

EUROPEAN UNION



Committee of the Regions



Bundesrat



# 6<sup>th</sup> Subsidiarity Conference

## Subsidiarity Monitoring after Lisbon: Experiences and Perspectives

Proceedings of the conference  
held at the German Bundesrat

Berlin,  
18 December 2013



Ramón Luis Valcárcel Siso, President of the Committee of the Regions, signs the Bundesrat guest book.

## Proceedings of the 6<sup>th</sup> Subsidiarity Conference

### *Subsidiarity Monitoring after Lisbon: Experiences and Perspectives*

The Subsidiarity Conference is organised on a biennial basis by the Committee of the Regions (CoR) and it gathers all relevant players in monitoring the principle of subsidiarity in Europe. This edition has assessed the status and impact of the principle of subsidiarity on EU law-making in the post-Lisbon era.

### Welcome addresses

The President of the German Bundesrat (BR), Stephan Weil, welcomed all the participants to the German BR, which had hosted the first Subsidiarity Conference almost 10 years ago. At that time, he said, the Laeken Declaration, the European Convention and the Intergovernmental Conference had been on the European agenda. There had also been a debate on the future of Europe, but the content was different. The main concern had been the preparation of the EU for its enlargement, and the referendums in France and the Netherlands had reflected this. Nowadays, because of the debt and banking crisis, scepticism concerning a further integration had increased both among the public and in the parliaments. Today, he said, Europe should not be a project of the elite. Moreover, it was necessary to convince the citizens that it was a good project. President Weil highlighted that on 1 December 2009, when the Lisbon Treaty had entered into force, it had been quite uncertain if the Subsidiarity Early Warning System (EWS) would work. More than four months later, the first reasoned opinion had been issued by a national parliament, and this parliament had been the German BR. Today, the EWS had proven to work in practice with the existence of two "yellow cards". Nevertheless, not all national parliaments made active use of the EWS and the involvement of regional parliaments with legislative power had not been completely successful. Furthermore, coordination between the national parliaments, despite the IPEX database and the Monday Morning Meetings, could be improved. President Weil also stressed that there had been a change of awareness within the European institutions concerning subsidiarity. He closed his speech by expressing the conviction that the German BR would be happy to host a further edition of the Subsidiarity Conference.



Ramón Luis Valcárcel Siso, President of the CoR and Stephan Weil, President of the German Bundesrat

**The President of the CoR, Ramón Luis Valcárcel Siso,** thanked the German BR for hosting the 6<sup>th</sup> Subsidiarity Conference. He underlined the timely moment of the conference when the principle of subsidiarity, often considered as a purely technical legal concept, was currently at the heart of a debate on the limits of EU action. He mentioned the debate launched by the Dutch government on a stricter application of the principle of subsidiarity as well as the British exercise on the "Balance of Competences Review". In this context, he affirmed that the return of subsidiarity in the rather eurosceptic narrative should be seen by all the players involved in the EU decision-making process as an opportunity for a debate on better and more acceptable and citizen-friendly legislation. Thus, subsidiarity was not simply about getting more or less legislation at EU level, but about getting it at the right level in areas where powers were shared, and this could only become a reality if tools

were implemented to verify and enforce compliance with this principle.

The principle of subsidiarity ensured that, in the areas of shared competence, the Union would only take action when it had an added value compared to action taken at central, regional or local level.

President Valcárcel highlighted the important role of regional parliaments for democracy, sub-

**“Subsidiarity is not simply about getting more or less legislation at EU level, but about getting it at the right level”**

sidiarity and multi-level governance. A total of 74 regional parliaments in eight EU Member States were concerned.

For its part, the CoR played an important role in terms of subsidiarity monitoring. Even if the CoR was entitled to bring an action for violation of the principle of subsidiarity before the European Court of Justice, President Valcárcel considered that it was important to avoid reaching this stage, and instead seek to strengthen cooperation with the other EU institutions to achieve the best possible legislation.

He finally stated the need to place subsidiarity at the centre of the debate on better governance in Europe in a constructive way. He invited the participants to talk about cooperation and information exchange on a regular and more efficient basis and to face challenges with a collaborative thinking for the benefits of citizens.



# The principle of subsidiarity as a joint challenge and opportunity for the European institutions



Vytautas Leškevičius, Vice-Minister of Foreign Affairs of Lithuania

**CoR President Valcárcel** chaired this session and introduced the speakers.

**The Lithuanian Vice-Minister for Foreign Affairs, Vytautas Leškevičius**, explained that the Council presidency had led discussions on the issue of democratic legitimacy, subsidiarity and inter-institutional relations on several occasions. This showed how pertinent the issue was in the overall context of how the EU functioned and future reforms, especially with the approaching elections for the European Parliament.

The challenge was to ensure that subsidiarity was a central value that guided EU policy proposals from the very beginning, and effective monitoring arrangements were therefore essential in this endeavour. Confidence in the EU had been rocked recently, and subsidiarity was a way to rebuild some trust in our ability to act in a

transparent, efficient and democratic way. The increased economic governance powers for the Commission that were being introduced as part of a deeper Economic and Monetary Union underlined the importance of upholding subsidiarity. But this did not mean a stop to lawmaking at EU level. With regard to the EWS and the recent second "yellow card",

“The EU should not be afraid to ask whether the process can be refined”

Mr Leškevičius said that the EU should not be afraid to ask whether the process could be refined. He considered that the process in general worked and that the Commission took subsidiarity very seriously. Such a refinement might include looking at the threshold number of reasoned opinions needed to trigger a "yellow card", the coordination machinery that existed between national parliaments and the time limit for reasoned opinions. The diverse nature of parliaments across the EU meant that several Member States needed to consult with regional assemblies or parliaments as part of their scrutiny process, which could be difficult to achieve within a short deadline. In this regard, he welcomed the continued activities of COSAC, hoping that these would strengthen coordination between national parliaments even further.

**Jens Nymand-Christensen, Director of Relations with the European Parliament, the Committees and General Institutional Issues at the General Secretariat of the European Commission**, intervened on behalf of Commissioner Šefčovič saying that the principle of subsidiarity was not a technical concept, but a fundamental democratic principle. Article 5 of the Lisbon Treaty laid down the guiding principle for all. The Union should only act if Member States, either at central or at regional and local level, could not achieve objectives sufficiently and if, by reason of the scale or effects, the Union could achieve them better. In his opinion, this principle was strong. It established a presumption in favour of local, regional and national action. But it was not a magical formula. It was subject to appraisal by policymakers on a case-by-case basis.

Controversies about the division of labour between the national and European levels would never be concluded. This was a continuous and joint endeavour, and its results should be reviewed regularly.

Continuous, because the choice of whether and where to propose action at European level was an intrinsic part of the Commission's approach to smart regulation. First, during the very initial planning phase, the question "Should we propose action at EU-level?" was examined. When a legislative proposal was being drafted, the question was asked again: in roadmaps (which provided initial information and a preliminary subsidiarity assessment); stakeholder consultations (which should systematically address subsidiarity questions); external studies; and finally, impact assessments (which contained the most detailed

“The principle of subsidiarity is not a technical concept, but a fundamental democratic principle”

subsidiarity argumentation). It was a joint endeavour because national and regional parliaments could come forward with new subsidiarity arguments which the Commission may not have considered during the pre-legislative phase, or which it may have considered from a different perspective. The Commission, Council and European Parliament had a genuine interest in hearing these arguments. From the Commission's perspective, the implementation of the subsidiarity control mechanism and, more generally, cooperation with national parliaments worked well. Regarding the "yellow card" for the European Prosecutor's Office (EPP) proposal, he explained that the Commission had examined and analysed all the subsidiarity arguments in their entirety. That was why the communication which concluded that the original proposal should be maintained was very detailed. Furthermore, he pointed out that the Commission's drive to

reduce regulatory burdens through the REFIT programme and respect the principle of subsidiarity were closely related. Both required a closer look to be taken at the justification for action.

Mr Nymand-Christensen concluded with a quote from Commission President Barroso: *"In the debate that is ongoing all across Europe, the bottom-line question is: Do we want to improve Europe, or give it up? My answer is clear: let's engage! If you don't like Europe as it is: improve it! Find ways to make it stronger, internally and internationally. Find ways that allow for diversity without creating discriminations. But don't turn away from it."*

**The Vice-President of the European Parliament, Rainer Wieland**, affirmed that Europe

had become united in many ways, because of federalism and also because of subsidiarity. The word "federalism" had positive connotations, except in some countries; and therefore, he said, Europeans had to make sure now that the term "subsidiarity" did not get split in the same way because of populism simplifying the concept. Subsidiarity needed to be flexible. The questions related to it at different levels of governance were: "Why should a certain matter be regulated at this level? And where is the European added value?"

With regard to the EWS, he admitted that the deadline was certainly not long enough and emphasised that parliaments should get involved directly with members of the European Parliament, trying to identify the issues at an early point in time, using different perceptions. He called for stronger coordination, beyond the COSAC. Good governance, he said, meant being close to people; it

was not a matter of distance, but of how good the outcome was for the individual citizen; this should be the yardstick. Europe should not be seen as a one-way street; subsidiarity had to make it a two-way street for the EU's members to face the future as individual Member States and as a unit.

**Michael Schneider (DE/EPP), Chair of the CoR Subsidiarity Steering Group**, explained the role of the CoR in monitoring the principle of subsidiarity. The Lisbon Treaty conferred more responsibility on the CoR with regard to subsidiarity and the CoR was vested with the right to bring an action before the Court of Justice of the EU for violation of the principle of subsidiarity. But he highlighted that it was much more important for the CoR to act upstream in the European legislation procedure and to constructively provide input to the European decision-making process at an early stage in order to influence EU legislation long before reaching the final judicial stage. He explained the CoR monitoring system, the main instrument of which is the Subsidiarity Monitoring Network (SMN) set up by the CoR in

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2007 and currently comprising about 150 partners at regional and local level. In 2012, the CoR Bureau had adopted a revised strategy and established the Subsidiarity Steering Group, which was responsible for political governance and comprised representatives of all five political groups of the CoR. Furthermore, the network had been complemented by the Subsidiarity Expert Group, which was made up of 15 experts from the administrations of different Members States and regions. In 2012, the CoR had created the REGPEX platform, inspired by IPEX – the platform for

Interparliamentary exchange for national parliaments – which facilitated access to and the exchange of information. Through REGPEX, regional parliaments did not only gain publicity and information, their position also was given the opportunity to be reflected in opinions of the CoR, since these were forwarded to the rapporteur of the relevant opinion. Regional parliaments could also use REGPEX to share information with each other and to feed their subsidiarity analysis better into the national debate.

As the CoR was not participating in the so-called Monday Morning Meetings, where representatives of the administrations of national parliaments exchanged views, Mr Schneider pleaded for a seat for the CoR, in order for it to exchange views with them on key subsidiarity dossiers, including "yellow card" dossiers. He also drew attention to a recent study on regional parliaments and their involvement in the EWS, commissioned by the CoR and distributed to participants. Finally, he invited participants to build a subsidiarity culture to assure the proximity of the legislator to the citizen.



Michael Schneider, Chair of the CoR Subsidiarity Steering Group



# Keynote speeches



Lars Bay Larsen, Judge at the Court of Justice of the European Union

Speakers were introduced by **Arnold Hatch, Member of the CoR and the Subsidiarity Steering Group (UK/ECR).**

**Lars Bay Larsen, Judge at the Court of Justice of the European Union,** gave his personal views on the judicial review of the principle of subsidiarity and the relevance of the EWS for the Court of Justice. The principle of subsidiarity, he said, was never intended to restrict the scope of the EU competences. It was not a rule for the allocation of powers, but one for their use. Subsidiarity monitoring was in fact two-fold, consisting of an ex-ante control carried out by national parliaments and an ex-post judicial control by the Court of Justice. With regard to the second “yellow card” issued recently on the EPPO proposal, he did not want to comment but he labelled it as a special case. He reminded that all Member States had agreed to include a provision in primary Union law, which provided the possibility to create a European Public

**“The principle of subsidiarity is not a rule for the allocation of competences, but one for their use”**

Prosecutor's Office and also a specific procedure for enhanced cooperation within the institutions in this area. He stated that beyond any doubt the principle of subsidiarity was subject to judicial review. Thus, all acts which had come into force after the Maastricht Treaty could be subject to subsidiarity control. When facing complex practical and political circumstances, a certain leeway had to be left to the EU institutions in the decision-making process. In such cases, the Court of Justice could not simply replace the assessment of the EU legislator

with its own, if it wanted to remain within the limits of the powers assigned to the judiciary. Hence, the very nature of the subsidiarity test imposed certain limitations as to the level of scrutiny to be undertaken by the Court.

As regards the number of references to subsidiarity in case-law, Mr Bay Larsen conceded that it was not enormous. Generally, subsidiarity was used as a supporting argument by the parties to strengthen their reasoning or because the measure which the Court had been called upon to interpret itself referred to the principle. However – so far – there had been no examples of the Court annulling an EU act because it had violated the principle of subsidiarity.

The principle also had its proper place in the legal toolbox before the Court, but Mr Bay Larsen predicted that although it would be taken out of the toolbox and used whenever appropriate, it would probably not often be deployed as a single and separate instrument.

**Professor Gabriele Abels, Jean Monnet Chair of the University of Tübingen**

gave an overview from a scientific perspective regarding the expectations and reality of the EWS. Initially, she explained that the expectations were particularly high: by means of subsidiarity monitoring it was expected that the current EU legitimacy concept could be enlarged by "parliamentarising" it. The scrutiny role of national parliaments had been extended to the EU level; they became "watchdogs" which could avoid the transfer of competences to the EU. Such optimistic expectations had been met with scepticism from the beginning.

Looking at the reality, it could be observed that there had been reforms in all Member States in order to make national (and if relevant, regional) parliaments "fit for the EU", and that there were some convergences: extending the information-based monitoring rights of parliaments towards national governments ex-ante or ex-post; increasing the role of EU committees; increasing the resources for information filtering in parliamentary administrations.

A quantitative analysis for 2010-2012 showed that the number of reasoned opinions was in-

creasing – in 2012, there had been 70 reasoned opinions on 34 Commission proposals. The instrument had been used by over half of the parliaments and chambers involved.

Analysing the first "yellow card" regarding the "Monti II proposal", Professor Abels observed that the national parliament of Denmark had played a leading role in mobilising other parliaments. The interparliamentary cooperation had been carried out by means of parliamentary representations in the Monday Morning Meetings in Brussels that allowed an exchange of information. During the eight-week EWS limit, a COSAC conference had been set up and used for mobilisation. Therefore, the timing of "Monti II" had been very good and a relevant factor in its success. The "yellow card" for the EPPO proposal had not yet been scientifically analysed, but there were differences in terms of institutional anchoring, concerning the process, and it was less clear whether a parliament took the lead. She considered the Commission's reaction as interesting. For Monti II, the Commission had accepted the "yellow card" as a "quasi-veto" and withdrew its initiative, in the context of the second "yellow card", the Com-

mission had maintained its EPPO proposal.

Regarding the number of subsidiarity objections coming from regional parliaments, Professor Abels declared that there were no reliable statistics. Case studies concerning several Member States showed that a lot of regional parliaments were quite active in the framework of the EWS. Coming to several recommendations, she admitted that the initial pessimistic prognosis ("paper tiger") had been premature.

Nevertheless, "yellow" and "orange cards" would be an exception in comparison with the number of legislative proposals in the future too. Experience had shown that there were important differences between parliaments in terms of political will for subsidiarity monitoring and also regarding the interpretation of the subsidiarity principle, some seeing it as a political instrument, some as a legal instrument. More debate was needed concerning guidelines. The subsidiarity monitoring activities of the CoR played an important role in this context. She pointed out that extending the period of eight weeks to ten or twelve for the EWS would be helpful and fully acceptable. More effective inter-parliamentary cooperation would also be desirable.



Professor Gabriele Abels, Jean Monnet Chair of the University of Tübingen



## First Round Table: National parliaments' experiences of subsidiarity monitoring



Karl Sigfrid, Member of the Committee on the Constitution of the Swedish Riksdag

The round table was introduced and chaired by **François Istasse (BE/PS), Member of the CoR and the Subsidiarity Steering Group**. It focused on the role of national parliaments in monitoring the subsidiarity principle and their coordination, as well as the EWS and the “yellow cards” triggered.

**Karl Sigfrid, Member of the Committee on the Constitution of the Swedish Riksdag**, explained that the Lisbon Treaty offered a trade-off between, on the one hand, new powers for the EU and, on the other hand, a new role for national parliaments as subsidiarity watchdogs. The result of the subsidiarity monitoring showed, with two yellow cards, that the tool had had some effect. At the same time, two was quite a small number in comparison to the more than 30 reasoned opinions that the Swedish Parliament had issued. He explained that the Swedish Parlia-

ment scrutinised every single legislative proposal from the Commission, and unless it was immediately obvious that the matter at hand should be handled at EU level, a serious assessment was made. It was not uncommon for an examination to lead to the conclusion that a certain proposal was at odds with the principle of subsidiarity.

When analysing a proposal, his committee first asked themselves if the goal could be achieved elsewhere than at EU level. If the answer was “no,” then the proposal was permissi-

“We need more cooperation and dialogue between national parliaments”

ble. If the answer was “yes,” meaning that the goals could be achieved by acting at a national, or perhaps a regional or a local level, then the committee asked a second question: Could the goals be better achieved at EU level? If the answer was “yes,” then the proposal was still permissible. If the answer was “no,” then a reasoned opinion was issued. The responsibility within the Swedish parliament lay in each case with the most relevant of the standing committees, who would normally ask the government for its analysis, and the government was obliged to respond within a strict timeframe. A difficulty that many of the committees had pointed out had to do with the statements from the Commission, which were overly brief and too vague to be useful. Finally, Mr Sigfrid expressed the need for more cooperation and dialogue between national parliaments.



Edgar Mayer, Chair of the EU Committee of the Austrian Bundesrat

**Volker Ratzmann, from the Representation of Baden-Württemberg in Berlin**, spoke on behalf of Peter Friedrich, Chair of the Committee on European Union Questions of the German BR, Minister for Bundesrat, European and International Affairs, Baden-Württemberg. He stressed that subsidiarity was a structural principle of the EU and that the German Länder had fought for the principle to be enshrined in the Treaties. He highlighted that the BR considered that the subsidiarity assessment included the examination if the EU had the competence to act. The non-respect of the division of powers could thus be subject of a reasoned opinion, because it would be contradictory if national parliaments could raise subsidiarity concerns, but not the more serious issue of EU action without competence. Moreover, for every EU draft legislative act there had to be a detailed justification for why the objectives of EU action could not be achieved at central, regional or local level. This applied also to the value added resulting from EU action. As such, a subsidiarity assessment could not be dissociated from

overall policy considerations; the question whether EU action brings such a value added was also a political one. The BR had not over-used the possibility of submitting reasoned opinions and discussed every case very intensively. Since 2010, the BR had issued 11 reasoned opinions. In practice, the BR tended to maintain the direct political dialogue with the European Commission by forwarding its decisions directly to the latter, without the involvement of the Federal Government. Moreover, the German Länder participated in consultations of the Commission in order to influence the decision making process at a very early stage.

**“A subsidiarity assessment cannot be dissociated from overall policy considerations”**

Mr Ratzmann closed his speech by sharing the view of Commis-

sion President Barroso that Europe should be big on big things and small on small things and by highlighting that there was a need for “more Europe” in certain fields, like in the financial and economic sector. However, in order to take decisions as closely as possible to the citizens and to make policy accepted by the latter, there also had to be “less Europe” in some domains, e.g. the services of general interest had to be regulated only by the central or regional level of Member States.

**Edgar Mayer, Chair of the EU Committee of the Austrian Bundesrat (BR)**, explained that the Austrian BR had the right to receive information on all EU initiatives from the Federal Government. At the beginning of the year, every Federal Minister presented to the Austrian BR an overview of expected EU initiatives on the basis of the Commission work programme. These reports were first discussed in the relevant committees and then submitted to the vote of the plenary. Mr Mayer highlighted that the BR could invite important persons from the EU and the international level and that in April



Paul Hardy, Counsel for European Legislation, House of Commons of the United Kingdom

2013, CoR President Valcárcel held a speech at the BR plenary session about the role of the regions in a changing Europe.

The BR carried out its subsidiarity monitoring activities in close cooperation with the Austrian Bundesländer having the right to submit comments in the framework of the EWS. In this context, Mr Mayer pointed out that the eight-week deadline was too short and should be extended.

The Austrian BR welcomed the political dialogue with the European Commission and made use of this tool. However, replies from the Commission were received only six months later. The substance of the replies was sometimes superficial, not going enough or at all into details on points raised by national parliaments.

Furthermore, Mr Mayer referred to delegated and implementing acts, which - if applied correctly and proportionately - meant more efficient and flexible exercise of legislation. However, the Austrian BR was critical if the number of possibilities to adopt such acts was unreasonably high as this could be problematic in terms of democratic control. The lack of transparency in

the decision making process concerning these acts sometimes prevented the public and national parliaments from taking control. The Austrian BR had issued a reasoned opinion on this issue.

Finally, Mr Mayer highlighted that interparliamentary cooperation was becoming more important. Therefore, the Austrian BR would welcome a platform where national parliaments could exchange views in the framework of the eight-week deadline in order to agree on a common approach on critical issues. The contact between national parliaments worked in the framework of COSAC, but due to this short deadline and the fact that COSAC conferences took place only twice every six months, this entity could be used just in a limited way.

**Paul Hardy, Counsel for European Legislation, House of Commons (HoC) of the United Kingdom**, explained that since the coming into force of the Lisbon Treaty, the HoC had issued twelve reasoned opinions, adopting a very selective approach. The Members of Parliament looked at all EU documents, like the Swedish

Parliament. Once a draft reasoned opinion had been recommended by the relevant committee, they ensured that their representative in Brussels made that fact known to all their colleagues in the Monday Morning Meetings. If a reasoned opinion was recommended, one of the two legal advisers to the committee would draft it: the consideration was predominantly a legal one and proportionality was not considered, in accordance with Protocol No. 2.

**“There is a strong argument for a "red card" ”**

He mentioned that there were two inherent flaws in the process. First, the thresholds were too high. National parliaments needed to collaborate with each other to a significant degree to reach even the "yellow card" threshold, and there was a limit to how far such collaboration could go, particularly in eight weeks. The fact that the "yellow card" had only been raised



twice in four years was illustrative of this. Secondly, even where a "yellow card" was raised, it was the institution that had proposed the legislative act, the Commission, which decided whether to withdraw it. There was therefore an appearance of unfairness, a lack of impartiality, in the design of the EWS – the institution which had worked, perhaps for years, on a proposal decided whether it should be maintained, abandoned or reviewed.

Mr Hardy presented personal suggestions as possible solutions: the eight-week deadline for the submission of a reasoned opinion should be extended and the thresholds lowered; the consequence of a "yellow card" should not be decided by the institution that had proposed the legislation; in terms of democratic mandate and oversight by national parliaments, the government ministers in the Council were better placed to decide on a "yellow card". He also stated that there was a strong argument for a "red card" – it was for the national parliaments to deter-

mine their own subsidiarity concerns, so if the highest of the thresholds was met the proposal should be withdrawn.

**Jens Nymand-Christensen, Director at the General Secretariat of the European Commission,** presented the views of the Commission, partly as a reaction to other remarks by panel members, and partly as a complementary contribution to the discussions. For the Commission - he said - the subsidiarity mechanism did work. He explained that when the drafting of Article 5 of the Treaty on European Union was discussed in the Presidium and later in the Intergovernmental Conference, it was not drafted as a mechanism functioning like a brake. It was meant to raise an issue of fundamental importance for the work of the EU, how it interrelated with the European level and the EU institutions and the national and regional level. It was not meant to be a rather primitive single instrument for blocking things and that is why the red card was rejected. So, at least those

Member States which were part of that discussion, including the accession countries at that time, agreed unanimously on not having a "red card" procedure.

On the other hand, even without a "yellow card", there were many opinions expressing views on subsidiarity. The Commission did think about this and that meant that they took those views forward into the legislative process in the Council and the European Parliament. The "yellow card" on the EPPO proposal was a good example. The Commission had come up with a cautious proposal of establishing something that all 28 Member States had agreed to include in the Treaty as a possibility. There was a significant body of opposition to this and it was now up to the European Parliament and Council to decide on further adjustments. Summing up, Mr Nymand-Christensen said that the process worked and sought to involve national and regional parliaments dealing with subsidiarity. The present conference was proof of this.

He stated that the debate had been incredibly interesting and would take us further. Furthermore, he emphasised the positive nature of the Monday Morning Meetings, which the Commission also attended and where it had the possibility to discuss with representatives of national parliaments. He also highlighted the close relations with the CoR the Commission saw it as a partnership exercise and largely shared its agenda.

- **Mr Sigfrid** commented on what the Commission had said regarding what was agreed in the Treaties on subsidiarity. In his opinion, if this had to be amended then there should be a discussion between the Member States and not between the Member States and the Commission.



Jens Nymand-Christensen, Director of Relations with the European Parliament, the Committees and General Institutional Issues at the Secretariat General of the European Commission

# First Round Table - Debate - Questions



- **Gordon Keymer, CoR Member (UK/ECR):** The Commission was demonstrating the problem: it was producing the legislation and was deciding in effective on "yellow" and "orange cards". Was there a way in which the perception could be improved? He also referred to a full process, including a "red card".
- **Thomas Weiner, Member of the Rheinland-Pfalz State Parliament, Germany**

  1. How many "yellow cards" would have been triggered with a lower threshold?
  2. In relation to ex-ante monitoring: What would the consequences be if the eight-week deadline were to be extended to twelve weeks? Would more national parliaments be able to make use of the EWS?
  3. What could be said against forwarding the issues which reached the threshold for a "yellow card" to the European Parliament for further discussion and decision?
- **Luc van den Brande, CoR Member (BE/EPP):** Subsidiarity monitoring was a reactive process, referral to the Court was a last resort; we should not focus only on the technical, institutional machinery of subsidiarity screening. We had to move towards a culture of subsidiarity in the legislative process in order to have a proactive approach on different political matters. We had to improve inter-institutional cooperation. We had to acknowledge that subsidiarity was about better and more democratic law-making at all stages. And we must in any case link the implementation of the subsidiarity principle to multi-level governance; this depended on functional cooperation and the quality of cooperation. The CoR also had a role to play here.
- **Mia De Vits, CoR Member (BE/PES):** Subsidiarity was an important pillar for the EU; the monitoring process did work and sometimes it was used by national parliaments for political reasons. She warned about the potential misuse of the concept of subsidiarity in times of crisis in order to try and avoid introducing some EU legislation in certain areas. She asked if the central question should not be the added value of EU action. From this angle, a major involvement of the European Parliament in the subsidiarity monitoring process might happen.
- **Georg Freytag, Saxon State Ministry for Justice and European Affairs, Germany**

  1. Would the lack of a legal basis for EU action be seen as a point related to subsidiarity? If not, would this aspect then be moved to the political dialogue?
  2. When would the Commission see action at Member State level as sufficient? Was it sufficient if Member States had put in place legislation that worked and was it sufficient if there were possibilities for such national legislation?

## First Round Table – Debate - Answers



• **Mr Ratzmann** took up Mr Van den Brande's comment that multi-level governance was an important instrument in order to foster acceptancy of the EU and reinforce relations between the different levels. Looking at the application of legislation by the German Länder, he said that complexity was even greater if supranational legislation had to be implemented or applied at this level. Regional peculiarities and the question of costs were important here. In his view the European Parliament, as legislator, should not necessarily be heavily involved in subsidiarity monitoring. The decisive question was a sufficient time period for the EWS, especially because of the link with multi-level governance. A network of different governance levels needed to be built up in order to assess the subsidiarity aspects and that would take time.

• **Mr Mayer:** The period of eight weeks was short, an extension to ten to twelve weeks would be recommended, but this meant that the Lisbon Treaty would have to be changed.

• **Mr Nymand-Christensen:** He recalled that the annual

report of the Commission on the application of the subsidiarity and proportionality principles, which was available online, contained all the reasoned opinions received. As most proposals attracted less than six reasoned opinions, Mr Nymand-Christensen felt that lowering the thresholds or extending the deadline would not dramatically increase the number of "yellow cards".

He stressed that at the last COSAC meeting in Vilnius, some national parliaments had been contemplating a gentlemen's agreement with the Commission meaning that national parliaments could, with a certain qualified majority, invite the Commission to come forward with further legislative proposals. This idea had been floated precisely because national parliaments did not want to be stuck with the image of just being there to have less Europe.

To Mr Freytag, he answered that the Commission frequently decided not to issue a proposal because the Treaty did not provide an adequate legal basis. For instance, the Commission had rejected nearly half of the new "citizens initiatives", as they were outside the Treaties

and thus the EU competences.

As regards the sufficiency of national legislation, the Commission felt that where problems could not be adequately dealt with by 28 national solutions, national legislation was not sufficient. For the Commission, the EPPO was such a case. The Commission realised that some Member States did not agree, but the issue of trans-border criminal activity and the problems that all Member States encountered in this area, had led the Commission to the conclusion that only a EPPO could address these issues effectively. It had based this conclusion on years of experience of working with the competent authorities in the Member States. Moreover, OLAF had investigated files where they had detected serious potential criminal activities and found that the national authorities were unwilling or incapable of taking effective action. So, although national systems might be sufficient in some areas, a case-by-case examination was necessary.

He also highlighted that Commission proposals did not just fall from the sky. The subjects of future proposals were known well in advance through the roadmaps, the public consultations and the impact assessments. The Commission went further than any Member State in its information policy. Eight weeks was a short period, but national parliaments could start earlier with the information provided, before the proposal was adopted - they might not have the final version, but work could be started months in advance.



## Second Round Table: The involvement of regional assemblies in monitoring the principle of subsidiarity



Martin Modschiedler, Chair of the Committee for Law, Constitutional Affairs and European Affairs of the Saxon State Parliament

The session was chaired by **Lord Graham Tope (UK/ALDE), Member of the CoR and the Subsidiarity Steering Group**. Its aim was to gain further knowledge on the experiences of regional parliaments in monitoring compliance with the principle of subsidiarity.

**Martin Modschiedler, Chair of the Committee for Law, Constitutional Affairs and European Affairs of the Saxon State Parliament**, explained that there was an agreement between the State Parliament and the State Government on the consultation of the Parliament in the framework of subsidiarity monitoring. In Germany, it was the BR as representation of the Länder participating in the EWS. As the BR was composed of representatives of the state governments, the participation of the Saxon State Parliament in the EWS took place via the Saxon State Government and the BR. In the

BR, there was a selection of EWS documents following their relevance for the Länder. Therefore, there was a filtering process and the relevant documents were forwarded to the Saxon State Parliament.

The Committee for European Affairs dealt with EWS documents if there was a "complementary memo" from the State Government concerning a potential subsidiarity breach. This had happened twice. Otherwise, Members of Parliament could make a request to take a decision on a subsidiarity breach. Since April 2011, there had been a total of five such requests introduced by the parliamentary opposition, which all had been rejected by the majority in the Committee. The Saxon State Parliament could take a decision on a subsidiarity breach in two ways: by decision of the plenary, if time allowed, or by a rapid decision taken by the European Affairs Committee in

case of urgency. The Saxon State Government was not legally bound by such a decision of the State Parliament in order to opt for a reasoned opinion to be issued by the BR. Following the above-mentioned agreement, the State Government was just obliged to take it into account.

The Saxon State Parliament published its subsidiarity-related decisions through official publications and on REGPEX. Furthermore, it had decided to send its subsidiarity concerns directly to the European Commission, as the Bavarian State Parliament did.

Mr Modschiedler highlighted that regional parliaments were at the end of the line in the eight-week timeframe; when they received a dossier they only had two or three days left, and such a deadline could not be met. He finished by stressing that his assembly wanted to cooperate more closely with the CoR.



Françoise Dupuis, President of the Parliament of the Brussels-Capital Region, President of CALRE

**Françoise Dupuis, Speaker of the Parliament of the Brussels-Capital Region, President of CALRE,** explained that CALRE, the Conference of European Regional Legislative Assemblies, brought together 74 regional assemblies with legislative powers in the EU, whose heads were convinced Europeans, albeit sometimes a little bit frustrated. She stressed that in French the EWS was called an "alarm" mechanism; which did not mean a "blocking" mechanism. Wondering about the aim of the system, she pointed out that the subsidiarity-related decisions from regional parliaments had no echoes at EU institutional level as they were not included

**“The EWS is an alarm mechanism, not a "blocking" mechanism”**

in any official procedure according to Protocol No 2. Therefore some regional parliaments were reluctant to participate in the EWS. As for the eight-week deadline, she was also in favour of extending it to twelve weeks. Another challenge was the language barrier, which limited the potential of regional assemblies' cooperation. Moreover, due to the different subsidiarity monitoring procedures and different powers of regional parliaments – even within one Member State, e.g. in Belgium - there was no identical basis for cooperation. Regional parliaments needed to be more interested; in this context, Ms Dupuis explained that CALRE, in its last declaration, had called upon national parliaments to intensify their subsidiarity monitoring and to take into account regional subsidiarity analyses. As for better cooperation, better mutual knowledge was required first; the role of CALRE in this respect for the exchange of best practices was very interesting and further development in this direction was desirable. Finally, she thanked the CoR for having

installed the REGPEX platform and the Subsidiarity Monitoring Network.

**David Melding, Chair of the Constitutional and Legislative Affairs Committee of the National Assembly for Wales.**

referred to the fact that several participants had talked about the culture of subsidiarity. Respecting what citizens wanted had to be at the core of that culture. But nearly everything the EU did was seen by its citizens as falling mostly within the sphere of domestic politics and not as foreign policy goals. It was a challenge to meet citizens and talk with them; otherwise, future generations would feel a much weaker commitment to European goals.

**“Respecting what citizens want has to be at the core of a culture of subsidiarity”**

Mr Melding then stressed that the National Assembly of Wales had developed its own monitoring system which had been well explained in the recently published study of the CoR presented by Mr Schneider. He pointed out that a close cooperation with the national parliament had been key. He congratulated the British national parliament for establishing an informal but very effective liaison committee where the chairs of the committees with responsibility for EU affairs came together and discussed relevant issues. One of the challenges they faced was time; eight weeks was very tight, twelve weeks would be a minimum. Another challenge was information. At regional level, the information came either directly from the EU or from the national parliament. He stressed that the CoR and CALRE might have a role to play here by being another source of information that could be very useful at regional level because of its independent nature, which is what good decision-making needed. Furthermore, there was a challenge when the regional level was somewhat more vague in its relationship with the EU institutions and was reliant on national government and the national parliament. In Wales' case there were no real complaints about this, but it was an informal process.

The informal process had worked very well because of its flexibility. The role of CALRE and the CoR had been very useful and he hoped it would be developed.

The National Assembly of Wales had recently issued two written responses to the national parliament raising subsidiarity concerns: on public procurement and on a high-speed telecommunication

network, plus another two informally.

Mr Melding concluded by stressing that identifying issues and upstreaming at a very early stage was the key to effective subsidiarity monitoring.

**Nazario Pagano, President of the Abruzzo Regional Assembly, President of the CALRE Working Group on Subsidiarity**, explained that in 2012 his parliament had approved the procedures for enabling the region to participate in the EWS. From last year's experience in the CALRE Working Group on Subsidiarity, created in 2004, he said that the degree of regional parliaments' participation in the process differed a lot and therefore there remained work ahead. Some regional assemblies were hardly aware that subsidiarity could be monitored. In this respect, regional assemblies could not ask for more facilities when the existing ones were not fully exploited. The main objectives for the working group were to: reinforce collaboration with the CoR and participation in its Subsidiarity Monitoring Network; reinforce governance through the exchange of practical experiences in subsidiarity monitoring; increase the visibility of subsidiarity analyses from regional parliaments; foster political dialogue with the European Commission; and consolidate cooperation with national parliaments. This year, they had worked together on two dossiers to be monitored under the Commission's work programme: the ports package and the proposal on e-invoicing in public procurement.

Mr Pagano highlighted that a very small percentage of regional parliaments effectively worked on subsidiarity monitoring in the last year. The relations between national and

**“National parliaments should take better account of regional parliaments”**

regional parliaments were usually not very smooth; national parliaments should take regional parliaments more into account at least when territorial issues were concerned. According to the Working Group on Subsidiarity, the decisions of regional parliaments should be binding for national parliaments.

As for relations with the CoR, Mr Pagano expressed the need for a reinforcement of the exchanges between the REGPEX platform and CALRE. To raise more awareness in regional parliaments, the CoR should provide more publicity concerning the subsidiarity related decisions of regional parliaments and the results of the consultations carried out. Moreover, he pointed out that new perspectives for a dialogue with the European Parliament on territorial and regional issues were now open, which could have advantages for both sides. With the Commission, CALRE could foster consultations with regions with legislative powers and their parliaments with the assistance of the CoR.

Finally, he underlined that the main challenge in the years ahead was to install a culture of subsidiarity.



## Second Round Table - Debate

• **Raffaele Cattaneo, President of the Lombardy Regional Assembly** believed that the debates on subsidiarity lacked a little bit of idealism, of vision, of hope; he was concerned that the subsidiarity debate would be turned into just a technical procedural question. True subsidiarity relied on the capacity of opening up real facilities for involving the general public, and not just the institutions. Moreover, he stressed the public disaffection with the EU. A cultural change could not be brought about through procedures alone. Regions could be the rock on which to rebuild a renewed European governance; but this would only be possible if a pyramid system of governance was replaced by a networking system. He considered that the Lisbon Treaty had not brought any particular improvement for regional assemblies.

• **Marian Elorza, General Secretary for Foreign Affairs of the Basque Government**, explained that her government participated in the subsidiarity monitoring process established by the Basque parliament. The consultation of regional parliaments by the Spanish national parliament happened regularly, but their analyses were only taken into account if they helped to draw more attention to the concerns of the national parliament. If the opinions differed from the national parliament's view, they were not considered and there was no obligation to discuss them or to forward them to the EU institutions. In her opinion, this discouraged regional parliaments from being involved in subsidiarity monitoring. Such a practice did not contribute towards developing the culture of subsidiarity mentioned during the conference.

• **Ekkehard Klug, Schleswig-Holstein State Parliament**, stressed that the German regional parliaments had to go through the regional governments being represented in the German BR, and therefore an analysis of how they dealt with subsidiarity monitoring and its different results was interesting. He also agreed on the need for a culture of subsidiarity and for a proper understanding of subsidiarity.

## Closing Session

**Lord Tope** started the closing session by apologising for CoR Vice-President Bresso not being able to participate. He recalled that he had already closed the first Subsidiarity Conference in Berlin in 2004. Significant and considerable progress had been made over those years although a lot remained to be done regarding subsidiarity monitoring.

Lord Tope announced that the 7<sup>th</sup> Subsidiarity Conference would take place in 2015 and invited the participants to put their names forward as host for this next edition. He closed the conference by thanking all the speakers for their valuable insights and for sharing their experience. Finally, he thanked the German BR for hosting the conference as well as the organisers and the interpreters.



# CoR key messages of the 6<sup>th</sup> Subsidiarity Conference

- Under the principle of subsidiarity, decisions should be taken as closely as possible to citizens and at the most appropriate level of government where the intended policy objectives can be achieved most effectively. The effective application of the subsidiarity principle in the EU enhances the democratic legitimacy of European governance, helps to achieve better regulation and increases public acceptance of decisions.
- The EU's credibility has suffered recently. There is an increasing perception among the EU public of democratic deficit and lack of accountability of decisions taken. A debate is unfolding on the limits of EU powers, and subsidiarity as a constructive concept should be put at the heart of this rather euro-sceptic debate: The principle of subsidiarity must be the yardstick for democratic legitimacy of EU legislation as it is the key tool for analysing and clarifying the role of the different levels of governance in order to shape policies for the benefit of all EU citizens.
- There must be a clear link between subsidiarity and multi-level governance. Multilevel governance is a concept that operates more effectively when connected with the subsidiarity principle. But multilevel governance is also a key driver for subsidiarity monitoring, as the latter can only be effective if it is based on a genuine cooperation of all relevant levels of governance.
- Inter-institutional cooperation on subsidiarity monitoring provides clear added value and should be increased in order to apply the subsidiarity principle as effectively as possible. Based on its fruitful cooperation with the German Bundesrat, the Committee of the Regions calls for closer co-operation with all relevant institutional players, particularly in terms of collaboration between national parliaments in the European Union.
- The Subsidiarity Early Warning Mechanism has proven to be a valuable tool for more efficient subsidiarity monitoring and thus increased democratic control. It may need to be further developed to ensure the optimal and timely involvement of all key players.
- Regional parliaments with legislative powers also have an important role to play in the framework of the Early Warning Mechanism by giving voice to the regional and local dimension of subsidiarity scrutiny. Inter-parliamentary cooperation is indispensable in this framework, fostering the exchange of good practices and a common approach to subsidiarity monitoring.
- Subsidiarity monitoring is not limited to the legislative process, but should be strengthened at the pre-legislative stage too. This means that all relevant players, particularly from the regional and local level, should be properly involved and that the territorial impact of EU actions should be considered.
- The European Union must put the citizen at the centre of its policies. The Committee of the Regions is committed to ensure that the subsidiarity principle is respected and effectively applied. Discussions on the subsidiarity principle and its monitoring involving all relevant institutions provide clear added value and should be stepped up in order to develop a genuine culture of subsidiarity. This has to be communicated in a language that citizens understand.
- The Committee of the Regions considers the Subsidiarity Conference to be a key European event where all relevant institutions and stakeholders come together on a biennial basis for a constructive dialogue on the application and strengthening of the subsidiarity principle.



Bundesrat



More information including speeches, presentations  
and audiovisuals can be found at:

[www.cor.europa.eu/subsidiarity](http://www.cor.europa.eu/subsidiarity)



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