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REFRAMING SUBSIDIARITY INQUIRY FROM AN
“EU VALUE-ADDED” TO AN “EU NON-
ENCROACHMENT” TEST?:
*SOME INSIGHTS FROM NATIONAL PARLIAMENTS
REASONED OPINION*

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ABSTRACT

The principle of subsidiarity was introduced within European Treaties to prevent EU's increasing competences from encroaching upon the power of lower levels of government. Nevertheless, the way in which the principle of subsidiarity has been operationalized (through so called "comparative efficiency test") has decisively favored EU action, which is usually deemed to be the most suitable to achieve European objectives. This paper aims at assessing: first, if and to what extent national Parliaments, as national actors exercising their monitoring functions in the context of the early warning system, could reframe subsidiarity inquiry from a "comparative efficiency test" to a sort of "non encroachment (upon Member States) test"; second, if and to what extent Art. 4.2 TEU, aimed at protecting Member States national identities and essential State functions, could help in this respect. To this purpose, several national Parliament's reasoned opinions mentioning the concept of national identities will be analysed.

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Keywords: subsidiarity, national Parliaments, Lisbon Treaty, early warning system, democracy, national identities.

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1. Introduction

The rationale underlying the introduction of the principle of subsidiarity within the Treaty was the attempt to limit the action of the Union legislature and restrain its encroachment upon the power of lower level of governments (Estella 2002, Kumm, 2006, Schütze 2009). Nevertheless, the way in which the principle of subsidiarity has been operationalized (i.e. through the so called “comparative efficiency test”) has decisively favoured European action at the expense of Member States action. By its side, the European Court of Justice has notoriously looked at the subsidiarity principle as a political rather than a legal concept, showing a strong deference towards the discretionary power of European institutions in assessing the compliance of Union acts with the principle of subsidiarity (Tridimas 2006; Martinico 2011, Biondi 2012).

In other words, there is a puzzling contradiction between the reasons endorsing the introduction of the principle of subsidiarity during the 1990s—i.e. restrain the EU “competence creep”¹—and the concrete purposes the subsidiarity test has served over the years (i.e. legitimizing EU action). Within this puzzle, the questions this paper tries to address are the following: could the subsidiarity inquiry be reframed to ask if, and to what extent, Union action is infringing upon Member States’ action? If it is so, could Art. 4.2 TEU, aimed at protecting Member States “national identities” and “essential State functions”, and newly introduced in the Treaty of Lisbon, help in this respect?

In trying to answer to these questions, the empirical part of this paper will be devoted to the action of national Parliaments for several reasons: first, the Treaty of Lisbon—through Protocol No. 2—entitles national Parliaments to check the compliance of EU measures with the principle of subsidiarity through the so-called “Early Warning System”; second, this political and *ex ante* control on the respect of the principle of subsidiarity could prove to be more effective than the judicial and *ex post* control performed by the ECJ (on the distinction see Schütze 2009: 259 ss). Deciding whether an action should be taken either at the national or supranational level is a discretionary action which suits more the political stage of the drafting of the proposal than the legal stage of the review of legality of EU acts.

In order to assess if and to what extent Art. 4.2 TEU can add some value in reframing subsidiarity inquiry in a way which is more attentive to the protection of Member States’ scope of action, only the reasoned opinions mentioning Art. 4.2 TEU or the notion of national identities will be analysed. As we will see, there are already three EU proposals against which this has occurred: one on the

¹ The expression competence creep indicates the gradual expansion of Community competences at the expenses of Member States ones. See S. Weatherill (2004).

award of concession contracts, one on the reintroduction of internal borders into the Schengen area, and one on the common fishery policy.

The structure of the proposals is the following. Paragraph 2 is devoted to the reframing of subsidiarity inquiry from a “comparative efficiency test” to a sort of “non encroachment (upon Member States) test”. Paragraph 3 explores why Art. 4.2 TEU could serve the purpose of reframing subsidiarity inquiry in this respect. Paragraph 4, 5, and 6 focus, respectively, on three EU proposals which triggered reasoned opinions of national Parliaments within the framework of the EWS mentioning the concept of national identities. Paragraph 7 will develop some concluding remarks.

2. Reframing subsidiarity inquiry: from an “EU value-added” to an “EU non encroachment” test?

Under Article 5.3 TEU, enshrining the principle of subsidiarity, in areas which do not fall within its exclusive competence, “the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”. Both the textual reading of the Treaty and the Commission’s interpretation of the Treaty suggest that the application of the principle of subsidiarity requires a test of “comparative efficiency”² (i.e. determining what of the level of government can better achieve the proposed objective). In the 19th Annual Report on Better Lawmaking it is stated that “although subsidiarity cannot be assessed mechanically by reference to operational criteria, the Commission continues to use ‘necessity’ and ‘EU value-added’ tests as part of its analytical framework and recommends that others do likewise”.³

As a matter of fact, European institutions do not always engage into an accurate analysis to explain why Union action is deemed to be more efficient than Member States’ one. According to the expectations of the Protocol on the application of the principle of subsidiarity and proportionality attached to the Treaty of Amsterdam, in order to show that the objectives of the proposed action could be better achieved by Community (rather than Member States) action, European institution should have assessed: first, if the transnational aspects of the proposal cannot be satisfactorily regulated by action by the Member States; second, if the lack of Community action would conflict with the requirements of the Treaty or would otherwise significantly damage Member States’

² Quoted in P. Craig and G. de Burca, (2011: 94).

³ Annual Report from the Commission on the principle of subsidiarity and proportionality, Brussels, 10.7.2012, COM(2012) 373 final, p. 3.

interests; third, if Community action would produce clear benefits by reasons of its scale or effects compared with Member States action.⁴ Moreover, the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators”.⁵ Indeed, the laconic way in which European institutions justify the compliance of Union legislation with the principle of subsidiarity, does not always follow the Amsterdam Protocol guidelines. The result is that the invitation of the Protocol to interpret subsidiarity as a “dynamic concept” to be applied “in the light of the objectives set out in the Treaty”⁶—i.e. as a concept that “allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified”⁷—has been to a certain extent neglected, since European institutions tends always to justify Union action and consequently to endorse its expansion.

For this reason, many scholars have criticized the concept of subsidiarity, or at least the way in which European institutions have interpreted it. For example, Schütze opined that subsidiarity should be interpreted as a requirement to check “*whether* the European legislator has *unnecessarily* restricted national autonomy”, i.e. that “subsidiarity properly understood *is* federal proportionality” (Schütze 2009: 533).⁸ Similarly, Davies argued that subsidiarity “misses the point”, as instead of striking a balance between Member State and EU interests, “it assumes the Community goals, privileges their achievement absolutely and simply asks who should be the one to do the implementing work” (Davies 2006: 67-68). In other words, the subsidiarity inquiry is misplaced because it does not focus on whether EU legislation is disproportionate by intruding too far into Member State values in relation to the objectives pursued by the EU.⁹ Consequently, Davies

⁴ See in particular point 5 of the Protocol on the application of the principles of proportionality and subsidiarity attached to the Treaty of Amsterdam.

⁵ Point 4 of the Protocol on the application of the principles of proportionality and subsidiarity attached to the Treaty of Amsterdam.

⁶ Point 3 of the Protocol on the application of the principles of proportionality and subsidiarity attached to the Treaty of Amsterdam.

⁷ Point 3 of the Protocol on the application of the principles of proportionality and subsidiarity attached to the Treaty of Amsterdam.

⁸ R. Schütze (2009: 533). On a comparison with the US system see E.T. Swaine (2000), and E. A. Young (2002).

⁹ Davies notes that in all the Commission procedures for applying subsidiarity, set out in Commission’s impact assessment guidelines, “nowhere in the entire process s there any explicit consideration of national autonomy, nor any within of Community against Member State goals, except perhaps for the warning, repeated several times, that impact assessments are not a substitute for political judgment”. Moreover, “whether MS can achieve this outcome sufficiently is considered exclusively in terms of the problem itself and other Community goals...the emphasis is overwhelmingly on impacts on non-public actors such as consumers and industry, and where the impact on public bodies is – briefly – mentioned, the focus is on economic and functional factors. National ...interests are further marginalized”. See Davies (2006: 76).

suggested that the ECJ should spell out the “competence function of proportionality”, i.e. should ask itself whether the importance of an EU is sufficient to justify its effect on national autonomy (Davies 2006: 83).

However, in a most recent article, Paul Craig moved some convincing criticisms to Davies’ analysis. First, he noted that also Member States play a role in the definition of the “European objective” pursued by EU legislation. Second, he argued that, in Davies’ reasoning, “proportionality fulfills an independent competence role” which is “markedly different from use of proportionality within Article 5.3 TEU as part of the subsidiarity calculus” (Craig 2012: 83). In Craig’s words “The schema of proportionality in Article 5.3 and the Lisbon Protocol are not framed in terms of the kind of free-standing, competence based proportionality analysis. Nor is there any suggestion of such use of proportionality in the discussion that led to the Constitutional or Lisbon Treaties” (Craig 2012: 83).

The intuition that Art. 4.2 TEU could help in coping with what has been referred to as “the absence of a comfortable place in the legal framework for Member State interest” (Davies 2006: 67) stems from the working documents of Art. I-5 of the Constitutional Treaty, namely the predecessor of Art. 4.2 TEU. These working documents, indeed, seem to attach to Art. 4.2 TEU the possibility to fulfill that “independent competence role” that Paul Craig deems to be missing in the working documents concerning the amendment of the principle of proportionality. The following paragraph will show how the drafting of Art. I-5 of the Constitutional Treaty (which reflects almost the same formulation of current Art. 4.2 TEU) is embedded in the discourse of delimitation of competences between the EU and the Member States, and could thus help reframing subsidiarity inquiry from a focus on the EU action “added-value” to a focus on EU action “non encroachment” upon Member States’ one.

3. The potential added value of Article 4.2 TEU on the protection of “national identities” and “essential State functions”

The current formulation of the identity clause stems from the works of the European Convention drafting the Treaty establishing a Constitution for Europe. If compared with Art. 6 TEU (Nice Version) which already required the EU to respect national identities of its Member States, Art. 4.2 TEU (Lisbon version) tries to clarify the scope of the concept of national identities, which are deemed to be “inherent” in Member States’ “fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State

functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security”.

Indeed, this novel formulation of the identity clause was first proposed by the Chair of working group V on “complementary competence”, Mr. Henning Christophersen – so to be consistently referred to as the “Christophersen clause” in all the working documents of the European Convention. Building on an analysis of the *travaux préparatoires* of this clause it has been already submitted that “by expanding the concept of “national identities” so as to include Member States’ “fundamental structures” and by introducing a duty to respect “essential State functions” the drafters sought to carve out core areas of national sovereignty, as no list of Member States’ exclusive powers was eventually included in the Treaties” (Guastaferrero 2012).

The history of the clause shows that the clause was meant to solve a problem that had and still has a great relevance in the everyday life of EU law: to avoid the encroachment of Union action upon Member States’ prerogatives in the so-called “complementary competences” areas (e.g. education, culture, and sport).¹⁰ Notoriously, complementary competences basically include the policy areas—such as culture, education, employment, customs cooperation, vocational training (where Community’s role should be limited to supporting, supplementing, or coordinating the action of the Member States) which are left substantive scope of action. The limited nature of Community power is usually expressed in legal basis which explicitly rule out harmonization measures. This is for example the case of employment, culture, and education where Community can encourage cooperation between Member States, it can—if necessary—support and supplement their action, but at the same time it cannot harmonize the laws and regulations of the Member States.¹¹

Nevertheless, within the EU legal orders there has always been a complicated and overlapping relationship between functional and sectorial competencies—i.e. between competence based on aims and competence based on fields.¹² How to avoid that the EU in exercising a functional power (e.g. under the internal market) encroaches upon sectorial areas which explicitly exclude or precisely define Community action (e.g. education, culture, public health etc.)?

In order to address this problem of the overlapping between functional and sectorial legal basis (the first allowing a broader scope of action to the EU at the expense of the Member States), one of the proposals was for example to draw a list of competences exclusive to the Member States, but this

¹⁰ Complementary competences are now envisaged by Art. 6 TFEU.

¹¹ See, respectively, Art. 139 EC, Art. 151(5) EC, and Art. 149 EC.

¹² On such a distinction between types of federal competencies, also referred to as *zielbezogene Kompetenzen* (competencies based on aims) and *sachbezogene Kompetenzen* (competencies based on fields)— see A. von Bogdandy and J. Bast (2010: 287).

was rebuffed since it could have been against the principle of conferral, conveying the message that it was the Treaty to confer powers to the Member States and not the other way around. Among a set of other proposals, the idea of Mr. Christophersen to take as point of departure art.6, par 3—stating that “the Union shall respect the national identities of its Member States”—and expand it by adding all those sensitive areas related to Member States sovereign powers was deemed to be a more balanced solution. The final formulation included into the notion of national identities the fundamental (political and constitutional) structures and some essential State functions such as national security and the territorial integrity of the State.

In sum, the working documents on the drafting of the identity clause suggest that, at least in the intention of the drafters, Art. I-5 (now Art. 4.2 TEU) could address the same kind of concerns (protecting Member State’s autonomy from EU action) of the possible reframing of subsidiarity suggested by some scholarly literature and outlined in the previous paragraph. It is not a case, indeed, that Art. 4.2 TEU, and more generally, the notion of national identity, has been used by some national Parliaments in monitoring the compliance of EU action with the principle of subsidiarity both in the context of the EWS and in the context of the so called “political dialogue”. The following three paragraphs will be devoted to these reasoned opinions.

4. The proposal on the award of concession contracts

The debate on the recent Commission Proposal on the award of concession contracts (COM (2011) 897 final) provides an excellent illustration of the role that the identity clause can play in safeguarding national autonomy. Art. 4.2 TEU, indeed, has been invoked—although not autonomously—against EU legislation that, while pursuing a legitimate objective (e.g. the functioning of the internal market), in fact encroaches upon an area in which Member State should enjoy a significant scope of action (e.g. services of general economic interest).

In its proposal, the Commission adopted a purely internal market perspective. The proposal was based on Article 114 TFEU, which enables the adoption of harmonization measures to ensure the proper functioning of the internal market. In its explanatory memorandum, under the “subsidiarity” and “proportionality” headings, the Commission merely underlined that a common legal framework is required to ensure effective and equal access to concessions for economic operators across the single market and that the existing soft-law does not provide sufficient legal certainty and does not ensure compliance with the Treaty principles applicable to concessions. The Commission’s

memorandum makes hardly any reference to the area of the internal market affected by the proposed regulatory framework, that is to say that of Services of General Economic Interest.

The Austrian Parliament adopted a reasoned opinion on the Commission's proposal according to the *ex ante* subsidiarity review mechanism introduced by the Treaty of Lisbon.¹³ In that opinion, the Austrian Parliament first noted that, contrary to the Commission's findings, there is no legal vacuum in the area concerned by the proposal, as concession contracts are already governed by primary law principles such as non-discrimination, transparency and competition. Most importantly, the Austrian Parliament emphasized that the service concession contracts covered by the proposal are related to the provision of Services of General Economic Interest, an area where a number of Treaty Provisions (Art. 3 TEU, Art. 14 and 106 TFEU, Protocol 26) grant the Member State "a broad scope of discretionary action" (p.1). The Austrian Parliament inferred from such provisions and from Art. 4.2 TEU that "the flexibility granted to the Member States must not be curtailed by an extremely far-reaching act of secondary law" (p. 2). Instead, according to the Austrian Parliament, the proposed directive may have a significant impact on the structure of municipal service provision, especially in the municipal water sector which is provided on a cooperative basis.

Also other national Parliaments have invited the Commission to frame the proposal taking into account the Treaty provisions on the services of general economic interests, which reserve to the Member States a significant scope of action. Protocol n. 26 which emphasizes the "essential role and wide discretion of national, regional and local authorities in providing, commissioning and organizing services of general economic interest as closely as possible to the needs of the users"—in conjunction with Art. 4.2 TEU—have been invoked also by the Bavarian State Parliament¹⁴ which has retained that the arguments put forward by the Commission to justify EU action in the field of service concessions (i.e. serious distortion of the internal market) have not been adequately supported. According to the Bavarian State Parliament "the Treaty of Lisbon has limited the scope for general EU provisions on service concessions which also concern local authorities Article 14 TFEU and Protocol No 26 specify the important role and the wide discretion given to local authorities when deciding how services of general economic interest should be made available to their users and how they should be commissioned and organised. This particular safeguarding of local self-government has to be taken into account when regulating the award of service concessions, by preserving the scope for action and negotiation of local authorities and by accommodating the concerns of local services of general economic interest".

¹³ *Reasoned Opinion of the European Affairs Committee of the Federal Council on COM (2011) 897 final*, 1 February 2011.

¹⁴ Draft Resolution of the Bavarian State Parliament on the Proposal for a Directive on the award of concession contracts COM(2011) 897 - summarised by the subsidiarity team.

Also the Cortes Generales of Spain have expressed. Article 4(2) TEU states that the EU must respect the national identities of Member States, inclusive of regional and local self-government. Furthermore,

similar concerns. On 6 March 2012, the Joint Committee for EU Affairs adopted a Resolution regarding the non compliance of the initiative with the principle of subsidiarity. The Joint Committee emphasises that the Commissions does not adequately explain why the differences among the national legal systems concerning the scope of provisions ruling the granting of concessions, represent an actual obstacle to market access, and thus justify EU action in the field of shared competences. There are two interesting aspects of the proposal: the first is that the Committee recalls that in the field of shared competences, when applying the principle of subsidiarity, the intervention of the Union is exceptional, in that it can only act in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States. “Therefore, according to this exceptional nature of the Union’s action, it must be the latter who is to justify to the greatest extent possible in terms of information, details and arguments, the existence of a problem affecting the basic principles of the European legal system (non discrimination, transparency, internal market and competitiveness)”. The second is that the Committee stresses that “what the proposal identifies as a problem is just the legal and cultural diverse reality of the countries that make up the Union, which has to be respected provided it does not represent an actual obstacle to the market, something that is far from being proven”. In endorsing the argument according to which the differences between Member States in terms of legal culture and practice with regard to service concessions, rather than constituting an obstacle to the market, should be taken in due account in EU action, the Joint Committee refers to both a Resolution recently adopted on October 25th, 2011, by the European Parliament on the Modernisation of the Public Procurement and Art. 4.2 TEU on the protection of national identities of the Member States.¹⁵

Finally, also the Italian Senate Standing Committee on European Union Policies seems to detect a *prima facie* violation of the principle of subsidiarity of the proposal of the award of concession contracts, in particular as regards the water sector, insofar as the nature of the “action proposed (regulation of a key public service) is such that it should be managed at a level as close as possible to a community. Supranational regulation would provide no added value”. Moreover, the Standing

¹⁵ As stated in the opinion “Once more, the Resolution of the European Parliament of October 25, 2011, and its warning in the sense that “due account must be taken both of the complexity of the procedures and of the differences between Member States in terms of legal culture and practice with regard to service concessions”, must be borne in mind, and even more so from the certainty that this warning by the Parliament is delivered taking into account paragraph 2 of Article 4 of the Treaty on the European Union, which affirms that the Union shall respect the equality of Member States before the Treaties, as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government”.

Committee states that “whereas water supply services are essential for the sheer existence of a community, they cannot be considered on a par with any other business sector, also in view of the need to ensure universal access to such commodity and following the outcome of the referendum of 12 June 2011 and the ensuing exclusion of water supply services from the regulation of "public local services" (under Article 4(3) of Decree-Law 13 August 2001, no. 138, converted into Law 14 September 2011, no. 148, as amended)”. Although there is no reference to Art. 4.2 TEU, the opinion focuses on two aspects that other national Parliaments’ opinions have deemed to be enshrined by the provision protecting Member States’ identity: on the one hand, the role of national and local government which is encroached upon a non justified supranational action, and on the other, the national specificity which afford to the water supply service a special protection, due to the Italian referendum on the topic.

To conclude, the analyzed Parliaments’ reasoned opinions and resolutions suggest that the identity clause may be invoked to protect national regulatory autonomy from an EU act that, while pursuing a legitimate objective, significantly constrains Member States’ action in an area where the Treaty itself affords the Member States a broad scope of maneuver. All of them seem to take into account issues related to choice of the legal basis. It remains to be seen if and to what extent the Commission will take into account its proposal’s implications on Services of general economic interest, rather than focusing exclusively on the proposal’s expediency *vis-à-vis* its internal market objective.¹⁶

5. The proposal on the temporary reintroduction of controls at internal borders in exceptional circumstances

The Swedish Parliament issued a reasoned opinion on the Commission’s proposal for amending Regulation (EC) No. 562/2006 in order to provide for common rules on the temporary reintroduction of border controls at internal borders in exceptional circumstances (COM (2011) 560).¹⁷ In the opinion presented from the Committee on Justice, the Swedish Parliament considers that the reintroduction of internal borders controls in the case of threats to general order or internal security does not comply with the principle of subsidiarity, because as per Art. 4.2 TEU and Art. 72

¹⁶ In the reply of the Commission to the Cortes Generales and to the Bavarian national Parliaments, the Commission seems to defend its position which grounds EU action on the absence of clear rules at Union level governing the award of concession contracts which have triggered legal uncertainty, obstacles to the market, and a lack of adequate judicial guarantees for the tenders.

¹⁷ Statement 2011/12:JuU13 Appendix: Reasoned opinion of the Riksdag, available at www.ipex.eu.

TFEU “national security and the maintenance of law and order continue to be the responsibility of each member state”. Notwithstanding the Swedish Government’s assessment that a certain degree of influence must be given to the Union in order to make all member states apply the same controls of both external and internal borders within the Schengen cooperation, the Riksdag considers that “the goals ...of the Commission’s proposal can be better achieved if the right to decide about the reintroduction of internal borders controls remains with the individual member States”.

It is very interesting to analyze the answer of the Commissioner Cecilia Malmström.¹⁸ While respecting some member States expressed doubts about the compliance of the proposal with the principle of subsidiarity and of Art. 4.2 TEU, she stresses that as per Art. 3.2 TEU, and Art. 67 and 77 TFEU, the EU has the authority to develop an area without internal borders, in which free movement is guaranteed. Therefore any legislation aiming at this objective—and also any exception to the general rule—shall be adopted at the EU level. Moreover, since in the proposal the internal border controls can only be reintroduced by the Commission with the help of comitology, it is possible for Member States to examine the Commission’s implementing powers. Last but not least, the decision to reintroduce internal borders’ controls is never solely of national interest, since it has far reaching humanitarian and economic consequences that stretch beyond a member state’s territory. Since “reintroducing controls at such borders affects freedom of movement for citizens in all member states it is therefore important that there is a mechanism that ensures that all measures that limit freedom of movement are both necessary and proportionate” (p. 2).

Also the Dutch Senate and the House of Representatives sent a joint reasoned opinion on 8 November 2011 doubting about the compliance of the proposal with the principle of subsidiarity. The Joint opinion stresses how the amendment proposal solicits a shift of power from the Member States to the EU as to the reintroduction of border controls at the internal borders in exceptional situations. Indeed, while according to the Schengen Borders code (562/2006) Member States may, by way of exception and in the event of a serious threat to internal security or public order, reintroduce internal borders controls for a period of at most 30 days (or for the foreseeable duration of the threat), the amendment proposal delivers to the Commission the power to reintroduce those controls, upon a request by the Member States. Moreover, also in those cases in which exceptional circumstances require a direct and immediate action by a Member State, this can act autonomously only for five days (thereafter, it is still up to the Commission to prolong the borders control).

In contesting this shift of power from the Member States to the EU, the Joint Opinion focuses on the legal basis chosen for the proposal, namely art. 77 para. 1 and 2 which entitle the EU to act in the fields of border checks, asylum and immigration. However, since the reintroduction of borders

¹⁸ Reply of Commissioner Malmström, 24 October 2011, D(2011) 1239888.

control envisaged by the proposal is strictly related to the existence of a serious threat to internal security—in the sense that is subsequent to it— the Dutch Parliaments invites the Commission to take into account other legal bases: first of all, Art. 73 TFEU, according to which the EU competences in the area of freedom, security and justice “shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”; second, Art. 276 TFEU, according to which in exercising its powers “regarding the provisions of Chapters...relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”; third, the already mentioned Art. 4.2 TEU.

The Joint Committee then concludes that this shift of power from the Member States to the Commission in the field of the reintroduction of internal borders controls is in breach of the subsidiarity principle because “in light of the TFEU, this competence clearly lies with the Member States”. Moreover, “the Member States have existing procedures to carry out these controls and are better able to assess and to decide on the reintroduction of such controls. The national authorities are, after all, in the best position to assess the specific local circumstances”.

6. The proposal on the Community financial measures for the implementation of the common fisheries policy

Also the Italian Senate has referred to the protection of national identity (although without explicitly mentioning Art. 4.2 TEU) in the Resolution of the Standing Committee on Agriculture and Agrifood Production of 8 June 2010 on the “Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 861/2006 of 22 May 2006 establishing Community financial measures for the implementation of the common fisheries policy and in the area of the Law of the Sea (COM (2010) 145 final)”.

Unlike within the other analyzed national Parliaments’ reasoned opinions, the Committee gives a positive opinion as far as the principle of subsidiarity is concerned. In this respect, the Community proposal for establishing Community financial measures for the implementation of the common fisheries policy sets out objectives which can not be sufficiently achieved by the Member States,

and makes more suitable to the achievement of those purposes, and therefore required, action at Community level.

It is in the following consideration of the Resolution of the Standing Committee, related to the “merit” of the proposal, that the issue of the protection of national identity is raised. In particular, the Committee focuses on the amendment to the proposal provided by Article 5, which endorses datasets on the level of fishing, the performance of the fishing industry, etc. which incorporate biological, technical, environmental, and socioeconomic information. The Committee expressly “welcomes the incorporation of socio-economic information in the datasets under Article 5 of the regulation, also with a view to protect the role of inshore fishing which, although neglected at EU level, is of considerable importance for Italy, where such industry is characterised by a network of small companies of time-honoured tradition closely connected with the country's *national identity*” (emphasis added). Moreover, the Committee stresses that “it would be appropriate to take into account the type and size of fisheries and to balance the unquestionable need to protect and preserve fish stocks with economic, social and environmental requirements in the stock assessment under Article 11, so as to ensure acceptable living standards for small and major actors involved in fishing, profitability of the industry and environmental sustainability”.

At the end, the Committee invites the Italian Government to follow up on these recommendations at both domestic and EU level. It is likely that the Committee is complaining about a non adequate consultation between the Parliament and the Government on European affairs. In this respect, the commented Resolution can be compared with the first negative opinion of the Senate on the compliance of an EU proposal with the principle of subsidiarity —issued by the same Committee in the same day and related to fishery policy as well (COM (2010) 176 def.; XVI leg., doc. XVIII, n. 41). Rather than being based on the *legal* question on which level of government was more suitable to act in the case of sharing competences, the negative opinion was issued with a strong *political* significance. It has been argued that on the one hand, being the national fisheries sector in serious trouble, the opinion aimed at protecting a specific national interest. On the other hand, it aimed at warning national Government not to neglect its duty to provide the Parliament with a constant, timely, and especially qualified information on European proposals stemming from Italian Law 11 of 2005 (Fasone 2010: 826).

Unlike the previously analysed reasoned opinions, the concept of national identity is here used more as a synonymous of national (economic) interest than as a sort of “competence clause”.

7. Concluding remarks

All the examples above show that Art. 4.2 TEU starts to be used in the opinions of national Parliaments both in the context of the Early Warning System and in the context of the political dialogue with at least a double meaning. In some cases it holds a sort of “competence” function, in that some Member State use the clause to invoke their regulatory autonomy in an area where the action of the EU is deemed to be too far-reaching with respect to the provisions of the Treaty which reserve to the Member States a certain scope of action. This has been the case both for the proposal on the awards of concession contracts and for the proposal on the reintroduction of internal borders control in the Schengen area. In some other cases, the concept of national identities is used to emphasize national specificities and national economic interest, and to invite the Commission to take them into account. This has been the case for the proposal on a Community financial measures for the implementation of the common fisheries policy, where the Italian Senate has acknowledged the compliance of the EU measure with the principle of subsidiarity but, shifting to the merit of the proposal, has reported to the Commission that inshore fishing, having a “time-honoured tradition closely connected with the country's national identity”, deserves to be protected.

In the first meaning related to the delimitation of competences between the EU and its Member States, the use of the identity clause has some implications both on the material and on the procedural dimension of subsidiarity (for the distinction see Estella 2002).

The “material” dimension of subsidiarity is envisaged by Art. 5 TEU, and requires EU action to be both *necessary* to achieve a specific Union goal and *value-added* if compared with that of lower levels of government. Indeed, as far as this dimension is concerned, some of the examples above show that the identity clause could help to reframe subsidiarity inquiry from a merely “comparative efficiency” test (which in asking which is the most efficient level of government to achieve an European objective usually opts for a favor towards EU action) to a test which aims at assessing if and to what extent EU action does not intrude too far into national regulatory autonomy. Nevertheless, it should be acknowledged that the empirical evidence outlined in this paper is not enough to draw definitive conclusions.

First of all, it should be specified that many of the substantive arguments generally endorsed by national Parliaments in their reasoned opinions, do not aim at protecting national competences vis-à-vis EU competences, but to protect or promote, for example, sectorial economic interests. Actually, it has been noted that the fact that only 64 of the 622 notices sent in 2011 by the national Parliaments to the European Commission can be characterized as reasoned opinions aimed at a

subsidiarity check of EU draft legislation, confirms that most of the Parliaments will not make use of this mechanism to block the European decision-making but to have a say on the substance of European institutions' legal and political choices.¹⁹ In other words, the need to engage into a dialogue with the European institutions might be stronger than the need to protect national competences from an expansion of European Union's action.

Second, it should be underlined that the position of national Parliaments in the context of both the early warning system and of the political dialogue, has happened to be against that of their respective national Governments, and sometimes even used to solicit those governments to comply with their duty to involve an inform national Parliaments about their "European" activity. This means that national Parliament may act as autonomous actors rather than voicing a unique and consistent "national" position at the European level (in harmony with their Governments) against a "European" one. Having saying that, the analysed reasoned opinions show that the suggested argument—i.e. that the involvement of national Parliaments in the monitoring of draft legislative acts could potentially help in reframing subsidiarity inquiry from an "EU value-added" to an "EU non-encroachment" test—deserves to be explored. This also because a shift of the *actors* involved within the subsidiarity check—"national" Parliaments and not any more "European" institutions only—could potentially and legitimately trigger a shift of the *questions* to be asked.

This potential change of the "material" dimension of subsidiarity, could also affect the "procedural" dimension of subsidiarity (envisaged by Art. 5 of the Protocol no. 2), which requires EU institutions to endow draft legislative acts with a detailed statement appraising the compliance of EU proposals with the principle of subsidiarity and with qualitative and, wherever possible, quantitative indicators showing that an objective can be better achieved at EU level. If the Commission starts to reply to reasoned opinions of national Parliaments taking into account their concerns regarding the possible encroachments of EU action on Member States competences, than it could include this kind of assessments also in the motivation of the legislative proposals. In other words, the practice of the Commission in replying to the instances of national Parliaments both in the frame of the EWS and in the frame of the political dialogue could constitute useful expertise to enrich the explanatory memorandums of the proposals, the Impact assessment process, etc. Indeed, while there should be a strong (and a functional) connection between European institutions "onus to justify" (De Burca 1999) and the concrete necessity and comparative efficiency/added value test, in the last years the

¹⁹ Camera dei Deputati, XIV Commissione (Politiche dell'Unione europea), DOC. XVIII, N. 62, *Documento finale, a norma dell'articolo 127 del regolamento, su: Legiferare meglio – 19a Relazione riguardante l'anno 2011 (COM (2012) 373 final)*, approvato nella seduta del 18 settembre 2012, available at: <http://www.camera.it/491?categoria=018&numero=062&file=testo>.

procedural requirements seem to be pretty detached from the material ones, and have acted as supplements rather than as complements of them.²⁰ As it has been noted, only in the very first years of the European Commissions Annual Reports on Better Lawmaking (dedicated to proportionality and subsidiarity) there was a focus on the material criterion of subsidiarity revolving around the opportunity of EU action. In the following reports, the issue of subsidiarity seems to have been tangled with and to a certain extent—substitute by—other procedural aspects such as the publication of roadmaps which outline the Commission’s intentions, the stakeholders consultation, the quality of the drafting, etc. (Ippolito 2007: 205; Russo 2012: 18).

Besides having an implication on both the material and the procedural dimensions of subsidiarity, the use of the identity clause in the analysed reasoned opinions also has some implications in defining the scope of the subsidiarity scrutiny. As it has been pointed out “the Protocol governing the Early Warning System deals with subsidiarity and proportionality, but that reasoned opinions may, strictly speaking, be issued only as regards subsidiarity” (Kiiver 2012: 23). Scholars have often criticized this narrow scope of the review, which excludes for examples proportionality and all other aspects related to competences (Cartabia 2007: 1096). In our view, it is very difficult to set fixed boundaries between all the three principles set out in Art. 5 TEU, such as the principle of conferral, related to the *delimitation* of competences between EU and Member States, and the principles of proportionality and subsidiarity, related to the *exercise* of Union competences. The analyzed reasoned opinions show that many Parliaments, focusing on the monitoring of subsidiarity principles, end up suggesting to the Commission different legal basis (less intruding upon Member States’ autonomy) for the European proposal; or they invite to read the chosen legal basis (which for examples allows the Union to act on a functional legal basis such as Art. 114 TFEU or 352 TFEU) in conjunction with other legal basis which tends to reserve to the Member States the regulation of such sensitive issues such as national security (see for example Art. 4.2 TEU and Art. 72 TFEU). Should Art. 4.2 TEU endorse this trend to reframe the subsidiarity inquiry from an “value-added test” to a “non encroaching” test, it will be more and more difficult to separate issues related for example to the legal basis of an act (traditionally associated with the respect of the principle of conferral) with issues related with the principle of subsidiarity. And it would be also more difficult to separate decisions as to whether to propose action at EU level (subsidiarity) from decisions as to the extent and form of EU action (proportionality), since the form of the measures is

²⁰ It could be argued that the Protocol on the application of the principle of subsidiarity and proportionality attached to the Treaty of Lisbon will not probably help in this respect. When compared to the same protocol attached to the Treaty of Amsterdam, the new Protocol does not explain how the comparative efficiency text should be structured (i.e. what kind of questions European Institutions should ask in applying the principle of subsidiarity), leaving much more space to provisions dedicated to the procedural aspects related to the time and scope of the involvement of national Parliaments.

able to affect the more or less preemptive nature of EU action upon Member States' one. In sum, shall the use of Art. 4.2 TEU help in reframing subsidiarity inquiry it could also help to broaden the scope of the subsidiarity review looking at Art. 5 TEU in its entirety, i.e. connecting the principle of subsidiarity also with the principle of conferral and the principle of proportionality (on the sequence of three cumulative steps the Union must pass as per Art- 5 TEU—namely legality, subsidiarity and proportionality—see Kiiver 2012: 69).

This broadening of the scope of the subsidiarity control carried out from the Parliaments is a welcome feature in the inter-institutional balance of a composite legal order for two reasons.

First, the monitoring function on the principle of subsidiarity has been attached to national Parliaments both to reduce the “democratic deficit” of the system (Sleath 2007) allowing national Parliaments to act as “watchdogs” (Cooper 2006) against the overwhelming expansion of Union competences (Weatherill 2003). In what has been referred to as a “compensatory” logic (Cartabia 2007: 1093), the institutions which have lost their proper and traditional legislative functions, through a gradual delegation of powers to the EU, have been to a certain extent rewarded with monitoring function on the exercise of those power. Nevertheless, it must be underlined that, on the one hand, national Parliaments are almost excluded from the Union decision-making process, and, on the other, the boldest version of its monitoring functioning (i.e. the possibility to issue a “red card” able to stop EU legislation non complying with the subsidiarity principle) was not finally included within the Treaty. A broader scope of the subsidiarity review, at least related to the legal basis review, would for sure strengthen the powers of national Parliaments in the legislative sphere. The second reason why the broadening of the scope of the subsidiarity review could be welcomed, is that the thresholds able to solicit the Commission to review its proposal are pretty high and they require a coordination among national Parliaments²¹ which is not always developed (it is not a case that the “yellow card” has been reached only once so far). Despite the suggestions of the President Barroso, according to which comments on the substance of the proposals raised within the political dialogue should be distinguished by the subsidiarity aspects,²² it should be taken into account that the opinions in the field of the political dialogue are not relevant to the threshold. In this respect, they can trigger the Commission reply, but they cannot affect the amendment of the proposal in line

²¹ On the possible results stemming from a dialogue among Parliaments, see C. Decaro and N. Lupo (2009).

²² As stated by J. Barroso and M. Wallstrom in their letter introducing to the practical arrangements for the operation of the subsidiarity control mechanism under protocol no. 2 of the Treaty of Lisbon (Brussels, 1st December 2009, p. 4), “As the subsidiarity control mechanism will be applied alongside the political dialogue, which covers all aspects of those documents transmitted to national Parliaments, and not only compliance with the principle of subsidiarity, the Commission invites national Parliaments to distinguish in their opinions as far as possible between subsidiarity aspects and comments on the substance of a proposal, and to be as clear as possible as regards their assessment on a proposal's compliance with the principle of subsidiarity.”

with the concerns of the national Parliaments. For this reason, a broader concept of the principle of subsidiarity should be endorsed so to allow national Parliament to have a say in the decision-making process.

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