you provide empirical evidence from your Member State/ region, which supports this view?*

*3. Do you believe that more decentralisation and stronger local and regional self-government could enhance the position of the Committee of the Regions and LRA, in particular regional parliaments with legislative powers, in monitoring compliance of EU legislation with the subsidiarity principle?*

*4. Would you suggest any other connection between subsidiarity and decentralisation/devolution than those highlighted in the Working Document?*

1. **Outcome**

The consultation attracted three contributions, although one of those was formally drafted by a partner of the Subsidiarity Monitoring Network which is not a member of the Expert Group (the Convention of Scottish Local Authorities - COSLA). As for the two contributions forwarded by members of the Expert Group (Johannes Maier from REGLEG and Austria and Maria Jesús San José López  
from the Basque Regional Government), one did not explicitly reply to the Rapporteur's questions but commented on the content of the working document. Two members of the Expert Group apologised for not being able to contribute due to the tight deadline combined with the Christmas period, which did not allow for proper consultation within their regions.

Beyond formalistic considerations, all three contributions added interesting elements to the discussion and were forwarded to the Rapporteur. In the light of their different nature and format, and given their limited number, it is difficult to draw general conclusions. It was therefore considered more appropriate to include them in full (see appendix) rather than drafting a summary.

A few interesting ideas may however be highlighted:

* **All respondents agreed with the Rapporteur's thesis presented in the working document that a proper application of the subsidiarity principle, within the EU but also at national level, involves effective and functional self-governance at the local and regional level.** Examples drawn from the Basque and Scottish contexts show that the subsidiarity principle needs to operate in a clear legal framework. In the absence of clear regulations organising the relations between the local level and the higher levels of governance, the subsidiarity principle cannot be argued legally before the courts and is difficult to defend politically. In these two examples, the fact that the subsidiarity principle is now clearly defined by the EU Treaties makes it easier to argue for compliance with this principle at the EU than at the national level.
* **Respondents did not really see subsidiarity as a driver for decentralisation.** Subsidiarity is seen more as having a neutral role with regard to decentralisation. It may be regarded as a guideline whenever the division of competences is at stake within the national context, competing with other concerns or principles such as transparency, efficiency, cost effectiveness, etc. **Subsidiarity may be acting more as a driver to avoid centralisation, protecting the competences of local and regional authorities.** In the current economic crisis, it can play a role in preventing austerity measures being used as an excuse for recentralising. In the case of Scotland, however, the absence of a clear definition in domestic legislation makes it difficult for local authorities to invoke subsidiarity in order to defend their competences against political fluctuations.
* **The economic crisis and austerity measures work against subsidiarity and favour centralisation at European level as well.** Recent developments in the European integration process (e.g. the "Six-Pack" legislation, the new intergovernmental Treaty on Stability, Coordination and Governance in the Economic and Monetary Union and the amendment of Article 136 of the TFEU) show how economic and fiscal crises lead to centralisation of certain legal as well as administrative powers at EU level. As Mr Meier put it, the "force of 'harmonization' – in order to simplify administrative procedures – is stronger than aspects of 'diversity'".
* Observation of the early warning mechanism shows that **subsidiarity checks performed at national level mix political with legal arguments. Subsidiarity analyses are often used to support positions already taken for political reasons,** in favour of or against EU action. Subsidiarity arguments should be taken more seriously as a means to ensure the exercise of shared competences at the appropriate level and not to legitimise positions taken by the political majority at a given moment. This approach would consolidate local and regional self-government (see in particular Mr Maier's contribution).
* In this respect, **the CoR and its Members have a role to play in improving domestic subsidiarity checks.** While waiting to see whether new Treaty negotiations could strengthen its role in the legislative process, the CoR should make optimal use of existing tools. Through its Members, the CoR can help ensure that better use is made of the Subsidiarity and Parliament Protocols to the Lisbon Treaty[[6]](#footnote-6) at domestic level. CoR Members can act as a conduit between subsidiarity scrutiny work in Brussels and in their respective constituency. In Scotland, for example, COSLA argued for the involvement of the four councillors sitting in the CoR in the Scottish Parliament's subsidiarity arrangements. This proposal was not, however, accepted by the Scottish Parliament.
* Finally, respondents stressed that **subsidiarity and decentralisation need not be focused on defensive arguments.** The contribution from the expert of the Basque Government insisted on the benefits of decentralisation, especially when combined with fiscal autonomy. As for COSLA, its contribution stressed that "subsidiarity is also about looking about making better policy decisions and defining partnerships between governance levels". "Outcome-driven policies" in particular are a way to improve the quality of local and EU policy-making. Scottish Single Outcome Agreements are an interesting example of agreements between the Scottish Government and each local authority. Based on 15 key national outcomes using a range of national and local indicators, they can create mutual accountability and differ from contracts that focus simply on inputs.

1. **Conclusions**

Content-wise, the contributions received to this consultation have certainly fed the reflections of the Rapporteur, as stated in the draft opinion submitted for adoption to the CIVEX Commission[[7]](#footnote-7). As indicated above, they provided some concrete examples illustrating the relationship between devolution and the application of the subsidiarity principle, as well as some more abstract thoughts on the role, application and effects of the principle itself in the EU and domestic contexts.

As for the methodology, some lessons can be drawn from this first consultation of the Subsidiarity Expert Group.

Firstly, the assumption that the Group could react more quickly than the whole SMN within a tight timescale did not prove correct. No systematic survey has been carried out among the experts to find out the reasons for the low level of participation. The period of the year (end of year holiday) and abstract nature of the topic (not an actual subsidiarity analysis of a given legislative proposal) may have played a role. However, some spontaneous reactions showed another element of explanation. Some experts who did not send a contribution indicated that they had wished to consult within their own regional or local authorities to back up their position and that the consultation deadline did not allow for this. Although experts have been selected in the light of their personal expertise (legal background and practical experience with subsidiarity analyses) and are not requested to express the official position of their employing authority, this approach should be taken into account when setting the consultation timetables. Sufficient time should be allowed to enable experts to consult in their respective constituency.

Secondly, the consultation attracted an interesting contribution from an SMN partner who is not on the Subsidiarity Expert Group. This would tend to plead for a clear opening of consultations of the Expert Group to other interested SMN partners.

1. **Appendix: Contributions**
   1. **Contribution of Mr Johannes Maier**

Comments Johannes Maier

Questions Mr Schausberger

Rapporteur on "Devolution in the European Union and the place for local and regional self-government in EU policy making and delivery"

1. Do you agree with the thesis presented in the working document that a proper application of the subsidiarity principle, within the EU but also at national level, involves effective and functional self-governance at the local and regional level?

If yes, could you please provide empirical evidence from your Member State/ region, which supports this view?

*Yes, but there is no practical evidence available*

2. Do you agree with the assumption that subsidiarity as a political and legal principle may act as a driver for decentralisation, in the sense that it can act as an incentive for central governments to locate powers and resources at the level where decision making would bring the optimal results?

If this is the case, can you provide empirical evidence from your Member State/ region, which supports this view?

*From a scientific point of view it has to be underlined that decentralization and devolution or any other kind of division of powers between different authorities is a sole affair of national competences. Scale and forms of dividing competences fall within the constitutional law of each state. The competences of the national level and the competences of the subnational level are determined first and may be changed by individual circumstances and national occasions. “Subsidiarity” can be regarded and play the role of a guideline, how to divide the competences. But it competes against many other “drivers” like transparency, quickness and clarity of decision procedures, simplification, comparability, harmonization/unification, cost effectiveness and efficiency. At the end the division of competences is a result of currently acting political powers, where the ratio of “optimal results” is pending and rarely applied.*

*The division of powers between the Member States and the EU – more precisely the delegation of powers by the Member States to the European Union – are comparably determined by the European Treaties. The principle of subsidiarity laid down in the Treaties is the guarantee to apply correctly the stated division of competences. Therefore the principle of “subsidiarity” has not the role of a driver of decentralization or devolution at the European level. The youngest European integration process proves evidence, how economic and fiscal crises forced “centralization” of partly legal as well as administrative powers at EU level. The “Six-Pack”-Legislation, the forthcoming “Two-Pack”-Legislation, the new intergovernmental Treaty on Stability, Coordination and Governance in the Economic and Monetary Union and the amendment of the Art. 136 of TFEU are clear examples, how new political challenges are forming the “division of powers”, mostly in favour of central authorities.*

*Unfortunately there are other examples at administrative level, e.g. when it comes to simplification: common guidelines or forms for reports or applications are the first step of harmonization or even unification. Different circumstances at local and regional level could not be taken into account anymore or are even neglected. The force of “harmonization”- in order to simplify administrative procedures - is stronger than aspects of “diversity”.*

3. Do you believe that more decentralisation and stronger local and regional self-government could enhance the position of the Committee of the Regions and LRA, in particular regional parliaments with legislative powers, in monitoring compliance of EU legislation with the subsidiarity principle?

*The procedure of monitoring the compliance of EU legislation with the subsidiarity principle is very complex. First experience on the early warning mechanism of the Lisbon Treaty proves evidence on lacks of knowledge about the clear content of the subsidiarity principle as laid down in the Treaties at the political level of national parliaments. Furthermore the “decision” on Early Warnings depends rather on the usefulness of the proposal for the political majority of the chamber other than arguments for or against subsidiarity. If it is important for the political majority that a concrete issue should be regulated, it is irrelevant at which level it should be regulated. It seems already opportune that it should be regulated at EU level, if will be expected that a regulation or action would not get an agreement at the national or even regional level. Subsidiarity is strongly argued if an action or regulation should be prohibited in any case at EU level. Arguments of subsidiarity then supplement the denial/rejection of the proposal as a whole. This is the current and ongoing dilemma in observing and applying tools on subsidiarity provided by the Lisbon Treaty. Therefore it must be questioned if more decentralisation could lead to stronger positions of LRA and their organs or the CoR in monitoring the subsidiarity principle. At all governmental levels objective arguments of subsidiarity have to be taken into account much more seriously. Vice versa subnational authorities and local and regional self-government will be consolidated.*

4. Would you suggest any other connection between subsidiarity and decentralisation/devolution than those highlighted in the Working Document?

*See comments to question 2 and 3 again.*

* 1. **Contribution of the Basque Country**

**COMMENTS ON THE WORKING DOCUMENT OF THE COMMITTEE OF THE REGIONS ON *DEVOLUTION IN THE EUROPEAN UNION AND THE PLACE FOR LOCAL AND REGIONAL SELF-GOVERNMENT IN EU POLICY-MAKING AND DELIVERY***

***[Preliminary remarks from the CoR Subsidiarity team:***

*These comments were submitted as a contribution from the Expert appointed by the Basque Government to the CoR Subsidiarity Expert Group to the consultation carried out from 21 November 2012 to 3 January 2013, upon request of rapporteur Schausberger for the own initiative opinion on "Devolution in the European Union and the place for local and regional self-government in EU policy making and delivery".*

*Due to recent electoral changes, Maria Jesús San José López, Director of the Liaison office between the Basque Regional Government and the Basque Regional Parliament, has ceased to sit on the CoR Subsidiarity Expert Group during the consultation. The Basque Government will appoint a new expert to the group in due time. Meanwhile, Ms San José López had asked the Directorate for developing autonomy within her government to comment on the rapporteur's Working Document. The Basque Government has shared these comments with the Subsidiarity team, for submission to the rapporteur. ]*

**I. Background.**

The Director of the Secretariat of the Government and Relations with Parliament has forwarded the working document so that the Directorate can comment on it from the self-government point of view.

In response, a series of comments are set out below addressing aspects of the document that are relevant from the point of view of self-government and which may be of interest to the requesting body in its work.

**II. Comments on the document on *Devolution in the European Union and the place for local and regional self-government in EU policy-making and delivery* from the self-government perspective.**

The comments set out below follow the order of the sections of the document under examination and refer to relevant parts of the opinion from the self-government perspective, based on the functions and activities of the Directorate for the Development of Autonomy.

**A) Objectives of the opinion (key messages).**

1. There are unquestionable benefits from political decentralisation in terms of the attribution or devolution of **powers** to the Autonomous Region of the Basque Country, as part of the Spanish system of distribution of powers based on the Constitution and, in the case of the Basque Country, the Guernica Statute of Autonomy. The current decentralisation arrangements are therefore to be welcomed, regardless of any other purely political considerations regarding the system. That is because the exclusive powers of the Basque Country, as set out in its Statute of Autonomy, are attributed to the relevant regional bodies in such a way as to comply with the core principle of subsidiarity, with decisions being taken at the level closest to citizens.

A positive assessment can also be made of decentralisation in terms of **financial resources** as mentioned in the opinion, since the Basque Country has a unique system of financial relations with the Spanish state (the Economic Accord) which, despite the controversy which may arise from various aspects of its practical implementation, assures it a level of financial autonomy that underpins the public policies pursued by the region in those areas where the legal system gives it some form of power or function.

2. With regard to progress on **political,** judicial and fiscal autonomy, there is little to add to the above point. It is however worth pointing out in this context that each of the three institutional levels in the Basque Country (region, provinces and municipalities) has specific machinery for exercising its political autonomy, expressed through a regional parliament, the general councils (which function as provincial parliaments) and local councils - all of which illustrate how each territorial body exercises political autonomy through the powers attributed to it under the current legal system.

In **fiscal** matters, the above-mentioned Economic Accord provides the Basque Country with a significant degree of fiscal autonomy as laid down in the Statute of Autonomy, although disagreements can arise in relation to the distribution of funds between the Basque government, the provincial authorities and, at a lower level, the local authorities. Any improvement with regard to legal aspects and powers (involving specific aspects of decentralisation and devolution) depends on the Basque Parliament adopting a draft municipal law defining and tackling these issues. A number of draft texts have been drawn up, the latest of which lapsed during the most recent legislative term although it had reached an advanced stage in the parliamentary procedure.

It is more difficult to assess the **judicial** autonomy enjoyed by regional and local authorities. Article 122(1) of the Spanish Constitution stipulates that “*The Organic Law of the Judiciary shall determine the setting up, operation and control of the Courts and Tribunals as well as the legal status of professional Judges and Magistrates, who shall form a single body, and of the staff serving in the administration of justice*”.

A single judicial system is thus established for the Spanish State as a whole, in which the General Council of the Judiciary is the sole body governing the judiciary. Given this context, there is little scope for considering judicial autonomy at regional or local level beyond the transfer of human and material resources (the "administration of the Justice Administration") to certain autonomous regions, such as the Basque Country, from the Justice Administration. Such transfers are part of a move to modernise and enhance how the Justice Administration works by providing human and material resources, but do not entail any decision-making or even consultative powers with regard to the judiciary, in respect of which the central government has full power.

3. With regard to **decentralisation and devolution** in the Basque Country, the transfer of **active employment policies** carried out during the most recent legislative term may be described as a genuine hand-over of functions rather than simply a trend. The basic purpose is, in general terms, to promote employment and training policies geared to facilitating access to the job market and which are clearly be better framed from the regional or local perspective as these are the administrative levels most in touch with the socio-economic circumstances in which public policies in these areas are to be formulated and implemented.

It is also worth mentioning the transfer to the Basque Country of **works inspectorates and social security**, with the relevant officials having been integrated into the Basque administration's own structure. This ensures that the implementation of labour and social security legislation in the Basque Country will be appropriate and properly monitored.

Lastly, a **Basque Competition Authority** has also been set up, responsible for monitoring the implementation of competition law (which has a strong European influence) within the region, based on the powers attributed to it by basic Spanish legislation in this area (which in turn stems from EU competition law).

4. What the document describes as *"ensur[ing] that the economic crisis and austerity measures implemented throughout Europe do not create an excuse for further centralisation of power"* solicits the following comment. The current Spanish government is seeking to reduce the public deficit by adopting austerity measures which – regardless of any political controversy or disputes over whether it is right to choose certain measures over others – merits discussion of the legislative instrument chosen by the Spanish government for adopting these measures, in the light of the principle of subsidiarity which informs the opinion under examination.

Over the last twelve months, the Spanish state has repeatedly used (and continues to use) **Royal Decree-Laws** which the Constitution allows in cases of *"extraordinary and urgent need"*. Apart from the evident economic crisis, the existence of such a case has not been substantiated by the government in compliance with the requirement laid down for the use of this legal instrument by Article 86 of the Constitution.

In terms of the practical application of the subsidiarity principle, this choice entails the absence of an in-depth debate in the Spanish parliament of the measures adopted by the Spanish government, and also a total lack not only of debate or consultation with Spain's territorial authorities and, where appropriate, their legislative bodies on these measures, but also of any communication or indication whatsoever from the central authorities to the regional and local authorities concerning central government's intentions in this field. This seems to reflect a clear failure in the proper application of the subsidiarity principle as set out in general terms in the Lisbon Treaty and more specifically in the relevant protocol.

5. The opinion then **puts forward some basic principles of decentralisation** and urges the European Union, the Member States and the enlargement countries to implement them, prompting the following ideas:

1. The search for real institutional identification between administrations and society.
2. Establishing the objectives of political action as the achievement of satisfactory outcomes in terms of well-being and progress for society as a whole, making it impossible for governments to adopt policy decisions that are guided by particular interests unrelated to objective public needs.

1. Establishing objective and specific political and legal guarantees designed to provide effective legal instruments or mechanisms to uphold political decentralisation.
2. The ability to convey a positive image of political decentralisation, through the possibility of using this instrument to play a real part in policy-making at higher levels.
3. Preventing (or keeping to the minimum necessary) legal mechanisms that remove, restrict or alter the role of lower territorial levels (e.g. by encouraging mandatory participation, allowing for specific vetoes, even if only in exceptional cases, fostering bilateral or multilateral negotiation, introducing mandatory arbitration mechanisms, etc.).
4. Avoiding the centralisation of public policies, whose core purpose is to grant centrally framed and managed State funds, which in practice means a form of indirect control of the freedom of action of any territorial administrations in receipt of such funds.
5. Avoiding systematic reference to the criterion of overall guidance / coordination / planning of the economy as an all-embracing factor that can throw the public policies of the regional or local authorities off course.
6. In the specific case of Spain, the proper and proportionate use of basic national law, by formulating only such common principles and rules as do not encroach upon the framework of sectoral regulation that falls to the autonomous regions or the other territorial administrations when they possess legislative competence in the relevant spheres. The improper or disproportionate use of basic State law across the board can undermine the principle of subsidiarity by facilitating repeated, constant and sometimes undue interventions by the State, affecting the exercise of the powers and functions of the territorial administrations.
7. Restricting use of the supraterritoriality criterion, by which central authorities seek to recover important management powers, as this hampers involvement by territorial bodies in decision-making in this field.
8. Avoiding the repeated use of the general interest criterion as an exclusive competence of the central administration and unilateral declarations of this competence, by promoting instruments that involve the territorial administrations in deciding whether projects or initiatives are of general interest.
9. Promoting ways of building political power by grouping interests at the appropriate administrative levels, to the extent that they contribute to the proper application of the subsidiarity principle.

A final thought. Proper implementation of political decentralisation by means of the principles that it truly implies, while at the same time fleshing it out with real content, means avoiding **duplication** between territorial bodies whose administrative powers in specific fields at times overlap, while at others it is difficult to determine which administrative level should exercise a specific power or function. This inevitably leads to poor management of public resources and generates a degree of legal uncertainty affecting the entire political and administrative framework of any territorial system founded on decentralised political and administrative powers – which must be defined and attributed to specific bodies with absolute clarity.

**B) Political context.**

The fifth paragraph of this section of the opinion, referring to the institutional reforms undertaken in some Member States, and the fact that the economic and financial crisis may be pushing the debate in the opposite direction to the current process of decentralisation or devolution, prompts the following considerations.

Firstly, we would underline the earlier point regarding the current improper use by the Spanish authorities of regulation via Royal Decree Law on the grounds of the economic crisis and the need to meet public deficit reduction targets.

This practice must be challenged, firstly because the existence of an extraordinary and urgent need as required by the Constitution has not been established, and secondly because in many fields (health, education, etc.) it means shifting powers attributed to the autonomous regions and local authorities back to the central State, reinforcing an underestimation of the territorial authorities' capacity for action that is in complete contradiction with the core ingredients of the subsidiarity principle.

Such an approach by the central State may in turn trigger sharply political disputes between the central government and one or another of the autonomous regions, which may see centralising policies as grounds for picking a politically-inspired quarrel with the State, but focusing on matters of pure administration or management of the territorial structure. These disputes may lead to criticism in public of financial imbalances which in the region's view favour the State, with the region calling for different policies from the central authorities, invariably relating to obtaining greater economic resources to boost its political autonomy.

Similarly, concerning the sixth paragraph of this section on the issue of fiscal decentralisation in the current context of financial and economic crisis and the increasing attention to this subject at both national and European level, the Basque Country offers a relevant example on this matter. The above-mentioned draft municipal law envisaged financial tools for local authorities that would strengthen their political and financial autonomy in exercising the powers and functions assigned to them. A clear link may be made between the draft law – which eventually lapsed during the present legislative term but will undoubtedly be addressed in the future – and the thoughts set out in the sixth paragraph in relation to trends in this area.

A critical self-examination within the Basque autonomous region must conclude that the lack of a law governing the local administrative level and its relations with the higher levels in the same territorial area reflects a failure to ensure compliance with the principle of subsidiarity. There is no legal text establishing the powers implied by the political autonomy of local authorities or the specific economic means available to them for exercising this autonomy, which may mean that their work unfortunately lacks legal certainty.

**C) Principles for the organisation of regional and local self-government.**

1. The fifth paragraph of this section should also include the word "**linguistic**" as well as "cultural diversity", as both cultural and linguistic diversity are part of the Union's shared heritage, as recognised in Article 3(3) of the Treaty on European Union, which defines them as EU objectives.

2. We fully agree with paragraph eight of this section. However, the decision to undertake reforms leading to devolution or decentralisation of powers must not only respond to the wishes and needs of citizens and their regional and local communities as reflected in their respective legislative elections and so on: in addition, these wishes and needs must be discovered and identified by using **direct participation tools** that express the democratic principle and are made available to the people of those regional and local communities, with the aim of keeping in touch with their concerns and requirements. This provides room to analyse possible reforms of how the lower-level territorial administrations operate, enabling them to frame public policies that are more directly and linked to people's real needs.

3. The ninth paragraph merits particular emphasis: transferring powers hand in hand with access to financial means. In any case, it must be ensured that these financial means are made available within a framework of financial autonomy (without prejudice to the appropriate checks on proper management and allocation), since to do otherwise would incur the risk of political control by the funding institution, and this could indirectly lead to a kind of subordination of the recipient administration to the higher level, affecting not only its financial autonomy but also the shape of the policies formulated at the lower territorial level in keeping with its political autonomy and in application of the principle of subsidiarity.

The content of the eleventh and twelfth paragraphs is also significant. It is absolutely crucial that regional and local authorities be more actively involved at an early stage in drawing up and subsequently implementing European legislation and policies. We are also in complete agreement with the argument that *"Member States with regional authorities endowed with legislative powers should establish the necessary mechanisms to allow these regional authorities to participate effectively in the EU decision-making processes in matters which concern them"*. In any case, it should be pointed if that if such participation is to be effective, as the opinion says, it needs to go beyond ensuring that a more or less formal procedure has been carried out, or just consultation that has no subsequent effects: the mechanisms introduced must allow for real involvement that can influence the shape of public initiatives.

**D) Multi-level governance and the link between effective and functional self-government at the local and regional level with the proper application of the subsidiarity principle.**

The broad institutional spectrum covered by multi-level governance would not be complete without mechanisms for **effective participation by citizens** that accurately and rapidly identify their needs. These needs effectively underpin the public policies to be pursued by each administration within its scope of activity. In keeping with the subsidiarity principle, decisions are to be taken at the closest possible level to citizens, and so it is precisely at each of these levels that channels can be opened for public consultation and participation in order to identify the most pressing needs so that the relevant administrations closest to such problems and needs can take the appropriate action.

**Vitoria-Gasteiz, 21 November 2012**

**Directorate for the Development of Autonomy**

* 1. **Contribution of COSLA**

Evidence from the Convention of Scottish Local Authorities

**DEVOLUTION IN THE EUROPEAN UNION AND THE PLACE FOR LOCAL AND REGIONAL SELF-GOVERNMENT IN EU POLICY MAKING AND**

**DELIVERY**

**Rapporteur: Prof. Franz Schausberger (AT/EPP)**

**Background:**

The **Convention of Scottish Local Authorities (COSLA)** is the national and international voice of the 32 Scottish Local Authorities. Municipal law is an exclusive jurisdiction of the Scottish Parliament. Our municipalities are the largest average in the developed world and have vast public service obligations. Their combined budget is 1/3 of the Scottish public budget. However they have no constitutional protection which has very significant consequences in arguing over subsidiarity issues.

COSLA has over the years contributed to this discussion at CoR, where we nominate and support four Members, most notably in the preparation of the White Paper on Multi Level Governance. We are also active members of the Subsidiarity Monitoring Network.

We strongly welcome Professor Schausberger proposals and we are grateful for being given the opportunity to contribute to this very important discussion.

**Rapporteur's Questions:**

1. *Do you agree with the thesis presented in the working document that a proper application of the*

*subsidiarity principle, within the EU but also at national level, involves effective and functional self-governance at the local and regional level?*

*If yes, could you please provide empirical evidence from your Member State/ region, which supports this view?*

The Rapporteur's thesis is entirely correct. In fact the Scottish local government case is a particularly good example of what happens when subsidiarity is not legally defined.

In Scotland, like the rest of the UK, Local Authority has **no** constitutional protection. Without this there subsidiarity principle cannot be argued legally through the courts and even politically because it is not formally *defined in a clear, unambiguous way in the legislation.*

In fact it is far easier to argue respect of subsidiarity from the EU than it is from the national level, as the former is clearly and succinctly defined in the Lisbon Treaty and its two key protocols.

By contrast, it is not even possible to define in a straightforward way what are the conferred powers (competences) that Scottish Local Authorities have, as they are scattered in no less than 100 separate pieces of legislation that have somewhere within its provisions statutory powers and duties conferred to Scottish Local Authorities. Some of this list goes back to the 19th century, you can see an incomplete catalogue (click here, page 40) and this list is not comprehensive for it does not contain new provisions that the Scottish Parliament has imposed since its founding in 1999. So given the lack of specific, unambigous constitutional protection and the extremely scattered set of powers conferred to local government it becomes extremely difficult to argue in an efficient way for the respect of the subsidiarity principle for the local authorities by the national levels.

While this situation is echoed in the two other separate legal/consitutional jurisdiccions (England&Wales, Northern Ireland) of which the UK has been made up since the UK's founding in 1707 the Scottish local government case is particularly poignant. The UK Parliament has no say in the definition and organisation of the Scottish Local Government as according to the first Scotland Act 1998 local goverment is exclusive legislative power of the Scottish Parliament and remains so to this day.

Crucially, at least since the UK Parliament approved the Scotland Act 2012 the Scottish Parliament and Government do have consitutional protection (as far as this is possible in the UK legal context, where the constitution is scattered across a number of separate pieces of legislation and practices).

By contrast, Scottish Local Government , which, did not get that recognition as part of the Scotland Act 2012. Because the 2012 Act or its predecessor did not explicitly mention the *principle of local self government,* Scottish Parliament can define at will what Local Goverment does, how many local authorities there should be and even whether there should be any municipalities at all in Scotland, something that is not an impossible scenario as we discuss below.

In other words, **local communities and local councillors have no formal legal say in deciding the future shape of their municipalities.** Only the political force that they can muster via lobbying the Government, the Members of Parliament and the media. This is a farcry from the legal principle of municipal autonomy that is entrenched in most EU Member States constitutions, particularly in those that also have Administrative Law ( *Werwaltungsrecht).*

*2. Do you agree with the assumption that subsidiarity as a political and legal principle may act as a*

*driver for decentralisation, in the sense that it can act as an incentive for central governments to locate powers and resources at the level where decision making would bring the optimal results?*

*If this is the case, can you provide empirical evidence from your Member State/ region, which supports this view?*

We would in fact say that the prior existence of a properly defined subsidiarity principle as a political

and, crucially, legal principle is a driver to avoid centralisation.

We indeed welcome the mention given in the working document on the relationship between economic crisis and a growing trend towards centralisation inside the EU Member States. This is in

our view the crucial development and trend of central-local relations at this point in time and we

would call for it to be given even more prominence in the final draft Opinion.

Again, the Scottish Local Government case offers a particularly poignant case in point on this trend:

The combined effect of the economic crisis and long term trends such as population ageing is increasing very significantly the demand and cost of local services at a time of much reduced budget.

Some key facts:

* The number of people in Scotland aged over 65 projected to be 21% greater in 2016 than in 2006 and 63% greater by 2031; for those over 75, the projected increase is 21% and 83% respectively.
* Funding gap between demand for services and the resources available will rise to almost £3bn by 2016/17 (The combined Scottish Local Authority budget is just above £11bn as of 2012/13, two billion less than in 2008, so a 3 billion gap in the middle of this decade is a very significant financial issue.

Thus, given the large powers that our municipalities have in social services, ***Local Government reorganisation* is *seen as a "quick fix" to save money*** (at least by some sectors of the Scottish institutions, academia and the media):

*Centralisation of Local public services:*

This growing climate is resulting in the following processes:

§ *Police and Fire services* (a single Scottish-wide service will be created from April 2013 - and with great scepticism from Scottish Councils who fear loss of current local accountability)

§ *Social Services* (possible - indeed a merging of health and social care to deal with the growth in older people is being planned for)

§ *Education* (proposed, but still in early stages than the social services)

§ *Criminal Justice Social Work -* (possible, but more a concern about promoting a non-custodial sentencing regime that judges have confidence in to avoid the increasing numbers who are incarcerated - at 160 per 100,000 it's among the higher rates in Western Europe)

While this trend is not uncommon in other parts of Europe at the moment (Finland is the most similar case to us, but of course also happening in Greece, Italy, Spain) the Scottish case is certainly the most extreme as **suggestions are being publicly made to cut the existing 32 local authorities, to only 15 municipalities** (this for a country the size of Hungary and the population of Denmark) Scotland has already by far the largest average size of municipalities in the developed world. See table below.



Therefore when confronted with such a political challenge a crucial disadvantage for elected members is that as the subsidiarity principle is not specifically defined in domestic legislation due to no constitutional protection of local government, the status, shape and powers of local authorities are totally dependent of the given majority of the Scottish Parliament of the day.

3. *Do you believe that more decentralisation and stronger local and regional self-government could enhance the position of the Committee of the Regions and LRA, in particular regional parliaments with legislative powers, in monitoring compliance of EU legislation with the subsidiarity principle?*

Indeed CoR status in the EU institutional setting is directly related to the stage of decentralisation/regionalisation across the EU. The CoR was created to reflect a clear trend towards decentralisation across many Member States in the early 90s.

CoR provides a voice that reflects the power of the LRAs at a given time. As Dr Schausberger clearly states it is not CoR role to shape decentralisation, this is a domestic issue. It is the opposite trend, whenever there are strong subsidiarity or other issues concerning LRA the role of CoR is to reflect these conditions from the ground at the EU level discussions.

Conversely, if the current trend towards re-centralisation grows and becomes prevalent, the status of CoR would be (negatively) affected accordingly.

However, this is far from certain and the moment. The reality is that CoR status in the EU institutional setting is still lags behind as reflections to the corresponding power of LRA currently have in the majority of Member States. So there is much to build on top of the prerogatives obtained in the Lisbon Treaty, such as crucially to have a binding role in the legislative process.

While waiting to see what comes out in 2014 in terms of a new Treaty negotiations and what opportunities there are to increase the status of CoR clearly the existing tools provided by Lisbon should be further exploited.

As the above question rightly points out, this does not depend on CoR doing an active work in Brussels but to ensure that there is a better use at the domestic level of the Subsidiarity and Parliament Protocols of the Lisbon Treaty.

On that we clearly believe that the role of the CoR members as conduct between the subsidiarity scrutiny work in Brussels and in the national and regional parliaments is key.

For instance, the Scottish Parliament agreed in mid-2011 to create its first fully fledged subsidiarity scrutiny system that would link up with the subsidiarity scrutiny arrangements in place in the UK Parliament to reflect the Lisbon Treaty protocols.

In the drafting process of the Scottish Parliament new system, COSLA argued, in our role as the official voice of the 32 Municipalities and the nominating body of 4 of the 8 Scottish Members of the Committee of the Regions (the other four are precisely Members of the Scottish Parliament), that these four councillors representing Scotland at CoR should be given a defined role in the Scottish Parliament Subsidiarity Monitoring Arrangements, possibly a *"ex officio" role* in being consulted whenever the Scottish Parliament undertakes a subsidiarity scrutiny.

The reason for that is that there are many subjects that CoR deals with that directly affect Scottish Local Authorities rather than the Scottish Parliament and Government. Therefore given their role of local councillors and active members of CoR in Brussels they are in a unique position to effectively undertake subsidiarity scrutiny in Scotland as they do that in Brussels in their role of CoR members.

In the end, and possibly due to the fact that it was a brand new system, the Parliament opted for a less ambitious approach. However we continue to make the case as we see an explicit linkage between CoR members and domestic Parliamentary Subsidiary Scrutiny as the most efficient way of undertaking subsidiarity early warning.

4. *Would you suggest any other connection between subsidiarity and decentralisation/devolution than those highlighted in the Working Document?*

Briefly, to conclude we believe that arguing about subsidiarity and decentralisation need not be focused on defensive arguments. Subsidiarity is also about looking about making better policy decisions and defining partnerships between governance levels.

On that regard, and in spite of all subsidiarity and decentralisation issues mentioned in Scotland in the above questions we also have quite innovative ways of central local relations that we would indeed like to promote at EU level, as they already undertake in practice some measures that the European Commission is only now conceptually developing, most likely outcome based-policy:

**Scottish Single Outcome Agreements (SOAs):** The SOAs have been concluded between the Scottish Government and each Local Authority. Each SOA is based on 15 key national outcomes using a range of national and local indicators. These cover economic development, social inclusion, environmental and a large set of other areas and define jointly agreed outcomes over a three year timescale. In other words as opposed to "contracts" that you see in some other Member States they do not deal with inputs, but with outputs and outcomes. That is, to look at the wider long term effects of policy decisions and make a commitment to change background conditions rather than merely looking at achieving some agreed input without looking at their real impact.

The key advantage is that SOAs create mutual accountability: The parties to the Single Outcome Agreement will be able to hold each other to account for the delivery of specific commitments they make to enable the delivery of the agreed outcomes.

This, the rapporteur would surely be aware, goes a step further than the *Tripartite Agreements* that were trialled a decade ago. Indeed the Commission in the current preparations of the next Multi Annual Financial Framework introduced, quite tentatively, some measures that are moving towards outcome driven policies.

We indeed believe that this is the way to go to make sure that local and regional policies make a difference. This is why we would very much suggest that the **new Schausberger Opinion contains a call for CoR to have an opinion on outcome-driven policies.** Using the Scottish example and others CoR would be in a unique position to proactively formulate proposals that would significantly improve the quality of local and EU policy making.

**Mr. Serafin Pazos-Vidal December 2012**

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1. R/CdR 606/2012 item 7a) rev. 1 EN/o [↑](#footnote-ref-1)
2. The list of members of the Subsidiarity Expert Group is published on the website of the Subsidiarity Monitoring Network, <http://portal.cor.europa.eu/subsidiarity/whatis/Pages/Subsidiarity-Expert-Group.aspx>. Experts may come directly from local and regional authorities, from associations of local or regional authorities, or from institutions representing local and regional authorities, such as chambers of national parliaments. [↑](#footnote-ref-2)
3. The Subsidiarity Steering Group includes four CoR Members, appointed by each of the CoR political groups – Michael Schneider (DE/EPP), Jean-François Istasse (BE/PES), Graham Tope (UK/ALDE) and Marc Hendrickx (BE/EA). It is chaired by Mr Schneider, who is also Coordinator of the Subsidiarity Monitoring Network. [↑](#footnote-ref-3)
4. R/[CdR 2214/2012](http://cor.europa.eu/en/activities/stakeholders/Documents/Working-Document-SCHAUSBERGER.pdf) [↑](#footnote-ref-4)
5. CDR2214-2012\_00\_00\_TRA\_DT [↑](#footnote-ref-5)
6. Protocols No 1 on the role of National Parliaments in the European Union and No 2 on the application of the principles of subsidiarity and proportionality. [↑](#footnote-ref-6)
7. CDR2214-2012\_00\_00\_TRA\_PA [↑](#footnote-ref-7)