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## **National Parliaments in the European Union – Toward a More Active Role?**

### **Introduction**

Ever since the founding of the European Union, with the initial three Communities, the role of national parliaments of the Member States in its overall functioning has mainly been indirect and informal. One might say that, in a certain way, national parliaments have usually been hidden behind their governments and have only been asked to take a direct role on exceptionally rare occasions, such as the adoption of Treaty amendments. Although, over the years the initial Community has changed significantly and soon after expanding its goals from predominantly economic to more ambitious, clearly expressed political ones, the deepening of the integration project and a rethinking of the political process did not significantly affect the position of national parliaments. Their legislative competences were weakened in comparison with those of supranational institutions,<sup>1</sup> and it is true that their participation in EU affairs “depended on national legal provisions (or customs).”<sup>2</sup>

The adoption of the Lisbon Treaty in 2007 finally created various new possibilities for the greater involvement of national parliaments in the overall functioning of the EU. Moreover, it was the first time that an EU treaty specifically acknowledged the role of national parliaments in the EU. Among these novelties probably the most important one concerned the Early Warning Mechanism (EWM, which is also called the Early Warning System) introduced with Protocol No 2 of the Treaty of Lisbon. The EWM was envisaged precisely to be the most significant improvement for national parliaments as regards their participation in the EU policy-making process. In this aspect, national parliaments are given the right to receive direct information on EU affairs without the intervention of their governments as well as to raise objections regarding EU legislative acts, making them the guardians of the subsidiarity principle.

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<sup>1</sup> A. Cygan, *National Parliaments within the EU polity – no longer losers but hardly victorious*, “ERA Forum” 2012, Vol. 12, Issue 4, p. 517 *et seq.*

<sup>2</sup> D. Fromage, *Subsidiarity as a means to enhance cooperation between EU institutions and National Parliaments*, PE 583 131, European Parliament, Brussels 2017, p. 2.

From the beginning the purpose of the EWM was dual.<sup>3</sup> First, national parliaments were tasked with the ostensibly technical task of examining new legislative proposals from the EU for compliance with the concept of subsidiarity defined in the Art. 5(3) of the Treaty on European Union (TEU);<sup>4</sup> this refers specifically to the idea that the EU should exercise its powers only when Member States are unable to achieve objectives sufficiently and if such Union action is justified by the added value it provides. Hence, any national parliament may issue a “reasoned opinion” outlining its objections to a legislative proposal on the basis of subsidiarity. Simultaneously, the EWM also has the broader goal of improving the EU’s overall democratic legitimacy by expanding the involvement of national legislatures in its legislative process. Since, until recently, national parliaments were thought of as democratically legitimate entities with little or no aggregate influence over EU policy,<sup>5</sup> it was envisaged that their participation in EU affairs by using the EWM would enhance the democratic legitimacy of the EU and further legitimize the whole integration project through its parliamentarization that will no longer be concentrated solely on the institution of the European Parliament.

It is our objective in this article to elaborate the position of the national parliaments in the EU following the Lisbon Treaty entering into force, with special insight into the functioning of the EWM and its normative framework. We also provide a short overview of the subsidiarity check procedures triggered thus far by national parliaments to assess the measure of their factual inclusion in legislative process at the EU level as well as the overall potential of the EWM. We also identify its shortcomings and include proposals for reforming the system structure and advocate for the overall enhancement of the position of national parliaments in the law-making process at the European level.

## 1. Strengthening the position of national parliaments in the EU

For a long period, the position of national parliaments in the European integration project was that of irrelevance, basically without any significant possibility of influencing the process and faced with constant strengthening of the executive at both supranational and national levels. Parliaments were largely dependent on their governments for information on EU affairs on the national level. At the same time, EU institutions acquired more competences at the supranational level, and they were deemed distant and hardly accessible to citizens, while their operating methods were complex and

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<sup>3</sup> I. Cooper, *National parliaments in the democratic politics of the EU: The subsidiarity early warning mechanism, 2009–2017*, “Comparative European Politics” 2019, Vol. 17, No. 6, p. 920.

<sup>4</sup> Treaty on European Union, Art. 5.3: Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

<sup>5</sup> I. Cooper, *National parliaments...*, p. 920.

qualified majority voting progressively replaced unanimity. This, together with some other factors such as economic hardship in Europe, contributed to the questioning of the democratic legitimacy of the EU. The quest to reduce the democratic deficit problem and to enhance the role and position of the European Parliament, which was being progressively realized from the end of the 1970s, was a logical choice. Over the years, however, national parliaments have begun to recognize the growing influence of European policymaking on their primary legislative responsibilities, while the EU has also realized that (re)integrating national parliaments into the process might help in legitimizing the integration project and reduce the democratic deficit since reforming and strengthening only the European Parliament will not solve the problem.

Maastricht Treaty (1992) Declarations Nos. 13 and 14 were the first, albeit modest, steps toward acknowledging the importance of national parliaments at the EU level. With a call for improved communication and information sharing between national parliaments and the European Parliament, attempts to restore the somewhat broken links between these bodies that existed in the period when European Parliament members exercised dual mandates as delegates nominated by national parliaments, it also urged national governments to make sure that national parliamentarians receive the Commission's proposals in a timely manner.<sup>6</sup> Furthermore, the Treaty of Maastricht introduced the principle of subsidiarity as a general principle applicable to all areas of non-exclusive competence.

While the Treaty of Amsterdam (1997) introduced the Protocol on the Role of National Parliaments in the EU concerning the transmission of documentation from EU institutions to national parliaments and also formally recognized the Conference of the Committees of the National Parliaments (COSAC),<sup>7</sup> and the Treaty of Nice (2001) provided the impetus for re-configuring national parliaments' position in the European integration project through the Declaration on the Future of the Union, it was the Lisbon Treaty entering into force in 2009 that created specific arrangements to secure

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<sup>6</sup> The Maastricht Treaty recognized the role of national parliaments as active participants in the process through Declaration No. 13 on the Role of National Parliaments in the European Union and Declaration No. 14 on the Conference of Parliaments. Declaration No. 13 encourages national parliaments to participate more actively in order to improve communication between national parliaments and the European Parliament. The inclusion of the national governments was made in an effort to accomplish the aforementioned goals, since doing so would guarantee that their parliaments receive Commission proposals on time and have proper time to review or be informed of them. At the same time, Declaration No 14 urges the European Parliament and national parliaments to convene whenever required as a conference of parliaments. The inclusion of these statements in the Treaty represented a political advance even if they were not legally enforceable and acknowledged national parliaments' authority to observe EU legislation *ex-ante*. See *National Parliaments within the enlarged European Union. From 'victims' of integration to competitive actors?*, eds. J. O'Brennan, T. Raunio, London–New York 2007, p. 12.

<sup>7</sup> The importance of national parliaments increased with the adoption of the Amsterdam Treaty, both because they were made the subject of the Protocol that has the same value as the treaties and because they were given certain guarantees. For instance, adequate time for thorough review was ensured because a legislative proposal could only be put on the Council's agenda after six months. D. Fromage, *Subsidiarity...*, p. 2.

the greater involvement of national parliaments in EU activities, including their participation in the legislative process.

Of the several Lisbon Treaty provisions concerning national parliaments, the most important is Art. 12 of the TEU as it attributes to them the responsibility of “contributing actively to the good functioning of the Union.” Further, the treaty secures the right to information for national parliaments, since EU institutions are obliged to forward to them all draft legislative acts of the Union and applications for accession to the Union (Art. 12, 49 TEU), as well as information on policies in the area of freedom, security and justice and proceedings on internal security (Art. 70, 71 TFEU).

Furthermore, according to Protocol No. 1, other information must be provided directly to national parliaments. The Commission must forward all consultation documents and legislative proposals to national parliaments upon their publication (Art. 1); the agendas for and the outcomes of meetings of the Council, including minutes, must be forwarded to national parliaments at the same time as to Member States’ governments (Art. 5); possible initiatives of the Council intending to adopt certain decisions with qualified majorities even if unanimity is normally required, must be forwarded at least six months before any decision is adopted (Art. 6); annual reports of the European Court of Auditors must be forwarded at the same time as to the European Parliament and to the Council (Art. 7).

The active participation of national parliaments within certain fields of decision-making processes at the EU level is also secured, for example through treaty revision procedures (Art. 12, 48 TEU), involvement in the political monitoring of Europol and the evaluation of Eurojust’s activities (Art. 12 TEU, Art. 85 & 88 TFEU), and adopting measures concerning family law with cross-border implications (Art. 12 TEU, Art. 81 TFEU).

National parliaments also have the right to express objections to policy proposals concerning treaty changes that are proposed under a simplified procedure instead of the normal one (Art. 48.7 TEU) and regarding measures of judicial cooperation in civil law matters with cross-border implications (Art. 81.3 TFEU). In both instances, proposals must be forwarded to national parliaments, and, if a national parliament makes known its opposition within six months of the date of notification, the decision shall not be adopted.

Finally, objections can be voiced with regard to the principle of subsidiarity. Namely, the monitoring of subsidiarity, which is one of the fundamental principles of the EU (together with the principles of conferral and proportionality, Art. 5 TEU), has been seen by many as the most important improvement introduced by the Lisbon Treaty with regard to national parliaments.<sup>8</sup>

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<sup>8</sup> M. Zalewska, O.J. Gstrein, *National Parliaments and their Role in European Integration: The EU’s Democratic Deficit in Times of Economic Hardship and Political Insecurity*, *College of Europe, “Bruges Political Research Papers”* 2013, No. 28, p. 12.

## 2. Normative framework of the EWM

As laid down in Art. 5 of the TEU, each institution shall ensure constant respect for the principles of subsidiarity and proportionality. The relevant procedure regarding the EWM, set out in Protocol No 2 on the application of the principles of subsidiarity and proportionality, is as follows: before proposing legislative acts, the Commission shall consult widely, taking into account regional and local dimensions of the action envisaged. Upon consulting, it shall forward its draft legislative acts and its amended drafts to national parliaments at the same time as to the Union legislator. The European Parliament shall forward its draft legislative acts and its amended drafts to national parliaments. The Council shall forward draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, and amended drafts to national parliaments. Upon adoption, legislative resolutions of the European Parliament and positions of the Council shall be forwarded by them to national parliaments. Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality.<sup>9</sup>

Each national parliament has two votes, shared out on the basis of the national parliamentary system. If the parliamentary system is a bicameral one, then each of the two chambers shall have one vote. National parliaments may, upon receiving a legislative proposal i.e., within eight weeks from the date of its transmission in EU official languages, give a reasoned opinion on whether the relevant proposal complies with the principle of subsidiarity (Art. 6). Furthermore, if a “violation” is detected, national parliaments may trigger two different procedures, widely known as yellow cards and orange cards.<sup>10</sup>

As regards the yellow card procedure, in the first eight weeks following receipt, each national parliamentary chamber may publish a reasoned opinion formally expressing its concerns regarding legislative proposal from the EU in areas of shared competence. Hence, reasoned opinions issued by unicameral national parliaments would count as two votes, while reasoned opinions published by a chamber of bicameral national parliaments would count as one vote when determining whether a proposal receives a yellow card (so each national parliament is given two votes and each well-reasoned view counts as one or two votes against the proposal). A yellow card is triggered when at least one third of national parliaments, i.e., of all votes allocated to them or a quarter of them if the proposal concerns areas of freedom, security, and justice, conclude that a legislative proposal does not comply with the principle of subsidiarity.

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<sup>9</sup> Consolidated version of the Treaty on European Union – PROTOCOLS – Protocol (No 2) on the application of the principles of subsidiarity and proportionality, Official Journal 115, 09/05/2008, pp. 0206–0209, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008M/PRO/02:EN:HTML> [accessed: 2023.06.04].

<sup>10</sup> See Relations with National Parliaments – The New Role of National Parliaments in the European Decision-making: Implications of the Lisbon treaty, EPP Group, November 2009, p. 6, [www.eppgroup.eu](http://www.eppgroup.eu) [accessed: 2023.06.04]; A. Cygan, *National Parliaments...*, p. 522 *et seq.*

If this threshold is met, the Commission (or other respective institution) must review the questioned draft legislative act, and it may decide to maintain, amend, or withdraw the draft. In other words, there is no obligation on the side of the Commission to withdraw the draft. So, the yellow card method might initially appear to offer significant formal power to national parliaments, but, in fact, it just calls on the Commission to look at its plan without exerting the obligation of changing draft legislative acts in any way. The only real restriction is the requirement that the Commission must justify its final choice in a reasoned decision. There is, of course, the possibility of ex-post judicial review before the Court of Justice of the EU.<sup>11</sup>

The second mechanism, referred to as the orange card, applies to the ordinary legislative procedure. It is triggered when at least a simple majority (i.e., more than half of the allocated votes) of national parliaments conclude that a legislative proposal does not comply with the principle of subsidiarity. If this threshold is met, the proposal must be reviewed by the Commission which, after such review, may decide to maintain, amend, or withdraw the proposal. Nevertheless, if the Commission decides to maintain the proposal and move forward with the text as it is, its reasoned opinion as to why the proposal complies with the principle of subsidiarity (together with those of national parliaments) must be submitted to the Union legislator (the European Parliament and the Council) for consideration. If 55% of the members of the Council or a simple majority of the European Parliament members confirm that the proposal in question is incompatible with the principle of subsidiarity, it shall not be given further consideration, and the legislative procedure shall be halted.<sup>12</sup>

Therefore, national parliaments can even be defined as a collective Virtual Third Chamber of the EU, that together with Council and European Parliament forms the imaginary legislative body of the EU. When national parliaments receive a draft proposal from the Commission, they scrutinize it to determine whether it is at odds with either the subsidiarity and proportionality principles.<sup>13</sup> In addition, they have occasionally used other principles as well, such as conferral, policy efficacy, and political expediency to support their arguments against EU proposals.<sup>14</sup>

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<sup>11</sup> M. Huysmans, *Euroscepticism and the Early Warning system*, "Journal of Common Market Studies" 2019, Vol. 57, No. 3, p. 433.

<sup>12</sup> M. Goldoni, *The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation*, "European Constitutional Law Review" May 2014, Vol. 10, p. 92.

<sup>13</sup> I. Cooper, *A 'Virtual Third Chamber' for the European Union? National Parliaments After the Treaty of Lisbon*, "West European Politics" 2012, Vol. 35, No. 3, pp. 441–465.

<sup>14</sup> I. Cooper, *Is the Subsidiarity Early Warning Mechanism a Legal or a Political Procedure? Three Questions and a Typology*, *European University Institute*, "Robert Schuman Centre for Advanced Studies Research Paper" 2016, No. 18, p. 17.

### 3. EWM in practice – procedures triggered to date

Although the EWM is a unique tool that enables national parliaments to play a certain role in legislative procedures by allowing them to give reasoned opinions to alert legislators that some proposals of legislative acts simply do not adhere to the principle of subsidiarity or other principles, it is also true that national parliaments have not often activated the mechanism, and, to date, only three yellow cards have been triggered, and the orange card procedure has never been used. The question remains of whether this is due to reluctance, a lack of knowledge, or perhaps inability, but the low number of cards drawn to date clearly shows that this procedure is certainly insufficient to lower the democratic deficit and shift citizens' perceptions and public opinion of the European Union and its institutions. Nevertheless, the overall record of national parliaments shows that they are not only prepared to make use of their new rights, but that they also co-ordinate across national borders.<sup>15</sup>

The most recent statistics (Report for 2021) indicate intensified collaboration with national parliaments, with considerably more opinions submitted than in the two previous years, of which there were a total of 16 reasoned opinions registered by the Commission expressing concerns regarding the infringement of the subsidiarity principle, while no individual proposal triggered more than three reasoned opinions.<sup>16</sup> It should also be pointed out that in several cases in which the threshold for triggering a yellow card was not reached, reasoned opinions put forward by national parliaments still managed to have significant influence on legislative acts that were adopted.<sup>17</sup> Furthermore, the conversation between the Commission and national parliaments is especially intense inside the informal political dialogue framework, which secures to national parliaments the possibility to express their opinion on every aspect of certain legislative proposals.<sup>18</sup> Besides including submitting opinions in written form, the political dialogue framework also includes visits by members of the Commission to national parliaments, and inter-parliamentary meetings and conferences with the participation

<sup>15</sup> K. Auel, C. Neuhold, *Multi-arena players in the making? Conceptualizing the role of national parliaments since the Lisbon Treaty*, "Journal of European Public Policy" 2017, Vol. 24, Issue 10, pp. 1547–1561.

<sup>16</sup> Report from the Commission on the application of the principles of subsidiarity proportionality and on relations with national parliaments, Annual Report 2021, COM(2022) 366 final, [https://commission.europa.eu/system/files/2022-08/com\\_2022\\_366\\_1\\_en\\_act\\_part1\\_v2.pdf](https://commission.europa.eu/system/files/2022-08/com_2022_366_1_en_act_part1_v2.pdf) [accessed: 2023.06.04]. It is interesting to point out that in the same report there is data that in the same year the European Parliament formally received 24 reasoned opinions. The European Parliament and the Commission (which registered 16 reasoned opinions during the same period) interpret the number of reasoned opinions differently. A reasoned opinion relating to more than one Commission proposal is counted by the Commission as only one reasoned opinion for statistical purposes, while for determining whether the threshold for a yellow/orange card has been reached for a Commission proposal, this reasoned opinion counts as one reasoned opinion for each of the proposals covered. By contrast, the European Parliament counts as many reasoned opinions as proposals involved.

<sup>17</sup> D. Fromage, *Controlling subsidiarity in today's EU: The Role of the European Parliament and the national parliaments*, European Parliament, Brussels 2022, p. 10.

<sup>18</sup> *Ibid.*, p. 11 *et seq.*

of the Commission, etc. One might therefore argue that there is a room for optimism as well. In this sense, the EWM is complemented by political dialogue or vice versa. Far from being the best and sole tool for decreasing the democratic deficit, the EWM enforces the subsidiarity principle and seeks to harmonize the relationship between European institutions and national parliaments, thus, between the EU and citizens.<sup>19</sup>

In the following sections we briefly refer to each of the three cases when a yellow card was triggered.

### 3.1. First yellow card (Monti II Regulation)

The first yellow card was triggered in 2012 following the Commission's proposal known as Monti II, which was adopted in March 2012 and officially transmitted to national parliaments on March 27.<sup>20</sup> The proposal was adopted based on the flexibility clause (Art. 352 TFEU) and provoked intense opposition because it was seen as interfering in domestic labor relations by placing limits on workers' rights to collective action and particularly the right to strike. It also confirmed that there was no primacy of the freedom to provide services or of establishment over the right to strike, while recognizing that situations may arise where these freedoms and rights could be reconciled in accordance with the principle of proportionality. Let us recall that a yellow card is triggered when the equivalent of one third of national parliaments pass reasoned opinions. Since each national parliamentary system is allotted two votes, one vote for each chamber in a bicameral parliament and two votes for a unicameral parliament, to trigger a yellow card, national parliaments needed to amass 18 votes by May 22. Although it is up to each parliament to decide how it will respond to a proposal, one parliament may take a leadership role by being the first to pass a reasoned opinion and then encouraging others to do so. In the case of Monti II, the leader was the Danish *Folketing*.<sup>21</sup> In the end, 12 national parliaments or parliamentary chambers passed reasoned opinions; the last two votes were collected in the afternoon of the closing day of the deadline, and there were 19 votes altogether. After the yellow card was triggered, the Commission had three choices: maintain, amend, or withdraw the Monti II proposal. The Commission considered the views expressed and the discussions among the co-legislators, the European Parliament, and the Council, and recognised that its proposal was unlikely to garner the necessary political support for its adoption. In September 2012, the Commission therefore announced its withdrawal and affirmed further that it had "not found based on this assessment [of the arguments put forward by national parliaments in their reasoned opinions] that the principle of subsidiarity has been breached."

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<sup>19</sup> A. Gasparini, *The Early Warning System: People's indirect empowerment to reduce the democratic deficit*, "Innovation: The European Journal of Social Science Research" 11 May 2022.

<sup>20</sup> European Commission, Proposal for a Council Regulation COM(2012) 130 final, 21.3.2012.

<sup>21</sup> I. Cooper, *The story of the first yellow card shows that national parliaments can act together to influence EU policy*, LSE Blog, 23 April 2015.



### 3.2. Second yellow card (EPPO proposal)

The second yellow card procedure was triggered on October 28, 2013, in relation to the Commission's proposal for a regulation establishing the European Public Prosecutor's Office (EPPO).<sup>22</sup> The proposal from the Commission was based on Article 86 TFEU, which gives the Council the authority to create the EPPO to tackle crimes that harm the Union's financial interests. A special legislative procedure requiring unanimity in the Council and the approval of the European Parliament is set forth in Article 86(1) of the TFEU, while, in the absence of unanimity, it also foresees the possibility of enhanced cooperation.<sup>23</sup> The proposal attracted wide attention and provoked both objections as well as positive comments.<sup>24</sup> National parliaments transmitted 14 reasoned opinions to the Commission, representing a total of 18 votes. The main objection was that the Commission had not fully outlined how the EPPO plan was in accordance with the subsidiarity concept. Parliaments also asserted that the Commission had failed to show a clear necessity for an EU-wide solution for the policy objective of increasing the effectiveness of the fight against fraud throughout the EU.<sup>25</sup> Some raised the traditional argument that criminal investigations and prosecutions are primarily a matter of national sovereignty and that the establishment of a supranational EPPO would limit national competence in a disproportionate way, while others pointed out that many offenses affecting the financial interests of the EU are situated at a purely national level and are often linked to other types of fraud or criminality.<sup>26</sup> Nevertheless, only three weeks after triggering the yellow card, the Commission informed national parliaments of its decision to continue with the establishment of the EPPO without any modification as regards the original text of the proposal. However, the legislation's final approved version underwent significant revision, which suggests that during the legislative procedure EU institutions accepted important modifications of the initial proposal as a result of the national parliaments' analysis of the legislation.<sup>27</sup>

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<sup>22</sup> Council Regulation on the establishment of the European Public Prosecutor's Office COM(2013) 534 final, <https://academic.oup.com/yel/article-abstract/35/1/5/2725281?redirectedFrom=fulltext> [accessed: 2023.06.04].

<sup>23</sup> O.J. Gstrein, D. Harvey, *The Role of National Parliaments in the European Union, an extended version of published written evidence: The United Kingdom House of Lords European Union Selected Committee*, "Zeitschrift für europarechtliche Studien" 2014, Nr. 3, p. 348.

<sup>24</sup> D. Fromage, *The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member State Parliaments?*, "Yearbook of European Law" 2016, Vol. 35, Issue 1, pp. 5–27.

<sup>25</sup> O. Pimenova, *National Parliaments in Subsidiarity Review: From Guardians to Partners*, "Statute Law Review" 2019, Vol. 40, No. 3, p. 291.

<sup>26</sup> V. Franssen, *National Parliaments Issue Yellow Card Against the European Public Prosecutor's Office*, European Law Blog, 4 November 2013, <https://europeanlawblog.eu/2013/11/04/national-parliaments-issue-yellow-card-against-the-european-public-prosecutors-office/> [accessed: 2023.06.04].

<sup>27</sup> A. Cygan, *Participation by national parliaments in the EU legislative process*, "ERA Forum" 2021, Vol. 22, No. 3, p. 429.

### 3.3. Third Yellow Card (Posted Workers Directive)

The third yellow card dates back to May 2016 and was provoked by the European Commission proposal for a revision of the Posted Workers Directive<sup>28</sup> concerning workers sent by their employers to another country to work there temporarily.<sup>29</sup> The main focus of the criticism of the proposal was the principle of equal pay for equal work, which would apply to posted and local workers, though its primary motivation seemed to be of political nature.<sup>30</sup> Namely, 14 parliamentary chambers (in total 22 votes) opposed the Commission's proposal to amend the Posted Workers Directive. It is interesting to point out that, with the exception of the Danish parliament, all reasoned opinions were from Central and Eastern Europe. In contrast, the plan enjoyed widespread support in Western Europe as a tool to combat social dumping and several Western European parliamentary chambers supported the directive during political dialogue. It seems therefore that the third activation of EWM also revealed an East-West rift in EU policies, especially since the parliaments mainly voiced national concerns previously raised by their governments. In the end, the Commission replied more than two months after receiving the yellow card. It rejected concerns raised by the national parliaments and decided to maintain the proposal in its original form.<sup>31</sup>

## 4. Proposals for reform – green card and red card

As already noted, national parliaments were ultimately involved in the European integration process when the Lisbon Treaty entered into force thanks to different possibilities it envisaged, i.e., through securing information rights, then thanks to the EWM, but also through political dialogue known as the Barroso initiative. While the EWM represents a more strict, formal mechanism of securing compliance with the principle of subsidiarity, political dialogue is a non-binding, more proactive, and collaborative channel of communication between national parliaments and the Commission.<sup>32</sup> The proposals for reforming existing mechanisms, called the green card and the red card,

<sup>28</sup> Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of Services COM(2016) 128 final.

<sup>29</sup> These workers are covered by social security rules in their country of origin. In countries with high wages, employers can therefore usually pay lower wages to these posted workers than to local workers. The issue of posted workers has divided the EU between countries such as Germany and France – home to 230,000 posted workers in 2014, and Eastern European nations. M. De La Baume, *Countries flash yellow card at EU changes to cross border work rules posted workers work abroad Europe*, "Politico" 10 May 2016, <https://www.politico.eu/article/countries-flash-yellow-card-at-eu-changes-to-cross-border-work-rules-posted-workers-work-abroad-europe/> [accessed: 2023.06.04].

<sup>30</sup> D. Fromage, V. Kreiling, *National Parliaments Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive*, "European Journal of Legal Studies" 2017, Vol. 10, No. 1, pp. 125–160.

<sup>31</sup> For detailed analysis see *ibid.*

<sup>32</sup> L. Terrinha Heleno, *The jurisprudential role of national parliaments in the European Union*, PE 583 133, European Parliament, Brussels 2017, p. 6 *et seq.*

focus on strengthening the role of national parliaments in overall legislative procedure at the European level.

#### 4.1. Green Card

At the beginning of 2015, national parliaments started discussing the idea of introducing a green card, a mechanism that would enable a more efficient way of strengthening their role in EU policy-making through possibilities concerning legislative initiatives. Namely, following the idea based on a discussion paper prepared by the House of Lords and endorsed by multiple national parliamentary chambers,<sup>33</sup> the Dutch *Tweede Kamer* published a document laying out the scope and nature of the green card initiative.<sup>34</sup> Under the proposed procedure, national parliaments could make constructive suggestions for legislative proposals to the European Commission.<sup>35</sup>

To qualify as a green card, a proposal would have to gain a minimum number of one quarter (25%) of the votes allocated to national parliaments under the EWM and be delivered to the Commission within a time frame of six months from the date of the proposing chamber circulating the draft. After the required threshold was met, the proposing chamber would send the co-signed text to the Commission under the political dialogue framework, making it clear that the proposal is labelled as a green card by the co-signatories. The national chamber that launched the proposal could also decide to transmit it to the Commission as part of a political conversation even if it fell short of the necessary threshold, but then it would not be labelled a green card.<sup>36</sup> The Commission would then react to the green card by formally responding and stating whether it intended to consider the proposed action or not, offering reasons for its decision.

In order to test the green card idea, the EU Committee of the House of Lords put forward a proposal for a trial green card on the issue of food waste.<sup>37</sup> This was deemed a non-controversial topic suitable for testing the proposal, especially as it is estimated that 89 million tons of food is wasted each year in the EU. The plan received wide support at the 53rd COSAC conference held in Riga. It included the following five ele-

<sup>33</sup> House of Lords, European Union Committee, Towards a “green card,” further discussion paper, 28 January 2015, pp. 5–6, <https://www.parliament.uk/globalassets/documents/lords-committees/eu-select/COSAC/20150128-Letter-to-Chairpersons.pdf> [accessed: 2023.06.04].

<sup>34</sup> For detailed analysis see K. Borońska-Hryniewiecka, *From the Early Warning System to a ‘Green Card’ for National Parliaments: Hindering or Accelerating EU Policy-making?* [in:] *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?*, ed. D. Jańczyć, Oxford 2017.

<sup>35</sup> C. Fasone, D. Fromage, *From Veto Players to Agenda-Setters – National Parliaments and Their Green Card to the European Commission*, “Maastricht Journal of European and Comparative Law” 2016, Vol. 23, No. 2, p. 309.

<sup>36</sup> House of Lords, European Union Committee, Towards a “green card,” further discussion paper, 28 January 2015, pp. 5–6, <https://www.parliament.uk/globalassets/documents/lords-committees/eu-select/COSAC/20150128-Letter-to-Chairpersons.pdf> [accessed: 2023.06.04].

<sup>37</sup> UK Parliament, EU committee launches green card on food waste, 12 June 2015, <https://committees.parliament.uk/committee/335/eu-energy-and-environment-subcommittee/news/93186/eu-committee-launches-green-card-on-food-waste/> [accessed: 2023.06.04].

ments: EU food donation guidelines, EU co-ordination mechanism, monitoring of the business-to-business cross border food supply chain, recommendations on the definition of food waste and on data collection, and the establishment of a horizontal working group within the Commission. In its response, the Commission thanked the 16 national parliaments and chambers that signed the green card and undertook to “pay particular attention to suggestions [...] including on food donation and on data collection” while assessing their proposal as a “clear demonstration of their readiness to contribute in a proactive and constructive manner to the policy debate at EU level.”<sup>38</sup>

One might therefore conclude that the green card mechanism was envisioned as yet another way of urging national chambers to collaborate and make suggestions for EU policy initiatives while also being an add-on to the already existing procedures (yellow and orange cards).

## 4.2. Red Card

A concession to add a red card to the EWM was part of the agreement negotiated with the British government in February 2016 in advance of the Brexit referendum. Former UK Prime Minister David Cameron negotiated an EU-UK deal and requested reform covering four key areas: economic governance, sovereignty, competitiveness, and immigration.<sup>39</sup> The proposal included a reform that would introduce a red card mechanism, under which national parliaments would be able to veto new EU legislation if 55% of parliament or chamber votes registered opposition to certain legislative proposals during the first three months after submission. The idea included a requirement to either reject the proposal or change the draft legislative act to reflect subsidiarity objections raised in reasoned opinions.<sup>40</sup> The UK prime minister also stated that the mechanism would enhance the sovereignty of national parliaments by enabling them jointly to “stop unwanted legislative proposals”<sup>41</sup> while also expressing his wish for the “EU’s commitments to subsidiarity to be fully implemented.”<sup>42</sup> Although the red card proposal was not originally Cameron’s idea, as it had been proposed previously by Labour MPs, it sent a very strong political message. The red card would be a powerful instrument building upon the EWM with the yellow card as solely a warning rather than a veto.<sup>43</sup> In other words, the red card was primarily intended as a mechanism that

<sup>38</sup> European Commission C (2015) 7982 final, of 17.11.2015; see also: UK Parliament, European Commission responds to green card on food waste, 20 November 2015, <https://committees.parliament.uk/committee/176/european-union-committee/news/92983/european-commission-responds-to-green-card-on-food-waste/> [accessed: 2023.06.04].

<sup>39</sup> The UK’s EU Referendum, De Havilland Information Services, 2016, <https://www.dehavilland.co.uk/PoliticalUploads/DHEU/Referendum/DraftRenegotiationDeal.pdf> [accessed: 2023.06.04].

<sup>40</sup> D. Fromage, *Subsidiarity...*, p. 9.

<sup>41</sup> UK’s draft EU deal: What do red and yellow cards mean? BBC News, 2 February 2016, <https://www.bbc.com/news/uk-politics-eu-referendum-35471248> [accessed: 2023.06.04].

<sup>42</sup> Explaining the EU deal: The red card, Full Fact, 22 February 2016, <https://fullfact.org/europe/explaining-eu-deal-red-card/> [accessed: 2023.06.04].

<sup>43</sup> I. Cooper, *How the ‘red card’ system could increase the power of national parliaments within the EU*, LSE Blog, 13 June 2016.

would give national parliaments the ability to veto or block draft legislative proposals when they asserted that they violate the principle of subsidiarity, thereby forcing the Commission to abandon proposals.

The red card proposal has also drawn significant criticism. Given that no proposal has yet to reach even the threshold for an orange card, a reasonable question is whether introducing a red card would make a difference. The current system is ineffective because of difficulties in reaching the threshold and because of the short timeframe of eight weeks.<sup>44</sup> In the end, introducing a new mechanism would make no difference as it would likely be used rarely or never, because of its high requirements, thus having no practical impact. Its scope is also very limited, meaning that it only applies to cases where parliaments can argue that a certain EU regulation would be better dealt with at the national level. On the other hand, despite not necessarily revolutionizing EU decision-making, it could still be regarded as positive progress and a step towards strengthening national parliaments' role. However, as the mechanism was negotiated prior to Brexit vote, the plan was never implemented. In 2019 Poland tried to revive the red card procedure plan, claiming that the yellow card mechanism proved to be "paper tiger [...] offering only superficial influence" for national parliaments, but to date its status remains the same.<sup>45</sup>

## Conclusions

Since its introduction in 2010, there have been multiple critiques of the EWM. Certain shortcomings regarding the functioning of the mechanism in practice are obvious. The EWM has been triggered in just three cases, only yellow cards were activated, and the Commission did not withdraw its proposal on any of these occasions. Some early critics pointed out that it is not a step in the right direction as regards alleviating democratic deficit and strengthening the role of national parliaments,<sup>46</sup> that the EWM generates only more institutional confusion and time consumption rather than simplifying the process that ultimately undermines people's trust in the EU and its efficiency.<sup>47</sup> Furthermore, its operation before the CJEU cannot be enforced directly by national parliaments.<sup>48</sup> National parliaments could use their right to urge their nation-

<sup>44</sup> V. Kreiling, *David Cameron's proposal to give national parliaments a 'red card' over EU laws is deeply flawed*, LSE Blog, 17 November 2015.

<sup>45</sup> *Poland attempts to revive EU's red card procedure*, "Financial Times" 23 May 2019, <https://www.ft.com/content/e60d6f78-7d48-11e9-81d2-f785092ab560> [accessed: 2023.06.04].

<sup>46</sup> P. De Wilde, *Why the Early Warning Mechanism does not alleviate the democratic deficit*, "OPAL Online Paper" 2012, No. 6, [https://www.researchgate.net/publication/236024899\\_Why\\_the\\_Early\\_Warning\\_Mechanism\\_Does\\_Not\\_Alleviate\\_the\\_Democratic\\_Deficit](https://www.researchgate.net/publication/236024899_Why_the_Early_Warning_Mechanism_Does_Not_Alleviate_the_Democratic_Deficit) [accessed: 2023.06.04].

<sup>47</sup> R. Ruiter, *Under the Radar? National Parliaments and the Ordinary Legislative Procedure in the European Union*, "Journal of European Public Policy" 2012, Vol. 20, No. 8, pp. 1196–1212.

<sup>48</sup> For deficiencies of the new mechanism see also A. Cygan, *National Parliaments within the EU...*, pp. 524–526; M. Zalewska, O.J. Gstrein, *National Parliaments...*, pp. 14–15.

al governments to launch a case before the EU Court of Justice, but they have simply never used this opportunity.<sup>49</sup>

On the other hand, while many believe the EWM to be a failed mechanism, some consider it useful and innovative, especially in the legislative process as a signaling device to the European Commission and other actors.<sup>50</sup> Concrete reform proposals of the EWM that could be considered include, among others, that the existing thresholds should be applied in a flexible manner, especially the eight-week deadline, and that the Commission should provide detailed answers to all reasoned opinions.<sup>51</sup> Insofar as the overall role of national parliaments in the law-making process is concerned, creating a green card is widely advocated as is the enhancement of the political dialogue procedure. The latter has already been proved to be an important channel of cooperation that might also be bolstered by adding certain features of the green or red cards, which, at the same time, would not require amending the treaties.<sup>52</sup>

There is absolutely no reason why national parliaments should not be considered as actors that could improve the law-making process at the European level, which would influence and promote its rationality, and focus on the justification and overall quality of EU legislation.<sup>53</sup> Increasing the influence of national parliaments on EU affairs in general would also contribute in achieving the further democratization of the Union as well as the much needed stronger connection with European citizens.

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<sup>49</sup> It is well worth noting though that the principle of subsidiarity has not been subject to intense judicial review; in fact, since the Lisbon Treaty entered into force, it has been considered only in 21 cases and no breach has ever been found. Therefore, it is obviously a "detering factor for parliaments." D. Fromage, *Controlling subsidiarity...*, pp. 34–36.

<sup>50</sup> P. Van Gruisen, M. Huysmans, *The Early Warning System and policymaking in the European Union*, "European Union Politics" 2020, Vol. 21, No. 3, pp. 451–473.

<sup>51</sup> D. Fromage, *Controlling subsidiarity...*, p. 39.

<sup>52</sup> See L. Terrinha Heleno, *The legisprudential role...*

<sup>53</sup> *Ibid.* See also I. Cooper, *Is the Subsidiarity...*

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## Summary

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### National Parliaments in the European Union – Toward a More Active Role?

The Lisbon Treaty created different possibilities for national parliaments to secure their greater involvement in the overall functioning of the EU and in the law-making process at the European level. Moreover, it was the first time that an EU Treaty specifically acknowledged the role of national parliaments in the EU. Among these novelties probably the most important concerned the Early Warning Mechanism that offers to national parliaments the possibility of examining new legislative proposals from the EU for compliance with the concept of subsidiarity through the so-called yellow card and orange card procedures. The possibility for national parliaments to make more active contributions at the European level also exists inside the informal political dialogue framework that is an important channel of cooperation among EU institutions.

**Keywords:** European Union, national parliaments, law-making process, early warning mechanism, political dialogue.

## Streszczenie

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### Parlamenty narodowe w Unii Europejskiej – w kierunku bardziej aktywnej roli?

Traktat lizboński stworzył różne możliwości dla parlamentów narodowych mające na celu zapewnienie ich większego zaangażowania w ogólne funkcjonowanie Unii Europejskiej, a także w proces stanowienia prawa na poziomie europejskim. Co więcej, po raz pierwszy w traktacie UE wyraźnie uznano rolę parlamentów narodowych w UE. Wśród tych nowości prawdopodobnie najważniejsza dotyczyła mechanizmu wczesnego ostrzegania, który oferuje parlamentom narodowym możliwość badania nowych wniosków legislacyjnych UE pod kątem zgodności z koncepcją pomocniczości w drodze procedury tzw. żółtej kartki i pomarańczowej kartki. Możliwość bardziej aktywnego udziału parlamentów narodowych na poziomie europejskim istnieje również w ramach nieformalnego dialogu politycznego, który okazuje się ważnym kanałem współpracy z instytucjami unijnymi.

**Słowa kluczowe:** Unia Europejska, parlamenty narodowe, proces stanowienia prawa, mechanizm wczesnego ostrzegania, dialog polityczny.