Task Force on Subsidiarity, Proportionality and Doing Less More Efficiently

Submission to Discussion paper No. 1 and Discussion Paper No 2*: The participation of local and regional authorities in the preparation and follow-up of Union legislation*

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Overview:
Building on my recent doctoral thesis on *Subsidiarity and Multi-Level Governance in the Framework of the EU Institutional Framework* (2017) this submission aims to provide a simplified version of that research to address the questions raised by Discussion Paper No.1 (whose questions are used to structure this submission) and Discussion Paper No. 2 of the Task Force on Subsidiarity, Proportionality and Doing Less More Efficiently. In it, it questions the conflicting definitions on subsidiarity that exist in the Treaties and whose use often makes enforcement of subsidiarity politically and legally very difficult. A consensuated proposal, building on the works of the European Council Conclusions of February 2016 is proposed instead. This submission also provides different examples where subsidiarity has been misunderstood as in itself is neither an instrument to justify more EU or more national/subnational powers but a mechanism to adjudicate when powers are shared. The definition of shared powers as framed in the treaties is also at the root of the problems to use subsidiarity as a legal principle. Last but not least the submission makes abundant suggestions on how the Commission and Committee of the Regions, as well as Council and Parliament, can make better use of the existing subsidiarity, better regulation and impact assessment toolbox in a way that can better reflect the imput of local and regional authorities. However, one critical issue for that to happen is to address the capacity issues and institutional culture of those institutions. For that it is also proposed the recreation of the Consultative Committee of Local and Regional Authorities that existed between 1988 and 1994 for the pre-legislative phase of EU policy formulation.

(1) Subsidiarity, proportionality and working more efficiently.

- How can the institutions account better for the principles of subsidiarity and proportionality in their work?

The fundamental problem with the principle of subsidiarity is that there is a fundamental misunderstanding about what it means. For the representatives of regions and local authorities this means that "decisions are taken as closely as possible to the citizen" (Preamble, TEU, Preamble (3rd Para) of the Charter of Fundamental Rights). This provision, which is in the Preamble of the Lisbon Treaty is not part of the legal definition of subsidiarity as defined in article 5(3) TEU which

(*) Though this submission is undoubtedly coloured by the author's professional role as Head of the Brussels Office of the Convention of Scottish Local Authorities (COSLA) , Member of the CoR Subsidiarity Expert Group, Coordinator of the CEMR Expert Group on Cohesion this submission is done strictly under a academic reseacher capacity.
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is the ones that the EU institutions and in particular the Commission interpret the principle: actions that "by reason of the **scale** or **effects** of the proposed action, be better achieved at Union level."[1]

This notion of "scale" and "effect" is the reason why most subsidiarity impact assessment that accompany Commission proposals invariably argue that the principle of Subsidiarity backs up intervention at EU level.

A significant reason why this conflicting meaning of subsidiarity[2] has not resolved lies in a more fundamental problem: the fact that the list of shared competences as outlined in article 4 (2) TFEU, to which the Principle of Subsidiarity contends with, is exceedingly vague, for it broadly outlines a given policy e.g. "transport" instead of being more precise clauses as "cross-border transport". That, in combination with art. 351 TFEU (ex art. 308 TEC) creates room for ever expanding power towards the EU institution.

Subsidiarity is often confused with the principles of conferral -art. 5(1) TEU-, sincere cooperation -art. 3(3) TEU- and respect of the internal constitutional order including local and regional self government -art. 4(2) TEU- Indeed Lisbon Treaty is notable as it does provide for the first time an explicit recognition in the said TEU article of local and regional self-government coupled by a recognition in the Preamble (3rd Para) of the Charter of Fundamental Rights.

Therefore, rather than being a stand-alone principle Subsidiarity is a *supporting* principle of those other Treaty principles:

- under the principle of **conferral**, on competences that are shared or supporting in nature it should help adjudicate which level or levels of government should exercise that shared competence in full in the future, delineating how the apportionment of conferred competence should work.

- Under the principle of **sincere cooperation**, this process of adjudication should be based upon a constructive and objective discussion process between the competent tiers of government

- Under the principle of **respect of the national constitutional order**, including the constitutionally and, after Lisbon Treaty, EU recognised principle of local self government the adjudication procedure on Subsidiarity, and given the unique nature of EU Law as a special branch of International Public Law that has primacy and direct effect upon national and subnational legal jurisdictions and arrangement, action at EU level must also assess the internal distribution of powers but also foresee that the said subnational levels are able to argue their case to either keep that shared competence in part or in full, share it (and how) or more unlikely give it away entirely.

In other words, the principle of subsidiarity is not really a fixed legal precept that discern between rights of wrong but a mechanism of decision making, or specifically a mechanism of adjudication of responsibilities, or part , its procedural nature could be equated to the principle of ***due diligence*** (Pazos-Vidal, 2017) , i.e. *a multilevel participatory process by which different levels of*

[1] Even if art 5(3) says that actions "cannot be sufficiently achieved at achieved by the Member States, either at central level or at regional and local level" this does not mean the same as "as closely as possible to the citizen". The former has an implication of upwardly transfer of responsibilities where as the latter does have a more downwardly implication on where these responsibilties should ideally lay.

[2] This polisemic nature of the principle can be observed, inter alia, in the classic debate between Craig (2012) and Davies (2006).

government discuss and decide with level of government can better exercise a shared competence or part of it.

There is some room for improvement even without amending the Treaties, as proven by the "Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union" and the "Draft declaration of the European Commission on a subsidiarity implementation mechanism and a burden reduction implementation mechanism" agreed at the European Council of 18 February 2016. These two documents did not enter into force because they depended on a positive outcome of the UK EU Referendum of 23 June 2016. Together with the Dutch and UK subsidiarity reviews that preceded them they remain, however, the state of the art of the EU work on subsidiarity.

A reformed meaning of the principle of Subsidiarity

This Task Force should build upon all this earlier work to find a new interpretation of the principle of Subsidiarity that is able to marry the two above mentioned notions of subsidiarity: the "proximity" one and the "scale and effect" one.

In practical terms this specifically means to start with that the Council Conclusions of 18 February on Subsidiarity, whose effect, including the new Subsidiarity "***Red Card***" procedure remains moot due to the outcome of the UK EU Referendum.

The red card mechanism was proposed as a complement the existing yellow card on Subsidiarity. While it has a longer period (12 instead of 8 weeks) but has a higher threshold (55% rather than 51%) it is clear that the whole purpose is that of deterrence of the EU institutions to legislate without having first a hard look about subsidiarity and crucially to do so in partnership with national and subnational authorities.

However, in so doing it is striking that clear provisions in the Subsidiarity Protocol such as the role of regional legislative parliaments and the Committee of the Regions was not embedded in this proposal, such as it is proposed in the above amendment.

Still given that these Council conclusions were agreed at the highest level of the EU but only in connection to a given outcome of the UK Referendum in order to become operational these Conclusions, hopefully amended in the sense proposed below, should be reinstated by way of a new Council Conclusions and its incorporation on the Interinstitutional Agreement on Better Lawmaking which would allow the "Red Card" mechanism to be used in the EU27.

More, fundamentally, there is a clear need to marry the above mentioned and often competing notions of "proximity" subsidiarity of the Preamble with "scale and effect" subsidiarity of the Treaty article and Protocol No. 2.

A starting point could be that this Task Force proposes, as we argued at the time the said February 2016 Council Conclusions should had been tightened further as suggested in the amendments in bold outlined here:

> " The purpose of the principle of **subsidiarity is to ensure that decisions are taken as closely as possible to the citizen**. ***For shared and supporting competences the*** choice of the right level of action therefore depends, inter alia, on whether ***it can clearly be demonstrated that*** the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States and on whether ***the European institutions can unambiguously prove*** that action at Union level would ***clearly outweigh***

~~produce clear~~ benefits by reason of its scale or effects compared with actions at the level of Member States.

Deciding what is the right level where decisions should be made in line with the principles of Subsidiarity and Proportionality must be the result of a comprehensive joint assessment by local, regional, national governments and parliaments and EU institutions from the pre-legislative stage."

European Council Conclusions 18 February 2016 (author´s suggested amendments in bold italics. Pazos-Vidal, 2017)

This more nuanced form of words that more effectively tryies to marry the subsidiarity precepts of the Preamble with that of Article 5 TEU and Protocol No. 2 would not require Treaty reform could be enacted by a new set of Council Conclusions, Commission Declaration of Subsidiarity and the corresponding amending of the Inter Institutional Agreement of Better Lawmaking.

Subsidiarity scrutniy in practice

There is a small arsenal of material that can help decision makers establish how to apply the principle of Subsidiarity when drafting EU Legislation. The reference document of the 2015 Better Regulation Package is "Tool #5. Legal Basis Subsidiarity and Proportionality". As it could be expected the tool, other than making a passing reference to decisions as close as possible to the citizen entirely checks whether that there are "clear benefits", "economies of scale", "improve the functioning" of the Internal Market by replacing national law from EU law. This is generally biased towards EU action, with the only quite helpful limitation that (reflecting a number of ECJ caselaw including the recent *Phillip Morris* (C-547/14)): *"It is insufficient merely to find differences between national laws. There must be more than an abstract risk that such differences could present an impediment to the exercise of the fundamental freedoms."*

The CoR Subsidiarity Guide and its Evaluation Grid and has rather optimistically identified six criteria for Subsidiary review using existing ECJ caselaw (CoR, 2012) Quite as expected the criteria of the CoR put a greater onus on the existence of local and regional powers at play.

Still, the definition of subsidiarity that that feature in both documents rely on legally open-ended concepts such as "sufficient" or "better" which are up to a point matter of qualitative assessment and political decision. The Commission and CoR checklists are also insufficient as per they try to address a binary choice: between EU vs. National/Subnational regulation. Neither document prefigures scenarios where a power would continue to be shared, albeit in shared proportions between the EU, national and subnational tiers of government. Crucially, there is not sufficient recognition of using alternative approaches to EU regulation namely mutual recognition.

What this suggest is that subsidiarity assessment is an opening for space for negotiation. If the principle of "Multilevel Governance", which while it does not exist in EU statue other than in discrete pieces of legislation[3] it can be however inferred, at least in its more normative version[4],

[3] It is indeed inferred in several pieces of legislation and in the Treaties themselves in all the mentions of several levels of goverment. So far the most explicit legally binding recognition of Muli-Level Governance is Art. 5 of the Common Provisions Regulation No 1303/2013 of the European Structural and Investment Funds and its accompanying Delegated Act the European Code of Conduct on the Partnership Principle. (Commission Delegated Regulation (EU) No 240/2014 of 7 January 2014) This is discussed in detail in Pazos-Vidal, 2014 and Piattoni and Polverari (2016).

from the Treaty principle of Sincere Cooperation. Thus, subsidiarity is no other thing that the expression in legal terms on how sincere cooperation/Multilevel Governance should operate when several levels of government share competences on an issue.

The contrast between this normative conception and the reality could hardly be any starker: there is no mechanism for that multilevel due diligence. While the Commission Box[5] is quite clear that "Assessing subsidiarity is not always a black and white case as evidence may not univocally point in one direction. It is therefore important to gather stakeholders' views." And that "National Parliaments and the Committee of the Regions have rights and powers to monitor the application of the principle of subsidiarity and they will critically examine any related analysis provided by the Commission alongside its proposals" (European Commission, 2015:24).

This hardly amounts to a holistic mechanism that could seek, in an structured way, the input on draft legislation by subnational authorities. Such arrangements exist in some Member States notably Scandinavia, Netherlands and Italy (Pazos-Vidal, 2017; COSLA, 2014). "Structured" is the key word> unless there is a clear and predictable structure where those authorities are *expected* (as opposed to *invited*, like the general public) to provide input it is unlikely that these public authorities will devote time and effort (including internal negotiation to do it). This is the main reason of the very limited input from subnational authorities in the expanded opportunities to respond to consultations on the Work Programme, Roadmaps, etc. inaugurated by the Better Regulation package of 2015. Indeed, only those that have a particular grievance, a specific interest or resources will engage, thus providing the Commission with a skewed reflection on the reality at subnational level.

Ironically the grounds for that work for already existed once at EU level too: In 1988 the European Commission created the **Consultative Committee of Local and Regional Authorities** (Council Decision 88/487/CEE[6]) that in a good deal replicated these best practices that exist at national level. Its work was superseded after Maastricht Treaty by the Committee of the Regions, which is an altogether different institutional and political actor and has path dependencies and institutional constraints inertias that make it unfit for having such responsibilities. Neither the purpose, scope and ambition of that former Consultative Committee can be compared with the much poorer version of the *Structured Dialogue between the European Commission and the Associations of Local and Regional Authorities* that was promoted in the 2001 White Paper of European Governance and developed in the Communication on dialogue with associations of regional and local authorities on the formulation of European Union policy (COM(2003) 811 final). This is because that Structured Dialogue, hosted by CoR with some senior EU officials and European associations of subnational authorities once a year is but a formalised and ritualistic once a year event with the secretariats of the said organisations. This a far cry with the direct central-local negotiation fora that exist in many Member States and indeed with the Consultative Committee. The Answer to Question 3 covers this in detail.

Last but not least, it has been argued that **Impact Assessments**, could be used, under certain terms, by the ECJ to adjudicate on matters of Subsidiarity (Lenaerts, 2012; Craig and De Búrca, 2011: 99

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[4] I.e. conceiving MLG as EU decision making of having a consociative nature , effectively transposing at EU level of the concept defined by Lijphart (2009) to describe consensus building at national level in for Benelux and other non majoritarian and/or multilevel national political systems (e.g. multiparty systems of Scandinavia, partly Germany , Spain, Italy, Austria.)

[5] European Commission, Better Regulation "Toolbox", 2015, p.24 http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf

[6] Commission Decision of 24 June 1988 on the creation of an Advisory Council of regional and local authorities, 88/487 / EEC

,*inter alia*). A description of the changes to the methodology and evaluation that could help IA being a more reliable reflection of subnational impacts is provided further below.

- Are there ways to enable the Union and its institutions to work more efficiently?

This is a matter that is not necessarily related to the principle of subsidiarity and should be subject to a separate discussion on EU institutional reform such as outlined in the Friends of the Presidency "*Improving the functioning of the EU"* report (2014), the Brok-Bresso Report (2015), Verhofstadt (2017), Pisani-Ferri et al. (2016), which together with the more recent 2017 White Paper on the Future of Europe and the Bratislava Declaration remain as the state of the art on the question of EU Reform.

What is striking is the fact that none of these major documents for the future of the post eurozone and financial crisis, post Brexit European Union considers at any length the issue of subsidiarity: only implicitly it can be inferred in Scenario 4 of the White Paper and a passing reference to subsidiarity in the Rome Declaration.

However, taking the State of the Union speech of 2017 as a reference it is clear that the ambition of the Commission as expressed in the EMU package of December 2017, - COM(2017) 821- and the Social Pillar proclaimed the previous October show there is an increased interest in increasing the scope of actions, and indeed of the remit of the EU institutions.

Assuming that this is the line that the College of Commissioners taking over in November 2019 will pursue there are two limitations that the existing EU institutional framework impose into this enhanced level of ambition and which would need to be resolved as part of a wider package of EU reforms: the **Commission own capacity** constraints to manage further powers and the limits of integration versus deeper integration such as exemplified by the **Social Pillar**.

Firstly, the **Commission own capacity** to take new regulatory and supervisory role is limited due to its present constraints and efficiency requirements. Indeed, one can see that recent decisions Commission decisions such as the Communication on the Notion of State Aid and related guidance (*vid. infra*), is not only trying to obey the Juncker Commission dictum of "the European Commission to be bigger and more ambitious on big things, and smaller and more modest on small things"[7] but also as acknowledgement of its limited institutional capacity to deal in deal with a heterogeneous Union of 27 Member States,

It is not the first time that the Commission realises that it simply does have the capacity to centrally deal with detailed management, a notable case was when it moved to shared management certain initiatives that previously were centrally managed in Cohesion Policy (Bachtler and Mendez, 2007). There is a case of realising these Commission capacity constraints and doing a step further in "doing less more efficiently": currently there are core functions by the Commission such a as watchdog of the EU Internal Market DG GROW that are understaffed at over 900 members of staff. Although together with the 800 staff of its sister department DG COMP are among they remain as much smaller than DEVCO or NEAR[8]. Even if the Commission is belatedly undertaking a process of *agentisation* (with a couple of decades after national and subnational administrations) with new agencies and bodies such as the SRB, FISMA taking some of the new tasks of deepening the EMU, it still bears the question if the core of EU Law which is the enforcement of the "four freedoms" of

[7] Mission Letter to 1st Vicepresident Timmermans, 2014.
[8] European Commission, "European Commission Key HR Figures 2017", 2017.

the Internal Market can be efficiently dealt with only 1700 members of staff compared to the 32,000-staff working for the Commission[9].

More fundamentally we should consider at this juncture and via this Task Force whether the 60 year-old *methode Communataire* with the Commission administration at is centre is the more efficient way of handling these new responsibilities. Even after the partial introduction of some *New Public Management* (NPM) practices by the Kinnock reforms (Pollit and Bouckaert, 2011; Fougier and Pradines, 2015) -agentisation, contractualisation, "strategic management", "performance" rhetoric- these have not replaced the old French styled model of "Administration Publique" (generalist, life-tenured civil servants, hierarchical, rule-bound *administrators* rather than *managers*) upon which the Commission has been based for 60 years and remains firmly grounded. This NPM overlaid over the old administration of the Commission is not too dissimilar to the "dual labour market segmentation" that is common in Southern Europe. This dualisation does have a direct bearing on the capacity of the Commission to take new tasks: by trying to obey two contradictory logics about how organisations are run (public administration versus NPM), it is highly unlikely that it would be able to deliver either. Let alone to take new task of deeper EMU.

In considering whether or not to give more powers to the EU institutions we should stop regarding them as "black boxes", the way they work internally, their ethos, policy communities, silos , networks and path dependencies need to be fully scoped before taking any a decision to give or take away powers from them.

For instance and quite controversially, the then German Finance Minister Wolfgang Schaeuble proposed to split the Commission supervisory powers (Competition, Internal Market) from those that are political in nature of whether the EU has limited shared or supporting powers (EU Observer, 2015). This would mean that Internal Market and Competition (guidelines, supervision, regulation, antitrust, etc.) would be transferred to an independent High Authority. The idea is not new as funcionalist EU Integration theories have long argued that instead of a single driver for EU integration there could be several pan European bodies with specialised tasks (as considered by classic functionalist theories such as Mitrany, 1933).

Equally, the Monnet-Schuman approach of EU institution building is well over sixty years on, a barrier for a better understanding at EU level of the constraints faced by national and subnational administrations – and vice versa. The High Authority and later the Commission were created as neutral adjudicators over Member States interests and thus, in the light of the times, with their own bureaucracy. These are mainly generalists that sixty years on come mainly to Brussels straight from university or via de halfway house of the Brussels policy bubble. The national and subnational authorities, though can and do send Seconded National Experts for a several semesters or years placement to Brussels this is rarely conducted as an all-government policy. The result is that EU and national/subnational administrations continue to operate in self-contained environments, only to come into contact with each other in the negotiation room, or in the courtroom. Given the expansion of areas of shared competence over the last few decades, which is only to increase due to the EMU, it seems pertinent that both EU and national-subnational administrations grow closer: for instance, it should be compulsory for national civil service promotion to senior levels to spend a number of years in the corresponding department of the EU. More radically, while areas such as competition should remain the privy of a dedicated (and specialised) EU civil service there are areas where the EU has limited shared or supporting competence where it would be more useful that the vast majority of officials of these Commission Directorates General are in fact SNEs – following but deepening the trend inaugurated by the EEAS.

[9] *Ibid.*

Whatever the choices made the point is that no new increase of tasks at EU level should be done without a proper assessment of the capacity, method and administrative culture of the existing EU Institutions is fit to purpose, and when the dividing line should be between EU and national/subnational authorities.

Secondly, the **Social Pillar,** if it is going to be really fulfilled in practice as it was formally proclaimed last October has clear implications on subsidiarity as it goes well beyond the general terms expressed in the TEU objectives and the Charter of Fundamental Rights. This can quickly result in an issue of conferral and subsidiarity such as raised by the German Constitutional court in its landmark Lisbon ruling[10], where by further EU integration should in any case allow for: *"sufficient space for the political formation of the economic, cultural and social circumstances of life", namely state citizenship, state monopoly of violence, fiscal decisions, criminal law, culture and education, freedom of opinion, press, assembly, religion and social welfare.* Without ignoring that this is the opinion of a very important but ultimately one of 26 national Constitutional Courts any such delimitation of core competences of the national/subnational level vis a vis further EU transfers is hardly inescapable. Different national constitutional courts might provide more or less expansive lists, some might even question the primacy of EU law at all. Often the necessary multilevel *dialogue* turns into a rather nasty *monologue* of competing legitimacies, even in the august hall of the Constitutional and EU Courts of Justice (Pernice, 2002; Torres Pérez, 2014).

Either by way of narrowing down the catalogue of shared competences by amending article 4(2) TFEU, via national and EU caselaw or more feasibly, by way of interinstitutional agreement, it seems pertinent that as to avoid endless discussion on subsidiarity a more precise distribution of powers, or more realistically, apportionment on shares of these competences, is a necessary condition for further EU competence expansion. More immediately, and regardless on the different views how wide the apportionment of shared competences between the EU and the national level is, clearly any expansion of EU competence such as in the terms expressed in the Social Pillar is bound to be subject to a subsidiarity test. This has not been the case so far.

(2) Re-delegation of policies to the Member States.

- On what basis can Union policies be identified with a view to passing some of these responsibilities back to the Member States?

We need to move from a deterministic notion of subsidiarity. As mentioned above, local authorities, regions and certain parliaments narrowly argue their case only referring to the definition of subsidiarity that features in the Lisbon Treaty Preamble and the Charter, in order to justify *no transfer* of powers to the EU level. By contrast the EU institutions, some Member States interpret subsidiarity as an argument to justify further transfers of powers to the EU on the basis of the notions of "scale" and "effect". For instance, this misunderstanding of subsidiarity of a one-way street is expressed in the recent press release of the CoR itself while welcoming their inclusion on the Task Force, it warns against any interpretation of subsidiarity that could mean renationalising powers – or the European Parliament failure to even nominate members to the Task Force.

Both biased interpretations are misguided. Subsidiarity is a mechanism whereby shared powers can be transferred to the EU level *or* being returned to the national and subnational level; it is a dynamic process and any apportionment of powers is not irreversible. If circumstances change over time a power can be renationalised and if circumstances chance once again, be transferred back at

[1010] Order of 30 June 2009 - 2 BvE 2/08

EU level. Borrowing the Commission own argumentation for the lack of blank protection for Services of General Interest in spite of the existence of the Protocol 26 due to the changing nature of public service provision (COM(2011) 900 : 15), whether to exercise a power at EU or national/subnational level can change over time, in a bidirectional way.

What is lacking is a proper system where subsidiarity scrutiny can result in an more objective and negotiated allocation of responsibilities between different levels of government. This results in the application of the principle of subsidiarity being the result of conjunctural matters that often have little to do with the principle of subsidiarity itself.

The contingency of Subsidiarity: several examples

A good example is the already cited "Notion of **State Aid**" Communication (C/2016/2946) as it means a break with previous Commission policy of centralising by default[11] EU State Aid Policy within the Commission. The new policy does revise the notion of scale and effect of state aid policy thus formally expanding the areas that would be exempt from European Commission detailed rules and supervision on the basis of their limited EU wide, cross-border effect as they are "purely local operations"[12]. It is a choice based on evidence, but also on reasons of policy shift (the above-mentioned Timmermans Mission Letter) but also, as discussed above, of internal capacity constraints of the Commission as Internal Market overseer and regulator.

Another example of the fluidity of evidence of EU-wide impact can be found on **public procurement:** the Commission 2017 Public Procurement Strategy has come up with updated figures where by *"data show that total cross-border procurement (direct and indirect) has increased in recent years, to around 23 %*" (COM (2017) 572) . This compares with earlier findings *"direct cross-border procurement accounts for 1.6% of awards or roughly 3.5% of the total value of contract awards published in Ted during 2006-9"*. The newer evidence takes into account procurement contracts won by subsidiaries in another Member State. (European Commission, 2011:15) Thus the case for more detailed EU legislation varies over time (in this case, increases) in view of the changing circumstances and when more refined evidence that is available.

A third and last example, this time of the political nature of subsidiarity is on **urban mobility**. This is an issue that since the first Transport White Paper of 2011 as the Commission, supported by the haulage industry has been trying to argue for minimum rules on urban mobility in general, access restriction schemes and green zones in particular has been actively resisted by subnational organised interests [13]. It is however an issue that even authorities that are hardly suspect of wanting greater EU legislation on this area such as the UK Government agree that Title VI TFEU does include in its scope urban mobility as a shared power but has that the Commission has chosen so far not to do so (Department for Transport,2013:12). Indeed, this is an example on subsidiarity being also a matter of political choice and political opportunity. In this case the concerted action of subnational authorities and certain national governments[14] resulted in the Urban Mobility Action Plan[15] finally shied away from introducing binding legislation on this matter. To highlight the point further the latest European Parliament input on this debate, the Delli Report (2015) does make a

[11] I.e. by this we mean when Commission Guidelines or even guidance, notices or Communications documents that are not secondary law, have in practice the same value as those given the Commission Treaty powers on State Aid under art. 107 TFEU.

[12] European Commission, ´State aid: Commission gives guidance on local public support measures that do not constitute state aid´, Press Release IP/16/3141 Brussels, 21 September 2016.

[13] Joint CEMR – EUROCITIES Statement on Access Restriction schemes in cities, 2011.

[14] As evidenced, inter alia in the "Council conclusions on Action Plan on Urban Mobility, 3024th Transport , Telecommunications and Energy Council meeting", Luxembourg, 24 June 2010.

[15] COM(2013) 913 final

strong case as subsidiarity as a particular form of *NIMBYsm*. And yet, there is a clear case of some EU legislation on the matter on the basis that local decisions on urban mobility may have a cross border impact. For instance, to introduce a requirement similar to the IMI in the Services Directive so that all access restriction schemes were part of an open access database so that the mapping applications used by the transport industry had real time information of the access, parking and pollution restrictions in a given area, or that, akin to the Intelligent Transport Systems, there were common or interoperable standards on for instance signalling, payment, etc. of such schemes. The reason that there is no legislation on those is not a matter of lack of scale and effect or insufficient evidence but that on this particular example the structure of political opportunity (Tarrow, 1998) i.e. the political power ratio between those in favour of EU regulation and those in favour of no EU regulation is decidedly in favour of the latter.

Subsidiarity as a mechanism for multilevel negotiation

These and many other examples point out to the fact that subsidiarity is a matter of shared competence, evidence existing at a given time, changing needs and, last but not least a matter of political decision.

The difficulty is to define a mechanism or methodology to make that assessment: both the CoR and Commission 2015 Better Regulation Package's subsidiarity toolbox are exceedingly formulaic for that to be used as a tool to assess whether a power should be transferred at EU level or back.

A key issue is the need for better impact assessment that embed the local and regional impacts of proposed EU actions. This is only indirectly addressed in the 2015 Guidelines for Stakeholder Consultation[16].

While most countries do not have subsidiarity as a legally defined principle, many do have structured systems of multilevel negotiation of shared legal or financial obligations, including EU derived ones (Pazos-Vidal, 2017). This can happen by way of constitutional recognition (notable case is Austria) or via secondary law (Spain, Italy) or political agreement (Netherlands is a salient example, Denmark) or practice (Finland, Sweden). (COSLA, 2014)

By contrast, the EU does not have such a sophisticated multilevel mechanism when assessing subsidiarity: the provisions of the Better Regulation package does not go as far as ensuring that there is a proper understanding of the national and subnational distribution of powers -formal and actual- , the Council is as a whole unable to reflect this due to the very uneven existence of multilevel arrangements for form national positions on EU legislation, the Parliament and CoR operate mainly in the legislative phase where neither the format of negotiation nor their own institutional positioning agenda provides a locus for fine-tuned subsidiarity assessments. To be effective this has to happen at the policy formulation stage.

Crucially, the various subsidiarity reviews that were taken place in the run up to the UK-EU pre-referendum negotiations, notably the *UK Balance of Competence Review* and the *Dutch Subsidiarity reviews* (whose outputs is strongly suggested that is used as one of the starting points of the work of this Task Force) do not deal with the principle subsidiarity as such but on matters of better regulation. The Dutch review is notable for it does not propose any particular area to be renationalised under the principle of Subsidiarity but gives an ample list of EU legislation that was drafted with a poor understanding of the multilevel nature of the problem and competence at hand and the realities on the ground, thus a case of regulatory fitness.

[16] European Commission, "Chapter VII Guidelines on Stakeholder Consultation", 2015 https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-stakeholder-consultation.pdf

(3) Involving local and regional authorities in EU policymaking and its implementation.

Also covering the questions of Discussion Paper No 2:

1)What are the reasons behind local and regional authorities' low level of direct participation in Commission consultation/feedback activities which support impact assessments and evaluations of existing legislation? What improvements can be made?

4) How can the practical experience and hard data from local and regional authorities be more effectively captured by the Commission when evaluating and revising Union law?

- How can local and regional authorities be more effectively involved in designing and implementing Union legislation nationally and at Union level?

At national level there is a deficit of involvement in most Member States with the exception of a few Member States with a constitutional mandate for such involvement of regional and local governments in EU policies (e.g. Germany, Austria) or with a political tradition of central-local involvement that also extends to EU matters (Denmark, Netherlands, Sweden, Finland). These internal deficits generate in turn pressure for compensating this by the EU institutions, when the most efficient way of influencing EU decisions by subnational authorities would have been in fact by an effective subnational involvement in shaping the the national position.

Having said that the EU has plenty of scope for facilitating this process of better involvement. Some basic proposals:

- Modifying the internal workings of the Committee of the Regions so that it is a body of territorial representation instead of a mainly party-political assembly, including focusing more on subsidiarity assessment.
- Discarding the notion of local and regional governments as "stakeholders" as the 2015 Better Regulation Package.
- Recreating, in the pre-legislative phase the Consultative Committee of Local and Regional Authorities.
- Introducing Territorial Impact Assessments as standard practice.

The above points will be addressed in the answers to this and the following questions below.

Genuine Territorial Impact Assessments

Starting with the impact assessments it is fair to say that so far they fail to properly capture the different nature and distribution of competences across all Member States. While this is a task made difficult in a EU 27(or presently, EU28) context, the Commission own practices do not do a good job in capturing the different evidence that is actually available. A first problem is the continued use of external consultants to do the initial impact assessments. They do not always have the sufficient knowledge and capacities to deliver the level of detail that is required. This is coupled by the often-narrow terms of reference that the said consultants are given results in these impact assessments being unable by design to capture the competence and territorial diversity due to impact a future Commission proposal.

Some examples of this over the years have been for instance the impact assessment of the Working Time Directive (Deloitte, 2010), the inception study that led to the framing of the Local Development policies in the present ESIF Regulations (IRS and IGOP, 2012). Indeed, DG REGIO, which by definition is more aware to subnational asymmetric impacts struggles on occasion to capture this in their own commissioned research in a way that is sufficiently representative of the whole of the EU. This can be seen in some examples such as the study on the Implementation of the partnership principle and Multilevel governance during the 2014-2020 ESI Funds (European Commission, 2016) or more sensitively when it tried to develop a "Self-rule Index for Local Authorities" (European Commission, 2015).

In these and other examples the terms of reference given to the consultants/academics were so narrow that even when the concerned local and regional authorities or, more commonly the official representative bodies that negotiate on their behalf at national level those policies managed to track down the consultants carrying out the field study saw their input being dismissed by the consultants on the basis that they were not included in the original terms of reference. This is particularly notable as often the same DG does have an established set of contacts with those organisations that could have helped scope the terms of reference of such study, provide de evidence base and even the potential contacts for the survey to be made at faster and cheaper cost. Indeed, the value of having a Consultative Committee of Local and Regional Authorities at pre-legislative stage would be to precisely provide the commission with that sense check before launching any major impact assessment.

On the issue of **CoR's Territorial Impact Assessment**, the CoR (supported by ESPON) should be commended by the activist, policy entrepreneurial zeal that has been pressing for this for years[17]. The Current Better Regulation package does only go towards the TIA by half measure, so there is much merit in fully exploiting the CoR proposal contained in the Schneider Opinion (2013) and subsequent proposals such as the CoR/ESPON *Quickscan*. There are however two caveats to this.

Firstly, there is an issue with the adequacy of the CoR, as currently internally configured, to being the body entrusted by the Commission to carry out such TIAs on behalf of local and regional authorities. While it is true that the CoR does have the financial and administrative capacity to carry such evidence gathering (REGPEX, SMN, stakeholder consultation) this body works mostly on the legislative phase and under mainly party political direction. For CoR to been able to carry such role its internal workings would have to change for TIA findings could express dissenting voices and made publicly available even if the evidence would go against the tenement of the Rapporteur or the political groups that make up the CoR. This will be discussed in detail further below.

Secondly, there is great potential in carrying out quantitative TIA on draft legislation. However, the output of the *ESPON Quickscan* shows the great lack of EU-wide quality data below NUTS II level (and that when NUTS II are not merely statistical units rather than real subnational polities), which has a knock-on effect on the quality of the TIA. While there is progress by introducing proxy tools (e.g. such as those developed by the JRC, Eurostat new TERCET Regulation[18]) there is the need to build a better datatasets at regional and particularly at local level as at present. Indeed, one of the big missed opportunities of the current 2014-2020 programming period is the fact that neither the Thematic Objective 11 of the Common Strategic Framework nor the more recent Structural Reform Support Service has been proactively used to finance better data collection at subnational level in the many Member States that lack such information. This is a missed opportunity because many of those countries are also those that are eligible for the largest amounts of ESI funds and are having

[17] As a disclaimer this author helped with the original scoping at CoR of what became the CoR/ESPON TIA methodology.

[18] Proposal for a Regulation of the European Parliament and of the Council PARLIAMENT AND OF THE COUNCIL amending Regulation (EC) No 1059/2003 as regards the territorial typologies (Tercet) COM/2016/0788 final.

the biggest challenges in terms of absorption capacity: investing a sizeable part of existing allocations in building better local data would increase absorption capacity, enable better national and EU policy making, including in terms of subsidiarity assessment.

- How can EU institutions better reflect local and regional authorities' contributions when designing Union legislation?

The key starting point is to respect the principle of sincere cooperation and respect of internal constitutional arrangements that are enshrined in the Lisbon Treaty. The recent attempt to treat local and regional authorities as lobbyists in the so called Transparency Register is an evidence on the difficulty that the Commission has in assuming these principles in practice (further discussed below).

Secondly, there is the issue of representativeness of local and regional contributions to EU consultations and impact assessments. To start with there is not clear instructions in the Better Regulation package on how to operate **weighting.** If this is not determined centrally by the Secretariat-General as *chef de file* of the Package his leads to each DG, or indeed, each unit and team carrying out impact assessments and evaluations to apply different and often contradictory weightings. Sometimes if a national corporate body (be that the Bundestag or a national association of local authorities) provides a response that was negotiated and consensuated among dozens, when not hundreds of territorial units of a given country, this is treated in the evaluation as only one response. If by contrast, to avoid this each individual authority responds, broadly with the same answer, there have been cases where they were the several dozens of responses were treated as a single response. Weighting is equally important when setting up advisory bodies or task forces in scoping the potential case for future EU legislation – for instance the VAT Task Force[19] which discussed the sensitive issue of municipal VAT recovery, there was only one municipal taxation expert surrounded by several dozen mainly private sector experts.

There is also the need for a more corporate approach on involvement on local and regional authorities by the Commission at the pre-legislative phase. At the moment predominate a series of *ad hoc* approaches, from the Code of conduct Partnership Group of Experts, informal meetings between DG MOVE and pan European local organisations[20] or indeed the Sectoral Social Dialogue Committee for Local and Regional Government (the only statutory instance under the EU Treaties that subnational governments are consulted in the pre-legislative phase).

Equally the case of CoR as described in detailed by Piattoni and Schonlau (*op.cit.*) the institutional logic of the CoR leads to its outputs being that of a consensus-maker of LRAs considered a as single category in the EU decision making process. However, the CoR, while a savvy operator in the interinstitutional game has serious limitations, as currently configured to act as a direct expression of the subnational tiers of government. This means that their participation in the pre-legislative and other Commission advisory bodies such as the REFIT Platform, bodies such as the Atlantic Strategy Stakeholder Forum, or indeed this Task Force is mediatised by the CoR own internal institutional logic[21] rather than acting as a direct conduit of local and regional authorities views to these bodies.

[19] This Task Force and ensuing consultation led to the proposals on "Towards a Single VAT Area" (2017)

[20] Namely, Eurocities, CEMR, POLIS.

[21] Including sending CoR members on the basis of party political affiliation (instead of experts from a regional or local administration) to specialised and technical bodies or groups set up by the Commission on issues such as biowaste, broadband or bioeconomy to cite a number of recent cases.

However, the most evident example of the current inadequacy of local and regional involvement in the EU pre-legislative phase is the new **EU Urban Agenda** – also known as the "Pact of Amsterdam". (European Commission, 2017). On the plus side, the Partnerships that have been created under the auspices of the Dutch EU Presidency and beyond do offer a genuine system of multilevel governance (as they involve individual cities, national ministries, Commission DGs and some pan European organisations) that is also interdepartmental as there is a cross cutting DG team led by DG REGIO. If this turns to be successful in providing mutually agreed solutions to multilevel challenges (and shared competences) it would be the biggest advance since the failed Tripartite Contracts piloted in the wake of the 2001 European Commission White Paper on European Governance (Pazos-Vidal, 2017; Mazzolenia, 2006). However, the urban agenda as currently configured is an insufficient base for the pre-legislative multilevel scoping on subsidiarity that is necessary: first, because the current method is prone to *self-selecting bias* (only the most active, and financially capable areas are able to contribute), *elite capture* (in the sense described by Barca, 2009) and lack of representativeness. Even the notion that there should be an urban agenda as currently defined is questionable for many of the subjects being explored in the thematic partnerships are territorial but not necessarily or explicitly urban in nature. The urban agenda is at present a large exercise of better regulation but one that most national, subnational tiers of government are not concerned with. Furthermore, the fact that this work is not actively led by the 1st Vice-president and the Secretariat General make it unlikely that whatever recommendations are followed through. Thus, the case for a more centrally managed, structured and holistic mechanism of consultation and negotiation with the subnational level.

The input of **REFIT Platform** via the CoR representative has proven to be, due to the institutional and path dependencies of the CoR described elsewhere an insufficient mechanism that fails to capture and consult the different local and regional interests even when these are properly organised and with a direct presence in Brussels. While it is true that the Better Regulation Package proposal to give CoR a seat (one that we campaigned for during the consultation prior to the tabling of the package) mirrors similar arrangements of including subnational representatives in the national counterparts of the REFIT Platform (the Dutch ACTAL or the German *Normenkontrollrat*) these arrangements at national level can work because of a shared political culture and mutual awareness of the different actors represented around the table. With the diversity of territorial units, competences and models of central local relations across the EU this arrangement of giving representation in the REFIT process via CoR has not proven fit to purpose.

Moreover, though the Better Regulation package significantly expanded the possibilities of input at an early stage of the pre-legislative phase (including consultations on the roadmaps) this system is geared only to appear inviting to those that are more motivated and often have more resources. Unless there is a predictable mechanism for pre-legislative consultation with subnational government that is precisely focused on subnational aspects of draft EU legislation (of which there are many not just on Cohesion but particularly in EU Environmental law, Energy, public sector regulation, public sector employment, social affairs etc.) it is unlikely that the Commission will ever get the proper understanding of what is the expected impact of its legislation once transposed at the subnational level.

Ironically this deficit of imput is what the new Urban Agenda partnerships are trying to bridge, but as mentioned above their policy design make them an insufficient mechanism to capture subnational evidence. For that reason a better alternative is to recreate the 1988 mechanism of consultation Consultative Committee of Local and Regional Authorities at the pre-legislative phase, but contrary to its predecessor, it should be technical, not political, in nature and directly made up by the national representative bodies of local and regional authorities, without a fixed membership (as to prevent elite capture), attendance based on genuine knowledge of the issue at hand (so as to prevent the creation of secretariats and related bureaucracies) and would help the

Commission gather the evidence on implementation and potential impacts (and when commissioning external impact assessments and evaluations advise on the terms of references). It would supersede the above mentioned formal and informal pre-legislative mechanisms (urban agenda partnerships, Sectoral Social Dialogue Committee for Local and Regional Government, Structured Dialogue with European Structural and Investment Funds' partners group of experts) and being grounded in the General Secretariat provide a consistent engagement with subnational authorities that all Directorate General will rely on. This will be complemented, in the legislative phase by the work of a reformed CoR that better reflects its internal territorial composition and mandate (*vid. supra*).

- How can stakeholder consultation and feedback processes more systematically attract contributions from local and regional authorities?

The first notion to discard is to treat consultation of local and regional levels of government as "stakeholders", in all the EU27 Member States the principle of local self-government is a constitutionally recognized principle, and further recognised by Lisbon Treaty article 4(2) TEU and, for good measure, the Charter of Local Self Government of the Council of Europe (CETS No. 122). They are democratically elected tiers of government as the national government is. Any consultation or impact assessment need to be designed by specifically addressing the distribution of powers within each Member States rather than treating them as "black boxes".

Some of the above-mentioned Commission advisory bodies fall precisely in the trap of regarding anyone that is not the Commission, and in some instances the Member States and the EU institutions as "stakeholders". While this term, commonly used in public policy and development policy (ironically, this notion was pioneered in planning for aid developing countries[22] and then copied by the EU) to describe, map and plan engagement in drafting, managing, delivering and evaluating multilevel public policies is often used to describe "anybody that has an interest in one issue". More worryingly the term is frequently used at EU level (and in Member States lacking a consociative or corporatist culture, e.g. the UK) to even out subnational democratically elected, constitutionally recognised public authorities with civil society and private sector interested parties.

Though not exclusive of the EU institutions, the Commission has a number of notable examples such as the above mentioned Sectoral Dialogue Committee and, most saliently the Partnership Principle of Cohesion policy (Art. 5 CPR) were democratically elected governments are put at the same level as civic groups. This principle that guides the way EU Cohesion policy is run was specifically designed to involve subnational authorities in the whole policy formulation, delivery and evaluation of a EU policy that is by definition the main expression of EU multilevel governance (Bache, 1998). However, both the specific formulation in the Common Provisions Regulation and the ensuing Code of Conduct have as a result that competent subnational authorities are given equal standing as social and private sector stakeholders, effectively turning partners as stakeholders (Pazos-Vidal, 2013; Pazos-Vidal, 2014)

Certainly, the most telling example of this *subnational shortsightedness* (to paraphrase Panara and de Becker, 2011) by the EU institutions is the present distinction in the EU Transparency Register between regional authorities (that are not expected to register in the so-called "EU lobby register") and all local authorities and their official representative bodies that they are. The fact that this distinction was so leisurely made without consideration of the Treaty article 4(2) TEU is quite telling of the poor or at least insufficient understanding by the EU institutions of subnational government. While this is in the process of being resolved as the Commission recognised in

[22] A classic example of this is: Robert Nash, Alan Hudson, and Cecilia Luttrell *ODI Toolkit, Mapping Political Context, A Toolkit for Civil Society Organisations.* London: Overseas Development Institute, 2006.

September 2017 that "*the new Agreement will also exclude local and regional authorities as well as their representative associations from the scope of the Register. This reflects feedback from the public consultation and is based on the fact that these public and democratically elected structures have a special status in the European Multilevel system of governance. Representation of their interests cannot be equated with lobbying activities*."[23], it is quite telling that such an obvious mishap by Commission and Parliament could have happened in the first place.

To sum up, we need a proper system of multilevel negotiation that does ensure that the competent, democratically elected tiers of government (local/regional, national and EU) are able to work together in those policy challenges where they share a competence in the terms of article 4(2) TFEU.

The role of the Committee of the Regions

The Committee of the Regions has been very successful at providing a "voice" (Piattoni and Schonlau, 2015) and creating a new holistic category of actor in the EU discourse. However, this does not equate to being local and regional government is part of the discourse for they are by definition many voices. CoR members do not have imperative mandate (article 300.4 TFEU) but have only a representative mandate. Its various and often roundabout nomination process contribute greatly to disconnect and insufficient accountability between the representative and the theoretical *representees*. Furthermore the institutional opportunity structure and the path dependency that is prevalent at CoR was adopted from the template provided by the pre-existent the European ECOSOC, itself modelled in the French equivalent. This resulted in a mechanic of work that is mainly focused on the production of "*Avis"* during the legislative phase.

While it is true that the CoR (administration) does actively play a role of policy entrepreneur (the White Paper on Multilevel Governance and accompanying Charter, the Cohesion Alliance, the Code of Conduct for Local and Regional Authorities in the European Semester being recent and ambitious examples of such entrepreneurialism) the nature of its mandate as framed by the Treaties (and the interpretation made by national governments as nominating bodies) coupled with its own institutional inertia, has led to CoR, -to use the classic categories of Lipset and Rokkan (1967) - to be a much more efficient vehicle for the expression of the party political left-right cleavage than a conduit to the territorial centre-periphery cleavages that is in theory the reason of its very existence.

The successive changes to the Internal Rules has resulted in the party-political axis, though very relevant since the very first meeting of this body in 1994, to have been further entrenched over time: creation of a Conference of Presidents, allocating of opinions and positions following entirely party political quotas and criteria, stronger party discipline expressed in party political voting lists and patronage mechanism). By contrast, other elements of aggregation such as the territorial one are underrepresented: for instance, the CoR foresees the creation of "Interregional Groups" but they have next to no institutional support to the point that become purely voluntary bodies to the point that the Valcarcel report (2014), itself the most long-ranged review of the CoR in its 20 years of existence, openly questioned the lasting added value of such groups.

Furthermore, the financial (and increasingly logistical) dependency of the CoR from the European Parliament (the EU partisan body par excellence) constitutes a further reinforcement of the party political cleavage well above any other as the main determinant of the CoR institutional behaviour. To be fair, even if the CoR as currently considered owes much more to the tradition of the French

[23] European Commission, "Questions & Answers: Proposal for an Interinstitutional Agreement on a mandatory Transparency Register" Brussels, 28 September 2016

ECOSOC and the French Senate (implicit territorial representation, representative mandate, advisory role) than the German Bundesrat , and which was the original source of inspiration to create this body in the run up to Maastricht (Jeffery, 1996) – imperative mandate, legislative veto role- it would be naïve to pretend that even in these other proper territorial representation legislatures the party political cleavage is absent : party political cleavage is certainly not absent in either the Bundesrat as it neither ins in the Austrian Federal Council, let alone in the Belgian Senate or the Spanish one. The crucial difference however, the higher intensity of the party cleavage over the territorial cleavage in the CoR compared to the second federal or territorial chamber in those Member States that have it.

At this juncture, and in terms of recommendations for this Task Force, we should open the question the adequacy of a reformed CoR as a vehicle to agree questions on subsidiarity moving forward:

- **A Senate of the Regions:** the ambition contained in the Valcarcel Report and the CoR 20th Year Anniversary Resolution 2014, was, according by their promoters' own admission, a "long term ambition". Clearly it would require Treaty change doing away with the representative mandate, and the Members' present nomination by national governments. It should be the regional chambers, national associations of municipalities or indeed the whole body politic of local and regional elected politicians in a Member State the ones who should elect their representatives to a said Senate. Also, a significant degree of best practices that CoR still needs to learn from the Congress of Local and Regional Authorities of the Council of Europe: the existence of separate internal organs for local and regional authorities (in the CoR case should also include the Regions with Legislative Powers), the bigger depth an use of external expertise in drafting their reports, their more reduced in number but more substantive in nature output or the detailed assessment in the Congress reports of the diverse and often asymmetric impacts of a given issue. Indeed, CoR output should put on record more about what Bavaria or Dresden think rather than try to even out from a lowest common denominator as at present. Indeed, the more this asymmetric impacts were captured by CoR the less need would be to recreate the Consultative Committee for Local and Regional Authorities in the pre-legislative phase, as CoR would then be able to provide that service to local and regional interest *both* at the pre and legislative phase. The CoR budget is close to 100 million euro. Clearly with such enormous resources the CoR political influence and its opinions, and particularly its subsidiarity considerations, should have the same quality as those provided by the House of Lords European Scrutiny Committee or the Danish *Folketing.*

- **CoR Subsidiarity Scrutiny as currently configured is insufficient**: the change of internal arrangements in 2015 has resulted in subsidiarity scrutiny being highly decentralised across CoR secions. It quite telling that as opposed to the Commission own proposals (or some Member States Explanatory Memoranda on EU proposals) most CoR opinions do not have a dedicated section to assess subsidiarity compliance , neither the existing scrutiny arrangements arrangements (REGPEX, SSE , Subsidiary Expert Group) are institutionally designed to provide such a view on matters on subsidiarity that can be independently expressed from the personal views of the Rapporteur and that of its Political Group. A possible solution is decoupling altogether the CoR role of subsidiarity scrutiny from the production of Opinions. A small Subsidiarity Scrutiny Commission supported by the existing Expert Groups and Networks could be created to assess subsidiarity in all proposals and issue independent assessment on subsidiary compliance. Its outputs (including dissenting voices) would be made public and sent to the EU Legislator and the Court. The existence of a dedicated body is the method of choice of a number of national and regional parliaments to deal with subsidiarity (or, more widely, in countries such as France and Finland, with constitutional matters in lieu of Constitutional Courts) in a time efficient way.

- **A more political CoR:** Though the CoR 20 Year anniversary and the Valcarcel report (2014) , together with the more political CoR advocated by the current CoR President Lambertz "Four Chantiers" plan (CoR, 2017), are a good basis, a significant review of CoR internal work, resources, moving away from the French/EU Economic Social Committee path dependency, and more towards a genuine territorial representation chamber is necessary as to guarantee that CoR is fit to purpose to deal with subnational representation and subsidiarity scrutiny in a reformed EU. However much of the above is a matter of internal political will within CoR for many of these changes can be operated without Treaty reform. For instance, Treaty reform could be necessary to turn CoR Amendments into direct amendments to legislation that could be voted directly by EP at Committee stage. However, a IIA and a change of the Parliament own rules could be sufficient before any IGC formalsied such a change in the Treaties.

The (re)creation of a Consultative Committee of Local and Regional Authorities

This new body would advise the Commission on the pre-legislative phase a) the principle of subsidiarity, and b) more generally the local and regional impact of draft legislation. Such body would be made up of the local and regional entities that at national level advice national governments when drafting legislation (including EU negotiation lines) that affect local government competences and finances.

These national bodies, are in some cases such as Austria are even constitutionally recognized and mandated to be consulted. Others, such as the Italian the *Conferenza Stato Regione* of Italy is another model that can be source of inspiration as it is an efficient, predicable and regular mechanism for multilevel negotiation including on EU issues. As opposed to its 1988 predecessor, it should not be a political platform. Instead, it should bring to Brussels in a regular and structured way the subnational authorities, institutions or bodies that already advice and negotiate with the national government on matters affecting local and regional government. This would allow the Commission to have, at a pre-legislative stage the input of those organisations that would deal with the transposition of that EU legislation and, in some cases such as the few Member States discussed above, the ones that will advice their government as their formulate the national negotiating position on an EU issue.

As opposed to CoR it would not have appointed elected members and it would be a technical not a political body (meaning elected politicians) who in turn would have imperative mandate. It would centralised engagement at Sec Gen and consultation of LRAs. It would constitute a structured venue for policy formulation and agreement of the apportionment of shared competences and subsidiarity scrutiny. It would meet every quarter and centralise consultation with subnational governments. Clearly, the more CoR could profoundly reform itself to be capable to carry out independent subsidiarity scrutiny and directly represent the local and regional level the less need for this new, nimbler body in the pre-legislative phase would be needed. However given the CoR institutional inertias and lack of follow up of the ambitious 2014 Valcarcel proposals and the Commission own policy silos, creating a new Consultative Committee of Local and Regional Authorities seems at present the most practicable, efficient, and resource limited way to ensure that the EU policies are properly formulated having an accurate knowledge of their potential impact at subnational level, including dealing with matters of subsidiarity and thus avoiding protracted discussions at the legislative and jurisdictional levels later on.

Council and European Parliament

From Discussion Paper No. 2

(2) How can the views of local and regional authorities about subsidiarity and territorial impacts be better taken account of by the European Parliament and the Council when considering Commission proposals?

As regards to Council, the answer is pretty straightforward. They should not need to rely on local and regional views on subsidiarity and territorial impacts if they have in place a proper system of subnational negotiation and consultation ahead of formulating their national negotiating position. As described above, only a minority of Member States (Netherlands, Finland, Sweden, Denmark and Italy have a comprehensive system of formulation and negotiation of the national position on EU legislation), others do have a system that is functional, at least in part for the regional level only and often relies far more on informal political arrangements than the formal constitutional or institutional arrangements where they exist (Germany, Austria, Spain, UK). Overall, save for small, homogeneous, multiparty and consensus-driven Member States all these systems have significant shortcomings. Ideally, it would be up to the Member States to optimise their own internal multilevel negotiation arrangements, but for the time being the existence of a reinforcement of those mechanism via the direct input of LRAs to the EU institutional level seems indispensable. In terms of Council this means, in very practical terms that the evidence that is made available during the pre-legislative stage is available to Council discussions as well. There is no barrier for that to happen, if it does not happen is that it hardly fits with the institutional nature of Council.

With regards to the European Parliament, and while acknowledging that throughout this submission a significant criticism is made that party-political matters excessively permeate discussions about subsidiarity and the existing EU mechanisms that exist to give a voice to subnational authorities, namely the CoR, there is scope for improvement.

First the CoR and the Parliament signed a Cooperation Agreement in 2014, that among other things, allowed for CoR Rapporteurs to speak at Parliamentary Committee meetings (which is indeed increasing), it remains underused. Particularly since the creation of the European Parliament Research Service there is an increased drive at the European Parliament to carry their own impact assessments, including on matters related to subsidiarity in order to increase its autonomy of scrutiny within the interinstitutional negotiation framework – thus following the practices of the likes of the US Congress-. While the Commission, during the negotiation of the current Inter-Institutional Agreement, made a case for the need of joint Impact Assessments as to reduce the different interpretations of draft legislation during the legislative process (thus making it faster, more efficient and with less risk of misunderstandings during the transposition phase) it seems pertinent, to preserve the interinstitutional balance, that Parliament retains a good deal of autonomy to set out its views separately including by gathering its own evidence via public consultations, evidence sessions, hearing, and most particularly external studies and impact assessments, including on subsidiarity. Having said that, there is a case for the same recommendations contained above with regards to the way such assessments are made by the Commission in terms of Subsidiarity and local and regional inputs to also apply, mutatis mutandis, to Parliament's own internal policies and mechanism. Clearly, fully exploiting the CoR resource provided by the Cooperation Agreement is a key part of this, however due to the above mentioned predominant party political cleavage in CoR no less than at Parliament, it seems pertinent that to ensure that local and regional authorities can also directly and by themselves input to consultations or impact assessments carried out by the Parliament services.

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