

**CHALLENGING THE SUBNATIONAL DIMENSION OF SUBSIDIARITY IN
EU LAW**

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This article, which forms part of the 'New Voices' series and is hence drafted as an essay rather than a proper academic article, examines the principle of subsidiarity in its application to local and regional authorities as they exist within the various Member States. While subnational authorities ('SNAs') have been studied extensively within the respective domestic contexts, their relation with other levels of public authority, such as the European Union, is less well-defined. Subsidiarity is often cast as the principle capable of recognising the existence of subnational autonomies by the EU, and guiding their interaction with the latter. This is so in particular after Article 5(3) TEU has been amended on the occasion of the Lisbon Treaty revision to include an express reference to local and regional authorities. This short essay challenges this perception of subsidiarity, putting forward that the core legal provisions that deal with subsidiarity in EU law do not allocate any meaningful role for SNAs. This is so, it is argued, because subsidiarity remains anchored in an understanding of the European Union and its legal order as composed of and shaped by the EU and the Member States to the exclusion of any other actor.

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The existence of local and regional authorities, which frequently have the competence to issue regulation, in the different Member States of the European Union is a factual truth. We know that they exist, and co-regulate with other levels of public authority, such as the Member States and the European Union. In this context the quest for a principle to guide the interaction between these multiple centres at which public authority is exercised appears to be a practical necessity. Subsidiarity is often cast as the principle capable of fulfilling that task in recognising the existence of subnational autonomies in the EU. In addition to its pre-legislative function, the principle is often presented as embodying a wider significance, a sort of

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ethos for the coexistence of many centres of public authority, including those at subnational level, in the EU. This is so in particular after it has been amended on the occasion of the Lisbon Treaty revision to include an express reference to local and regional authorities.¹

My short essay challenges this perception of subsidiarity. The main argument that is developed is that the core legal provisions that deal with subsidiarity in EU law do not allocate any meaningful role for subnational authorities ('SNAs').² This is so, it is argued, because subsidiarity remains anchored in an understanding of the European Union and its legal order as composed of and shaped by the EU and the States to the exclusion of any other actor. Thus, while subsidiarity bears the promise of recognising SNAs in EU law, it is unsuccessful in doing so in practice. The conclusion this essay will accordingly reach is that the reformulation of subsidiarity to recognise SNAs is mainly a rhetorical twist, which appears incapable of bringing about substantive change.

The analysis that leads me to reach this conclusion is structured as follows. I will first briefly recall the structure of the European legal order in which regulation originates at a multitude of centres of public authority, including the local and regional scales. The analysis will then focus on subsidiarity as the posterchild of a multi-level EU and illustrate that Article 5(3) TEU was specifically designed to recognise the subnational dimension of contemporary governance patterns. It will then be seen that despite the promise subsidiarity bears in this respect, it is in fact unable to distance itself from the bi-centric spirit of EU law. Just as the European Treaties more generally, subsidiarity recognises only the Member States and the EU, not local and regional authorities, as autonomous regulators.

I. THE EU AS A POLYCENTRIC AND POROUS LEGAL SPACE

The starting point of my observations is that the EU legal order is characterised by polycentricity and porosity. The notion of *polycentricity* captures the co-existence of many levels of public authority within the complex European legal space. Due to the limited space available to me I will not explain this concept in depth, but rather limit myself to providing an overview thereof. Polycentricity emphasizes that there are many levels - international, supranational, national, regional, local - at which norms are created. According to Ostrom 'Polycentric systems are characterized by multiple governing authorities at differing scales rather than a monocentric

¹ Art 5(3) TEU.

² Such SNAs take have very different statuses, competences and names under the domestic provisions of the various EU Member States. For the sake of simplicity they will all be generically referred to as SNAs.

unit.³ Within each unit, regulation is issued independently with the advantage of using local knowledge.⁴ At the same time, however, such regulatory activity is fundamentally interdependent as the various units learn from other units that 'are also engaged in trial-and-error learning processes.'⁵

The interaction between various scales of public authority in the EU mirrors such simultaneous independence and interdependence. On the one hand, each of these units has the capacity to regulate in some domains. On the other hand, their norm-generating capacity is limited by the regulatory competence of other units and the norms they have already created. Polycentricity thus captures that there are many levels of public authority that coexist within the EU. It comes accompanied by another phenomenon, that can be labelled as porosity, which in turn reflects that the borders dividing these various levels of public authority are permeable so that ideas and norms leak from one level to another, giving rise to a creative process of cross-fertilization. In the EU then, a multitude of levels of public authority interconnect and intertwine and their interaction generates a number of legal dynamics. This will not be outlined in depth, but an example serves to illustrate my point.

Let's take *Omega*, one of those cases known to any student of EU law.⁶ While this decision has often been understood as concerning the relation between a national constitutional imperative and EU internal market principles, a closer look reveals that *Omega* can also be understood as an instance of polycentricity and porosity in EU law. The German city of Bonn had independently decided to ban laser games within its territory; a ban that was subsequently challenged for it conflicted with the freedom to provide services under Article 56 TFEU. The CJEU however accepted the local ban as legitimate because it aimed at the protection of public order and human dignity and even declared human dignity to be a general principle of EU law, applicable throughout the territory of the EU, thus extending its reach from the local to the supranational. A local norm hence coexists with a supranational level (polycentricity), conflicts with it, but can nonetheless stand and even influence substantive change in EU law (porosity). Polycentricity and porosity are of course merely labels that I use because I find them helpful in portraying the interaction between various scales in the EU. They are more complex in nature than indicated here and some may contest that they offer any value at all in describing the EU. That may be true, but for the purposes of this essay it should be noted that they reflect a state of

³ Elinor Ostrom, 'Polycentric Systems for Coping with Collective Action and Global Environmental Change' (2010) 20 *Global Environmental Change* 550, 552.

⁴ *ibid.*

⁵ *ibid.*

⁶ Case C-36/02 *Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundestadt Bonn* [2004] ECR-09609.

affairs that subsidiarity seeks to capture, an argument which I outline further just below.

It is the subnational dimension of this polycentric legal order that I am particularly interested in. SNAs are an intriguing component thereof as they doubtlessly exist; yet the European Treaties largely ignore their existence. The Treaties engage at length with the relation between the Member States and the EU, but not SNAs. The bi-centric spirit of the European Treaties can for instance be perceived in the context of the rules on the division of competence in the EU, which envisage only the Member States and the EU as levels of public authority competent to craft regulation.⁷ While the existence of SNAs cannot be called into question, the Treaties remain predominantly bi-centric in nature. Such bi-centricity of course reflects the special status of the Member States as masters of the Treaties, which have created the EU and continue to determine its shape. In light of the importance of the Member States in EU integration, EU law may very well choose to only engage with these States and not SNAs - rendering any recognition of SNAs, and the search for any mechanism to fulfil that task, unnecessary. This is not, however, the route that has been chosen. Two provisions of EU law, namely Article 4(2) TEU and Article 5(3) TEU indeed express a clear intention to provide some kind of recognition for SNAs in EU law. These two provisions, expressly referring to SNAs and the EU's duty to acknowledge their existence cannot be understood in any other way as expressing a willingness to recognise subnational autonomies. Whereas the reference to subsidiarity in EU primary law did not previously mention SNAs, it was amended in 2009 with the sole purpose of including such a reference. Article 5(3) TEU now reads as follows:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Before the Lisbon Treaty revision subsidiarity existed in EU law, but applied only to the Member States and the EU. Its reformulation to include local and regional authorities witnesses an intention to recognise these autonomies in EU law, even though the exact contours of such recognition remain subject to debate.⁸ The remaining part of this paper examines whether this strategy is

⁷ See Art 3 TFEU, Art 4 TFEU and Art 6 TFEU.

⁸ The main questions are whether they are recognized directly or only indirectly through the Member State and, if the former is the case, whether they are perceived to have the

prone to success. It will undertake an analysis of the ability of subsidiarity to recognise local and regional autonomies as components of the polycentric EU and reach the conclusion that it is incapable of doing so. The essay will show that despite the attempt to move away from bi-centricity the principle remains deeply anchored in the bi-centric spirit of the European Treaties.

II. THE PRINCIPLE OF SUBSIDIARITY

Subsidiarity is a pre-legislative procedural requirement that regulates the exercise of regulatory competence (rather than its allocation) in the EU.⁹ In areas of non-exclusive EU competence the subsidiarity question unveils whether the EU should regulate or not. In addition, the spirit of the subsidiarity principle is presumed to operate on a larger scale than just the pure pre-legislative setting.¹⁰ There is indeed a common assumption that subsidiarity more widely symbolises the coexistence of various levels of public authority in the EU, making it a catchphrase used to state that European integration does not threaten the existence and regulatory competence of domestic authorities. It has also been argued that subsidiarity can be understood as ‘a way of enhancing pluralism and the diversity of national values’.¹¹

It is particularly noteworthy in this regard that subsidiarity is frequently presented as the posterchild of a multi-level EU that recognises SNAs.¹² After all the German Länder played a prominent role behind the insertion of the principle into the Maastricht Treaty.¹³ Subsidiarity has been labelled as ‘a principle constitutive of a multilevel governance in Europe’¹⁴ as well as an ‘element connecting the different levels of governance and government and as a technique of making flexible the map of competences drawn by the treaties or the constitutions.’¹⁵ Some have put forward that with the entry into force of

same importance as Member States. I examine this question at length in my doctoral thesis and there is no space to reproduce this examination in this essay.

⁹ Koen Lenaerts and Piet Van Nuffel, *Constitutional Law of the European Union*, Robert Bray (ed) (2nd edn, Sweet&Maxwell 2005), 102.

¹⁰ See inter alia Gráinne de Búrca, ‘Reappraising Subsidiarity’s Significance After Amsterdam’ (2000) Harvard Jean Monnet Working Paper 7/99.

¹¹ Paul Craig, ‘Subsidiarity: A Political and Legal Analysis’ (2012) 50(1) *Journal of Common Market Studies* 72, 73.

¹² This is not least reflected by Art 5(3) TEU, which henceforth refers also to the local and regional levels of government.

¹³ Reimer von Borries and Malte Hauschild, ‘Implementing the Subsidiarity Principle’ (1999) 5 *Columbia Journal of European Law* 369, 371-72.

¹⁴ Ken Endo, ‘Subsidiarity and Its Enemies: To What Extent is Sovereignty Contested in the Mixed Commonwealth of Europe?’ (2001) *EUI Working Paper RSC 2001/24*, 24.

¹⁵ Guiseppe Martinico, ‘Dating Cinderella: On Subsidiarity as a Political Safeguard of Federalism in the European Union’ (2011) *European Public Law* 652.

Article 5(3) TEU, ‘subsidiarity now penetrates below the Member State level, and requires examination of the regional issues’.¹⁶ This echoes the conclusion reached above: the current formulation of the principle can only be understood as an attempt to recognise polycentricity in EU law. Cygan argued that:

Because the post-Lisbon version of Article 5 TEU explicitly refers to the legislative capacity of regional governance, this means that formal consideration of regional competences, together with the legislative capacity of regional institutions, is now an integral part of the legislative process. This ranges from the consideration of regional impact of a legislative proposal within the Commission’s Impact Assessments, to the ability of the CoR to seek judicial review of a legislative proposal for non-compliance with the principle of subsidiarity. It is perhaps the ability of the CoR to engage in subsidiarity monitoring under Protocol 2 and alongside national parliaments which offers the most effective opportunities.¹⁷

In examining whether subsidiarity manages to achieve these objectives just below, I find that despite its intention, subsidiarity remains incapable of doing so. The reason for this incapability is that the principle remains deeply anchored in the bi-centricity encountered elsewhere in the Treaties as well as the assumption that the various levels of public authority are self-contained. Subsidiarity reflects the bi-centricity inherent to the Treaties rather than the EU’s polycentric reality. This is so because Article 5(3) TEU establishes a two-part, not a three-part test. It enquires whether the goals of the proposed action can be achieved by the Member States (either at central, regional or local level). If this is not found to be the case, it is for the EU to regulate. The provision does *not* ask whether (i) the objectives can be best achieved at subnational level, (ii) if not, at national level, and that if that is not so, then (iii) the case for supranational legislation is made.¹⁸ Local and regional

¹⁶ Joxerramon Bengoetxea, ‘Autonomous Constitutional Regions in a Federal Europe’, in G De Baere E Cloots, S Sottiaux (eds), *Federalism in the European Union* (Hart 2012) 238.

¹⁷ Adam Cygan, ‘The Regions Within Multi-Level Governance: Enhanced Opportunity for Improved Accountability?’ (2014) 21(2) *The Maastricht Journal of European and Comparative Law* 265, 268.

¹⁸ This gives rise to a presumption that the Member State should in principle regulate unless there are compelling reasons for the EU to do so. As seen further below, this is not, however, how the principle operates in practice. On this see also Adam Cygan, ‘The Parliamentarisation of EU Decision-Making? The Impact of the Treaty of Lisbon on National Parliaments’ (2011) 36 *European Law Review* 478, 481.

authorities are recognised to exist, but only in an indirect capacity as it is for the Member States to decide whether they should be classified as potential regulators - by the Member States, and not the EU.

As per Article 5(3) TEU, either the national or the supranational is considered to be the appropriate scale of regulation. In the former scenario, it is for the State to decide whether to regulate in a centralised or a decentralised manner. This maintains the monolithic conception of statehood as from the perspective of EU law the Member State is the regulating instance. While the State may internally designate SNAs as regulators, EU law does not engage directly with their regulatory capacity. Article 5(3) TEU leaves it to the Member States to 'decide according to their own constitution whether to apply the principle domestically as well'.¹⁹ From the supranational perspective it does not matter whether the Member State legislates at central, regional, or local level. Any regulatory measure originating within the Member State is considered to be that of the Member State. This sketches a division of public authority alongside two centres: the national and the supranational.

Moreover, instead of recognising the inherent interconnection between various scales of public authority, subsidiarity takes their division for granted. The EU and its Member States are often understood as 'two independent and autonomous spheres of power',²⁰ a fact echoed by the division of competence inherent to the Treaties, which recognises that States and the Union regulate, but not SNAs. It is, however, questionable whether such an assumption of division reflects reality in all cases as it is indeed well known that regional and local governments are often endowed with a law-making capacity. Subsidiarity nonetheless attempts to create the impression of a bi-centric division of public authority. As de Búrca has noted, Member States' attempt to set clear competence boundaries in the Treaties 'reflects a more fundamental wish to protect the integrity of the boundaries of the state polity.'²¹ The protection of boundaries stands very much at odds with the EU integrating the local and regional levels of government for it reinforces rather than weakens the dividing borders between them. What is more, by definition the protection of State boundaries mandates against any independent recognition of the subnational entities making up the Member State. The attachment to bi-centricity and the denial of porosity are also evident in Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality and the

¹⁹ Reimer von Borries and Malte Hauschild, 'Implementing the Subsidiarity Principle' (1999) 5 *Columbia Journal of European Law* 369, 374.

²⁰ Fernanda Nicola, 'Invisible Cities in Europe' (2012) 35 *Fordham International Law Journal* 1286.

²¹ Gráinne de Búrca, 'Setting Constitutional Limits to EU Competence?' *Faculdade de Direito da Universidade Nova de Lisboa Francisco Lucas Pires Working Paper Series on European Constitutionalism Working Paper 2001/02*, 12.

therein-enshrined Early Warning System.²² It will be seen that, just as Article 5(3) TEU itself, the corresponding Protocol bears the promise of recognising polycentricity but cannot deliver that promise.

III. PROTOCOL NO 2

The new formulation of Article 5(3) TEU is not the sole innovation brought about by the Lisbon Treaty with regard to subsidiarity. There is also a revised version of Protocol No 2 that has been said to lead to a procedural thickening of the subsidiarity principle.²³ Protocol No 2 refers, on a number of occasions, to the subnational levels of government. In the context of this essay this raises the question whether it is capable of recognising polycentricity and porosity.

Article 2 of the Protocol provides that before proposing legislative acts, the Commission ‘shall consult widely. Such consultation shall, where appropriate, take into account the regional and local dimension of the action envisaged.’²⁴ This requirement mandates that the Commission consult a number of actors, including SNAs, in the context of its own legislative activity. SNAs are, however, solely recognised as actors EU legislation impacts upon - as subjects and implementers of EU law rather than autonomous regulators. The same conclusion emerges with regard to Article 5 of the Protocol, which establishes that EU directives must contain an assessment of ‘the rules to be put in place by Member States, including, where necessary, the regional legislation.’²⁵ This requirement seeks to ascertain the impact of EU legislation on domestic authorities - in their implementing capacity - rather than in their role of autonomous regulators. The same provision further provides that EU draft legislative acts shall take account of financial and administrative burdens ‘falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimized and commensurate with the objective to be achieved.’ SNAs, just as the other actors referred to, are subject to EU law and the supranational legislative process should be sensitive towards the effects this will have on them.

Article 5(3) TEU and Protocol No 2 accordingly recognise the existence of subnational authorities - however mainly as subjects and implementers of EU law rather than autonomous regulators. This would be possible even in absence of a reference to subnational authorities in Article 5(3) TEU. The

²² Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality [2008] OJ C115/206 (hereinafter referred to as ‘Protocol No 2’).

²³ Sanja Bogojević and Xavier Groussot, ‘Subsidiarity as a Procedural Safeguard of Federalism’, in Loic Azoulai (ed), *The Question of Competence in the European Union* (OUP 2014), 234.

²⁴ Art 2 of Protocol No 2.

²⁵ Art 5 of Protocol No 2.

relationship between SNAs and the EU that is envisaged is indeed of a purely indirect nature and does not elevate SNAs to be recognised as autonomous levels of public authority in their own right. Whereas Article 5(3) TEU envisages the subnational dimension as a scale of public authority at which regulation is issued, Protocol No 2 focuses on their function as implementers of EU law. Local and regional authorities are portrayed as passive outsiders rather than active insiders to EU affairs. This echoes the conclusion reached above with regard to Article 5(3) TEU, namely that while subsidiarity on its face seems to move away from bi-centricity to create space for SNAs in EU law, this does not in fact appear to be the case as the latter continue to be recognised solely in an indirect as opposed to direct manner. The next section deals with the so-called Early Warning System; a new mechanism enshrined in Protocol No 2, which on its face bears a lot of promise for the recognition of polycentricity in EU law.

IV. THE EARLY WARNING SYSTEM

Article 4 of Protocol No 2 obliges the Commission, the European Parliament and the Council to forward their draft legislative acts to national Parliaments. Article 6 of Protocol No 2 sets out the modalities of this procedure:

Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

This is commonly referred to as the 'Early Warning System' ('EWS'), a 'pre-legislative constitutional intervention device'²⁶ designed to give national Parliaments, which have lost power as a result of European integration, a say in the EU legislative process.²⁷ In its current form, the EWS allows national parliaments to issue a reasoned opinion when they believe that an EU draft legislative act violates subsidiarity. If more than one third of national parliaments raise a reasoned opinion, the proposal must be reviewed. The initiating institution can, however, decide to maintain, amend, or withdraw

²⁶ Cygan (n 17) 481.

²⁷ Philipp Kiiver, 'The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity' (2008) 15(1) Maastricht Journal of European and Comparative Law 77, 77.

the draft and must provide reasons for its decision.²⁸ If the reasoned opinions represent at least half of all votes assigned to national Parliaments, the Commission must review the draft legislative act, and may decide to maintain, amend or withdraw the draft. If it decides to maintain the draft, it must issue a reasoned opinion on the draft's compliance with Article 5(3) TEU.²⁹ The reasoned opinion is subsequently forwarded to the European Parliament and Council who have the final word on the matter. This mechanism gives force to Article 12 TEU, pursuant to which national parliaments contribute actively to the good functioning of the Union.³⁰

Article 6 of Protocol No 2's reference to 'national' parliaments triggers the question whether, and if yes, to which extent, regional parliaments participate in the operation of the EWS. Regional parliaments are indeed just as likely as national parliaments to lose some of their decision-making abilities as a consequence of European integration, so that the rationale behind the EWS would also apply to them. It will be seen that five distinct avenues exist for SNAs to contribute to the EWS. Importantly, however, none of these avenues recognises SNAs as integral components of the polycentric EU.

First, Article 6 of the Protocol provides that it is for each national parliament 'to consult, where appropriate, regional parliaments with legislative powers.' This reflects that European integration not only impacts on national, but also subnational political power. Subnational parliaments are, however, consulted through the Member State, not directly by the EU, and States have discretion whether they wish to do so. Bi-centricity stands affirmed in this regard. Second, SNAs may participate in the EWS in those Member States with a bicameral parliamentary system in which one chamber is composed of regional representatives. In such a scenario this chamber has one of the two votes attributed to each national parliament in the context of the EWS. This is for instance the case of the German Bundesrat and the Austrian Bundesrat.³¹ The EWS allows regional parliaments to intervene in the EU

²⁸ See Art 7(2) of the Protocol No 2. According to Art 6 of the Protocol, national parliaments have eight weeks from the date of transmission of a draft legislative act to send a reasoned opinion. The threshold is $\frac{1}{4}$ in the case of a draft legislative act based on Art 76 TFEU.

²⁹ Art 7(3) of the Protocol No 2.

³⁰ The first yellow card was issued in 2012 as a consequence of a EU legislative proposal on the right to strike. See Federico Fabbrini and Katarzyna Granat, 'Yellow Card, But No Foul': The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike' (2013) 50(1) *Common Market Law Review* 115.

³¹ See also Josu Osés Abando, 'Early Warning and Regional Parliaments: In Search of a New Model. Suggestions from the Basque Experience' (2013) 5(2) *Perspectives on Federalism* 74. See also Philipp Kiiver, 'The conduct of subsidiarity checks of EU legislative

decision-making and have their vote cast. However, from the perspective of EU law, they fall under the definition of ‘national’ parliament. They act on behalf of the State where this is provided for under domestic procedures. From the perspective of EU law, they however act as a Member State parliament rather than that of an SNA, affirming bicentricity rather than polycentricity. Third, regional parliaments can be considered to be national parliaments and accordingly directly participate in the EWM. Declaration 51, which only applies to one Member States, provides that:

Belgium wishes to make clear that, in accordance with its constitutional law, not only the Chamber of Representatives and Senate of the Federal Parliament but also the parliamentary assemblies of the Communities and the Regions act, in terms of the competences exercised by the Union, as components of the national parliamentary system or chambers of the national Parliament.

Belgium has created an avenue for its regional parliaments to be recognised as ‘national parliaments’. This allows regional legislatures to directly intervene in the EWS without the need to pass through a secondary chamber at national level. Declaration 51 allows the involvement of regional parliaments not in their own capacity, but representing the Member State. They are ‘national’ parliaments from the perspective of EU law, reaffirming bicentricity. Fourth, a number of procedures within the respective Member States allow SNAs to transmit their concerns concerning EU draft legislative acts to the national parliament, which may then take them into account in its own reasoned opinion. Some of the Spanish regions’ statutes of autonomy for instance include provisions concerning participation in subsidiarity control.³² Abando noted that this has allowed the Basque chamber to make ‘specific contributions’ with regard to subsidiarity monitoring, but also noted that this mechanism ‘does not guarantee the taking into account of the contributions by the regional parliaments’.³³ From of the perspective of EU law, such procedures are invisible, what the EWS sees is solely the final reasoned opinion submitted by the national Parliament. The former Commission President Barroso recognised in 2012 that the Commission ‘has no information as to the involvement of the respective regions in the elaboration and adoption of these opinions.’³⁴ In 2011 already the Commissioner for

proposals by national parliaments: analysis, observations and practical recommendations’ (2012) 12(4) ERA Forum 535, 544.

³² *ibid*, 78.

³³ *ibid*, 74.

³⁴ Question for written answer by MEP Izaskun Bilbao Barandica (ALDE) on the statistics on the early warning process, no. E-5865/2010, at

Interinstitutional Relations and Administration stated that ‘the Commission does not take account of the extent to which opinions of the regions are reflected in reports forwarded by the Member States.’³⁵ This affirms bi-centricity to the extent that from the perspective of EU law any opinion originating within the Member State is considered to be that of the Member State.

Five distinct options exist that allow SNAs to indirectly contribute to the EWS, undoubtedly widening the participatory options SNAs have when it comes to EU affairs. This aspect of the subsidiarity mechanism, however, remains firmly attached to bi-centricity. It safeguards the monolithic nature of the Member State in assuming that any action originating within the State is that of the State. The analysis that has been undertaken confirms Cygan’s conclusion that Protocol 2 is a ‘state-centric process of subsidiarity review whose objective is to improve the accountability of, and inject democratic legitimacy into, what continues to be an equally state-centric legislative process.’³⁶ While the EWS offers a number of options for SNAs to indirectly participate in subsidiarity review, it continues to reflect a bi-centric spirit. As such the revised version of subsidiarity, which henceforth also refers to local and regional authorities, does not significantly alter the state of affairs that predominated under the previous version thereof that solely referred to the Member States and the EU. However, SNAs may be involved in matters of subsidiarity monitoring only by virtue of provisions of domestic, rather than EU law. This was already possible under previous formulations of subsidiarity that did not involve any reference to SNAs.

V. CONCLUSION

This essay has argued that the ability of the principle of subsidiarity, as enshrined in Article 5(3) TEU and Protocol No 2, to recognise subnational autonomies in EU law should be reconsidered. While on their face these provisions seem to directly recognise local and regional authorities as components of EU law, a second look reveals that this is not in fact the case. Even though Article 5(3) TEU was specifically amended to refer to local and regional autonomies, attempting to move away from the bi-centric spirit that otherwise characterises the European Treaties, this undertaking bears little promise of success. Despite the apparent intention, the provisions that have been examined do not provide any meaningful role for SNAs in subsidiarity

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2010-5865+0+DOC+XML+V0//EN>.

³⁵ Question for written answer E-009555/2011 on the Committee of the Regions and early warning system: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2011-009555+0+DOC+XML+V0//EN>.

³⁶ Cygan (n 17) 274.

control. Subsidiarity continues to apply only between the Member States and the EU, not SNAs - staying within the paradigm of bi-centricity rather than embracing polycentricity. Member States are free to implement the subsidiarity principle also on a domestic scale - extending it to local and regional authorities. This is not however mandated as a matter of EU law, where subsidiarity remains a two-part rather than a two-part test. It must thus be concluded that while subsidiarity seemed to bear the promise of recognising local and regional authorities as regulators in EU law, under its current formulation and implementation, Article 5(3) TEU limits this promise to pure rhetoric rather than actual substantive change.