

## CONDITIONS FOR EFFECTIVE AND AUTONOMOUS COMPLIANCE WITH THE FUNCTION OF MONITORING THE SUBSIDIARITY PRINCIPLE BY THE PARLIAMENT OF CATALONIA\*

Miquel Palomares Amat\*\*

### Abstract

The procedure for monitoring the subsidiarity principle, as governed by the treaties of the European Union and, in the case of Spain, in its Law on the Joint Committee for the EU, does not fit with either the nature or the characteristics of parliamentary actions. The brevity of the periods granted and the exclusion of opinions on the initiative's content, amongst other matters, have led to indifference on the part of parliamentarians and the trivialisation of the procedure. This is why, in my opinion, there is a need to rethink this procedure from the standpoints of both its regulation and its on-the-ground practice. This paper argues that, to overcome some of the aforementioned problems, a series of conditions needs to be met. Firstly, the procedure for monitoring the subsidiarity principle must be configured as just one part of a broader parliamentary policy with regard to relations with the European Union. Secondly, there is a need for systematic dialogue and cooperation between all the institutions involved in this function. Lastly, it argues that the Parliament of Catalonia should be granted the human and material resources allowing it to fulfil the obligations arising from the Treaty of Lisbon.

Key words: subsidiary principle; European Union; Parliament of Catalonia; regional parliaments with legislative competences; active subsidiarity.

## CONDICIONS PER A UN COMPLIMENT EFICAC I AUTÒNOM DE LA FUNCIÓ DE CONTROL DEL PRINCIPÍ DE SUBSIDIARIETAT PER PART DEL PARLAMENT DE CATALUNYA

### Resum

*El procediment de control del principi de subsidiarietat, tal com es regula en els tractats de la Unió Europea i, en el cas de l'Estat espanyol, en la llei de la Comissió Mixta, no s'adequa a la naturalesa ni a les característiques de l'actuació parlamentària. La fugacitat dels terminis o l'exclusió de les consideracions de contingut de les iniciatives, entre altres aspectes, han conduït al desinterès dels diputats i han comportat la banalització del procediment. Per aquest motiu, en la meua opinió, caldria repensar aquest procediment tant des de la perspectiva de la seva regulació com des de la pràctica realitzada. En aquest estudi s'argumenta que la superació d'alguns dels problemes esmentats requeriria una sèrie de condicions. En primer lloc, la funció de control del principi de subsidiarietat s'hauria de configurar com un element més d'una política parlamentària més àmplia amb relació a la Unió Europea. En segon lloc, caldria l'establiment d'un diàleg i cooperació sistemàtics amb totes les institucions implicades en aquesta funció. Finalment, es defensa que el Parlament hauria de disposar dels mitjans personals i materials que li permetessin assumir les obligacions derivades del Tractat de Lisboa.*

*Paraules clau: principi de subsidiarietat; Unió Europea; Parlament de Catalunya; parlaments regionals amb competències legislatives; subsidiarietat activa.*

\* This article is a translation of an original version in Catalan and a revised version of a paper presented at the XIII Joint Seminar of the German Research Institute for Public Administration and the Public Administration School of Catalonia, held in Barcelona on 27 June 2019, entitled [The process of European integration, today](#).

\*\* Miquel Palomares Amat, tenured Professor of International Public Law at the University of Barcelona and Counsel to the Parliament of Catalonia. Parc de la Ciutadella, s/n. 08003 Barcelona. [mpalomares@parlament.cat](mailto:mpalomares@parlament.cat).

Article received: 16.07.2019. Blind review: 19.08.2019 and 20.08.2019. Final version accepted: 13.09.2019.

**Recommended citation:** Palomares Amat, Miquel. (2019). Conditions for effective and autonomous compliance with the function of monitoring the subsidiarity principle by the Parliament of Catalonia. *Revista Catalana de Dret Públic*, 59. 52-67. <http://doi.org/10.2436/rcdp.i59.2019.3339>

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## 1 Introduction

The goal of this paper is to perform a diagnosis of the procedure for monitoring the subsidiarity principle of the legislative acts of the European Union by the Parliament of Catalonia since the entry into force of this function, arising from the Treaty of Lisbon. Based on this diagnosis, some proposals shall be formulated to achieve, in the author's opinion, an effective and autonomous exercising of this function.<sup>1</sup>

The procedure for monitoring the subsidiarity principle raised great expectations, from both a political and a doctrinal standpoint. These expectations were associated, firstly, with the possibility of parliaments participating in the adoption of European Union decisions and, secondly, with the potential integration of EU policies and affairs within the day-to-day work of parliaments.

In my opinion, in the case of the Parliament of Catalonia, the aforementioned expectations have not been met. This is why it is my belief that there is a need to rethink this procedure from both the perspective of its normative regulation, both Europe-wide and domestically, and that of its practical implementation. In this regard, the article seeks to conclude the analysis performed on the same issue in 2011.<sup>2</sup>

On a European level, this idea of "rethinking" the procedure also forms the basis for the report of the "Task force on subsidiarity, proportionality and doing less more efficiently".<sup>3</sup> This task force was created from an initiative by President Juncker stemming from the White Paper on the Future of Europe, of 14 November 2017. Under the chairmanship of Commission Vice-President Frans Timmermans, it was made up of three members of the national parliaments of Austria, Bulgaria and Estonia and three members of the Committee of the Regions. The European Parliament was also invited (but declined) to participate.

One of the task force's conclusions was on the need for a new way of working to improve current policymaking processes, one that includes a more effective contribution from the interested parties, particularly local and regional authorities. It therefore proposes the concept of "active subsidiarity" that promotes a greater degree of assumption and understanding of the European Union's tasks by all levels of government involved.

This article is structured as follows: following a section on the general aspects of parliaments' participation in international affairs and on the principle of subsidiarity, it outlines the institutional procedure adopted by the Parliament of Catalonia to exercise the subsidiarity monitoring function. The following section seeks to perform a diagnosis of this parliamentary function in the Parliament of Catalonia. Finally, the last section proposes some conditions that may, in the author's opinion, encourage a more effective and autonomous exercising of this parliamentary function.

## 2 General aspects

### 2.1 The indispensable European policy of EU Member State parliaments for effective and autonomous exercising of parliamentary functions

International and European affairs have, traditionally, been matters subject to the analysis and action of governments. Parliament's role has been limited to overseeing and driving government and the function of authorising certain international treaties. Nevertheless, within the scope of the European Union, treaties have been progressively incorporating parliamentary actions different from those habitually performed by government.<sup>4</sup>

What is more, this parliamentary participation entails some peculiarities such as the involvement of parliamentary minorities or a requirement for public debate. Indeed, some of these peculiarities, inherent in the representative parliamentary system, mesh with the core, recurring themes of the idea of Europe,

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1 This article summarises and revises my contribution to the seminar entitled *El procés d'integració europea, avui (The process of European integration, today)*, on 27 June 2019 organised jointly by the Public Administration School of Catalonia and the Deutsches Forschungsinstitut für öffentliche Verwaltung Speyer (FÖV).

2 Palomares (2011: 19-58).

3 European Commission. [Report on the Task force on subsidiarity, proportionality and doing less more efficiently.](#)

4 Palomares (2005); Fromage (2015).

as formulated by authors such as Saint Simon, Emil Ludwig, James Lorrimer and Richard Coudenhove-Kalergi.<sup>5</sup>

The characteristics of contemporary society have meant that the international law it has created has increasingly greater importance in parliamentary activities. The adoption of decisions and regulations on an international level that are worldwide in scope and impact has led to the required monitoring by parliaments for an effective exercise of their functions.

As a result, the participation of parliaments in international affairs, including the framework of the European Union, is increasingly justified due to the fact that international and EU law are increasingly affecting and providing a framework for parliamentary functions, both the legislative function and that of prompting and overseeing government actions, not to mention their budgetary function.

In any case, practice has led, over recent decades, to an extraordinary increase in the international actions of parliaments, including the parliamentary assemblies of sub-state political entities, such as Quebec.<sup>6</sup> So it is that parliamentary practice reflects the conclusion of accords, participation in international parliamentary cooperation bodies on worldwide,<sup>7</sup> regional<sup>8</sup> or inter-regional scale,<sup>9</sup> participation, with different statutes, in the parliamentary bodies of international organisations<sup>10</sup> and, finally, official visits and other forms of bilateral relations. These foreign parliamentary actions are characterised by a wide range of goals, structures and working methods and have been dubbed “parliamentary diplomacy”.<sup>11</sup> As precedents for this process, we would note, on the one hand, the creation in 1899 of the Inter-Parliamentary Union (IPU), within the context of international initiatives in defence of peace and international humanitarian law and, on the other the assemblies of international organisations that proliferated after the Second World War,<sup>12</sup> which, in the case of Europe, included national parliaments of Member States.<sup>13</sup>

The Parliament of Catalonia has been formulating its own foreign actions since its first term. The fields in which its foreign policy has manifested relate, generally speaking, to the aforementioned practices of the majority of parliaments within the framework of international society.<sup>14</sup> So, the Parliament has established conventions with other parliaments,<sup>15</sup> participated in international inter-parliamentary cooperation bodies

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5 Conseil de l'Union Européenne. *Donner corps à une idée Europe*. Bruxelles: Bruylant, 2009.

6 The National Assembly of Quebec features different delegations assigned to its foreign policy both within a multilateral framework (*Assemblée parlementaire de la Francophonie*, the Commonwealth Parliamentary Association, the Parliamentary Confederation of the Americas, the National Assembly Delegation for Relations with the United States), and bilaterally (National Assembly Delegations for Relations with Bavaria, the French Community of Belgium/the Federation of Wallonia-Brussels/the Region of Wallonia/Belgium, Catalonia, the French National Assembly, the French Senate, European institutions) (<http://www.assnat.qc.ca/en/diplomatique/relations-bilaterales/index.html>).

7 The Inter-Parliamentary Union (IPU), the Parliamentary Center and Parliamentarians for Global Action.

8 The Latin American Parliament, the Pan-African Parliament, etc.

9 The Parliamentary Association for Euro-Arab Cooperation.

10 The *Assemblée parlementaire de la Francophonie*, the ASEAN Inter-Parliamentary Assembly, the Parliamentary Assembly of the Council of Europe, etc.

11 Elorriaga (2001: 7-20); Stavridis (2019: 187-206). For a bibliography on parliamentary diplomacy, see: <https://www.parlament.cat/document/recursos/4411539.pdf>.

12 Martínez (2001: 11ff.).

13 For example, the Consultative Assembly of the Council of Europe, as established in 1949 in the Treaty of London, which created the Council of Europe.

14 With regard to the action of Autonomous Community parliaments, cf., for example, Arrufat (2009).

15 For example, with the California State Senate (1986), with the National Assembly of Quebec (2002), the Regional Council of Tuscany and with Flanders (2002) and with the House of Representatives of the Kingdom of Morocco (2004).

and conferences, such as the Conference of European Regional Legislative Assemblies (CALRE)<sup>16</sup> and the *Assemblée parlementaire de la Francophonie* (APF),<sup>17</sup> made official trips and established bilateral relations.

Within the framework of the European Union, the international actions of the Parliament of Catalonia have been evidenced by means of the exercise of the subsidiarity monitoring function, the exercise of the right to petition<sup>18</sup> and the establishment of bilateral relationships with the European Parliament. Lastly, the committee with powers over Foreign Action and the European Union has, in each parliamentary term and in the exercise of its parliamentary functions, adopted resolutions and made appearances and held debates with regard to international and European affairs and, on occasion, a plenary session of the Parliament has made interpellations on international and European matters.

With regard to the normative basis for the Parliament's foreign action, it should be noted that Catalonia's Statute of Autonomy and, particularly, Law 16/2014, of 4 December, on foreign action and relations with the European Union, have boosted Parliament's functions in foreign affairs. The Statute assigns to the Parliament, together with the Catalan Government,<sup>19</sup> the function of submitting to the Spanish Government or its Parliament any observations they deem fit on Spanish State initiatives and proposals submitted before the European Union (Art. 186) or on the conclusion of treaties that affect the powers of the Government of Catalonia (Art. 196). Likewise, the Statute, firstly, establishes that the Catalan Parliament participates in the procedure for monitoring the subsidiarity of the legislative acts of the European Union (Art. 188) and, secondly, empowers it to establish relations with the European Parliament (Art. 187.4). Law 16/2014 lists a series of functions that the Catalan Parliament must exercise pursuant to the Statute and in accordance with the principle of reglementary autonomy. Amongst these functions, the Law states that it is the role of Parliament to participate, where applicable, in international inter-parliamentary cooperation bodies and conferences.<sup>20</sup>

So, based on the aforementioned normative foundation and given that the political and legal actions of the European Union affect and provide the framework for parliamentary functions, it is in my view essential

16 CALRE brings together the regional parliaments of the European Union with legislative competences. It is made up of the parliaments of Spain's Autonomous Communities, Italy's regional assemblies, Belgium's regional and community assemblies, the parliaments of Germany's and Austria's *Länder*, the autonomous parliament of Finland's Åland Islands, the regional assemblies of the Azores and Madeira (Portugal), and those of Wales, Scotland and Northern Ireland. These parliaments represent more than two hundred million inhabitants and, although possessing different types of competences or powers, all have two features in common: they belong to the European Union and have legislative powers to transpose European regulations into domestic law.

The Parliament of Catalonia has chaired this organisation and has coordinated the Subsidiarity Working Group. See the Parliament of Catalonia publications on the work within the framework of CALRE and on the principle of subsidiarity, in the collection "*Testimonis Parlamentaris*": *El principi de la Subsidiarietat a la Unió Europea* (The subsidiarity principle in the European Union, 2005), *El control del principi de subsidiarietat* (Monitoring the subsidiarity principle, 2010a); *L'aplicació parlamentària del principi de subsidiarietat* (Parliamentary implementation of the subsidiarity principle, 2010b); *Les relacions entre els parlaments regionals amb competències legislatives i la Comissió Europea en la fase inicial del procés legislatiu de la Unió Europea* (Relations between regional parliaments with legislative competences and the European Commission in the initial phase of the legislative process of the European Union, 2012); *La dimensió regional del principi de subsidiarietat i la seva aplicació pràctica a Catalunya* (The regional dimension of the subsidiarity principle and its practical implementation in Catalonia, 2012).

17 Palomares (2016).

18 At its session of 10 February 1988, the Cultural Policy Committee of the Parliament of Catalonia adopted a resolution requesting that the European Parliament declare Catalan as an official language of Community institutions. This request was accepted and classified as a petition and entered into the public register of documents of the European Parliament under number 113/88, with prior reports from the Committee on Petitions, the Committee on Legal Affairs and Citizens' Rights, the Committee on Youth, Culture and Education, Information and Sport of the European Parliament. Additionally, the European Parliament's Legal Service issued an informative note on the matter. As a result of this petition (and a subsequent one by the Parliament of the Balearic Islands in 1989), the European Parliament adopted the Resolution of 11 December 1990 on languages in the Community and the situation of Catalan, in which it requested that the Council and the Commission, amongst other actions, publish the core treaties and texts of the European Communities in Catalan. This request is of interest because the treaties subsequently configured a right of petition, within the framework of citizenship of the Union, as a right that should be exercised by citizens of the European Union, by a physical or legal person, more than by a public institution. Cf. Generalitat de Catalunya (1990). *El català reconegut pel Parlament Europeu*. Estrasburg, 11.12.90.

19 Article 196.1 contains a technical error, arising from common parlance, given that it refers to the *Generalitat* (Government of Catalonia) and the *Parlament* (Parliament), contradicting Article 2 of the Statute itself, which establishes that the *Generalitat* is made up of the *Parlament*, the Office of President of the *Generalitat*, the *Govern* (Government) and the other institutions established by Chapter V of Title II.

20 Article 5 of the Law on foreign action and relations with the European Union.



that any parliament of an EU Member State have a “European policy”, for duly effective and autonomous exercising of its parliamentary functions.

## 2.2 The scope of the Parliament of Catalonia’s participation: reference to the principle of subsidiarity in European Union law

Few concepts within the framework of the European Union have been the cause of such disagreement but also such interest. The flexible, dynamic and multidimensional nature of the principle of subsidiarity has doubtless led to its acceptance and defence by both Union institutions and some Member States, including local and regional bodies. Nevertheless, its nature, content and functionality within the process of European construction have by no means been the subject of consensus.<sup>21</sup>

By virtue of the procedure for monitoring the subsidiarity principle established by the Treaty of Lisbon, national parliaments and those regional parliaments with legislative powers must be consulted on the fit of all draft legislative acts of the EU’s institutions with the principle of subsidiarity. In addition to governing treaties, within the framework of Spain, the regulatory basis for the participation of autonomous community parliaments is to be found in Law 24/2009, of 22 December, modifying Law 8/1994, of 19 May, governing the Joint Committee for the European Union, to adapt it to the Treaty of Lisbon of 13 December 2007. In the case of the Parliament of Catalonia, the Statute of Autonomy and the Parliament’s Regulations also provide a normative basis.

Pursuant to the definition of the principle of subsidiarity contained in Article 5(3) of the Treaty on the European Union (TEU), 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 rather, by reason of the scale or effects of the proposed action, can be better achieved at Union level. There are, then, two requirements for exercising a Union power: the necessity and the added value of the European Union action. So, if the objectives of the action can be sufficiently achieved by Member States (the necessity test) and cannot be achieved better at a Union level (the added value test), then the Union must not act. The legal mandate contained in Article 5(3) TEU makes it clear that the two requirements set must be met. Thus, the objective that underlies and gives sense to the principle of subsidiarity is the greatest effectiveness of the power that is acting, with the legally-established limits and functions.

The two aforementioned conditions that legitimise the exercising of action by the European Union also entail a political appreciation and some legal considerations. For these purposes, the doctrinal distinction between “material” and “formal” subsidiarity may be of use. In its material sense, subsidiarity refers to the substantive criteria that may help guide Union legislators. In its formal dimension, subsidiarity encompasses the conditions of a procedural nature that institutions must fulfil.<sup>22</sup>

Thus, the aforementioned conditions call for a particularly political decision, the responsibility of the Union legislator and Member States’ parliaments, to choose between equally legally valid alternatives. In this way, resorting to the principle of subsidiary appears not so much as an *a priori* criterion but rather one that varies depending upon the time and place, seeking consensus between the competent public authorities with regard to the establishment of the authority that can most effectively be involved in a specific sphere. Evolving practice, legal interpretation and doctrine could furnish criteria to more accurately establish the conditions that would legitimise the fit of a draft legislative act with the principle of subsidiarity. This flexible, consensual and alternative conception of powers has, in the United States, been dubbed “cooperative” (or “marble cake”) federalism.<sup>23</sup>

Subsidiarity is a principle regulating the sharing of the exercise of powers between the European Union and its Member States, not as a procedure for the conferral of said powers. The conferral of powers in the Union is established by the express legal basis contemplated in treaties and the interpretation thereof by the Court of Justice of the European Union. The function of the principle of subsidiarity is, according to Article 5(3)

21 With regard to the differing doctrinal interpretations of the principle, see Palomares (2011).

22 Estella de Noriega (2000: 60).

23 Fernández (1996: XIV).

TEU, that of determining who exercises a shared power—already conferred upon the Union by treaties—in a specific case.

The role of subsidiarity will depend upon the precision with which the constitutive treaties define the particular power or competence of the European Union and, most especially, the exercise thereof. In this regard, subsidiarity also entails consideration of the principle of conferral of competences. So it is that the greatest fit possible is required between the powers conferred and the goals sought.<sup>24</sup> To the extent that treaties clearly and exhaustively govern the conditions for justifying the exercising of a Union competence and the European Union legislator demonstrates that these conditions are met, the action's necessity test and added value test will be clear. Professor and CJEU judge C. Timmermans has given as an example the field of harmonising internal market legislations. The provisions of the Treaty on the Functioning of the European Union (TFEU) (Arts. 114ff) imply that if the Union institutions show, to justify an action, that the diversity of legislations may constitute an obstacle to the internal market,<sup>25</sup> affect trade<sup>26</sup> or distort competition, the conditions required by the principle of subsidiarity will be met and there will be no room for debate on said principle to justify an action.<sup>27</sup> The Court of Justice itself has noted that the goal of harmonisation of legislations necessarily requires an action at European Union level without going into any further detail on this requirement.<sup>28</sup> Nevertheless, should the founding treaties not precisely provide the conditions for justifying the exercise of a competence, the Union legislator must thoroughly substantiate a legislative act's fit with the principle of subsidiarity by, for example, making use of the criteria furnished in Protocol 2 to the Treaties on the European Union on the application of the principles of subsidiarity and proportionality or the impact studies issued by the European Commission. In such cases, subsidiarity needs to play a more important role to establish whether the European Union should be the entity to act.

### 3 The institutional procedure adopted by the Parliament of Catalonia to exercise the function of monitoring the subsidiarity principle

In its two latest terms, the sectoral committee with competence over foreign action and the European Union has agreed to create the Working Group on Control of the Principle of Subsidiarity and Monitoring of European Union Law, made up of one representative from each parliamentary group,<sup>29</sup> with the normative basis stemming from Article 55 of the Parliament's Regulation. This article empowers the Committees, at the proposal of their Bureau or of two of the parliamentary groups, to agree to create working parties to study or prepare affairs with which the committee is charged or any other matter, which, by reason of its nature, falls within its competence.

The grounds justifying their creation are based on the shortcomings of parliamentary procedure with regard to the subsidiarity monitoring function, existing since its establishment by the Treaty of Lisbon.

The reglementary procedure in existence prior to the creation of the Working Group, based on the wording of Article 204 of the Parliament's Regulations, stated that it was the sectoral committee competent by reason of the subject of the Europe Union legislative act that would carry out this function. This procedure did not permit the carrying out of the task of selecting the initiatives of greatest interest to the Parliament nor, accordingly, the enjoyment of an overview of these European Union initiatives received by the Parliament by virtue of this function. Furthermore, the wide range of subjects, the workload and the responsibilities making up the agendas of the different sectoral committees did not permit the creation of efficient dynamics within this framework.

24 Héraud (1968: 48).

25 Ruling of the Court of Justice of 10 December 2001 (see documentary references).

26 Ruling of the Court of the First Instance of 27 September 2006 (see documentary references).

27 Timmermans (2010: 18).

28 Ruling of the Court of Justice of 12 November 1996 (see documentary references).

29 [Resolution 1/XI](#) of the Parliament of Catalonia, on the creation of the Working Group on Control of the Principle of Subsidiarity and Monitoring of European Law, BOPC no. 79, of 11 March 2016.

[Resolution 1/XII](#) of the Parliament of Catalonia, on the creation of the Working Group on Control of the Principle of Subsidiarity and Monitoring of European Law, BOPC no. 133, of 23 July 2018.

The creation of the Working Group entailed, in theory, a number of advantages compared with the previous procedure. The Working Group may carry out the task of analysing and selecting the draft European Laws received within the framework of this parliamentary function. This analysis permits the identification, in a very initial phase of the brief period of four weeks contemplated in this procedure, of those initiatives in respect of which it would be recommendable for the Parliament to issue an opinion, by reason of their impact upon the competences of the Government of Catalonia or due to their specific interest. In this way, this body can distinguish between those initiatives that are or are not of importance for the Parliament of Catalonia.

So, the Working Group can make an immediate decision to issue a draft opinion that must subsequently be approved by the decision-making body within the framework of the subsidiarity control procedure, which in this parliamentary term is, by decision of the Bureau, the Committee on Foreign Action, Institutional Relations and Transparency.

This selection also permits, firstly, the immediate requesting of a technical report from the Government on the content of initiatives classified as important and, secondly, the drawing up by Parliament's services of an information dossier on said content, so that deputies can have more information available.

On a complementary basis, the Working Group may also perform the function of analysing the preparatory documents of European Union institutions at a pre-legislative stage, such as the European Commission's Work Programme. This analysis of the preparatory documents of European Union institutions entails benefits for the exercising of the subsidiarity monitoring function in that Parliament has more information on future EU initiatives before formal proposals are made by the European Commission. Similarly, this analysis of the preparatory documents could be beneficial to other parliamentary functions, in that it would permit the alerting of sectoral committees with regard to European initiatives of interest to Parliament at a very initial, pre-legislative stage, of the European Union's normative procedure.

Accordingly, this analysis could help Parliament shape a political strategy with regard to those European Union initiatives of interest to it.

#### **4 One possible diagnosis of the subsidiarity monitoring function in the Parliament of Catalonia**

From the work of the European Convention's Working Group on the Principle of Subsidiarity and the regulations of the Lisbon Treaties themselves, it can be seen that one of the possible objectives of establishing a procedure for the monitoring of the subsidiarity principle was, basically, to integrate European policy into parliaments' day-to-day work, so as to bring this policy into closer contact with their parliamentarians and MPs and, ultimately, the public and, in this way, counter criticisms regarding the democratic deficit of the EU's institutional system.

The procedure for monitoring the subsidiarity principle, as currently contemplated in the Treaty of Lisbon and, in the case of Spain, in the Law on the Joint Committee for the EU, does not in itself contribute to this goal of integrating European policy into the day-to-day work of the Parliament of Catalonia.<sup>30</sup>

In my view, this is the case due to a range of problems arising from both the regulations themselves and also from practice, which have been made clear during the Catalan Parliament's exercising of this function.

One problem or limitation arises from the fact that regulations configure this function (particularly for regional, but also for national, parliaments) as an information-related procedure, more than one of participation, with regard to the legislative initiatives of the European Union, at a relatively advanced stage of the Community legislation procedure. The forwarding to parliaments of all European Union legislative initiatives prior to their adoption is, in my opinion, the greatest virtue, as things currently stand, of the procedure for monitoring the subsidiarity principle.

Another problem is caused by the fact that European Union institutions' knowledge of the opinion of the Parliament of Catalonia on the part of is subordinated and mediated by a prior decision of the Spanish

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30 Palomares (2015: 265ff.).



Parliament's Joint Committee, by virtue of the way this procedure is governed in the case of Spain. This means that EU institutions do not have the possibility of hearing the opinion of the Catalan Parliament if, firstly, the Joint Committee does not decide to issue its own opinion on the same draft legislation and, secondly, if the Joint Committee does not include Parliament's observations.

The only case I am aware of in which the observations of the Catalan Parliament were included was in the Joint Committee Report on the Regulation creating the Asylum, Immigration and Integration Fund.<sup>31</sup> This report included the Parliament's proposal that regional administrations with legislative competences have access to this Fund. These observations were originally formulated by the Catalan Government and assumed by the parliamentary groups lending their support to the Government in the Catalan Parliament. The reasons for incorporating these observations from the Catalan Parliament lay in the fact that the Rapporteur for this Joint Committee Report was Senator Eva Parera, of the Catalan party CIU.

A third problem arises from the fact that the object of the analysis, as provided for in regulations, focuses more on technical and legal aspects, such as subsidiarity-related matters, rather than the material content of the proposals. Nevertheless, in practice, more active parliaments tend to submit observations on their content, so it could be argued that a precedent has been set.

In my view, any reform of the procedure for monitoring the subsidiarity principle should cover this aspect: giving national and regional parliaments the chance to give their opinions on content-related aspects of proposals. In my experience in the Catalan Parliament, subsidiarity or proportionality-related technical matters are not of great interest to parliamentarians.

The Task Force suggests a grid for a joint assessment between the European Union's institutions and Member States' parliaments with the regard to the principles of subsidiarity and proportionality, including technical aspects associated with the legal basis, the types of competences and compliance with the conditions of subsidiarity and proportionality.

In my opinion, the proposed assessment grid should feature a section for contributions on content, in addition to technical and legal aspects, on the understanding that it is the role of European Union institutions to draw up the content of the EU's legislative initiatives.

By way of example for the point I am making, I would like to highlight a European Union legislative act that was submitted, in the form of a proposal, for the consideration of the Parliament of Catalonia, as part of the exercising of the function of monitoring the subsidiarity principle. This was Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011.<sup>32</sup>

The general objective of this European Union legislative act is to establish a database on third-country nationals crossing the external borders of the Member States, for the purpose of the detection and investigation of terrorist and other serious criminal offences.

In this case, the opinion of the Parliament of Catalonia on this proposal was that the draft legislative act fitted with the principal of subsidiarity—i.e., that the proposal's objectives could be achieved better at a European Union rather than a Member State level—but it also made some comments on its content, specifically on the need for the participation of regional authorities (the *Mossos d'Esquadra* police force of the Government of Catalonia) whose powers would be affected. It should be noted that Catalonia's Statute of Autonomy provides a legal basis in this regard in that it acknowledges that the Catalan Government must participate in the exchange of information and in international police cooperation (Article 164). This observation would appear particularly pertinent from a regional standpoint and that of federal logic, inherent in the European Union, with a view to articulating a multi-level system of government.

31 [BOCG, 14 March 2012, no. 24, p. 4.](#)

32 [DOUE L, núm. 327, 9/12/2017.](#)

Finally, another problem stems from the fact that the Parliament only has a period of four weeks in which to carry out this function. The Task Force recommends the flexible application of an eight-week period and that, when the opportunity for amending the treaties arises, twelve weeks be established for the drawing up of a reasoned opinion. The fact is that the periods of eight or four weeks are unsuited to parliamentary practice. Therefore, the procedure for monitoring the subsidiarity principle should be reformed to establish a more suitable period.

In sum, the procedure for monitoring the subsidiarity principle, as currently provided for, does not fit the nature or the characteristics of parliamentary action. The brevity of the periods and the exclusion of opinions on the initiatives' content, amongst other aspects, has led to a lack of interest on the part of parliamentarians and the trivialisation of the procedure. Evidence of this fact is the number of opinions issued by the Catalan Parliament, which has been decreasing ever since the commencement of this procedure with the entry into force of the Treaty of Lisbon.

Over the course of the 8<sup>th</sup> parliamentary term, 21 opinions were issued on a total of 65 proposals received. In the 9<sup>th</sup>, only 5 were issued on 247 proposals. In the 10<sup>th</sup>, 2 on 199 and, in the 11<sup>th</sup>, 14 on 197.<sup>33</sup> What is more, the majority of opinions have been issued by the legal services or based on observations submitted by the Government and assumed by the parliamentary groups supporting it. So, in reality, the observations were made by the Government rather than by the Parliament.

This is also a practice common to other Autonomous Community parliaments. For example, during the 12<sup>th</sup> Parliamentary term of the Spanish houses of parliament (19/7/2016-20/5/2019) the parliaments of Aragon and Extremadura submitted a report stating that the document had come directly from their respective governments.<sup>34</sup>

Obviously, the predominance of governments over parliaments is a common feature of some parliamentary systems. Nevertheless, I would like to point out that such a practice does not foster the “material parliamentarisation” of this function. Indeed, only when the opinions have been drawn up on the basis of proposals by the Parliament's services has this parliamentary function been performed autonomously by the Parliament of Catalonia.

To date, over the course of the current (12<sup>th</sup>) parliamentary term, three opinions on a total of 152 initiatives received have been adopted. The parliamentary groups have not submitted any observations in the opinions adopted in this parliamentary term. The draft opinions have been formulated by the Parliament's legal services. After approval by the Working Group, the opinions have been approved by the Committee for Foreign Action, Institutional Relations and Transparency. Indeed, due to the complexity of the current political situation, the Working Group has met only once.

To overcome some of the aforementioned problems a number of conditions would, in my opinion, need to be met.

## **5 Conditions for the effective and autonomous participation of the Parliament of Catalonia in the procedure for monitoring the subsidiarity principle**

### **5.1 The procedure for monitoring the subsidiarity principle as a one part of a broader parliamentary policy with regard to the European Union**

The need for this policy is based, on my opinion, and as noted above, on the fact that the European Union's political and legislative activities currently frame and affect the parliamentary functions of the EU's Member States.

Furthermore, from a legal standpoint, it should be noted that Article 12 of the Treaty on the European Union expressly establishes that parliaments must contribute to the functioning of the Union. So it is that the

33 [https://www.parlament.cat/web/composicio/fonts-informacio/index.html?p\\_id=GT\\_SUBS\\_1](https://www.parlament.cat/web/composicio/fonts-informacio/index.html?p_id=GT_SUBS_1).

34 <http://www.congreso.es/portal/page/portal/Congreso/Congreso/CongresoUE/ComunicALCAs/ALCAsXIIIeg>.

treaties contemplate parliamentary activities within the Union's system different from those that habitually performed by governments.

From this standpoint, it can be seen how the legal process of European construction reflects a progressive tendency towards a parliamentarisation of the decision-making system as manifested, for example, in the Treaty of Lisbon, with the increase in the powers of the European Parliament, particularly via the generalisation of the ordinary legislative procedure, or the aforementioned participation of national and regional parliaments with legislative competences in different spheres of the European Union, not only within the framework of the principle of subsidiarity. Having said this, I am still aware that, with regard to the issues key to the European Union, Member State governments continue to be the "lords of the treaties".

The procedure for monitoring the subsidiarity principle is configured as one of the—modest but not to be underestimated—mechanisms in the innovative process of associating parliaments with the procedure for the European Union's adoption of decisions.

This European policy, which could be implemented by the Parliament of Catalonia, must have as its goal to make the contributions and interests of Catalonia reach the European Union with regard to strategic areas for the Parliament, so that the European Union may be aware of and consider them. To configure this key strategy, one possibility could be as follows: one or more actions, regarded as a priority or important to the Catalonia's interests, should be chosen from amongst all the initiatives and policy areas identified by the European Commission every year in its work programme.

This is the procedure carried out by the Scottish Parliament, which debates, firstly at the committee stage and subsequently in a plenary session, the aforementioned European Commission work programme and, by means of a resolution, identifies those policy areas and resulting actions that will shape said Parliament's political strategy that year. The Scottish Parliament has the duty to act in these areas and on the defined strategy, within the framework of the European Union.<sup>35</sup>

Clearly, any realistic strategy requires a clear and careful selection of the actions and policy areas of interest, from amongst all those that the European Commission announces it will pursue in a given year.

I believe that defining such a strategy could help European Union policy to become more integrated into the Catalan Parliament's day-to-day work. To configure this strategy, a distinction needs to be made between two different points in time:

- 1) The pre-legislative phase, prior to the formal proposal for a European Union legislative initiative.
- 2) The legislative phase itself, within which the procedure for monitoring the subsidiarity principle would be framed.

Given these characteristics of the European Union's normative procedures, the pre-legislative phase, in which European institutions seek information and begin drawing up their policies, is the perfect time for Parliament to submit its contributions and interests to Brussels.

Both the Treaty of Lisbon and institutions' practice permit this possibility. Pursuant to Article 2 of Protocol 2 to the Treaty on the European Union and the Treaty on the Functioning of the European Union, the European Commission has the duty to consult widely, taking into account the regional dimension, before proposing a legislative act.

Similarly, the European Commission expressly encourages Member State parliaments to establish political dialogue on its initiatives. Through this political dialogue, parliaments can offer their observations on all aspects they deem fit regarding Commission initiatives.<sup>36</sup> Practice confirms the use of this political dialogue between some national parliaments and the European Commission.<sup>37</sup>

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<sup>35</sup> Orr (2016).

<sup>36</sup> European Commission. *Commission to the European Council - A citizens' agenda - Delivering results for Europe*. COM (2006) FINAL, 10 May 2016, p. 10.

<sup>37</sup> Parlament de Catalunya (2012a).

One recommendation of the Task Force is indeed that the Commission and the Committee of the Regions should raise the awareness of national, regional and local administrations on the opportunities available to them for contributing to the drawing up of policies, from an early stage. Additionally, the Task Force proposes that the Commission fully involve regional and local administrations in their consultation processes and in the assessment of the territorial impact of European Union initiatives.

In my opinion, these provisions regarding regional administrations should also include regional parliaments with legislative competences, should this not be the will of the Task Force.

If this preliminary analysis and monitoring of the content of European Union initiatives does not take place, the procedure for monitoring the subsidiarity principle becomes more of a formality than a substantive process, given the brevity of the time period contemplated in the treaties, and it will be even more difficult for a parliament to form a political strategy. Accordingly, without these preliminary analyses, the parliamentary function of monitoring the subsidiarity principle is an exercise of more interest to technical staff and academics than to parliamentarians.

## 5.2 Establishment of systematic dialogue and cooperation with all institutions involved

Efficient fulfilment of the function of monitoring the subsidiarity principle calls, in my opinion, for a constant flow of information and ongoing dialogue with all the institutions involved. This constant flow of data and assessments would permit an integrated overview of the problems and suggested solutions.

Firstly, access to the information and the technical criteria of the Catalan Government will be key to allowing the Catalan Parliament to form its opinion with regard to the European Union's legislative initiatives. Within this framework, I would like to point out that practice has led to the establishment of collaboration mechanisms between the Catalan Parliament and Government that have, in my view, worked satisfactorily.<sup>38</sup>

Secondly, there is a need to bolster cooperation between the Parliament of Catalonia and the Spanish parliament's Joint Committee for the European Union, so that the views and opinions of the former are taken into account. It should be noted, with regard to the legal effects of the Catalan Parliament's opinions, that the implementing regulation for the Law on the Joint Committee does not take into account the nature of Autonomous Community competences affected by draft European Union legislative acts. In cases in which draft European Union legislative acts may have an impact upon the exclusive competences of the Government of Catalonia, legal logic demands that the Catalan Parliament's opinions and observations be included, on a harmonised basis, in the final opinion sent by the Joint Committee to European Union institutions.

Finally, systematic dialogue between the Parliament of Catalonia and European Union institutions, particularly the Commission and the European Parliament, would do a great deal to enhance access to important and immediate information on EU initiatives and strategies and would, in short, help ensure proper fulfilment of the subsidiarity principle monitoring function.

In this regard, the Treaty of Lisbon has increased the potential for interparliamentary cooperation between the European Parliament and the national parliaments of Member States.

Additionally, intensification of interparliamentary cooperation, at both a Spanish State and European Union level, would also boost the exchange of immediate information on aspects of common interest in the European Union's legislative initiatives and any opinions eventually adopted.

The Task Force recommends that EU legislators consider the possibility of inviting representatives of local and regional administrations to their meetings or hold hearings and other events.

Additionally, it recommends that national and regional parliaments make more effective use of information exchange platforms such as IPEX, in the case of the European Parliament and national parliaments, and REGPEX, in that of regional governments and parliaments.

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<sup>38</sup> Parlament de Catalunya (2012a).

Within this context, one should note the role that could be played by CALRE (the Conference of European Regional Legislative Assemblies), as the organisation bringing together the presidents of regional parliaments with legislative competences within the framework of the European Union. Its joint action could create a critical mass around an EU legislative proposal, which could be more effective than individual parliamentary action. Furthermore, worth highlighting is the fact that CALRE has a Working Group on subsidiarity.

The existence in the Catalan Parliament of a body with specific functions associated with the European Union, the Working Group, could foster the establishment of a range of institutionalised and structured relations, where possible, with, firstly, the Catalan Government and the Spanish parliament's Joint Committee and, secondly, with EU institutions, particularly the European Commission and the European Parliament, and other parliaments.

These relations could be formalised by means of institutional collaboration agreements.

Some regional parliaments in the EU have developed a proactive strategy based on systematic dialogue, with both domestic institutions and those of the European Union. Within this framework, I would like to highlight the experience of the Marche Regional Assembly, which managed to ensure that the European Parliament's Committee on Agriculture and Rural Development approved an amendment on the content of a proposal for modifying Regulation no 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development. The Marche Regional Assembly developed a strategy based on systematic dialogue with both the Italian Senate and European Union institutions, and submitted its proposal to the Commission and to the European Parliament.<sup>39</sup> This experience is a fine example of the exercise of good multi-level government within the framework of the European Union, in which regional parliaments with legislative competences have a role to play.

### 5.3 Bolstering human and material resources to assume the obligations arising from the Treaty of Lisbon

It is my view that the Parliament of Catalonia should follow the example set by other parliaments that are bolstering their European capacity by establishing organic units dedicated to the study and selection of European Union law and, especially, the initial documents in its legislative procedure. This more pragmatic than theoretical approach is, in my opinion, key.

In this regard, it is worth noting that, on 31 December 2017, the Parliament's Bureau created the Office for Foreign Action and Relations with the European Union, subsequently amended and renamed the Office for Foreign Action, Inter-Parliamentary Cooperation and Relations with the European Union on 20 December 2018, with, amongst others, the functions of providing legal advice in the function of monitoring the subsidiarity principle of legislative acts of the European Union.<sup>40</sup> This Office is currently being furnished with its staff and material structure.

The Bureau also adopted, on 30 July 2018, the Foreign Action and European Union Relations Plan, which aims to define the objectives, strategic goals, priority actions and preferential geographic areas, as well as the chief proposals for foreign action for the Parliament of Catalonia. Thus, for the first time, the Parliament possesses a document that aims to put its foreign action objectives in order.<sup>41</sup>

By way of example, the Plan establishes the following proposals for action to help facilitate the function of monitoring the subsidiarity principle:

- Legal analysis of preparatory legislative documents in the European Union's legislative process, such as the European Commission's annual work programme.
- Analysis of EU legislative initiatives of particular importance to the Government of Catalonia.

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39 Parlament de Catalunya (2012a).

40 [BOPC no. 330, of 13 February 2017](#) and [BOPC no. 247, of 29 January 2019](#).

41 <https://www.parlament.cat/web/activitat-parlamentaria/pla-exterior/index.html>.



- The fostering of a permanent relationship with European Union institutions, particularly the European Parliament and the European Commission.
- Demanding the inter-parliamentary cooperation mechanisms contemplated in the Regulation of the European Parliament for cooperation with Member States' national parliaments.
- An initiative, via inter-parliamentary cooperation, to create a technical office for sub-national parliaments with legislative competences at the seat of the European Parliament.
- Establishment of a relationship of permanent collaboration with the Delegation of the Government of Catalonia to the European Union.
- Encouragement of coordination and cooperation between parliamentary committees specialising in European Union matters.
- Reactivation of the Network of Regional European Committees (NORPEC) with the parliaments of Scotland, Flanders and the Basque Country.

So it is that the Parliament has a series of specific proposals for action within the framework of the European Union that, if implemented, could provide a significant boost for the function of monitoring the subsidiarity principle.

## 6 Some final thoughts

**One:** Effective and autonomous fulfilment of the function of monitoring the subsidiarity principle would require, from a parliamentary standpoint, that parliamentary groups have the political will to leverage the potential of this procedure and other ways forward within the framework of the European Union's legislative process. In this regard, this function should form part of a broader strategy of the Catalan Parliament with regard to European Union policy, to be manifested via systematic cooperation with other institutions involved.

**Two:** As noted in this article, the experience of the Parliament of Catalonia shows that it is only when the Parliament's services prepare and formulate a draft opinion, which the parliamentary groups need to amend or validate, that the Parliament autonomously exercises this parliamentary function.

For its part, the practice of only including the Government's observations, without contributions from the parliamentary groups, means that, in substance, this function is carried out by the Government and not by the Parliament.

**Three:** Effective and autonomous fulfilment of the function of monitoring the subsidiarity principle would require, from a parliamentary administration standpoint, the strengthening of Parliament's human and material resources, to be able to provide parliamentarians with support in terms of the technical capacity to analyse European Union initiatives.

**Four:** At a European Union level, it would be worth reconsidering a reform of the procedure for monitoring the subsidiarity principle to overcome some of the aforementioned problems and allow, fundamentally, parliaments, both national and regional with legislative competences, to submit to the Union legislature their propositions and interests with regard to the content of draft legislative acts.

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