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Towards New Procedures between State and Regional Legislatures in Italy, Exploiting the Tool of the Early Warning Mechanism

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Abstract

The early warning mechanism represents an opportunity for building new and direct relationships between regional councils and the national parliament, which to date have been substantially lacking in Italy. Relying on the provision of Art. 6 of Protocol no 2 annexed to the Treaty of Lisbon, the new law on the participation of Italy in EU affairs provides, for the first time, a bottom-up process of transmission of regional opinions (also from the regional executives, by means of a ‘political dialogue’) to the Italian parliament, thus indirectly also enhancing the ties between the regional and national levels of government.

Key-words

Italian parliament, regional councils, participation in EU affairs, early warning mechanism, political dialogue



1. Foreword: Is there a shift from the European to an Italian ‘regional blindness’, after the Treaty of Lisbon?

The European Community (EC) has often been accused of remaining ‘blind’ towards the territorial organization of its federal and regional Member States (Ipsen 1966; D’Atena 1998; Weatherill 2005a; Borońska-Hryniewieka 2013).^I However, the traditional EC indifference for the constitutional structure of Member States has been gradually attenuated and, with the Treaty of Lisbon, which entered into force on 1 December 2009, it seems that it has almost disappeared from the European Union (EU).^{II}

The ‘regional blindness’ started to be effectively overcome since the Treaty of Maastricht (1993), when the principle of subsidiarity^{III} was introduced into EC primary law with regard to non exclusive competences (*ex multis*, Toth 1992: 1072-1105; Massa Pinto 2003; Ippolito 2007) and when the Committee of the Regions, as an EC advisory body entitled to territorial representation at EC level, was established (Loughlin 1996: 141-162; Iurato 2006: 679-710). Other significant steps towards the acknowledgement of the regional dimension of the EU have been: the strengthening of EU cohesion policy (Martinico 2013); the White Paper of the European Commission on European Governance (COM(2001)428) and the launch of wide-ranging consultations among sub-national actors on European dossiers and draft legislative acts (Plutino 2003: 61-94; Groppi 2007: 155-214); the acknowledgment of the *locus standi* of regions before the Court of Justice in matter of state aids (Porchia 1999: 1674-1680; Caruso 2011: 804-827; Raspadori 2012: 69-72);^{IV} and, finally, the Laeken Declaration that put the territorial question firmly within the agenda of the Convention on the Future of Europe (Loughlin 2005; Weatherill 2005b; Kiiiver 2006; Domenichelli, 2007).

The Treaty of Lisbon substantially extinguished the problem of ‘regional blindness’, at least legally speaking. This Treaty touches upon the regional issue through four groups of provisions: firstly, the constitutional identity of Member States, which must be taken into account by EU institutions when acting, by referring to ‘their fundamental structure, political and constitutional, *inclusive of regional and local self-government?* (Article 4(2) TEU) (Di Salvatore 2008; Guastaferrero 2012: 305-318); secondly, the principle of subsidiarity has been restyled (Article 5(3) TEU) in order to assess whether the objectives of a proposed action



can be sufficiently achieved at regional and local level (Schütze 2009: 525-536); thirdly, as an expansion of the duty of the European Commission to launch wide-ranging consultations before any draft legislative act is proposed (Article 2, Protocol no. 2), also regions, although not directly mentioned, can have a say at the pre-legislative stage (Morelli 2011: 109-124; Fasone and Lupo: 2013); and, finally, regions are enabled to control the compliance of draft legislative acts with the principle of subsidiarity (Articles 6 and 8, Protocol no. 2).

Regions have become the guardians of the principle of subsidiarity by means of two procedures (Bußjäger 2010: 51-71). On the one hand, ‘*regional parliaments with legislative power*’ (Article 6) can be consulted by the relevant national legislature as part of the early warning mechanism, that is during the eight-week period when parliaments can address reasoned – i.e. negative – opinions to the EU institutions claiming a breach of the principle of subsidiarity before the beginning of the legislative process; provided certain thresholds are reached, that can lead to a delay or even to a locking of the process (Article 7).^V On the other hand (Article 8), the Committee of the Regions can now bring an action for annulment before the Court of Justice when a legislative act is deemed to be adopted in violation of the principle of subsidiarity (Porchia 2009: 223-232; Piattoni 2012: 59-73).

In particular, the involvement of regional parliaments with legislative powers in the early warning mechanism, although indirectly (through the national parliaments) can be welcomed as a ‘revolutionary’ result. In fact, this new provision not only requires the participation of regions in a euro-national procedure, but also imposes that regions will be consulted at parliamentary level. In other words, the EU makes a clear option for a regional institution, the regional legislature, to be involved. This norm marks a sort of abandonment of the EU’s ‘regional blindness’ and also sanctions the rise of an EU interest in the institutional dimension and form of government of regions with legislative powers.

Moreover, the EU has reached the point to shape directly the inter-institutional relations between levels of government within the Member States. By asking national parliaments to consult, where appropriate, regional parliaments in the early warning mechanism, Article 6 of Protocol no. 2 has made the consultation of regional legislatures compulsory whenever a draft legislative act (or an EU document) falls within the regional remit (Álvarez Conde 2006: 51 ff.; Fasone 2009). Thus a European obligation to introduce



a procedure linking regional and national parliaments in the early warning mechanism seems to exist after the Treaty of Lisbon.

Starting from this assumption, this essay aims at analyzing how the Italian legal system has regulated and, if so, enforced this new inter-institutional and multilevel procedure shaped by Article 6 of Protocol no. 2. In this regard, Italy seems an interesting case study, given the lack of any official form of involvement of regional councils in the activity and procedures of the national parliament, with very few exceptions (see section 2). Because of this institutional and constitutional constraint, this essay argues that the procedure provided by the Treaty of Lisbon could affect the relationship between the regional and national levels of government in Italy and foster a brand new form of cooperation amongst legislatures – one which the Italian parliament itself has not been able to design or reform over the last ten years. In fact, compared to the results achieved by the EU, the state level in Italy has shown itself to be affected by a two-tier ‘regional blindness’. First of all internally because, in spite of some failed attempts, no direct relationships between the Italian parliament and regional councils have been established after the constitutional reform of 2001, nor have the relevant provisions of Constitutional Law no. 3/2001 been implemented to this purpose. Therefore regions are either substantially kept apart from the decision-making processes of the national parliament or, instead, can intervene indirectly through their regional executives as part of the inter-governmental State-Regions Conference, which is consulted on most parliamentary bills. Secondly, the Italian ‘regional blindness’ emerges with regard to the participation of regions in the national procedures dealing with EU affairs. Here the implementation of the provisions of the Treaty of Lisbon, in particular that on the involvement of regional councils based on Article 6, took a long time before it was regulated (see Law no. 234/2012, finally passed on 27 November 2012). Nor does it not seem that at the national level, particularly within the executive, there is awareness about the difference, legally speaking and in practice, to be made for the participation of regional institutions – governments or councils – in EU affairs at national level. Apparently the EU has thus become more conscious than some Member States of the inherent distinction, as regards the nature of institutions and the scope of their involvement, between different forms of regional participation in Euro-national procedures. By contrast, the quality and the significance of involving regional councils, the directly elected legislatures acting most closely to citizens and representing also political



minorities, rather than simply regional governments, is worth mentioning, since Article 6 of Protocol no. 2 does not refer to ‘regional parliaments’ by chance (section 3).

The essay is structured as follows: after a very brief overview of (or, rather, the lack of) the tools of cooperation between the Italian national parliament and the regional councils, the relationship between the Italian legislatures on EU affairs is examined in light of the provisions in force before, only recently, a new Law entered into force. Then, the content of this Law no. 234/2012 is analysed, focusing in particular on the early warning mechanism and on its collateral procedures. Finally, before the conclusion, a few observations on the prospects for strengthening the relationship between the national parliament and the regional councils are presented.

2. Brief introduction to a complicated story: on the relationship between State and regional legislatures in the Italian constitutional system

The relationship between the national parliament and the regional councils in Italy has always been quite weak (Manzella 2003: 19-20). Contrary to what happens in other decentralized EU Member States, for example in Austria or in Germany, the Italian regions are not represented in a national second chamber, neither at executive nor at parliamentary level.

The delayed establishment of the regions,^{VI} in the 1970s, when the (renewed) Italian parliament had already functioned for more than twenty years, and the limited legislative competences initially attributed to the regional councils, have not favoured the creation of an inter-institutional cooperation between the regional and national legislatures. The idea of establishing a Senate of the Regions has recurred several times throughout the Italian Republican history,^{VII} in particular after the revision of Title V of the Constitution (Const. Law no. 3/2001), in 2001, when the legislative competences of the regions have been significantly extended and their exercise has become more autonomous from the control of the State (Article 117, sect. 3 and 4 Const.) (*ex multis*, Martines *et al* 2008).^{VIII}

The persistent failure of setting up a Senate of the Regions and the weakening of regional councils following the reform of regional statutes and forms of government from 1999 onwards (Olivetti 2002: 308-310) have made the cooperation between the State and regions a matter for inter-governmental relations only (Ruggiu 2006; Rivosecchi 2010; and



Griglio in this *Issue*). Thus this cooperation has been modeled on conferences that bring together representatives of the State and of regional governments (as well as of local self-government, depending on the issue at stake), although some tools of inter-parliamentary cooperation have been provided in the renewed constitutional framework.

Possibly the most significant example consisted (and still consists) in the provisions of Constitutional Law no. 3/2001 that require to complement the parliamentary Committee on Regional Affairs (Article 11), which is a bicameral committee usually exercising advisory powers (Article 126 Const.), through representatives of the regions (and of local units of self-government), to be chosen at 'parliamentary level', either from within the regional council or appointed by them (Gianfrancesco 2004: 111 ff; Bifulco 2007: 88 ff.; Lupo 2007: 357 ff; Mangiameli 2007: 111 ff.). Article 11, which also increases the powers of this Committee since its opinions on certain issues would have become somewhat binding for the committee responsible on the subject matter, has never been enforced. Although this was a provisional solution waiting for a more comprehensive constitutional revision, the rules of procedure of the two Chambers have not been amended so far. Amendments would have been particularly crucial, given the difficult coordination between national and regional legislators in the aftermath of the 2001 revision and the confusing situation arising from the new division of legislative competences. Thus it is exactly after 2001 that the first level of 'regional blindness' of the state has become exacerbated: the Italian Parliament refrained from taking any action for bridging the gap between national and regional legislators and often kept on legislating as if the constitutional amendments had not been approved (D'Andrea 2002: 253 ff.; Rosa 2003: 54).

Until recently a sort of apathy has characterised the attitude of the Italian Parliament towards the regional councils and their new competences. In addition to the lack of commitment to modify the composition of the bicameral Committee on Regional Affairs, not even the 'jurisdictions' (i.e. the subject matters) of the standing committees have been updated and reformed to accommodate the expansion of the regional legislative competences and the simultaneous restriction of the State ones (Midiri 2007: 123-140). Likewise, some outdated provisions of the parliamentary rules of procedure stemming from the pre-2001 constitutional setting, like those on parliamentary approval of regional statutes or on the parliamentary control of regional laws on the ground of the merit



(Paladin 1957: 623-666; Gianfrancesco 1994), have not been repealed yet – more than ten years after the constitutional revision.

Apart from some minor legislative provisions, like those of Law no. 42/2009 on the bicameral Committee on the Enforcement of Fiscal Federalism (Lupo 2009), which however have not changed the landscape of the relationship between regional councils and the parliament, until 2012 only two formal and official channels of cooperation have effectively been in force, the others being informal tools not provided by law. These two official channels are regional initiatives of national bills and the so-called ‘votes’ of the regional councils. However, while the former show a low degree of success in spite of a certain regional activism,^{IX} the latter are likely to experience a sort of ‘revival’. Indeed, these ‘votes’, which are provided only by the Rules of the Senate (Article 138), are petitions or contributions submitted by regional councils to the Senate on issues of their interest. These are then examined by the competent standing committee, possibly jointly with a bill dealing with the same subject-matter, if existing. The number of such ‘votes’ has increased since the entry into force of the Treaty of Lisbon because, lacking any other provision that could regulate the participation of regional councils in the early warning mechanism (see above, section 1), regional legislatures have started to transmit their opinions and observations in particular to the Senate by means of this pre-existing tool.

Moreover, also informal instruments of cooperation have increasingly been used in the last few years, such as hearings of regional councilors before national parliamentary committees, even though they take place in the same way as hearings of interest groups, i.e. without any explicit recognition of the constitutional status of regional councils, in particular with regard to their relationship with parliament. Finally, in order to compensate for the lack of a Senate of the Regions, by means of an inter-institutional agreement of 28 June 2007 between the Presidents of the Chambers of the Italian Parliament and the Coordinator of the Conference of the Presidents of Regional Councils, a Joint Committee composed of an equal number of deputies, senators and regional councilors, plus the President of the parliamentary Committee on Regional Affairs, has been established. This Joint Committee, which is the result of an informal process of cooperation that had started in 2002 as a joint working group, saw its composition and functions enlarged in 2009, but it has been rarely summoned to date. Indeed, in order to organize a meeting – to which also Italian members of the European Parliament can be invited – of this Joint Committee the



activities of several assemblies have to be coordinated and outcomes of such meetings suffer from an uncertain legal status and effectiveness.

Given the weakness of existing cooperation between Parliament and regional councils in terms both of legal and more informal instruments, the Treaty of Lisbon and in particular Protocol no. 2 can probably bring new blood to this exhausted relationship. In other words, the early warning mechanism, by imposing a direct dialogue among the legislatures of the Member States, could be the starting point to reshape such a relationship beyond the 'borders' of a mere coordinated participation in EU affairs and to counteract the first level of the state's 'regional blindness'.

3. The relationship between the Italian Parliament and the regional councils on EU affairs before Law no. 234/2012

The second level of 'regional blindness' of the Italian state affects regional participation in the EU decision-making and consists of two dimension. The first deals with the fact that national bodies have perceived the involvement of regions in national procedures related to EU matters as a burden, instead of taking advantage of it as a further source of legitimation for their national position, which should arise from the accommodation of different points of view, including regional ones. The second dimension of 'blindness', which anyway is connected to the first, stems from the age-old assumption that regions must be considered as parts of a unitary approach towards EU affairs, thus not only disregarding regional diversities, but also neglecting that regional councils and governments can play a distinctive, though coordinated, role in EU affairs.

As pointed out by many scholars (Pérez Tremps 1991: 93-110; Berti 2002: 9-20; Antonelli 2010: 246-247), as a general trend of the process of EU integration the role of executives, both at national and supranational levels, has been strongly reinforced whereas national legislatures have been weakened (Cartabia 2007: 1081-1104; Spadacini 2007: 353-430; Giroto 2009: 95-100). Because of the progressive conferral of more and more competences to the EU, legislatures have been deprived, with their consent, of the power to regulate many issues that once fell under the 'jurisdiction' of Member States. This has caused a sort of competition between legislatures located at different levels aiming to preserve their legislative powers (Zuddas 2010).



However, the revision of Title V of the Italian Constitution in 2001 provided a broader room for manoeuvre for regional legislatures compared to the past and simultaneously enhanced their position in the ‘preparatory decision-making process of EU legislative acts’ and in the implementation of EU measures (Article 117, sect. 5 Const.), provided the areas concerned fall within their responsibility and subject to the rules set out in state law. Thus these new provisions seem to run in favour of a more active involvement of the regions and possibly of the regional councils, both in the preparatory stage, which deals with law-making, and in the execution of EU obligations, which often requires adaptation by means of legislation (Plutino 2003: 61-94; Paterniti 2012: 51-79).

However, although it allows regions to take part in EU policy-making also on behalf of the Italian Republic and in the place of the State, here the Constitution does not identify the regional body or bodies entitled to step in this procedure. In fact, two new ordinary laws approved in the aftermath of the constitutional revision, Law no. 131/2003 and Law no. 11/2005, seem to further strengthen the position of regional executives in EU affairs (in principle, since some provisions have remained unenforced),^x individually and through their Conferences (Bilancia *et al.* 2010: 140 ff.), and, what is more important for the aim of this contribution, avoid the creation of any mechanism of direct cooperation between parliament and the regional councils. The only provision establishing a sort of coordination between the legislatures of the two levels of government concerns the implementation of EU obligations and, in particular, in matters of shared competences (Article 117, sect. 3), the setting of fundamental principles of legislation to be developed by the State and then specified by the regions – namely by the regional councils (Cartabia and Violini 2005: 475-512).

By contrast, according to Article 5 of Law no. 11/2005, regional councils, like regional executives, enjoy a direct relationship only with the State government, particularly with the Department on EC (then EU) policies. Indeed, the State government transmitted and still transmits all EU draft legislative acts and documents also to regional councils, by means of the Conference of their Presidents (see above, section 2). In turn, within twenty days regional councils submit their observations to the Department on EC policies. The Italian Parliament has remained excluded from this cycle of top-down and then bottom-up interaction between regions and the State government.

The lack of any direct relationship between parliament and regional legislatures has



appeared to be even more serious after the ratification of the Treaty of Lisbon, which in Italy was done unanimously already in 2008. From then and until the end of 2012, passing through the entry into force of the Treaty in 2009, no change has occurred with regard to the direct cooperation between the parliament and the regional councils on EU matters (neither in other fields) in terms of national legislation – i.e. no amendments to State laws or the parliamentary Rules of procedure took place (Bifulco 2012: 10 ff.).

Although Law no. 11/2005 was amended in several provisions in order to guarantee the transmission of a broader flow of information from the government to the parliament and to regulate its involvement in the early warning mechanism (while postponing until Law no. 234/2012 the effective enforcement of the other Treaty provisions concerning the national parliament), no mention of the regional councils was made. In the light of Article 6 of Protocol no 2 annexed to the Treaty of Lisbon (see above, section 1), the lack of any reference to regional legislatures and to their mandatory consultation by parliament appeared very ambiguous, above all because a brand new article, Article 4-*quater*, was introduced *ad hoc* on the early warning mechanism.

Rather, regional councils have only indirectly benefited from the strengthening of parliament's position as regards the executive's duty of information, thus also receiving the government's Annual Report and Programme^{XI} about, on the one hand, prospective actions of the Republic in the EU and, on the other, the implementation of EU obligations, the outcomes of the Italian participation in the meetings of EU institutions, and the follow up of parliamentary resolutions and regional observations (Article 15, Law no. 11/2005).^{XII}

Although the two Chambers, in particular the Chamber of Deputies expressly,^{XIII} have recognised the need to adjust their Rules towards establishing direct contacts with regional councils regarding their consultation during the early warning mechanism, neither have their Rules of procedure been reformed to date nor has the involvement of regional legislatures been provided for in the new experimental and temporary procedures fixed through two decisions by the Committee on Rules of the Chamber and in a letter of the President of the Senate.^{XIV}

Nevertheless, if until 2012 both the Italian parliament and government have substantially ignored the regional dimension of the Treaty of Lisbon – confirming, once more, the thesis of the 'regional blindness' of Italy – regions, and particularly regional councils, have shown a great commitment to revise their own statutes, laws and rules of



procedure. In other words, regional councils have succeeded where the State has failed, with most of them adopting updated rules even before the Treaty of Lisbon entry into force. To date all the regional councils, with only few exceptions,^{xv} have adopted new rules allowing them, in principle, to take part in the early warning mechanism, although parliament has not approved symmetrical provisions.

Indeed, in spite of the absence of legal provisions at national level, the cooperation between regional councils and the two chambers in the early warning mechanism has *de facto* started to develop intensively ever since the 16th parliamentary term (2008-2013) (Olivetti 2012: 551-552). Some regional legislatures, especially those of Abruzzo, Emilia-Romagna and Marche (Sardella 2007: 431-477; Voltan 2010: 135:141), have begun to transmit their observations to both chambers on the basis on the combined provisions of Article 6 of Protocol no. 2 with Articles 4-*quarter* and 5 of Law no. 5/2005: in fact, in the observations regional councils inserted not only their assessment on the compliance with the principle of subsidiarity, but also their concerns about the principle of proportionality and on the substance of draft legislative acts and documents. Albeit initially these observations have been ignored, since the Chamber and the Senate do not even know how to deal with them, by which existing procedures, and how to catalogue them, the situation later has changed. Already in 2009 the Regional Assembly of Emilia-Romagna submitted its observations to the parliament on a draft Directive concerning the application of patients' rights in cross-border healthcare and, subsequently, because of the regional competence on the matter, the Chairman of the Committee on Budget, General and Institutional Affairs of this Regional Assembly was heard before the Committee on EU Policies of the Chamber of Deputies.^{xvi}

Later on this inter-parliamentary relationship has developed further into institutional practice, given the fact that the flow of observations from regional legislatures to parliament has constantly grown. The Senate has revitalized the procedure on the 'votes' of regional councils (see above, section 2) treating regional observations under the early warning mechanism as if they were votes and starting to inform the regional legislatures, by means of the Conference of their Presidents, on EU draft legislative acts and documents to be examined by the Senate, whatever the competence affected (national or regional) and before the deadline of eight weeks has expired (Capuano 2011: 519-550).

Even though the deadline has almost never been respected, which in the end is



important in terms of the effectiveness of the whole early warning mechanism carried out at national level, the cooperation amongst legislatures has led to unexpected results, given the lack of legal guarantees in the national legislation. Since 2012 the standing committees of the Senate responsible on the subject matter, when examining within the early warning mechanism EU draft legislative acts falling within regional competences and on which regional observations had been submitted, have publicly acknowledged the contributions sent by regional councils and cited them in their resolutions that are also the acts where possibly a reasoned opinion is expressed, according to Protocol no. 2. Moreover, by way of the Conference of their Presidents, regional councils have developed an enhanced cooperation amongst themselves,^{xvii} starting to agree, whenever possible, on a common and unitary position to be submitted to parliament. Therefore both the single submission by each regional council and the collective position that they express are examined by the national legislature.^{xviii} An interesting case was that of the common position adopted on 16 December 2011 by the Conference of the Presidents of Regional Councils, on the input of the regional councils of Calabria, Emilia-Romagna, Marche, Sardegna and Veneto, on the EU legislative package dealing with the reform of the cohesion policy and of the common agricultural policy for 2014–2020, later cited by the Senate in its resolution.^{xix}

Although these developments by means of institutional practice have not at all solved the problem of ‘regional blindness’ by the State as regards participation in EU affairs, they demonstrate an active engagement by regional councils in the early warning mechanism and have produced one of the most dedicated attempt on the part of the regions to create a direct and stable cooperation with parliament.

4. Is Law no. 234/2012 a turning point? Lights and shadows for Regional Councils

Institutional practice alone is not able to ensure the effective enforcement of the Treaty of Lisbon and of the early warning mechanism and Article 4-*quater*, which only refers to parliament (Capuano 2011), must be complemented by provisions that consider also regional legislatures otherwise marginalized in breach of the Treaty itself. In the other Member States where all the regions are provided with legislative powers (Austria, Belgium, Germany, Spain and the UK) this issue has been already addressed, sometimes after long



and complicated negotiations, such as in Belgium (Popelier and Vandenbruwaene 2011: 204-228), while in others it has been a priority to maintain the participation of the executives of the *Länder* in EU affairs (Müller 2010: 75-96).

Following a cumbersome *iter legis* that began in 2010, originating from several parliamentary bills then merged with a government bill and overcoming the change of the parliamentary majority and of the executive in November 2011, on 27 November 2012 finally Law no. 234/2012 was approved. It entirely repealed Law no. 11/2005 and indeed contains many innovative provisions (Esposito 2013: 14 ff.). Most of all, Law no. 234/2012 introduces, for the first time, into ordinary legislation a direct form of cooperation, that is a channel of inter-institutional relations,^{xx} between the parliament and regional councils that is compulsory according to EU obligations. The fact that such an obligation arises from outside the nation-state, i.e. from a Treaty provision, possibly limits the risk of repeating unsuccessful experiences like that of Article 11 of Const. Law no. 3/2001 on the parliamentary Committee on Regional Affairs.

4.1. The early warning mechanism

The participation of the Italian ‘regional parliaments with legislative powers’ or, rather, according to the jurisprudence of the Constitutional Court (Lupo 2002: 1209-1224),^{xxi} of regional councils or assemblies, in the early warning mechanism is now provided by Article 8, section 3, and Article 25 of Law no. 234/2012. The former takes the perspective of the Italian Parliament, locating the consultation of regional councils within the national parliamentary scrutiny of subsidiarity, while the latter considers it from the standpoint of the regions and thus constitutes the ‘legal basis’ for the submission of observations on the subsidiarity principle by the assemblies to parliament. This is reflected also in the location of Article 8 within Title II that deals with the participation of parliament in the formation of the Italian position on EU policies and in EU decision-making, and of Article 25 within Title IV that instead deals with the participation of regions and local self-government in EU law-making.

The option to split the regulation of a unitary procedure, as it is conceived by Article 6 of Protocol no. 2, into two articles, however, either appears as a duplication or remains unclear at first sight. The early warning mechanism is, in fact, a procedure where all the players involved at either the national or the supranational level interact repeatedly, in



particular those located inside the same Member State, i.e. the national and regional parliaments. However, analysing the two articles more in depth, it appears that the *ratio* behind them is the guarantee a real participation of regional councils in this process.

Since Article 8, section 3, which follows the provisions on the adoption of reasoned opinions by parliament, states that the two Chambers *can* (*possono*), and not *shall*, consult the regional councils in compliance with Protocol no. 2, the carrying out of an effective consultation does not seem to be ensured in any case. Instead it results from the discretionary choice of each Chamber, this being an individual prerogative of each branch of parliament. For example, in principle the Senate could proceed to consult regional legislatures, whereas the Chamber does not. Moreover, if shaped within the format of a request of opinions to the presidents of the 20 regional councils (plus the councils of the two autonomous provinces), the consultation could become quite complex, although an alternative would be to address such a request of opinions to the Coordinator of the Conference of Presidents of regional councils. Even more cumbersome is the hypothesis of summoning a bargaining table (*tavolo negoziale*) among all the legislatures concerned aimed at making the consultation effective.

However, in order to prevent any possible hurdle that could discourage parliament from undertaking this consultation, as a precaution Article 25 entitles regional councils to directly submit to Parliament, either upon its request or not, their observations on the principle of subsidiarity in due time for the conclusion of the parliamentary scrutiny within the eight-week deadline. Therefore, Article 25 ensures that the positions adopted by the regional legislatures are taken into account by the two chambers. In other words, a sort of 'double-flow' procedure is established: whenever the top-down consultation is not accomplished, a bottom-up flow of observations emanating from the regional councils can reach the parliament anyway. This contributes to the prospects of creating a long-term cooperation among the legislatures.

This procedure reveals another advantage of regional legislatures, as the submission of their observations under the early warning mechanism is not constrained by a rigid division of competences between regions and State. If regional councils would have been allowed to express their positions only upon the summoning of a consultation on the part of each chamber, then it would have been likely that such consultation was arranged only with regard to draft legislative acts falling within the regional remit. By contrast, the wording of



Article 25 guarantees that regional councils can transmit observations on the principle of subsidiarity within the national stage of the early warning mechanism also on EU proposals that primarily affect state competences: examples are EU draft legislative acts concerning immigration which have a deep impact also on the regions (e.g. on health care or social services), although according to Article 117, section 2, lit. b), immigration formally is a State competence.

In light of the above, the institutional practice already followed by parliament and regional councils is confirmed. However, the fact that now this practice has been codified into ordinary legislation should not be underestimated. The mere behavior of institutional actors – like national legislatures – or the attempt to connect their conduct to existing general rules of procedure or to ‘experimental and provisional procedures’ – which would imply stretching parliamentary rules beyond their scope – aiming at regulating a completely new subject-matter (the idea of a direct relationship between parliament and European institutions or between parliament and regional councils on EU affairs has never been contemplated before the Treaty of Lisbon) do not enjoy the same degree of legal certainty accorded to an ordinary law, nor do they appear as fully correct from a legal point of view. Therefore it can be questionably argued that the provisions of Law no. 324/2012 on the early warning mechanism are devoid of autonomous legal value (Esposito 2013: 48).^{xxii} On the contrary, they provide, for the first time, a national legal basis for the effective implementation of the early warning mechanism that takes into account not only the parliament (as in the former Article 4-*quarter*) but also regional legislatures, as provided by Protocol no. 2.

Nor can the thesis be supported according to which the provisions of EU Treaties and Protocols are sufficient to enforce the new mechanism at national level (Capuano 2011). To some extent these European provisions need to be ‘nationalised’, according to the constitutional and institutional identity and the parliamentary tradition of each Member State. The EU only establishes a minimum common standard for the early warning mechanism, in order to leave room for manoeuvre to Member States, which, for example, are free to make the effects of the consultation of regional legislatures more or less binding as well as to define further conditions.

Law no. 234/2012 has somewhat abdicated from this function with regard to the role of regional legislatures in the early warning mechanism and this is why Article 8, section 3,



has been depicted in the literature as a ‘programmatic rule’ (*norma programmatica*) (Esposito 2013: 48). Indeed it fails to define the duty of the parliament with regard to effects and frequency – i.e. when such a consultation must occur – of regional consultation, simply referring to the rules of procedure for a detailed regulation of the matter. While according to Article 6 of Protocol no. 2 national Parliaments seem to be bound to consult their regional legislatures when the issue at stake affects regional competences, quite understandably EU provisions have not fixed any further obligations for national parliamentary procedures. Indeed, this matter should be regulated either by means of constitutional law – as it was done in 2001 regarding the participation of regions in the Committee on Regional Affairs –, since it concerns the relationship between parliamentary institutions enjoying a constitutional status and located at different levels of government within the Italian Republic or, as it seems preferable, by means of ordinary legislation. In the end, it would not be the first time that an ordinary law defines in great detail the effects of parliamentary procedures or the activity of parliamentary bodies (see, e.g., Law no. 124/2007 and Law no. 42/2009), nor can such legislation be deemed to impair the autonomy of parliament. By contrast, much less can be done through the rules of each chamber because the whole process concerns a national multi-level and inter-institutional procedure and there exists the risk to undermine the prerogatives conferred by the Treaty of Lisbon upon regional legislatures. What parliamentary rules of procedure could rationally establish, instead, are certain procedural but equally fundamental aspects, like the introduction of the ‘votes’ of regional councils also in the Chamber and formal and televised hearings of regional councilors during the early warning mechanism or to regulate the status of regional ‘votes’ within the parliamentary scrutiny on subsidiarity (which committee is entitled to examine them, whether they are annexed to the opinions or to the reasoned opinions, etc.).

As much as Article 8, also Article 25 remains deliberately silent on certain issues. For example, it is worth mentioning the lack of a further deadline for the transmission of the observations on the part of regional councils. This seems consistent with the fact that the main deadline has already been fixed, for everybody, in the eight weeks laid down by Protocol no. 2 itself. However, mentioning as the only time limit for regional legislatures the submission ‘in due time as for the conclusion of the parliamentary scrutiny’ (thus within the eight-week period), the provision remains too vague. Indeed, practice reveals



that whenever one or both chambers are able to send their opinions or reasoned opinions in advance (sometimes they do not, and thus this case falls into the category of the ‘political dialogue’, see section 4.2.),^{xxiii} they do not wait for the submission of regional observations until the expiration of deadline. Instead, as soon as the opinion is supposed to be finalized, it is voted by the committee concerned or by the House and immediately transmitted to the EU institutions and the executive. Article 25 does not prevent such a hypothesis from happening. In other words, what ‘due time’ means is likely to be decided by the parliament every time (20, 30, 40 days), thus giving it great discretion and damaging the predictability of the whole procedure.

Moreover, relying on the rules of procedure (Articles 125 R.C. and 144 R.S.) and on the experimental procedures in force, the time limit also differs from one chamber to the other (40 days, 15 days etc.). Not only would a fixed deadline give legal certainty to the procedure, stimulating more promptly a reaction on the part of regional councils, but it would also solve a possible mismatch which could occur with regard to the deadline of 30 days, fixed in Article 24 and concerning the submission of regional observations, either by legislatures or executives, to the State government. The content of these latter observations is not clarified by the Law, but in principle they should not deal with the principle of subsidiarity in order to avoid overlapping with Article 25.

Law no. 234/2012 does not solve the problem, which has existed since the entry into force of the Treaty of Lisbon, of coordinating multiple procedures involving the same players, i.e. the regional councils, and dealing with the same subject, i.e. an identical EU draft legislative act, but having different:

- recipients at national level, i.e. government and parliament;
- scopes, i.e. issues arising from the proposal or the principle of subsidiarity (or, within the ‘political dialogue’, any other issue); and
- deadlines, i.e. eight weeks, 30 days or the undefined parliamentary schedule, to be fixed for each draft legislative act.

With regards to the problem of accommodating the early warning mechanism, which by definition is a parliament-based procedure, with the relationship between regions – regional councils included – and the State government, provided by Article 24, Law no. 234/2012 fails to establish an additional but autonomous flow of information from parliament to the regional legislatures or to their Conference (as it is developing in practice:



see above, section 3).^{xxiv} In fact, if the government is possibly the best institution to provide also regional councils with specialized and timely information on EU draft legislative acts (Article 24, section 2), nonetheless the State legislature seems the most appropriate institution for sending draft legislative acts to regional councils and to fix, at the same time, the deadline for the early warning mechanism.^{xxv}

However, in contrast to this criticism emerging from the analysis of Articles 8 and 25, a positive element deriving from the new provisions deals with a clarification of the relationship within the ‘triangle’ identified by parliament, regional councils and the Conference of their presidents. Here Article 25 opts for setting up individual relationships between each regional legislature and parliament within the early warning mechanism, a choice which mirrors that of the EU Treaties for an individual participation of every parliament or chamber thereof, without however excluding the exchange of views and coordination amongst parliaments (Louis 2009: 131 ff).

The ratio is the following and seconds the asymmetry of Italian regionalism (Bilancia *et al.* 2010: 124): in fact, a different degree of commitment and engagement can emerge across the councils when participating in the early warning mechanism and the same EU draft legislative act can raise a harsh debate in a certain region while passing ignored in another. Thus, it is not convenient to force regional councils to agree on a common position within the Conference of their Presidents, thereby blocking the submission of regional observations in case of diverging views. Rather, as in other Member States like Austria (Kiefer 2010: 143-160; Weiss 2010: 97-106), Spain (Auzmendi del Solar 2010: 21-28; Palomares Amat 2011: 19-58; Alonso de León 2012: 305-322) and the UK (Carter and McLeod 2005; Fasone 2009; Bruno 2012), the submission is conceived by Article 25 as an individual prerogative of every regional council, which in principle does not forbid them to adopt common observations within the Conference – being always informed by regional legislatures – and transmit them to the Parliament. This is a flexible solution which intends to simplify the procedure whenever possible: for instance, the top-down flow of information reaches the regional legislatures through their Conference, while the bottom-up flow of information ensures the highest level of pluralism possible, allowing the expression of all regional positions unless a compromise amongst them is feasible.

4.1. The ‘political dialogue’





The most ‘revolutionary’ provisions of Law no. 234/2012 dealing with the relationship between regional councils and parliament in EU policy-making are those concerning the ‘political dialogue’. This is a mechanism not regulated by the EU Treaties but invented by the European Commission in 2006, and confirmed in 2009, that enables national parliaments to directly transmit to the Commission any opinion or contribution on whatever EU draft legislative act or documents and raising any kind of concerns (on the legal basis, on the principles of subsidiarity or proportionality, or on the substance) outside the early warning mechanism and its deadline. The ‘political dialogue’ was actually conceived as a tool for legitimizing a direct channel between the Commission and parliaments to remedy the rigidity of the early warning mechanism, and in particular to broaden the focus of the scrutiny and to minimize time-constraints that could limit parliamentary participation.

Indeed, as it is shown also by the European Commission, the ‘political dialogue’ has enhanced the position of parliaments in the EU constitutional architecture much more than the early warning mechanism (European Commission 2012: 4).^{xxvi} Furthermore, the Italian Parliament has become one of the most active parliaments in this ‘political dialogue’ and thus it is not surprising that Law no. 234/2012 has regulated this fact, although it is quite a unique case in comparative perspective.

In particular, the decision of the Italian legislator to include also regional councils into the ‘political dialogue’ is extremely important as regards the cooperation between national and regional legislatures. Italy is the only Member State to have adopted legal provisions which enable regional legislatures to participate in this EU mechanism. However, this does not mean that, outside of launching open consultations during pre-legislative stage (see above, section 1), regional councils are entitled to send their observations directly to the Commission, as the Italian chambers can (Article 9, section 1). Instead, the same mechanism that is in force between the national legislature and the Commission is now ‘transplanted’ into the Italian Republic with regard to the relationship between regional councils and parliament. The submission of regional observations takes place under the same conditions as provided by Article 25 on the early warning mechanism, but the impact is more far-reaching in a twofold sense.

First of all, since it has become evident that legislatures, as political bodies, are possibly not the best equipped institutions to accomplish a strictly legal scrutiny of the principle of



subsidiarity (Schütze 2009; Martinico 2011; *contra* Küiver 2012), both national parliaments and regional assemblies are used to adopt opinions or contributions that also deal with the choice of the legal basis, the compliance with the principle of proportionality and, most of all, with the substance or the merit of a prospective measure, that also concern EU draft legislative acts falling within the exclusive competence of the Union (as it notably happened on the draft Regulation of the European citizens' initiative) or simply EU documents, which sometimes are crucial (like the Annual Commission Work Programme). The 'political dialogue' has anticipated such trends and Article 9 of Law no. 234/2012 has seconded it, creating a chain between regional, State and European institutions. Indeed, regional legislatures can now submit to the two chambers observations on any draft legislative act or document, on any ground, and in principle without a deadline, but of course respecting the parliamentary schedule, thus intervening before the opinions of parliament are transmitted to the Commission. In prospect, an interesting example could be that of the scrutiny of the Annual Commission Work Programme which, according to Article 13, section 1 of Law no. 234/2012, shall be examined jointly with the Annual Programme of the government on the future participation of Italy in EU affairs, and which are both transmitted to the regional councils through the Conference of their Presidents (Article 24 and Article 13, section 3).^{xxvii} So by way of the (national) 'political dialogue', each regional council can now make its voice heard by parliament on both documents, thus submitting observations on the Annual Programme of the government in light of the Commission Work Programme (or *vice versa*), and identifying its own priorities also on EU legislative proposals, which is particularly important during the planning stage. Therefore, regional councils can have a say both at the national planning stage and, indirectly, also with regards to the EU planning stage, since their observations are taken into account by parliament when it transmit its opinions on the Commission Work Programme within the (European) 'political dialogue' (see *infra*).

Secondly, the impact of the 'political dialogue' on regional councils is deeper if compared to the early warning mechanism because Article 9 expressly mandates parliament to take into consideration regional observations in its own opinions. Regional legislatures have been entitled to influence parliamentary procedures and to guide the content of parliamentary deliberations, at least when a residual or a shared competence of the regions was concerned. Therefore parliament is bound by regional observations, while again (see



above, section 4.1.) no specific limitations are posed upon regional councils as for the submission of observations to parliament, which can, in theory at least, pertain to any issue, no matter if it falls within the regional or the State remit. Although Article 9 marks a breakthrough with regard to the cooperation between national and regional legislatures – since, in principle, the observations of the latter can to some extent not be disregarded by the former – it is a paradox that such a result is achieved on a procedure which is not even provided by the Treaties, whereas the early warning mechanism, regarded as one of the main innovations of the Treaty of Lisbon (Küiver 2012: 19 ff.),^{xxviii} according to Law no. 234/2012, only limitedly strengthens the tie between the national and the regional legislatures.

In spite of the significance of the provisions on the ‘parliamentary dialogue’ for regional councils, also in comparative perspective, Article 9 also contains an ambiguous and maybe erroneous reference to the ‘regions and autonomous provinces’, besides regional legislatures, as if the latter were not part of the regions themselves. The norm is actually meant to involve also regional executives into the ‘political dialogue’ with parliament, with the same binding effects as accorded to the observations submitted by the regional councils, and aims to increase the information flow from regional political bodies to the national legislature. However, this new provision once more demonstrates the ‘regional blindness’ of the Italian state, which ignores how the early warning mechanism is designed at the regional level and how complicated the relationship between each regional legislature and executive is on this issue.^{xxix} Indeed, nowadays most regional laws that regulate this matter try to foster the adoption of a unitary position involving both the regional councils and the regional executives (Fasone 2010: 163-190). This happens either by means of a case-by-case inter-institutional agreement between the regional councils and the executive, which assigns to the council the power to submit observations – in particular on the principle of subsidiarity– on EU draft legislative acts to parliament and to the regional executive that to submit observations to the State government, thus establishing two parallel but consistent channels: one inter-parliamentary, the other inter-governmental. Or, as it is provided for in some other regions, like Marche, on the basis of a framework inter-institutional agreement it is the regional legislative Assembly that is entitled to adopt a position, also on behalf of the executive, which is then submitted to both the national parliament and government.^{xxx}



By contrast, as mentioned above (section 4.1.), these regional provisions and practices have been neglected by the national legislator, who has tried to establish procedures where there are multiple, confusing and overlapping interactions:

- between the regional Councils, on the one hand, and the regional executives, on the other, with the State executive, on potentially any issue arising from an EU proposal, within 30 days since its transmission;

- between regional councils and the parliament, only on the compliance with the principle of subsidiarity in the early warning mechanism and in due time, within the eight-week period; and, finally,

- between regional councils and regional executives, on the one hand, and the parliament, on the other, within the 'political dialogue', again in due time but considering the parliamentary schedule.

These several procedures, instead of enhancing regional participation in shaping the national position on EU policies, could contribute to exacerbate tensions and to a deadlock within the regions on who, whether the council or the regional executive, is finally entitled to interact with the national parliament and the national government, as well as between the national legislature and the national executive, which to date have often acted independently from another on EU draft legislative acts (Esposito 2013: 41). Furthermore, despite the delayed adoption of Law no. 234/2012, it has ignored regional legislative provisions and practice in force for several years in order to arrange the most suitable regional institutional balance after the Treaty of Lisbon (since before regional participation in EU affairs was dominated by the executives) and it seems to complicate the inter-institutional and multi-level relationships.

5. In prospect: what else can strengthen the relationship between the Italian State and regional legislatures on EU matters?

In spite of the expectations placed on Law no. 234/2012, this Law has missed the opportunity to define the relationship between regional councils and parliament as a long-term and structured cooperation, inspired by the model of the early warning mechanism and potentially enforceable in many other circumstances dealing with Italian participation in EU affairs. Although it appears unlikely, from a political point of view, that Law no.



234/2012, approved after a long parliamentary process and three years after the entry into force of the Treaty of Lisbon, will be substantially amended in the near future, in prospect some adjustments could be provided in order to establish a more direct and effective channel of interaction between the regional and the national legislatures.

A first example of such an improvement consists in involving regional councils in the operation of the parliamentary scrutiny reserve, which gives parliament a guaranteed time-frame – 30 days – to accomplish its scrutiny of an EU draft legislative act or document before any position is taken by the Italian Government in the Council of Ministers of the EU (Article 10). In particular, it could be provided that a scrutiny reserve, when activated by parliament, could be raised upon request of a minimum threshold of regional councils (e.g. at least one fourth, the same as the threshold for the early warning mechanism on criminal matters), if the issue at stake is of great concern for the region, if it affects the substance of a regional competence or if it compels crucial cross-regional interest. A regional scrutiny reserve is already in place and can be activated by the State-Regions Conference (Article 25, section 5). However, there only executives are represented and any direct relations between this body and parliament is inexistent. By contrast, the activation of the parliamentary scrutiny reserve upon a request of regional councils could also be convenient for parliament in order to understand how national legislative competences are affected by an EU measure.

A similar input on the part of a consistent number of regional councils could also be provided with regards to the ex-post subsidiarity scrutiny, that is the procedure whereby one or both chambers can request the government to bring an action for annulment of a legislative act which is deemed to be inconsistent with the principle of subsidiarity before the Court of Justice of the EU (Article 8, Protocol no. 2, and Article 42, section 4, Law no. 234/2012). The give such a role, which should concern just the initiation of the procedure without further binding parliament, to the regional councils seems coherent with the whole design of the ex-ante subsidiarity scrutiny, i.e. the participation of regional legislatures in the early warning mechanism by means of the consultation of parliament. In other words, since regional councils are entitled to step into the early warning mechanism, likewise they should be allowed to claim before parliament a violation of the principle of subsidiarity once the contested act, which violates regional legislative competences, has entered into force, although the decision to activate the procedure should lay firmly with parliament.^{XXXI}



Finally, other examples of prospective provisions to be accommodated to the need of creating a more enduring relationship between national and regional legislatures are those concerning the involvement of the Italian Parliament in the simplified revision procedures of the EU Treaties – in particular, Article 48, sections 6 and 7 TEU, and Article 11, Law no. 234/2012 – and in the enforcement of the emergency brake mechanism (Article 12, Law no. 234/2012). Here both chambers are required to agree, either by way of a law or joint resolution. Given the impact of a Treaties revision on policies and policy-making in the long term and because, if it is simplified, it takes place without the solemn process of the ordinary revision procedure and of a proper national ratification, enhancing the participation of regions in the process at national level could contribute to making the revision more legitimate and shared. Each regional council could be allowed to send observations to parliament about the necessity of such a revision and its implications at regional level. The same procedure could apply in the event of an enforcement of the emergency brake procedure with regard to Article 48, section 2 TEU that deals with the adoption of measures by the European Parliament and the Council in the field of social security, particularly regarding the benefits of employed and self-employed workers and their dependants. Within this procedure each government in the Council can complain about an impairment of its social security system or its financial sustainability deriving from the measure proposed, thus suspending the procedure for its adoption. Consequently, Article 12 of Law no. 234/2012 entitles parliament to raise such an objection – the ‘emergency brake’ – which then is binding for the Government in the Council. Since the measures adopted according to Article 48, section 2 TEU could produce a deep impact on social services provided within the regions as well as on their financial burdens, the possibility for regional councils to submit observations to parliament on whether the use of the emergency brake is suitable appears appropriate.

In the end, fostering the tie between regional councils and parliament is not only convenient in terms of the protection of regional autonomy and competences, but it also improves the (democratic) quality of multi-level decision-making and provides parliament with information and observations – necessary for achieving a weighted decision – of which it would otherwise be devoid.



6. Conclusion. Will the early warning mechanism act as stimulus for a turn in the relationship between Italian legislatures?

After decades of national uncertainty, the EU seems finally to have succeeded in establishing a direct and long-lasting relationship between the Italian parliament and regional councils by way of the early warning mechanism. In fact, in spite of the need to set up a stable cooperation between the national and regional legislatures, particularly after the extension of the legislative competences of the regions in 2001, Italy has failed to address this issue properly because of the lack of political agreement and willingness (section 2).

The Treaty of Lisbon and its Protocol no. 2 (Article 6) provide for a first step in overcoming the lack of an enduring and institutionalized relationship amongst Italian assemblies. It is significant that the EU, the legal order traditionally accused to remain 'blind' towards the regional or federal dimension of its Member States, is now likely to offer a first solution to the abovementioned problem: through the consultation of regional 'parliaments' by the national legislature on the compliance of EU draft legislative acts with the principle of subsidiarity (section 1). Deprived of its long-standing 'regional blindness', since the entry into force of the Treaty of Lisbon, the EU seems rather to be supporting – more or less consciously – the creation of an effective 'multi-level parliamentary field' (Crum and Fossum 2009: 249-271) even within Member States, as in Italy.

However, in Italy the implementation of new EU provisions by the state level took a long time (contrary to what has happened at regional level, where several regional councils have proven to be quite active), in particular with regard to making the relationship between legislatures in the early warning mechanism effective, finally resulting in the adoption of Law no. 234/2012 on 27 November 2012 (section 3). Codifying the existing institutional practice with regards to inter-parliamentary relations, Art. 8 section 3 and Art. 25 of the new Law have not introduced very innovative provisions on the national early warning mechanism, mainly deferring their detailed regulation to the parliamentary rules of procedure, a choice that can definitely be contested (section 4.1.): neither the effects nor the subjects of regional councils' observations, nor the time-frame of the process, have been defined. A double-flow procedure is set up, whereby either the initiative for the consultation of regional councils can be taken by parliament (top-down), or the regional



councils themselves can activate the procedure and submit their observations to parliament (bottom-up).

By contrast, the introduction of a ‘political dialogue’ between regional and national legislatures (Article 9, Law no. 234/2012), modeled on the European ‘political dialogue’ between national parliaments and the European Commission, appears ‘revolutionary’, also in comparative perspective (section 4.2.). Not only can regional councils send their observations to parliament on any EU draft legislative act or document, whatever the EU competence, but the two chambers are also bound to take them into consideration when adopting their opinions addressed to the European Commission.

However, also this latter procedure raises some concerns, since it does not clarify the complex network of inter-institutional and multi-level relationships that should shape the position of the Italian Republic on EU affairs. Regardless of the institutional and legislative arrangements in force at regional level, which have been consolidated over the past few years, Law no. 234/2012 arguably also includes regional executives into the ‘political dialogue’ and thereby creates confusing and overlapping flows of information between governments and parliaments at national and regional level (section 4.2.).

Although Protocol no. 2 annexed to the Treaty of Lisbon could have foreseen an overall transformation of the national-regional legislatures relationship, starting from the provisions of its Article 6 on the early warning mechanism, Law no. 234/2012 has not exploited these norms in full and refrained from providing more effective and structured channels of inter-parliamentary cooperation. Inspired by what Protocol no. 2 states, the national legislator could have established further mechanisms of coordination between parliament and regional councils, for example with regards to the initiative for ex-post subsidiarity scrutiny before the Court of Justice of the EU, the activation of the parliamentary scrutiny reserve upon request of a certain number of regional councils, or parliamentary consultation of regional councils on provisions dealing with the simplified revision procedures of the Treaties or with the emergency brake.

To conclude, the shift from the ‘regional blindness’ of the EU to the ‘regional blindness’ of Italy, as for regional participation in both the national parliamentary procedures in general and on EU affairs in particular, has only partially been recomposed by Law no. 234/2012, in spite of the potential impact of the Treaty of Lisbon, which could have provided an impetus for a more comprehensive reform of inter-parliamentary



relations in Italy— or rather, for its first introduction and proper regulation. However, possibly by way of institutional practice developed for the implementation of the national provisions on the early warning mechanism and on the ‘political dialogue’ as well as by way of further amendments to the Law, an effective inter-parliamentary cooperation, on EU inputs, will take place also in Italy and will expand beyond the EU related procedures, too.

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^I To date 8 Member States of the European Union give legislative powers to all or some of their regions or states (in the case of federal system): Austria, Belgium, Finland, Germany, Italy, Portugal, Spain, and the United Kingdom. On the whole, in the EU there are 72 regional parliaments with legislative power.

^{II} However, as it has been underlined by some scholars, much more can be done in order to overcome the problem of the EU ‘regional blindness’, starting from the reshaping of the cohesion policy (Martinico 2013).

^{III} Article 5(2) of the TEC, as modified by the Treaty of Maastricht stated: ‘In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.’

^{IV} See, in particular, the decision of the Court of First Instance (now General Court) on the case *Regione autonoma Friuli Venezia Giulia v Commission of the European Communities*, of 15 June 1999, case T-288/97 [ECR II-01871], when the Court admitted for the first time an action for annulment brought against a decision of the Commission by a sub-State body. However, while the standards applied by the General Court for the recognition of a ‘regional direct concern’ are more flexible, to date the European Court of Justice has shown a more conservative approach (Caruso 2011).

^V According to Article 7, Protocol no 2, ‘Each national Parliament shall have two votes, shared on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote. Where reasoned opinions on a draft legislative act’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the draft must be reviewed. This threshold shall be a quarter in the case of a draft legislative act submitted on the basis of Article 76 of the Treaty on the Functioning of the European Union on the area of freedom, security and justice. After such review, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision’. Moreover, if the simple majority of the vote cast to parliaments is expressed by means of reasoned opinions before the beginning of the ordinary legislative procedure and if the Commission decides to maintain the proposal unmodified, then the Council, by a majority of 55% of its member, or the European Parliament, by a majority of the votes cast, can block the legislative process, considering such proposal in breach of the principle of subsidiarity.

^{VI} Italy has 20 Regions (and 2 autonomous provinces): 5 of them were acknowledged by the Constitution itself and established in the aftermath of the adoption of the new Constitution. They enjoy a special status, meaning a greater fiscal autonomy and also broader legislative competences until 2001, usually because they are historical regions or because of the minorities living there. The remaining 15 Regions, instead, were established in the 1970s and where originally provided with less significant autonomy and legislative powers, although the constitutional reform of 2001 has significantly moved the position of the ordinary Regions closer to those having a special status.

^{VII} Perhaps the most notable attempt to create a ‘federal’ Senate or a Senate of the Regions in Italy was that



pursued by the Constitutional Law which intended to amend the Second Part of the Constitution, 'Modifiche alla Parte II della Costituzione', published on the Official Journal on 18 November 2005 (*Gazzetta Ufficiale* n. 269) and then rejected on the occasion of the constitutional referendum held on 25 and 26 June 2006.

^{viii} In fact, nowadays Regions can legislate in all matters not expressly listed in Article 117 Const. (residual clause) and in those listed in section 3 of Article 117 Const., provided that the State fixes the fundamental principles of the subject-matter. By contrast, the State, in principle (since the Constitutional Court has interpreted the catalogue of competences aiming at broadening the scope of action of the State), can intervene strictly in the matters listed in section 2. Moreover before the constitutional revision of 2001 regional laws must pass the preventive control of the State Government (former Article 127 Const.), which, under certain conditions, could challenge the constitutionality of the law before the Constitutional Court or the merit of the law before the State Parliament (although the latter procedure was never applied) (Gianfrancesco 1994).

^{ix} In the 16th Italian parliamentary term, 68 regional initiatives of national bills have been presented, 41 in the Chamber and 27 in the Senate (including those for amending the Statutes of the Regions enjoying special status), but only 5 of them (mostly constitutional law amending those special regional Statutes) have been enacted into law (source: websites of the Italian Chamber of Deputies, <http://www.camera.it>, and of the Senate, <http://www.senato.it>).

^x An example of a provision which has not been applied, although it would have enhanced the role of the Italian Regions in EU affairs, concerns the participation of members of regional governments in the national delegation to the Council of Ministers of the EU instead of State Ministers, when the draft legislative act to be examined falls in the within the regional remit (Paterniti 2012: 89-93). This can count as a further example of the 'regional blindness' of the State.

^{xi} Whose transmission has always been delayed by the Government with regard to the deadlines fixed by Law no. 11/2005, respectively, 31 December and 31 January.

^{xii} Article 15 of Law no. 11/2005 was entirely substituted by Article 8 of Law no. 96/2010, the annual Community Law for 2009, thus after the entry into force of the Treaty of Lisbon.

^{xiii} See the Report of the meeting of the Committee on Rules of the Chamber of Deputies held on 6 October 2009 about the new procedures of cooperation between the Chamber and the EU institutions (www.camera.it).

^{xiv} See the decisions adopted by the Committee on Rules of the Chamber of Deputies on 6 October 2009 and on 14 July 2010, as well as the letter sent on the same day when the new Treaty entered into force, on 1 December 2009, by the President of the Senate to the Chairmen of the standing committees.

^{xv} These are the cases of the two autonomous Provinces of Bolzano and Trento, of Calabria, Campania, Friuli-Venezia Giulia, Lazio, and Piemonte.

^{xvi} See Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare, COM (2008) 414 final, 2 July 2008, then become Directive 2011/24/EU of 9 March 2011. The hearing of the councilor of the Assembly of Emilia-Romagna took place on 26 February 2009, as an informal hearing. From the adoption of the first decision by the Committee on Rules of the Chamber about the provisional procedure to be follow within the early warning mechanism, thus from 6 October 2009 onwards and until the revision of the Rules of procedure, regional councilors can be heard during this procedure according to Article 79, section 4, 5, and 6 on pre-legislative scrutiny. Therefore these hearings, if relying on these provisions can enjoy a higher level of publicity.

^{xvii} The term enhanced cooperation here is not used with the meaning it has according to Article 20 TEU, as a form of differentiated integration or of multi-speed Europe, but rather as a strengthened form of cooperation amongst all regional councils, with all of them agreeing on a common position.

^{xviii} Of course those observations are currently transmitted also to the Government (in particular to the Minister on EU affairs and to the Permanent Representation of Italy at the EU), to the Conference of the Presidents of the Regions, and to the Committee of the Regions besides the Parliament.

^{xix} See resolution of the Italian Senate, doc. XVIII-bis no. 65, of 8 May 2012, on a package of five draft Regulations, COM (2011) 610 def., COM (2011) 611 def., COM (2011) 612 def., COM (2011) 614 def., COM (2011) 615 def.

^{xx} Antonio Esposito (2013: 14) has underlined that Law no. 234/2012 aims at fostering the participation of Italy in the EU decision-making and in the implementation of EU as a system, that is inter-institutional coordination between the Parliament and the Government, between the Parliament and the Regional Councils, between Regions and local self-government and within the Executive itself. This standpoint is also



shared by Jens Woelk (2010: 11-24).

^{XXI} Indeed, when describing regional legislatures, Article 6 of Protocol no. 2 annexed to the Treaty of Lisbon uses a formulation which has been banned by the Italian constitutional jurisprudence in two decisions (no. 106 and no. 306 of 2002): Regional Councils cannot be assimilated, as for their nature, to the national legislature, which alone can be named as 'Parliament'. It is not clear whether the formula 'regional parliaments with legislative powers' has been included in Protocol no. 2 following an inappropriate translation from the original French and English version of the Treaty (that refer to *Parlements* and *Parliaments*), or, rather, as it seems more plausible, no specific attention has been paid to the *nomen* used, since the distinctive features of this sub-national assemblies are substantially two: their inclusion within the regional level of government and the circumstance of being provided with legislative powers. By contrast, the formula used does not appear to design a 'model' of Parliament in the EU and to identify which these Parliaments are.

^{XXII} This statement, however, can find a reasonable explanation in the need to design the prospective procedure implementing the early warning mechanism by means of a fine-tuning of the initial procedure introduced provisionally and on an experimental basis. In other words, there was a need to test the procedure before it was codified.

^{XXIII} See further, section 4.2.

^{XXIV} According to Article 24, section 1, as soon as it receives them, the State Government transmits EU draft legislative acts and documents to the Conference of the Presidents of the Regional Councils (and to the Conference of the regional executives), which take care to forward them to very regional legislature. Thus, in the top-down procedure there is no direct flow of information between the Government and each Council.

^{XXV} Since 1 December 2009 (and even before, on the basis of a choice made by the European Commission in 2006 and seconded by the European Council), national Parliaments have received all EU draft legislative acts and documents, thus they could easily forward them to the Regional Councils.

^{XXVI} The number of opinions sent by national Parliaments, according to the 'political dialogue' has increased of about 60%, from 387 in 2010 to 622 in 2011.

^{XXVII} Article 16 of Law no. 234/2012 adds a new document to be transmitted by the Government to the Regional Councils through the Conference of their Presidents (as well as to the Regional Executives through their Conference): the Report on the trend of the financial flow between Italy and the EU, which was already transmitted to the Parliament, according to Law no. 11/2005, and which contains very significant information for Regional Councils, for example on the incoming cohesion funds.

^{XXVIII} For the first time ever in 2012 the threshold of one third of reasoned opinions from national parliaments, sufficient for triggering the re-examination of an EU draft legislative act by the Commission, has been reached on the draft Regulation on the right to take collective action with regard to the freedom of establishment and the freedom to provide services in the EU (COM (2012) 130 final). In September 2012 the Commission decided to withdraw the proposal. See Russo (2012) and Fabbri and Granat (2013: 115-144).

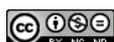
^{XXIX} I am grateful to Barbara Sardella for having raised this point to my attention.

^{XXX} The opposite solution, i.e. that of enabling the Regional Executive to adopt a binding position for the whole Region, also on behalf of the Council, which some Regions, like Campania (Article 2, regional law no. 18/2008), still use, does not seem consistent with the new framework provided by EU law, in particular with the early warning mechanism where there is a direct call for the participation of regional legislatures.

^{XXXI} According to Article 8 of Protocol no. 2, annexed to the Treaty of Lisbon, an action for annulment on the same ground can be brought also by the Committee of the Regions (CoR), where Regional Councils are represented on the basis of Article 27 of Law no. 234/2012. However, the position of Regional Councils is quite different in the Committee of the Regions, compared to the status acquired in the early warning mechanism *vis-à-vis* the national Parliament. Indeed, within the CoR Italian Regional Councils are only a minor component, next to local self-government and regions from other EU Member States, the executives moreover being the largest component of the CoR.

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