

The Flemish Parliament: a regional parliament in Belgium, a chamber of the national parliament in Europe

Luk Van Looy
legal advisor to the Flemish Parliament

1. INTRODUCTION

National and regional parliaments are the heart of democracy. However, more and more legislation comes 'from Europe'. The main European legislator is the Council of Ministers, composed of representatives of the governments of the member states. In the European legislative process, governments have taken over the power of parliaments. National and regional parliaments have no say in the adoption of European directives and regulations.

Since 2009 (Lisbon Treaty) the national parliaments are cautiously involved in the European decision-making process, mainly by granting them the authority to assess whether European legislative proposals comply with subsidiarity principle. The European treaties do not grant this authority to regional parliaments, they have to rely on the goodwill of their national parliament to involve them.

On the basis of Belgian federalism, this paper explains that regional parliaments of the EU Member States do not depend solely on their recognition in the European treaties to play a European role. Each federal country is architect of its own state structure and is able to actively involve its regions in the European decision-making process.

2. BELGIAN CONSTITUTION SETS ITS REGIONS ON THE TRACK TO EUROPE

As a federal country, Belgium is definitely not unique in the European Union. However, Belgian federalism does have certain characteristics that make it unique. To understand the role and powers of the Flemish Parliament in the European Union, a short introduction on some specific features of Belgian federalism is necessary.

2.1. Multi-dimensional federalism

Unlike a classic federal state, Belgium's federalism is multi-dimensional, characterized by two subnational levels of government that overlap, namely the Regions (3) and the Communities (3). Both the Regions and the Communities have their own government and their directly¹ elected parliament.

The Regions - Flanders, Wallonia and Brussels-Capital – are most similar to traditional regional states as they are based on a strict geographical division. By consequence the competences of the Regions are related to 'territorial' policy areas such as environment, housing, agriculture. The three Communities – the Flemish, the French and the German-speaking Community – are more abstract entities, referring to the competence to make legislation and to establish institutions in the field of education, culture and other individual matters. The authority of the Flemish, French and German-speaking Communities are

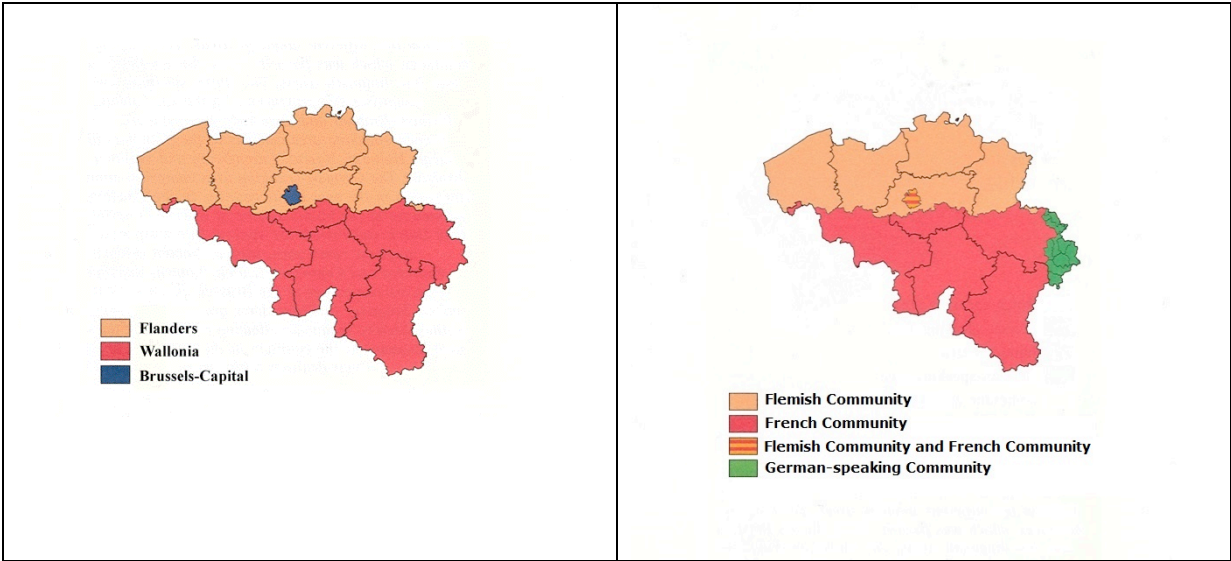
¹ With exception of the Parliament of the French Community which is composed of the French speaking members of the Walloon Parliament and 17 French speaking members of the Brussels Parliament.

territorially limited to the area where respectively Dutch, French and German are recognised as an official language. In this way bilingual Brussels 'belongs' both to the Flemish Community and the French Community. The German-speaking Community covers the Walloon municipalities where German is the official language.

On the Flemish side, the community and the regional institutions have been merged: the Flemish Government and the Flemish Parliament are dealing with the competences of the Flemish Community and the Flemish Region. In the context of this paper, the distinction between Communities and Regions is irrelevant. Any reference to Communities and Regions will therefore be replaced by the umbrella term 'Regions'.

The Belgian Regions

The Belgian Communities



2.2 Exclusivity principle

What sets Belgian federalism further apart from other federal systems is the strict and exclusive division of powers between the different levels. The federal government, the Communities and the Regions all are *exclusively* competent, without interference of other authorities, to take legislative, executive *and* international action in the areas that the Constitution and the Special Law on Institutional Reform² have assigned to them. This exclusivity principle is one of the foundations of Belgian federalism and also offers the explanation for the specific position of the Belgian Regions in the European Union. In principle, action on a specific matter always belongs to the exclusive authority of the federal government, the Communities or the Regions. Overlaps in authority are excluded. In addition, there is no hierarchy between federal and regional norms. Consequently the federal government is not authorised to overrule the Regions.

² Special Law of 8 August 1980 on Institutional Reform.

2.3. In foro interno, in foro externo

2.3.1. The Regions help determine the Belgian vote in the Council of Ministers

The exclusivity principle extends to foreign policy. When Regions are internally responsible for a policy area, they are also internationally responsible (the *in foro interno, in foro externo* principle). The Regions have the authority to conclude treaties for their policy areas autonomously.³ Furthermore they are responsible for their policy areas at the European level.

The Treaty on European Union (TEU) recognises the constitutional identity of each member state, including the ability to grant self-government to local and regional authorities.⁴ Nevertheless, the European Union is first and foremost a union of states and not Regions. The European basic treaties recognise only the national or federal authorities of member states as interlocutors, the Regions are not fully recognised as actors in the European decision-making process. This does not prevent the member states from involving their Regions in the preparation of the Councils of Ministers.

In Belgium each Council of Ministers is prepared by the governments that are responsible for the policy areas about which the Council decides. If a subject falls under the responsibility of the Regions, the relevant ministers of the several Regions prepare the Belgian position. The federal parliament and regional parliaments are not involved in determining this position. The concrete procedure for determining a common Belgian position was set out in the cooperation agreement of 8 March 1994 on the representation of the Kingdom of Belgium in the Council of Ministers of the European Union.⁵ The consultations between the federal government and the various regional governments aim to reach a consensus. If this fails, Belgium abstains from the vote in the Council of Ministers. An abstention is not politically neutral. When unanimity is required, abstentions count as positive votes. When a qualified majority is required, abstentions count as negative votes.

2.3.2. Regional ministers represent Belgium in the Council of Ministers

Until 1992, only members of national governments were allowed to represent their country in the Council of Ministers. During the negotiations for the Maastricht Treaty, it was agreed on the initiative of Belgium, Austria and Germany, that member states can also be represented by regional ministers in the Council of Ministers, on the condition that these ministers are authorised to commit their member state. Regional ministers do not act on their own behalf, but represent the member state. Their position is assumed to be the position of the member state.⁶ To this, the Lisbon Treaty has added, unnecessarily in our opinion, that the (federal or regional) ministers must also be authorised to cast a vote on behalf of their member state in the Council of Ministers.⁷

In Belgium, the possibility for regional ministers to take part in the European Council of Ministers is established by law.⁸ The actual composition of the Belgian delegation depends on the policy area which is discussed in the Council, and is regulated in detail in

³ Article 167 Constitution, article 81, §§1-5 Special Law on Institutional Reform.

⁴ Art. 4.2, first sentence TEU: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."

⁵ Cooperation Agreement of 8 March 1994 between the federal government and the governments of the Communities and the Regions on the representation of the Kingdom of Belgium in the Council of Ministers of the European Union.

⁶ Article 146 former EC Treaty: "The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question."

⁷ Article 16.2 TEU: "The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote."

⁸ Article 81, §6 Special Law on Institutional Reform.

the cooperation agreement of 8 March 1994 on the representation of the Kingdom of Belgium in the Council of Ministers of the European Union.

In principle, Belgium is represented by one (federal or regional) minister. For the Councils dealing with European policy areas that, according to Belgian law, fall partly under federal authority and partly under regional authority, the representing minister is assisted by an assessor from another legislation level. In order to align the composition of the Belgian delegation with the authority of each council formation, the cooperation agreement of 8 March 1994 divides the European Council formations into six Belgian council categories. The composition of the Belgian delegation depends on the category under which a policy area falls:

- Category I (general affairs, foreign affairs, ecofin, budget, justice, telecommunications, consumer affairs, development cooperation and civil protection): these councils deal with themes that are entirely federal responsibilities. For these Councils, Belgium appoints only a federal minister.
- Category II (internal market, public health, energy, transport and social affairs): these councils deal mainly, but not exclusively with federal responsibilities. A federal minister speaks on behalf of Belgium, but is assisted by a regional minister.
- Category III (industry, research and environment): these Councils deal mainly, but not exclusively with regional responsibilities. A regional minister speaks on behalf of Belgium, assisted by a federal minister.
- Category IV (culture, education, tourism, youth, urban planning and housing): these Councils deal with entirely regional responsibilities. In these Councils, Belgium is represented by a regional minister only.
- Category V (fisheries): fisheries is a regional responsibility. Because Flanders is the only Region with a coast, Belgium is always represented by a Flemish minister.
- Category VI (agriculture): agriculture is an entirely regional responsibility. However, for historical reasons, in this Council Belgium is represented by a federal minister, assisted by the competent Flemish and Walloon ministers.

The participation of regional ministers in the Councils proceeds in turns. In the Councils that belong to the mixed categories, the representing minister or the assessor come from different Regions, in turn, and always for one year.

2.4. Declaration 51: "Belgian regional parliaments are chambers of the Belgian parliamentary system"

The Treaty of Lisbon (2007) involved the national parliaments of the member states for the first time directly in the European decision-making process. Article 12 TEU provides that the national parliaments contribute actively to the good functioning of the Union, for instance by being informed by the institutions of the Union and by assessing compliance of European draft legislation with the principle of subsidiarity. The fact that those powers only have been granted to the national parliaments is problematic in the Belgian context.

On the basis of the principle of exclusivity, the Belgian federal Parliament is not authorised to issue opinions on subsidiarity for regional policy areas (including environment, agriculture and mobility). Following Belgian law, only regional parliaments are authorised to issue opinions on subsidiarity for legislative proposals related to regional powers.

The same goes for the possibility to veto the use of the passerelle clause⁹ that is granted to the national parliaments. Given that Belgium can only ratify EU Treaties after the federal chambers and the regional parliaments have given their consent, it is inconsistent with the logic of the Belgian constitution that only the federal chambers would be able to veto simplified treaty changes.

To reconcile the conflicting principles of the European and Belgian institutional orderings, Belgium made a unilateral declaration (no. 51) when the Treaty of Lisbon was signed, in which it clarified that in the Belgian institutional context both the federal legislative chambers and the regional parliaments should be considered chambers of the 'national parliamentary system'.¹⁰ Declaration 51 has no legal implications, but is of purely didactic nature. It explains to the other member states and the European institutions that on the basis of the Belgian Constitution, the regional parliaments have the right to exercise the parliamentary 'Lisbon Powers' (subsidiarity scrutiny, veto against passerelle clause). However, the European institutions recognise the contributions of national parliaments only. The opinions of the regional parliaments are therefore presented as opinions of the national parliament. The exercise of the Lisbon Powers by the federal parliament and the regional parliaments was regulated in a Parliamentary Cooperation Agreement.

2.5. Parliamentary Cooperation Agreement on the exercise of the Lisbon Powers

In July 2008 the presidents of the two federal chambers and the five regional parliaments¹¹ signed a cooperation agreement on the exercise of the powers that the Lisbon Treaty has granted to the national parliaments. The cooperation agreement provides, among other elements, how and under what conditions the regional parliaments can communicate their subsidiarity concerns and votes to the European Commission.¹²

The starting point of the cooperation agreement is that both the federal and regional parliaments have the autonomous authority to exercise their powers. No mutual consultation and certainly no consensus are needed to issue an opinion on subsidiarity, for example. This cooperation agreement therefore differs fundamentally from the rules for establishing a Belgian position for the Council of Ministers based on a consultation and consensus model. This different approach is not illogical. The votes and the views that are expressed in the Council of Ministers represent the whole member state, including the Regions. Unanimity is required to do so. By contrast, the subsidiarity checks performed by the parliaments do not commit a member state — and not even a national parliament¹³ — but are meant to inform the European Commission as early as possible about all possible subsidiarity concerns.

⁹ A passerelle clause is a clause in treaties of the European Union that allows the alteration of a legislative procedure without a formal amendment of the treaties. Unlike formal treaty revision this simplified revision of procedures does not require national ratification.

¹⁰ Declaration No. 51: "The Kingdom of Belgium clarifies that, in accordance with its constitutional law, both the House of Representatives and the Senate of the Federal Parliament, and the parliamentary assemblies of the Communities and Regions, act as components of the national parliamentary system or chambers of the national parliament in relation to the competences of the Union."

¹¹ The federal chambers are the federal House of Representatives and the Senate. The regional parliaments are the Flemish Parliament, the Parliament of the French Community, the Walloon Parliament, the Brussels Capital Parliament and the Parliament of the German-speaking Community. The cooperation agreement was also signed by the presidents of the two Brussels mini-parliaments that are both a part of the Brussels Capital Parliament.

¹² Cooperation agreement between the Federal Legislative Chambers, the parliaments of the Communities and the parliaments of the Regions on the exercise of the powers granted to the national parliaments by the Treaty of Lisbon (Parl.Doc., Fl. Parl. 2007-2008, no. 1653/3-attachments), hereinafter: Parliamentary Cooperation agreement on the exercise of the Lisbon Powers.

¹³ In a bicameral system, both chambers have the power to issue an opinion and cast a negative subsidiarity vote separately. Two chambers of one parliament can therefore assume different attitudes towards the same legislative proposal.

So far, only the Flemish Parliament has formally adopted the cooperation agreement. The federal chambers and other regional parliaments have not yet approved the agreement because of some legal and principled objections.¹⁴ In practice, the Parliamentary Cooperation Agreement is carried out, however.

3. KNOWLEDGE IS POWER: EUROPEAN INFORMATION FLOWS TO THE FLEMISH PARLIAMENT

To play a relevant role in the European decision-making process, it is essential that the parliament is informed at a very early stage about the European legislative proposals and the preparatory documents that precede them. The Flemish Parliament can appeal to several information channels.

Both the federal government and the regional governments are obliged by law to provide the European legislative proposals to their parliament.¹⁵ The same law stipulates that the parliaments can submit an opinion on these proposals to their government. Such parliamentary opinions do not commit the government. The explicit mention of this right to submit an opinion is largely symbolic. After all, on the basis of their general right of scrutiny, parliaments can always make recommendations (motions, resolutions) to their government, including on the European policy of that government.

The European institutions, too, have a number of information obligations towards the national parliaments.¹⁶ The European Commission must share all its consultation documents (green and white papers and communications), the annual work programme and any other instrument of legislative planning or policy strategy directly with the national parliaments. In addition, all European legislative proposals¹⁷ must be delivered directly to the national parliaments. This obligation falls on the European Commission, the European Parliament or the Council, depending on the case.¹⁸

The information obligation enables the parliaments to participate in the European decision-making process at an early stage. This can be done indirectly by asking their government to take a particular position at the European level, but also directly, by issuing opinions on subsidiarity or, in the context of the political dialogue, communicate opinions or observations to the European Commission.

The European institutions do not share their documents with the regional parliaments. In the spirit of Declaration 51, all EU documents that are sent to the House of representatives and the Senate are also sent (as a cc) to a general parliamentary email address that is monitored by the Senate and directly linked with all the regional parliaments.¹⁹ The regional parliaments therefore receive all EU documents at the same time as the national parliaments. From those documents, the European Information Point of the Flemish Parliament selects the legislative proposals that fall under the responsibility of Flanders and puts those documents on the intranet pages of the competent Standing committees. In the course of 2015, all EU documents relevant to Flanders are processed

¹⁴ The cooperation agreement stipulates that both the federal chambers and the regional parliaments have a right to veto the simplified treaty revisions (passerelle clause). On this point, there is currently no consensus.

¹⁵ Article 92quater Special Law on Institutional Reform. The flow of information from the European Commission to the Flemish Parliament is further regulated by a Decree of the Flemish Government and the Rules of the Flemish Parliament (article 94).

¹⁶ Protocol on the role of the national parliaments in the European Union and the Subsidiarity protocol.

¹⁷ These are defined as: the Commission proposals, initiatives from a group of member states, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank with a view to the adoption of a legislative act.

¹⁸ Article 2 Protocol on the role of the national parliaments in the European Union.

¹⁹ Article 3 Parliamentary Cooperation agreement on the exercise of the Lisbon Powers.

in an EU database which will also be publicly accessible on the website of the Flemish Parliament.

4. THE ROLE OF THE FLEMISH PARLIAMENT IN THE RATIFICATION OF EU TREATIES

European institutional treaties always cover both federal and regional policy areas. In accordance with the *in foro interno, in foro externo* principle, the Regions have the right to help determine the Belgian positions. Just as with other mixed treaties, there is consultation between the federal government and the governments of the Regions on the Belgian position during the treaty negotiations. This consultation follows a procedure that was established in two cooperation agreements of 8 March 1994.²⁰

4.1. Preparation and signing of European basic treaties

The revision of the European basic treaties is usually prepared during so-called Intergovernmental Conferences (IGCs). An IGC is the collective name for a series of negotiations that precede a treaty revision. During an IGC there is usually negotiation at both technical and political level between representatives of the national governments of the member states. For Belgium, the Belgian Permanent Representative to the EU heads the technical negotiation delegation, which also consists of representatives of the Regions. At the political level, the governments of the member states negotiate mainly in the Council of Ministers and the European Council.²¹ At the ministerial negotiating tables the Belgian position is represented by the federal Prime Minister or the Federal Minister of Foreign Affairs.

At the Belgian level, the representatives of the federal and regional governments together prepare on equal basis a common position, under the leadership of the Ministry of Foreign Affairs. Only positions on which a consensus exists are defended by Belgium at the European negotiating table. Although in principle, the power to conclude treaties rests with the executive, the parliaments are involved in the review of the European institutional treaties at an exceptionally early stage. The federal government and the regional governments are constitutionally obliged to inform their parliaments on the progress of the negotiations.²² In principle, the parliaments are entitled to the treaty text before it is signed, but in practice it rarely happens that governments submit the final draft of treaty texts to their parliaments.

Normally mixed treaties, which cover both federal and regional powers, are signed by the federal minister of Foreign Affairs and by one regional minister per Region. Notwithstanding this principle, the basic European Treaties are only signed by the prime minister or the minister of foreign affairs of the federal government "on behalf of the Kingdom of Belgium". The Regions are listed below that signature.²³

²⁰ The special legislator has not established a consultation procedure. The federal government and the regional governments were instructed to make an agreement about this (Art. 92 §4ter Special Law on Institutional Reform). This resulted in the Cooperation Agreement of 8 March 1994 between the federal government, the communities and the regions on the detailed rules for the conclusion of mixed treaties, and the cooperation agreement of 8 March 1994 between the federal government, the communities and the regions and the United College of the Joint Community Commission on the detailed rules for the conclusion of mixed treaties. Both agreements were approved by the respective parliaments.

²¹ In 2000 (IGC in preparation of the Nice Treaty), representatives of European Commission and the European Parliament took part in the negotiations.

²² Article 168 GW and article 16, §2 Special Law on Institutional Reform.

²³ PB. C. 18 November 1998, vol. 351,1.

4.2. Approval by Flemish Parliament required

The European Union does not interfere in the internal treaty procedures of the member states. In Belgium, treaties only take effect after all relevant parliaments have given their consent.²⁴ This consent has to be given by law.²⁵ The parliaments cannot amend the treaties, only approve or reject them. The power of the parliaments is therefore limited, but decisive. If only one regional parliament refuses to approve a treaty the Belgian ratification of that treaty is blocked. Only after all parliaments have approved the treaty, the act for ratification of the treaty will be submitted to the King for signature.

4.3. Role of the Flemish Parliament role in the application of the passerelle clause

A major innovation in the Lisbon Treaty is the possibility to revise treaties in a simplified way through the passerelle clause (Article 48.7 TEU). This clause allows the alteration of a legislative procedure²⁶ without a formal amendment of the treaties. The use of a passerelle clause requires unanimity of all member states although member states with opt-outs and those not participating in an area under enhanced cooperation may not have a vote. Unlike formal treaty revision a formal ratification by the member states is not required. The European Council submits any initiative to easing the legislative procedure to the national parliaments. Every parliament has a veto right. It is sufficient that one parliament objects within the prescribed period of six months to wipe the proposal to ease the procedures off the table. What is easily presented as a reevaluation of the national parliaments is, at least for the Belgian parliaments, not necessarily progress.²⁷ Previously, for a relaxation of the voting procedures a classic treaty change was needed, including the ratification by all member states. The Belgian ratification depends on the approval of both the federal parliament and the regional parliaments.

Article 48.7 TEU grants the veto right to *the national* parliaments, and not — when this is applicable — to the chambers of the parliaments. Member states with a bicameral system must establish an internal procedure with a view to pronouncing the parliamentary veto on easing the European decision-making procedures. Given the Belgian institutional context, the five regional parliaments are also involved in the exercise of this veto right. According to the Parliamentary Cooperation Agreement on the exercise of the Lisbon Powers²⁸, both the federal chambers and the regional parliaments have the autonomous authority to lodge a complaint about the use of the passerelle clause. A consensus between the relevant parliaments is not needed, it is sufficient that one parliament is against the use of the passerelle clause to lodge a complaint on behalf of Belgium. The objections of the regional parliaments are communicated to the European Council through the House of Representatives. The House of Representatives is not authorised to overrule the objections of the regional parliaments, it only functions as a mailbox.

Once again it has to be mentioned that the Parliamentary Cooperation Agreement has not yet entered into force. Precisely the lack of consensus on the exercise of the parliamentary veto against the use of the passerelle clause is one of the main reasons for this.

²⁴ Article 167, §§2 and 3 Constitution and art. 16, §1 Special Law on Institutional Reform.

²⁵ The laws of the regional parliaments are called decrees (and in Brussels: ordinances).

²⁶ The most important example is a possible relaxation of the required number of votes. For policy that is decided unanimously today, it could be established through the application of the bridging clause that in the future, a qualified majority is sufficient.

²⁷ In member states where ratification is dependent on a favourable referendum, this scheme gives the parliaments involved more freedom.

²⁸ Articles 9 to 11.

5. SCRUTINY OF EUROPEAN DRAFT LEGISLATION BY THE FLEMISH PARLIAMENT

5.1. Parliamentary subsidiarity control

5.1.1. Treaty of Lisbon involves (only) national parliaments in the control of the subsidiarity principle

Since 1992, the principle of subsidiarity is formally one of the main principles for the exercise of powers by the European Union.²⁹ In matters for which both the European Union and its member States are responsible, the EU can only legislate if and insofar as the objectives cannot be sufficiently achieved by the member states (“adequacy test”), and if the European Union can itself achieve these objectives better because of the scale or effects of the proposed action (“effectiveness test”). The subsidiarity check answers the question of whether the European Union is the most appropriate policy level to achieve the desired objectives. This requires not a legal but a political assessment.

Under the Treaty of Lisbon the national parliaments of the member states are actively involved in the monitoring of subsidiarity. The national parliaments may challenge the violation of the principle of subsidiarity in various stages of the decision-making process and by various means. They are entitled to inform the initiating body whenever a legislative proposal does not, in their opinion, comply with the principle of subsidiarity (so called Early Warning Mechanism).³⁰ Once a regulation or directive has been adopted, the national parliaments may bring an appeal for infringement of the principle of subsidiarity by a European law before the European Court of Justice (ex post control). The procedures for this subsidiarity checks are set out in Protocol No. 2 on the application of the principles of subsidiarity and proportionality³¹ and in Protocol No. 1 on the role of the national parliaments in the European Union.

In neither of these protocols powers are granted to the regional parliaments.³²

5.1.2. Declaration no. 51: federal chambers and regional parliaments authorised to carry out subsidiarity checks autonomously

According to the Subsidiarity Protocol, when carrying out a subsidiarity check the national parliaments must ‘where appropriate’ consult with the regional parliaments that have legislative power.³³ the of European legislative proposals, The national parliaments must involve the regional parliaments in the subsidiarity checks, but are not obliged to take into account their comments and recommendations. For the Belgian regional parliaments this provision is not relevant. Through Declaration 51, Belgium has made clear to the other EU member states and the EU institutions that the powers granted to the national parliaments by the European treaties are exercised by the federal and/or the regional parliaments in line with the internal division of powers. From a Belgian perspective, the regional parliaments are fully competent to carry out a subsidiarity check if the concerned legislative proposal falls within their field of competence. The way this happens is regulated by the Parliamentary Cooperation Agreement on the exercise of the Lisbon Powers.

²⁹ Article 5 TEU, as introduced by the Maastricht Treaty (1992).

³⁰ Articles 5.3 and 12,b TEU.

³¹ Hereinafter: Subsidiarity Protocol.

³² Article 3, Protocol I on the role of the national parliaments in the European Union.

³³ Article 6 Subsidiarity Protocol.

5.1.3. Early Warning System (subsidiarity control ex ante)

The Early Warning System, laid down in the Treaty on European Union³⁴ and in the Subsidiarity Protocol, opens up the possibility for national parliaments to issue reasoned opinions on the violation of the subsidiarity principle by a European legislative proposal. From the date of transmission of a legislative proposal in all official languages, any national parliament or any chamber of a national parliament has eight weeks to send a reasoned opinion to the initiating body (mostly the European Commission) stating why it considers that the proposal does not comply with the principle of subsidiarity. Together with the reasoned opinions that express the arguments for the alleged violation of the subsidiarity principle (qualitative approach) goes a system of votes that can have an impact on the decision making process (quantitative approach).

Every national parliament has two votes, in a bicameral parliamentary the two chambers share the votes so that both have one vote. When the number of reasoned opinions issued by national parliaments represent *at least one third*³⁵ of the votes allocated to the national parliaments, the legislative proposal must be reviewed ("yellow card"). The initiating body may decide to maintain, amend or withdraw it. Reasons must be given for this decision.³⁶

Additionally for legislative proposals under the ordinary legislative procedure another threshold has to be taken into consideration. When the number of reasoned opinions represent *at least a simple majority* of the votes allocated to the national parliaments and the European Commission decides to maintain its proposal, the proposal is referred to the European Parliament and the Council ("orange card"). If a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament consider that the legislative proposal is not compatible with the principle of subsidiarity, the proposal shall not be given further consideration.³⁷

The premise of the Belgian Parliamentary Cooperation Agreement is that the federal chambers as well as the regional parliaments can issue, separately and autonomously, a reasoned opinion stating why it considers that a legislative draft does not comply with the principle of subsidiarity as far as the proposed legislation falls within their competence areas.³⁸ This principle means that different parliamentary opinions can be submitted on the same legislative proposal. Each parliament that wishes to express an opinion on subsidiarity announces its intention to the other parliaments. If the competence of the Parliament is not disputed by the other parliaments, the opinion is communicated to the House of Representatives. Because the EU Treaties and the subsidiarity protocol only recognise the national parliaments as 'interlocutors', the House of Representatives sends the opinions of the regional parliaments to the relevant European institutions under the heading "opinion of the Belgian national parliamentary system". The regional parliaments receive the replies to their opinions from the European Commission indirectly through the secretary of the federal parliament. The subsidiarity opinions of the regional parliaments are published on both the IPEX³⁹ and the REGPEX databases.

³⁴ Article 5(3) and Article 12(b) TEU.

³⁵ If the legislative proposal is submitted on the basis of article 76 TFEU on the area of freedom, security and justice, the threshold is a quarter of the total amount of votes allocated to the national parliaments.

³⁶ Article 7(2) Subsidiarity Protocol.

³⁷ Article 7(3) Subsidiarity Protocol.

³⁸ A parliament that is of the opinion that another parliament wrongly considers itself competent with regard to a particular European legislative proposal may submit this misuse of powers to the Council of State, which issues a non-binding opinion within a period of 5 days. If, following the opinion of the Council of State, the dispute persists, the case is referred to the Conference of the Presidents of the parliamentary assemblies (CPPA). The Parliamentary Cooperation Agreement does not solve the hypothesis that the CPPA also fails to resolve the misuse of powers.

³⁹ IPEX is a platform of the national EU parliaments to exchange information. The Belgian regional parliaments are not members of IPEX. Their subsidiarity opinions are published on IPEX as if they were opinions of the Senate, but with the inclusion of the regional parliament that has submitted this opinion.

For casting the two Belgian subsidiarity votes, a complex scheme has been established. For European legislative proposals that cover both federal and regional responsibilities, one vote is reserved for the federal chambers (House of Representatives and Senate) and one vote for the regional parliaments. Because each parliament must be able to fully exercise its power of control, it is sufficient that one regional parliament establishes the violation of the principle of subsidiarity for the 'regional subsidiarity vote' to be cast. If more than one regional parliament casts a reasoned subsidiarity opinion, it's still worth only one (regional) vote, but the arguments and considerations of both parliaments will be put together in the sole Belgian reasoned opinion.

For European legislative proposals falling under the exclusive competence of the Regions, the two subsidiarity votes both belong to the regional parliaments involved. The Cooperation Agreement guarantees that no single language area can monopolise the vote, however. The regional parliaments are therefore divided into four language groups, according to the official language of the parliaments involved: the Flemish Parliament belongs to the Dutch language group, the Walloon Parliament and the Parliament of the French Community belong to the French language group, the Parliament of the German-speaking Community belongs to the German language group and the Brussels Capital Parliament belongs to the bilingual language group (French and Dutch). A maximum of one vote can be granted per language group. This does not mean that there must be a consensus within each language group about casting this vote; once a parliament has cast a vote, the vote of the language group has been used. The negative opinions of the Walloon Parliament and the Parliament of the French Community therefore result in one vote only. This scheme aims at a minimum representation of the total number of votes cast.

5.1.4. *Subsidiarity control ex post*

Any member state may contest the legality of European legislation in the Court of Justice on the basis of the violation of the principle of subsidiarity.⁴⁰ In litigation before the Court of Justice, member states are in principle represented by their governments. Notwithstanding this, appeals for the violation of the principle of subsidiarity can also be filed on behalf of a national parliament or a chamber of that parliament.⁴¹ As follows from the subsidiarity control ex ante, it is evident from a Belgian perspective that also the regional parliaments can take the initiative to initiate an appeal.

The Parliamentary Cooperation Agreement of 2008 regulates how the federal chambers and the regional parliaments can bring an appeal for the violation of the principle of subsidiarity before the Court of Justice. The parliament that wishes to initiate an appeal communicates its intention to the other parliaments. If the competence of that parliament is not disputed by the other parliaments, the request to initiate an appeal is sent to the House of Representatives. The appeal is initiated as soon as one competent parliament requests it. The Parliamentary Cooperation Agreement does not comment on the question of which institution should file the appeal. In the Belgian legal system, the government and parliament have no legal personality, but they do have the power to represent their authorities (federal, regional) in court. Originally, only the governments had that right. Since 2003, both the federal parliament and the Regions have the power to represent their government in court in the case of a dispute or act whose object belongs to the independent authority of the relevant parliament. Since then, the parliaments are no longer dependent on the actions of their government to defend their parliamentary interests in court.

⁴⁰ Article 263 Treaty on the Functioning of the European Union.

⁴¹ Article 8 Subsidiarity Protocol.

When the contested regulation or directive covers only a federal responsibility, according to Belgian law, the federal parliament is itself authorised to bring an appeal before the Court of Justice, on behalf of the Belgian State. The regional parliaments do not have direct access to the Court of Justice. If they want to bring a violation of the principle of subsidiarity before the court, they must ask the federal government through their regional government to initiate the lawsuit in the Court of Justice.⁴²

5.1.5. *Subsidiarity control as leverage for more Europe in the Flemish Parliament*

To seal its power to issue opinions on subsidiarity, in 2012 the Flemish Parliament adopted an internal procedure.⁴³ With this formal procedure, the Parliament has a specific instrument to put European issues on the political agenda.

Each member of the Flemish Parliament may submit a proposal for an opinion of subsidiarity. This proposal can only be put on the agenda after the official Dutch version of the European legislative proposal has been communicated to the Flemish representatives.

There is no specific Committee on Subsidiarity in the Flemish Parliament. A proposal for a motivated opinion on subsidiarity is jointly discussed by the members of the Committee on European Affairs and the members of the most relevant Standing committee. To introduce the discussion of a proposal for a motivated opinion on subsidiarity, a hearing with external experts may be held. So far, the government has never taken part in the parliamentary discussion of European legislative proposals. The united committees vote on the proposal for a reasoned opinion on subsidiarity. After the proposal has been approved in the united committees, there is a vote in the plenary session. Given the tight deadline of 8 weeks, there is not always enough time to discuss a proposal for a reasoned opinion on subsidiarity in the committees first. In that case the proposal is immediately put to the vote in the plenary session, through an urgent procedure. Once the opinion on subsidiarity has been approved, it is passed to the competent European institution through the House of Representatives and published on IPEX and REGPEX. The Flemish Government will be informed of the opinion.

While the Belgian regional parliaments occupy a unique position in the European Union and are the only sub-national parliaments to have direct access to the early warning mechanism, until now they have hardly used their powers to issue opinions on subsidiarity.⁴⁴ This paradox can possibly be explained by the traditionally very pro-European attitude of the Belgian political parties. Moreover, the European decision-making process is still too often regarded as the monopoly of governments. The subsidiarity competence nevertheless gives good leverage to get more European issues on the parliamentary agenda and to launch a debate on the content of European legislative proposals.

⁴² Article 81, §7 Special Law on Institutional Reform.

⁴³ Article 112 Rules Flemish Parliament

⁴⁴ In the context of the early warning mechanism, so far the Flemish Parliament has only checked two European legislative proposals against the principle of subsidiarity, both in 2013. *The proposal for a Directive establishing a framework for maritime spatial planning and integrated coastal management (COM(2013)133)* was considered incompatible with the principle of subsidiarity. *The proposal for a Regulation establishing a framework on market access to port services and financial transparency of ports (COM(2013)296)* was not considered in breach of the principle of subsidiarity. However, the parliament did adopt a resolution with a number of concerns about the content of that proposal. In the context of the political dialogue, the resolution was communicated to the European Commission through the House of Representatives.

5.2. Political dialogue

In 2006, three years before the Early Warning System entered into force, the European Commission launched 'the political dialogue', an initiative to involve the national parliaments in the European decision making process. According to the Protocol on the role of the national parliaments in the European Union the European Commission sends its new legislative proposals and consultation documents to national Parliaments. The national parliaments are invited to give opinions and recommendations on these proposals and documents. The mechanism for political dialogue was set up as a privileged channel of communication between the European Commission and the national parliaments.

Regional parliaments are not directly involved in the political dialogue. This does not apply to the Belgian regional parliaments. Once again, in accordance with Declaration 51 the Belgian regional parliaments are considered to be chambers of the Belgian national parliament. On the basis of the Parliamentary Cooperation Agreement of 2008 (see above) the regional parliaments receive the documents of the Commission through a general parliamentary email address that is monitored by the Senate and directly linked with all the regional parliaments. When a regional parliament wants to raise an opinion in the context of the political dialogue, it will be sent to the European Commission by the federal parliament. Until today the Flemish Parliament has addressed only one resolution to the European Commission in the context of the political dialogue.⁴⁵

6. PARLIAMENTARY SCRUTINY OF THE FLEMISH GOVERNMENT'S EUROPEAN POLICY

In addition to the direct access to the European institutions through the reasoned opinions on subsidiarity and the ability to submit comments on European legislative proposals to the European Commission in the context of the political dialogue, the Flemish Parliament can also monitor the European policy of the Flemish Government.

6.1. Horizontal control of the European Policy in the Flemish Parliament

In the Flemish Parliament there is no specific Committee for European Affairs that is responsible for all EU issues. 'Europe' is considered a horizontal competence that can be addressed in any standing committee. Not the European origin of a particular European legislative proposal is important, but its content. Every Flemish representative deals with European rules in their field. Every European issue is therefore treated in the standing committee that is responsible for its content. European institutional and cross-department issues (treaty changes, priorities of the EU Presidency, working program of the European Commission,...) are discussed in the Commission for Foreign and European Affairs.

6.2. Control of the Flemish position in EU affairs

The Belgian vote in the Council of Ministers is the result of intensive consultation between the concerned federal and regional governments. The Flemish Government can only weigh on European negotiations if it succeeds in aligning the Belgian position with the Flemish position. Consultation with other governments is necessary because the Belgian representative in the Council of Ministers may only defend a position that has been

⁴⁵ After scrutinizing *the proposal for a Regulation establishing a framework on market access to port services and financial transparency of ports (COM(2013)296)* the Flemish Parliament concluded that the proposal was not in breach of the principle of subsidiarity but adopted a resolution with a number of concerns about the content of the proposal. The resolution was communicated to the European Commission through the House of Representatives.

approved unanimously. The parliaments are not involved in the coordination of the Belgian position. The Flemish Government nevertheless remains politically responsible to the Flemish Parliament for its positions in European issues and for its negotiating behaviour during the internal and European consultations. The parliament is informed in various ways about these.

6.2.1 Regular reports by the government

The Flemish Government informs the Flemish Parliament via six-monthly reports on the developments in European issues that are important to Flanders. These reports are circulated to the members of parliament in the form of a parliamentary document. They contain a number of records on issues that are important to Flanders. These issues are selected on the basis of the work programme of the European Commission and the work programme of the next Council Presidency. In addition, monthly communications report on the concrete work in the various Council formations and on transposition and infringement cases. Although the reports are mainly descriptive and contain hardly any views of the Flemish Government, they are a useful tool for parliamentarians to keep abreast of the progress of a European issue.

6.2.2 Debriefings of the Councils of Ministers

The Flemish Government is only one of the many players in Belgium. Belgium, in turn, is a small pawn in a larger European whole. It would therefore not be reasonable to hold only the Flemish Government accountable for the decisions of the Council of Ministers. When a directive or regulation differs significantly from the position of the Flemish Government, the Flemish Parliament has the right to be informed about the progress of the negotiations. The standing committees may require the Flemish ministers to inform them about the discussions in the COREPER and the Council of Ministers. For a number of policy areas⁴⁶ the staff of the Flemish Permanent Representative to the European Union and the Flemish Minister that was present at the Council report on the previous Councils of Ministers in the relevant expert committees. A report of these information sessions will be published as a parliamentary document. Although these reporting moments are useful, it is far from ideal for a parliament to exclusively depend on officials for information about the progress of negotiations and the voting behaviour in the Council of Ministers. For the parliaments, direct access to the minutes of the Council of Ministers could be an additional source of information for monitoring the negotiation behaviour of their governments.

6.2.3 The Flemish Parliament and the European Semester

In response to the financial crisis of 2007 and its impact on the public finances of the EU member states, measures were taken to monitor, coordinate and, if necessary, correct the economic and fiscal policy of the member states. Moreover, a number of monitoring mechanisms specific to the eurozone were established. The control and adjustment follows an annual cycle of reporting about, and European monitoring of the budgets and macro-economic situation in the member states. This cycle is known as the European Semester.

In the context of the European Semester, the member states have a number of new budgetary and reporting obligations. Their governments must submit their National Reform Programme by 30 April and submit a draft budget plan to the European Commission

⁴⁶ Including Agriculture, Fisheries and Transport.

by 15 October. In Belgium the regional governments contribute to both documents.

Parliamentary debate on the Flemish Reform Programme

Every EU Member State annually sets out its National Reform Programme, in which its progress in the area of the Europe 2020 targets are described. The reform programmes are characterised by their 'rolling character': they contain both a report on the implementation of the previous reform programme and an explanation of the measures planned for the next twelve months. On the basis of the Stability Programme and the National Reform Programme, the European Commission makes country recommendations for the member states. In their National Reform Programme of the following year, the member states respond to the country-specific recommendations previously made to them.

The Regions are closely involved in the drafting of the Belgian National Reform Programme. They take part in the editorial and political support committees that set out the Belgian National Reform Programme. The regional governments also actively participate in the bilateral meetings between the European Commission and Belgium on the follow-up of the country-specific recommendations and the drafting of the reform programmes. Since 2011, the Flemish Government sets out its own Flemish Reform Programme (FRP), which is integrated into the Belgian National Reform Programme.

From 2015, the Flemish Government is obliged to submit the draft of its Flemish Reform Programme to the Flemish Parliament by the end of March, so that a parliamentary debate is possible before the FRP must be communicated to the federal government.⁴⁷

Draft Budget Plan

Every year, the euro countries must submit a draft budget plan to the European Commission before 15 October. The plan contains not only the data about the federal budget, but also the main parameters of the draft budgets of the Regions and local authorities. The Flemish Government sets out its own Flemish draft budget plan and submits it to the federal government as a contribution to the Belgian draft budget plan.

The Flemish Government is obliged to submit the Flemish draft budget plan timely to the Flemish Parliament, so that the Committee on Finance and Budget has the opportunity to discuss it by 7 October.⁴⁸ If the committee objects to the Flemish draft budget plan, Parliament still has one week (until 14 October) to adopt a resolution in which the Flemish Government is asked to take its comments into account.

7. PARTICIPATION IN INTER-PARLIAMENTARY MEETINGS

The European Parliament and the national parliaments of the EU Presidency regularly organise inter-parliamentary meetings.⁴⁹ These meetings are meant to establish a dialogue between the members of the European Parliament and the national parliaments. Most of these meetings deal with a specific European policy area. Only the members of the corresponding policy committees of the European Parliament and of the parliaments of the member states take part in these meetings. Only the national parliaments of the member states are invited.

⁴⁷ Article 84/1 Rules Flemish Parliament.

⁴⁸ Article 83/1 Rules Flemish Parliament.

⁴⁹ Article 9 Protocol on the role of the national parliaments in the European Union.

In the Belgian context, where a number of important European policy areas fall under the exclusive responsibility of the Regions, this is problematic. For these regional policy areas (eg. education, agriculture, environment, youth) the federal parliament does not have standing committees. To solve this problem, in 2007 the federal parliament and regional parliaments made an agreement on the composition of the Belgian delegations participating in inter-parliamentary meetings. For the meetings on regional responsibilities, every competent regional parliament may add one MP to the Belgian delegation. Specifically with regard to the biannual Inter-parliamentary Conferences under Article 13 of the Fiscal Compact, the Belgian parliaments have agreed in a separate agreement that the Belgian delegation is composed of one member from both federal chambers and one member from each regional parliament. Following the same Belgian logic, during the Belgian EU Presidency in 2011, the Flemish Parliament organised an inter-parliamentary meeting with members of the national parliaments of the other member states.

The Flemish representatives do not take part in the inter-parliamentary dialogue as members of the Flemish Parliament but as members of the 'Belgian parliamentary system'. This Belgian 'disguise' of regional MP's is a typical example of Belgian pragmatism that tries to reconcile the internal Belgian division of responsibilities with the European principle that only national institutions can represent their member state.

The Flemish Parliament is also active in some networks of regional parliaments. Firstly it is a member of CALRE, the Conference of European Regional Legislative Assemblies. CALRE unites the presidents of almost 50 European regional legislative assemblies⁵⁰ and organises inter-parliamentary meetings in thematic work groups (e.g. on subsidiarity, gender equality, e-democracy). Furthermore the Flemish Parliament is member of the Subsidiarity Monitoring Network (SMN). This network is monitored by the Committee of the Regions and is set up to facilitate the exchange of reasoned opinions on subsidiarity and other related contributions between local and regional authorities in the European Union. As the Flemish Parliament acts like a chamber of a national parliament, has legislative powers that reach further than those of any other regional parliament and has direct access to the Early Warning System, its membership of CALRE en SMN are somehow ambiguous.

Conclusion

Regarding the involvement in the European decision-making process, the Belgian regional parliaments have the same powers as the national parliaments. They therefore occupy a unique position in the European Union. The Flemish Parliament must approve European treaty changes, may submit reasoned opinions on subsidiarity, is involved in the political dialogue and participates in European inter-parliamentary consultation. It derives those powers not from European treaties, but from the Belgian constitutional principle that the federal government and the Regions are all exclusively and fully (also in a European and international context) competent for distinct policy areas, and that there is no hierarchy between the two levels of government. However, a basic principle of the European Union is that the member states are represented by their national governments and national parliaments. To reconcile the Belgian Constitution with the European basic rules, the federal parliaments and the regional parliaments concluded a number of agreements and arrangements, all based on the principle that the regional parliaments can fully exercise their European powers, with the proviso that their decisions and initiatives are communicated to the European Union through the federal parliament. Ac-

⁵⁰ The parliaments of the Spanish communities, Italian regional councils, the federated states of Germany and Austria, the Portuguese regions of l'Açores and Madeira, Wales, Scotland and Northern Ireland in the United Kingdom, Åland Islands in Finland and Belgium regional parliaments.

According to the same principle, the regional parliaments that participate in inter-parliamentary EU meetings will act as members of the Belgian parliamentary system.