

# Subsidiarity as a means to enhance cooperation between EU Institutions and National Parliaments

## KEY FINDINGS

- Rather than the introduction of the principle of subsidiarity itself in the Treaties in 1992, it is the creation of the **Early Warning System** in the Lisbon Treaty that has really contributed to the enhancement of the cooperation between EU institutions and national parliaments.
- The **European Commission** has been the **primary interlocutor of parliaments** in this framework, although the European Parliament also receives and follows-up on national parliaments' reasoned opinions.
- Despite positive developments visible both at EU and at national level, **important challenges remain** in particular in relation to the limited scope offered by the EWS for more political engagement. As illustrated by the success of the Political Dialogue with the European Commission and by the recent "green card initiative", parliaments are **eager to play a role in EU affairs**, but they want this role to be **positive rather than negative** as currently foreseen by the Treaties.

## 1. INTRODUCTION

Like the Treaty establishing a Constitution for Europe (Constitutional Treaty) before it, **the Lisbon Treaty has entrusted national parliaments (NPs) with the responsibility to monitor the respect of the principle of subsidiarity** in new EU legislative proposals adopted in areas of non-exclusive EU competence (so-called Early Warning System (EWS)).<sup>1</sup> To this end, since 2009, all legislative proposals are forwarded to NPs by the European Union (EU) Institutions directly (alongside other planification and consultation documents such as the Commission's Annual Work Programme or green and white papers).<sup>2</sup> Once a legislative proposal has been made available in all official languages, NPs have eight weeks to adopt and forward their "reasoned opinions" to the Presidents of the European Parliament (EP), the Council and the Commission if they consider that the proposal in question breaches the principle of subsidiarity. Each NP has two votes whereby bicameral NPs attributes one vote to each of their chambers. Once the eight-week period has passed – a period during which the proposal cannot be placed on the Council's agenda except in cases of emergency –, if the number of reasoned opinions amounts to 1/3 of the total number of votes (1/4 in the Area of Freedom, Security and Justice), the EWS is activated. EWS activation is the so-called "yellow card". Under the ordinary legislative procedure, if the number of reasoned opinions issued equals half the total number of votes available, an "orange card" is triggered; this has not yet happened to date. Once a card has been shown, the institution author of the proposal – most commonly the Commission – must review it. The Commission may then decide to maintain, amend or withdraw the proposal and must justify its decision. The Union's legislators are also involved in the instance of an orange card.

EWS has only been activated in three occasions since the entry into force of the Lisbon Treaty seven years ago.<sup>3</sup> Therefore, it is important to reflect on the potential this principle has

represented so far and represents today for the enhancement of the relationship between EU Institutions and NPs. This is particularly the case because this system has frequently been deemed inefficient<sup>4</sup> and it is therefore necessary to assess whether this statement holds true. Brexit and the 60<sup>th</sup> anniversary of the signature of the Rome Treaty also represent a momentum for deep(er) reflection as to the future of Europe and the potential NPs may represent to bridge the gap between the EU and its citizens.

## 2. THE RELATIONSHIP BETWEEN EU INSTITUTIONS AND NPs IN A HISTORICAL PERSPECTIVE

For several decades, **the Treaties did not foresee any relationship between NPs and the Institutions of the European Communities (EC) (or later with those of the EU)**. NPs were first mentioned in the Treaty of Maastricht as the object of a non-legally binding declaration annexed to the Treaties<sup>5</sup> which foresaw that contacts and exchanges of information between NPs and the EP should be enhanced while also urging national governments to ensure that NPs receive Commission proposals in good time. With the approval of the Amsterdam Treaty NPs' importance was enhanced, both because they became the object of a protocol<sup>6</sup> – which has the same value as the treaties – and because certain guarantees were provided to them. For instance, sufficient time for proper scrutiny was secured, since only after a period of six weeks could a legislative proposal be tabled on the Council's agenda. The real "revolution" in this domain however took place with the entry into force of the Lisbon Treaty when the responsibility to "contribute actively to the good functioning of the Union" (art. 12 TEU) was attributed to NPs alongside certain rights of information and of participation. The most visible and frequently used right is the control of the respect of the principle of subsidiarity.

Hence, until the Lisbon Treaty **NPs depended on national legal provisions (or customs) to be involved in EU affairs**. Their capacities to control their governments and actively participate largely varied,<sup>7</sup> ranging from some having the capacity to mandate their executive representatives in the Council to others being barely informed. In fact, it appears that proper information remained largely an issue until the Lisbon Treaty introduced the direct transmission of legislative proposals and planification documents, as information was often insufficient or could intervene too late. Furthermore, even where NPs had been secured rights of participation in EU affairs at national level such as in the German Bundestag, they were not always very keen on using them; sometimes MPs belonging to a political majority preferred using informal and hence less visible contacts with the government to avoid showing potential diverging opinions.<sup>8</sup>

There are **several reasons for this original lack of mention of NPs in the Treaties**. First, the original European Parliamentary Assembly was composed of delegates designated by NPs among their members. Arguably, the Assembly had only limited, predominantly consultative, powers but its composition of members of national parliaments (MPs), at least in theory,<sup>9</sup> guaranteed a link between national and European levels of governance. Secondly, and perhaps most importantly, the EC was conceived as a classical international organization. This resulted in EC affairs being predominantly assimilated to foreign affairs within parliaments, and this assimilation lasted for several decades in certain cases. This is, for example, illustrated by the fact that EC affairs were long under the remit of the Foreign Affairs committees, and even when and where a specific EC committee was created it remained dependent on the Foreign Affairs Committee in some occasions. Beyond this assimilation of EC affairs to foreign affairs, a strong importance was given to the output of the integration process, i.e. peace and wealth, and less to democratic legitimacy. Citizens themselves were largely off the radar during several decades as the integration process largely moved forward on the basis of decisions made by political elites.<sup>10</sup> In the post-war period, there existed a general and permissive consensus in favour of the integration process meaning that the question of democratic legitimacy was not a real issue for several decades. Democratic legitimacy became an issue with the accession of less pro-integration Member States in the 1970s; coupled with the emergence of an economic recession in Europe at approximately the

same time. The question of the EC's democratic legitimacy and the existing "democratic deficit"<sup>11</sup> also became more acute as more competences were transferred to the supranational institutions and as qualified-majority voting progressively replaced unanimity.

### **3. CONTEXT AND RATIONALE FOR THE INTRODUCTION OF THE PRINCIPLE OF SUBSIDIARITY IN 1992**

The introduction of the **principle of subsidiarity** should be seen in this broader context of the evolution of the European integration process. This principle was already included in the Single European Act of 1986 but solely in reference to the environment policy (art. 130R). With the approval of the **Maastricht Treaty**, it was upgraded to the status of **general principle of EU law** and thus became liable for judicial review by the European Court of Justice.

The upgrade of this principle can be traced back to the growing importance of the issue of the EC's democratic deficit. The EC was deemed by some to attribute too many powers to itself or to neglect the federal entities existing in certain Member States. Therefore, the principle of subsidiarity was introduced in the Treaties in 1992 in order to provide remedy to both sources of dissatisfaction as expressed at the time in particular by the United Kingdom and the German *Länder* respectively. It was conceived as a useful tool to provide remedy to the absence of clear division of competences as well as to the lack of definition between shared and exclusive competences at European level.<sup>12</sup> It could serve both to the detriment or to the advantage of the Union's actions and it was sufficiently broad to reconcile diverging views. It was even said to have been the "word that saved Maastricht".<sup>13</sup> Additionally, the then Commission President, Jacques Delors, appears to have been a fervent advocate of this principle himself.<sup>14</sup>

However, at the time **no specific link between subsidiarity and parliaments was made** and it would have been hard to predict that this principle would gain the importance it has now acquired within the EU. In fact, there was a certain paradox in the introduction of the principle of subsidiarity, applicable only in areas of shared competence, at a time when there was no clear definition of the different types of competences. This does not mean that the principle of subsidiarity was not taken into consideration by the Commission, but the absence of the definition of the exclusive competences hindered that all the objectives that had motivated the introduction of the principle could be achieved.

A few months after the approval of the Maastricht Treaty, the Council provided some guidance as to how the principle should be applied.<sup>15</sup> For instance, it considered that applying this principle now contained in Article 3b of the EC Treaty would amount to asking the question: "Should the Community act?". It further spelt out the obligation for all EC Institutions to respect it and also insisted on the dual nature of this "dynamic principle" which could (and still can) serve both to expand and to limit the EC's (now EU's) capacities to act in domains of shared competence. An interinstitutional agreement followed.<sup>16</sup> These criteria were later laid down in a new protocol on subsidiarity annexed to the Amsterdam Treaty:<sup>17</sup> at the time both this principle and NPs became the object of protocols. Although the "EU added value" and the "sufficiency" tests the Amsterdam protocol had introduced were not included in the Lisbon Treaty protocol, the Commission continues to use them and has encouraged NPs to do so as well.<sup>18</sup>

### **4. SUBSIDIARITY AS A MEANS TO STRENGTHEN THE RELATIONSHIP BETWEEN EU INSTITUTIONS AND NPs**

As stated above, **in attributing the task to monitor subsidiarity to parliaments, the Constitutional Treaty and later the Lisbon Treaty have represented a dramatic change in NPs' role within the EU.** While it is true that the principle existed and some NPs, such as the UK House of Commons, had already started monitoring it before the introduction of the EWS, in other chambers it was not scrutinised. In fact, some NPs, such as the Spanish

parliament, did not regularly monitor EU legislative proposals at all: even if the added value of the EWS can be subject to debate, it is certainly true that **its introduction has contributed to setting EU affairs on NPs' agendas in providing a reason for them to conduct systematic scrutiny.**

## From the Constitutional Treaty to the Lisbon Treaty

After the Dutch and the French negative referenda, Commission President Barroso launched its **"Political Dialogue" initiative** in May 2006;<sup>19</sup> note that this Political Dialogue has both a written dimension (NPs submit their contributions) and a non-written one (in the form of visits to NPs by Commissioners, for instance). The Commission "wished to transmit directly all new proposals and consultation papers to national parliaments, inviting them to react so as to improve the process of policy formulation". The Commission also committed, on its own initiative, to provide an answer to each and every single one of NPs' submissions within three months. No official obligation exists on the Commission since this initiative is merely informal. After President Barroso's announcement, the European Council subsequently set the emphasis on the principles of subsidiarity and of proportionality in asking the Commission to pay particular attention to NPs' comments, in general and on those topics in particular.<sup>20</sup> The practice that developed around this initiative has paved the way towards establishing the relationships existing today between the Commission and NPs. The **Political Dialogue was immediately a huge success** and, as shown by the figures included Table 1, it has been used much more frequently than the EWS. This is, in particular, due to the fact that **the Political Dialogue is much more open than the EWS** is; in its framework, NPs can submit their contributions to the Commission at any point in time and are therefore not bound by the eight-week limit. These contributions can address any issue at all whereas the reasoned opinions addressed in the framework of the EWS are strictly limited to subsidiarity breaches.

In the framework of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC), eight pilot-tests were also conducted pre-Lisbon to test the EWS and to help NPs adapt their procedures in preparation of the entry into force of the Lisbon Treaty.<sup>21</sup>

## Tendencies in the post-Lisbon practice

The period that has followed the entry into force of the Lisbon Treaty has been characterised by the **co-existence of the Treaty-based EWS and the informal Political Dialogue** between the Commission and NPs. President Barroso decided to maintain the informal Policy Dialogue, even though the EWS had been formally introduced by the Lisbon Treaty.<sup>22</sup> This decision should be welcomed as the **Political Dialogue is a good complement to the EWS**: it broadens the scope of the exchanges between NPs and EU institutions and, in so doing, arguably makes participation more (politically) attractive to MPs.

The **vast majority of opinions transmitted by NPs have been contributions**, i.e. opinions unrelated to a breach of subsidiarity (between 86.8 and 97.7% of the total number of opinions were resolutions over the period 2010-2015 – Table 1). Furthermore, the number of contributions and reasoned opinions has varied over time quite drastically. The number of reasoned opinions increased progressively during the first years after the entry into force of the Lisbon Treaty and peaked in 2013 at 88. This figure has since been decreasing: in 2015, only 8 reasoned opinions were transmitted to the Commission. This evolution can be linked back to the organisation of elections to the EP in 2014 when consequently a renewal of the Commission also took place. President Juncker's decision to make fewer legislative proposals has also mathematically influenced the number of reasoned opinions.

As to the **contributions**, they **increased sharply during the first years that followed the entry into force of the Lisbon Treaty but decreased again in 2014 and 2015**. This evolution will have to be monitored in the future to determine whether this is a long-lasting tendency or whether this decrease was only accidental. It should additionally be kept in mind

that the Political Dialogue, in its written dimension, embraces many different aspects. NPs can for instance submit their views on the Commission's Annual Work Programme or on non-legislative proposals and green papers. In 2015, 11 out of the 19 Commission documents that received the most opinions were non-legislative documents.<sup>23</sup> This change has been encouraged by the Commission and could compensate for the decrease in the number of legislative proposals tabled by the Commission.

Another recent development should also be monitored as it might have an influence on the frequency of these written exchanges in the long run: As stated above, the Political Dialogue is not limited to its written dimension as it also encompasses the participation of Commissioners in interparliamentary conferences or Commissioners' visits to NPs. When it took office in 2014, President Juncker expressed its willingness to cooperate more closely with NPs. This is visible in the creation of the figure of Vice-president for Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights in charge of, among others, "Coordinating the work on better regulation within the Commission, ensuring that every proposal respects the principles of subsidiarity and proportionality, which are at the heart of the Commission's work" and of "Overseeing the European Commission's relations with the other European institutions and promoting a new partnership with national Parliaments".<sup>24</sup>

Commission President Juncker's commitment is also visible in the important increase in the number of visits and meetings between Commissioners and NPs. In 2013, Maroš Šefčovič, Vice-President and Commissioner for inter-institutional relations and administration made eight visits to NPs and he received visits from another eight of them in Brussels<sup>25</sup>. In comparison in 2015, Commissioners paid over 200 visits to NPs.<sup>26</sup> This tendency was confirmed by 11 out of 39 parliaments/chambers which considered that the number of visits by Commissioners had "significantly" increased in October 2016 while another 16 of them judged that it had "somewhat" done so.<sup>27</sup> It remains to be seen if over time these regular visits will not replace (part of) the written exchanges, especially since visits allow for a personal direct exchange and dialogue while written submissions imply that NPs have to wait to receive an answer which, in addition, in many occasions, has given little satisfaction to them (see challenges below).

**Table 1 : NPs' reasoned opinions and contributions (2006-2015)**

	Reasoned opinions	Contributions	Percentage reasoned opinions
2006	NA	83 <sup>28</sup>	NA
2007	NA	168	NA
2008	NA	200	NA
2009	NA	250	NA
2010	34	353	8.8
2011	64	558	10.3
2012	70	593	10.5
2013	88	533	14.2
2014	21	485	4.1
2015	8	342	2.3

**Source:** Own compilation on the basis of the European Commission's Annual reports on relations with national parliaments

For what concerns the **three yellow cards** triggered thus far,<sup>29</sup> both their individual circumstances and their outcome differed. A brief summary will be provided here to allow for their consideration in the assessment of the current and future perspectives of the EWS below. The **first yellow card** concerned the Proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (Monti II proposal). It was triggered in 2012 following the

adoption of 12 reasoned opinions amounting to a total of 19 votes. The Commission subsequently decided to withdraw its proposal in a standardized letter it sent to all parliaments that found a subsidiarity breach, despite the fact that in its view there was no breach. Since the proposal had been adopted on the basis of the flexibility clause (art. 352 TFEU), unanimity was required in the Council and it appeared that the proposal would never be adopted. In fact, the question of the legal basis was critical in this case as it was doubtful whether the Union even had competence to act. Should this not have been the case then there would not even have been any question of subsidiarity. Beyond this, the Commission had failed to justify adequately why the proposal was in line with the principle of subsidiarity.<sup>30</sup>

As regards the **second yellow card** triggered in 2013 – also under the presidency of J.-M. Barroso – it was issued on the proposal for the creation of the European Public Prosecutor's Office (EPPO). 13 parliaments/chambers amounting to 18 votes considered that the principle of subsidiarity was not respected but in that occasion, the Commission decided to maintain its proposal in identical terms. It did this time provide NPs with a more detailed and timelier answer as it announced its decision only three weeks after the yellow card had been triggered. This time around the Commission also provided individual answers for all the arguments that did not regard subsidiarity some months afterwards.<sup>31</sup> The legal basis for this proposal was clearer than it had been in the case of the first yellow card: since the entry into force of the Lisbon Treaty, Article 86 TEU allows the Council to establish an EPPO from Eurojust. Like the flexibility clause used as a basis for the Monti II proposal, this legal basis was also particular, as it provides for the possibility to establish an EPPO by means of enhanced cooperation if Member States cannot agree. As a consequence, even though some Member States had expressed their disagreement with the proposal in their reasoned opinions, it could not be deemed to fail only on these grounds. The existence of this possibility of enhanced cooperation could have contributed to the Commission's decision to maintain its proposal in identical terms. In this second case it is also interesting to note that the breach of subsidiarity was linked again to the lack of proper justification on the side of the Commission.<sup>32</sup>

Finally, the **third yellow card** was issued on a topic related to that of the first card as it concerned the question of posted workers. Even if this proposal was maintained identically – like the EPPO proposal before it –, it differs from the previous cards in several regards: it was issued under the Juncker Commission in 2016, and most importantly it has evidenced a strong divide between Western on the one hand, and Central and Eastern European Member States on the other. All but one of the 14 reasoned opinions issued were adopted by the parliaments of Central and Eastern European Member States.<sup>33</sup> In this case as well it is true that the Commission failed to properly justify why the proposal was in line with the principle of subsidiarity but other than that there was no issue of subsidiarity so that legally the Commission was right to maintain its proposal without modifying it, even if this could be disappointing for NPs. It appears that actually in this case what these Central and Eastern European Member States parliaments wanted to show was rather their disagreement with the content of the proposal itself rather than its breach of subsidiarity.

## Opportunities and challenges

Over the past seven years, the practice of the control of the respect of the principle of subsidiarity by NPs has evidenced certain opportunities and challenges in its capacity to enhance the relations between NPs and EU institutions.

Regarding the **opportunities for NPs as "European actors"**, the biggest achievement has been that the EWS, and the Political Dialogue since 2006, have allowed for the establishment of a **direct and constant exchange** between NPs and EU institutions. In this regard, the Commission plays the biggest role but the EP's potential should not be neglected. In fact, the EP was even the instigator of the introduction of the principle in the 1980s: the EP proposed to include a provision on it in the draft TEU in 1984<sup>34</sup> and later on reaffirmed its support for the principle of subsidiarity in several resolutions.<sup>35</sup> In the framework of the EWS, it also receives all reasoned opinions and has established a detailed procedure for the adequate

treatment and follow-up of parliamentary reasoned opinions and contributions:<sup>36</sup> all of them are duly examined and the reasoned opinions are even translated. Moreover, these exchanges also take place in a context in which the initiatives for increased interparliamentary cooperation between the EP and NPs are always more numerous.

The **existence of the EWS in itself also brings about some benefits for NPs**: Knowing that NPs will control its legislative proposals, the Commission will be less inclined to not respect the principle of subsidiarity in the first place and will limit NPs' chances to be unduly deprived of the exercise of their competences. With this in mind, it would be misleading to judge the EWS's efficiency solely on the number of yellow cards triggered as effectiveness should arguably rather be measured in the absence of frequent system activations.<sup>37</sup> The EWS is also a means for NPs to **gain visibility and make their concerns more salient**. When NPs issue a yellow card or transmit several opinions to the Commission, NPs have a chance to be more visible in the European arena. This usage of the EWS is perhaps not always fully in line with its purpose – see the case of the third yellow card – but on the other hand it has allowed them to express their opinion and become active participants in EU affairs. The EWS furthermore provides NPs with a motive to **enhance interparliamentary cooperation among themselves**. The EWS is a collective instrument and NPs depend on one another for their reasoned opinions to attain the yellow-card threshold, resulting in a potential incentive for NPs to work with one another. This positive aspect should not be overestimated however since some chambers/parliament do not generally consider the EWS to be an efficient instrument (e.g. Finland) and where NPs do coordinate their positions, they in some occasions largely follow their governments' position as was illustrated in the case of the third yellow card.

In addition to these benefits for NPs as European actors, the EWS has contributed to **enhance NPs' role in EU affairs in their MS**. First and foremost, the need to control the respect of the principle of subsidiarity has led certain NPs to **start conducting systematic scrutiny** of EU documents. This has also contributed to the **establishment or the reinforcement of systematic exchanges with their governments**.

Despite these positive developments, **important challenges remain**. These are both inherent to the EWS itself and to the way in which the EU Institutions have been responding to its introduction. First, the EWS's **scope is narrow** since it only encompasses the principle of subsidiarity and does not formally allow NPs to express their opinions on other elements, even the principle of proportionality which is also contained in the same protocol cannot be the object of NPs' reasoned opinions. As detailed below, this is one of the elements that requires change in the future: NPs want to play a more active role in EU affairs, subsidiarity is not politically as attractive to MPs as comments on content are, and the principle of subsidiarity is in any case interpreted in different ways by NPs. The **problem of the lack of (common) definition** of the principle of subsidiarity has indeed surfaced, resulting in some NPs' attempts to develop a "voluntary, non-binding set of best practices and guidelines on the subsidiarity check".<sup>38</sup> NPs, in assessing the two aspects that compound the subsidiarity check – whether an action cannot be sufficiently achieved at Member State level while being better achieved at EU level – are likely to come to different conclusions based on elements such as the size of their Member State or its administrative capacities for example or simply because some of them include other elements, such as proportionality, whereas others do not. Even if the Lisbon Treaty has now specifically provided NPs with the capacity to bring an action for annulment before the Court of Justice of the European Union (CJEU), so far they have not used this avenue and the CJEU has not clarified the content of the principle either.<sup>39</sup>

Another issue that has arisen is that of the **time span** reserved for the subsidiarity check. The Lisbon Treaty now reserves eight weeks to this end (which is already more than the Constitutional Treaty had since it only foresaw a period of six weeks) but this has been deemed to be too short a period. Procedures for the conduct of the subsidiarity scrutiny differ among NPs with some of them providing for the involvement of more than one parliamentary committee and some also requiring the approval of the plenary. Bearing this in mind, eight weeks may indeed be short, especially because the period of session at national level may

differ from the European one.<sup>40</sup> It is true that NPs should in any case start their scrutiny early and not wait until the proposals are actually forwarded to them to start their scrutiny. NPs can do this, for example, by participating during the consultation phase or monitoring the Commission's Annual Work Programme and the Presidencies' programme. However, especially in the Member States in which regional parliaments with legislative competences may also be consulted,<sup>41</sup> respecting the eight-week deadline could be challenging. This brings to the fore the question of the **moment at which the subsidiarity check intervenes**; it is to a certain extent too late for NPs to truly influence the content of the proposal which, at the same time, will still be modified during the legislative procedure while these modifications could have a bearing on the outcome of initial subsidiarity assessment.

Due to the way in which the EWS functions, NPs are also **highly dependent** on each other. In other words, one isolated reasoned opinion will be treated under the Political Dialogue initiative in whose framework the Commission has the obligations it has committed itself to as these exchanges take place outside of the Treaty framework. If NPs want their voice to be heard and the Commission to be under the obligation to review its proposal, they must reach the thresholds required to trigger a yellow card, and cooperate in some way to be successful in this endeavour in the short time span of eight weeks. NPs have to invest important resources to keep up with this demanding timeline with no guarantee that a yellow card will be triggered and even if it is, they are not sure whether their opinions will have any impact as illustrated by the second and the third yellow cards. One issue for parliaments is that the **Commission is free to decide what to do**. There may be little doubt that the Commission is right to maintain its proposal from a legal point of view but it remains that this outcome does not incentivise NPs to keep performing their subsidiarity check. The same applies to the **quality of the answers provided by the Commission**: they have often been deemed too short, standardised and intervening too late.<sup>42</sup> The Juncker Commission has committed to improve this situation and revised the structure of the answers it provides. Yet it remains to be seen whether this will be satisfactory in NPs' opinions.<sup>43</sup> This is all the more important as, at present, **imbalances exist in the level of participation of the different chambers**: Some are very active whereas others barely send anything.

## 5. THE FUTURE OF THE EARLY WARNING SYSTEM

It results from the preceding analysis that the principle of subsidiarity and in particular the EWS have indeed contributed to fostering closer relations between NPs and EU institutions. However, some shortcomings have become apparent in the post-Lisbon era which are likely to impede the development of closer ties if they remain unsolved.

The question of the **definition of the principle of subsidiarity** appears to be one of the most pressing issues as a common understanding would not only make NPs' task lighter, which is particularly important in the light of the shortage of time and resources NPs suffer from. A definition would also make the Commission's role easier at the time of classifying, assessing and responding to all reasoned opinions received. In this regard, it could also be useful for NPs to adopt a **common format** for their reasoned opinions. A broader definition of the principle which should also encompass proportionality or the legal basis might also be envisaged.<sup>44</sup> Perhaps this is a satisfactory solution in the short term since it could make NPs' better heard at EU level and all their opinions related to the content of a proposal would not automatically be labelled as contributions and treated under the Political Dialogue initiative. However, such broad(er) interpretation of the principle of subsidiarity also entails certain problems. For instance, there is little doubt that the CJEU should continue to apply the strict definition contained in the Treaties if it were to assess the respect of the principle of subsidiarity. Furthermore, such an evolution would not change the fact that certain guidelines need to be elaborated so that NPs judge on the same basis. On the contrary, this need would become even more acute if the principle were to become broader.

As to concerns about the **timeframe** and the **fact that all reasoned opinions are treated as contributions if the thresholds necessary for a yellow card fails to be triggered**,

in the absence of any Treaty reform the Commission may not formally accept any extension of the eight-week period or decide on the activation of the EWS where the thresholds have not been reached. It would, however, be desirable for the Commission – and the EP alike – to pay specific attention to the proposals that receive numerous reasoned opinions and to provide them with some visibility. The **Commission** should continue to enhance the level of detail of its annual reports on relations with NPs, in particular regarding the impact reasoned opinions and opinions have had. It should equally keep **improving the quality and speediness of the answers** it provides. It is furthermore **necessary that more attention is devoted to the justification enclosed in the legislative proposals**.

The **EP** has already announced that its *Connect* database will be made available to all<sup>45</sup> and this will usefully complement the already available monthly “State of Play” notes. Perhaps the **introduction of a dedicated annual report stating how it has followed up on reasoned opinions and contributions** could be useful to NPs – and citizens – in identifying the impact of these opinions.

Initiatives currently under discussion at present are the “**red card**” and the “**green card**”. The **red card** arose, among others, in the pre-Brexit discussions but it would conversely not have provided a remedy to the challenges previously identified. The threshold for a red card to be triggered would have been even higher than the threshold for yellow and orange cards, hence potentially even more unattainable. The Council would have been responsible for the treatment of the reasoned opinions alone, and it would have had to “discontinue the consideration of the draft legislative act in question unless the draft is amended to accommodate the concerns expressed in the reasoned opinions”.<sup>46</sup> At first glance, this procedure seems very protective of NPs’ opinions but it would have set the Council in a difficult position since, as we know, the “concerns expressed in the reasoned opinions” are not always strictly related to subsidiarity.

NPs themselves have proposed the introduction of a pro-active **green card**. Several understandings as to the form this initiative should take co-exist,<sup>47</sup> but a consensus appears to have emerged around the possibility that it should provide NPs with the ability to invite the Commission to adopt a legislative proposal (this right would be similar to the one held by the EP on the basis of art. 225 TFEU). Even in the absence of any formalisation in the Treaties, this initiative should be encouraged (provided perhaps that certain thresholds are defined so that the Commission is not suddenly flooded by suggestions) since it would provide NPs with a possibility to influence the direction in which the EU is developing in setting the EU’s agenda.<sup>48</sup>

## 6. CONCLUSION

The principle of subsidiarity, and most importantly the introduction of the EWS, have certainly contributed to the enhancement of relations between NPs and EU institutions. However, this avenue for multi-level cooperation appears to be too narrow to satisfy NPs’ thirst for being better involved in EU affairs. This is why the positive developments observed since the EWS has started to function cannot be detached from the broader context, and in particular from the added value ensured by the Political Dialogue in its written and non-written dimensions.

These instruments should be praised since they have undoubtedly contributed to turning NPs into true European institutions and have established a constant dialogue between NPs and the Commission. Whether these positive effects will continue to endure in the absence of reforms is unclear. Reforms should probably be implemented to make active participation more attractive to MPs; one of these reforms could be the implementation of an additional “green card” initiative, another reform could be enhanced attention paid by the Commission where a significant number of reasoned opinions have been issued even when these opinions are received slightly after the deadline.

These changes and those previously mentioned would encourage NPs to remain active participants in the EWS (and the broader Political Dialogue) and hopefully contribute to making it attractive to those who do not engage in this system at present. However, these **solutions are only partial solutions**. They will only satisfy NPs' thirst for a more active role in EU affairs to a certain extent as it seems that the (giant) step taken by the Lisbon Treaty is generally insufficient. The "Treaty of parliaments" as the Lisbon Treaty has been nicknamed has turned NPs into "European institutions" deemed to "contribute to the good functioning of the Union" (Art. 12 TEU). But the instruments it has attributed to them to this end seem inappropriate and have little attraction to MPs. The latter is because **MPs** – especially in pro-EU Member States – **do not want to be circumscribed to a negative role**. The prerogatives NPs have received in the Treaty are largely negative or of control: they can delay the adoption of a proposal that does not respect the principle of subsidiarity and they can veto the use of certain *passerelle* clauses and so forth.

Subsidiarity check is also **too narrow and of limited political attractiveness**. MPs may try and gain influence by controlling their governments. As a matter of fact, for these and other reasons, NPs' main focus in EU affairs appears to be (still) set on their national government, even if NPs then eventually depend on their national constitutional arrangements and on whether their governments can themselves be heard in Brussels.

As NPs, or some of them at least, appear to be eager for a more significant role within the EU integration process, this opportunity should be praised in the future to try and enhance the EU's democratic legitimacy. In this context, the question of the need for a (re-)establishment of an **arena for their collective representation at EU level** should certainly be posed.

<sup>1</sup> Art. 12 TEU and Protocol no 1 and 2 annexed to the Treaties.

<sup>2</sup> Art. 1 and 2 Protocol no 1.

<sup>3</sup> Proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM (2012) 130; Proposal for a Council Regulation on the European Public Prosecutor's Office, COM(2013) 534; Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM (2016) 128 final.

<sup>4</sup> Among others: A. Cygan, 'National parliaments within the EU polity - no longer losers but hardly victorious', *ERA Forum*, 2011, 12, 517-533. p. 525, P. Kiiver, 'The Early-Warning System for the Principle of Subsidiarity: The National Parliament as a Conseil d'État for Europe', *European Law Review*, 2011, 36(1), 100 and T. Raunio, 'Destined for Irrelevance? Subsidiarity Control by National Parliaments', *Real Instituto Elcano Working Paper 36/2010*.

<sup>5</sup> Declaration no 13 on the role of national parliaments.

<sup>6</sup> Protocol no 9 on the role of national parliaments in the European Union.

<sup>7</sup> See on NPs' role in EU affairs during the first decades of the integration process: A. Maurer and W. Wessels (ed), *National parliaments on their ways to Europe: Losers or latecomers?*, Nomos, Baden-Baden, 2001.

<sup>8</sup> K. Auel, 'The Europeanisation of the German Bundestag: Institutional Change and Informal Adaptation', *German politics*, 2006, 15(3), 249-268.

<sup>9</sup> It has been shown that, de facto, the level of diffusion of the knowledge gained by the delegated MPs on EU affairs was only limitedly spread among the rest of MPs back in the capitals. In the French National assembly, for instance, the MPs who were also members of the European Parliamentary Assembly had to present an annual report on the main European questions to the Foreign affairs committee. Yet in practice they only complied with this obligation after 1970. E. Saulnier, *La participation des parlements français et britannique aux Communautés et à l'Union européenne*, LGDJ, Paris, 2002, 283.

<sup>10</sup> K. Featherstone, 'Jean Monnet and the 'Democratic deficit' in the European Union', *Journal of Common Market Studies*, 1994, 32(2), 149-170.

<sup>11</sup> The expression "democratic deficit" was first used by David Marquand: D. Marquand, *Parliament for Europe*, John Cape, London, 1979, 64.

<sup>12</sup> P. Craig, 'Subsidiarity: A Political and Legal Analysis', *Journal of Common Market Studies*, 2012, 50(1), 72-87, 73.

<sup>13</sup> *European Independent* newspaper as quoted by D.Z. Cass, 'The Word That Saved Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community', *Common Market Law Review*, 1992, 29(6), 1107-1136, 1136.

<sup>14</sup> On this context: D. Fromage, 'Subsidiarity: from a general principle to an instrument for the improvement of democratic legitimacy in Lisbon' in M. de Visser and A. P. van der Mei (Ed.) *The Treaty on European Union 1993-2013: Reflections from Maastricht*, Antwerp, Intersentia, 139-156.

<sup>15</sup> Annex 1 to the Conclusions of the Council Summit of Edinburgh of 12 December 1992.

<sup>16</sup> Interinstitutional Agreement of 25 October 1993 on the procedures for implementing the principle of subsidiarity and resolution of the European Parliament of 13 May 1997.

<sup>17</sup> Protocol no 30 on the application of the principles of subsidiarity and proportionality.

<sup>18</sup> European Commission, Report on Subsidiarity and Proportionality 2010, 2011, 2.

<sup>19</sup> Communication from the Commission to the European Council of 10 May 2006, A citizens' agenda delivering results for Europe, COM(2006) 211 final.

<sup>20</sup> Presidency Conclusions, 15-16 June 2006, 14.

<sup>21</sup> On NPs' reaction to the pilot-tests: COSAC, 7<sup>th</sup> bi-annual report, 6f.

<sup>22</sup> Letter by Commission President Barroso and Vice President Wallström of 1 December 2009.

<sup>23</sup> European Commission, Annual report 2015 on relations with national parliaments, 2016, 3.

<sup>24</sup> European Commission, Frans Timmermans. [https://ec.europa.eu/commission/2014-2019/timmermans\\_en](https://ec.europa.eu/commission/2014-2019/timmermans_en).

<sup>25</sup> European Commission, Annual report on relations with national parliaments 2014, 2015, 8-9.

<sup>26</sup> European Commission, Annual report on relations with national parliaments 2015, 2016, 11.

<sup>27</sup> COSAC, 26<sup>th</sup> bi-annual report, 2016, 22.

<sup>28</sup> Also the first four months of 2007 were counted.

<sup>29</sup> See on the first yellow card: F. Fabbrini and K. Granat, "'Yellow Card, but not Foul": The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike' *Common Market Law Review*, 2013, 50(1) 115-144, D. Fromage, *Les Parlements dans l'Union Européenne après le Traité de Lisbonne. La participation des parlements allemands, britanniques, espagnols français et italiens*, L'Harmattan, Paris, 2015, 359f and M. Goldoni, 'The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation', *European Constitutional Law Review*, 2014, 10(1), 90-108 ; on the second: C. Fasone, 'Parlamentari nazionali e controllo di sussidiarietà: il secondo "cartellino giallo" sull'istituzione della procura europea', *Quaderni costituzionali*, 2014, 1, 165-167, D. Fromage, 'The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member States Parliaments?', *Yearbook of European Law*, 2016, 35(1), 5-27; and on the third: D. Jancic, 'EU Law's Grand Scheme on National Parliaments: The Third Yellow Card on Posted Workers and the Way Forward' in id. (ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?*, OUP, Oxford, 2017, 299-312 and N. Lupo, 'Le molteplici funzioni dell'early warning system, alla luce del terzo "cartellino giallo" sui lavoratori distaccati', *Astrid Rassegna 19/2016*.

<sup>30</sup> Note that the issue of the need for the Commission to respect its duty of proper justification is also important to the EP. Among others: European Parliament resolution of 13 September 2012 on the 18th report on Better legislation - Application of the principles of subsidiarity and proportionality, 2010, 4.

<sup>31</sup> It is noteworthy that contrary to common practice, in this occasion a dialogue could be established between the Commission and NPs with some of them submitting a second or even a third opinion. Further on this: D. Fromage, 'The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member States Parliaments?' op.cit.

<sup>32</sup> This obligation is nevertheless clearly anchored in art. 5 protocol no 2.

<sup>33</sup> The exception here is Denmark which adopted a reasoned opinion for motives radically different from those of the Central and Eastern European Parliaments.

<sup>34</sup> Art. 12-2 Draft Treaty establishing the European Union, 14 February 1984.

<sup>35</sup> For instance, Resolutions of 23 November and 14 December 1989, 12 July and 21 November 1990 and 18 May 1995.

<sup>36</sup> Art. 42 European Parliament rules of procedure and

<sup>37</sup> G. Barrett, 'Monti II: The subsidiarity review process comes of age...or then again maybe it doesn't', *Maastricht Journal of European and Comparative law*, 2012, 19(4), 595-600, 599.

<sup>38</sup> Information Note in relation to the COSAC Working Group 30 October 2015, Luxembourg "Yellow card" procedure available at: <http://www.cosac.eu/54-luxembourg-2015/cosac-working-group-30-october-2015/>.

<sup>39</sup> This notwithstanding it is interesting to note that Advocate General Kokott has recently advocated a better justification by the Commission (Opinion of Advocate General Kokott delivered on 23 December 2015, case (C-547/14) Philip Morris Brands SARL, par. 188). See on the judicial review of subsidiarity: G. A. Moens and J. Trone, 'The principle of subsidiarity in EU judicial and legislative practice: panacea or placebo?', *Journal of legislation*, 2015, 41(1), 65.-102

<sup>40</sup> Actually NPs have recently advocated both for the eight-week period to be extended to twelve weeks and for the Christmas period to be excluded, like the month of August already does not count towards the eight-week deadline. Information Note in relation to the COSAC Working Group 30 October 2015, op. cit.

<sup>41</sup> Art. 6 Protocol no 2 specifically establishes that regional parliaments may be consulted by their respective NP where appropriate.

<sup>42</sup> COSAC, 24<sup>th</sup> bi-annual report, 2015, 17.

<sup>43</sup> Some NPs observed a slight improvement under the Barroso Commission. COSAC, 26<sup>th</sup> bi-annual report 2016, 23.

<sup>44</sup> Actually, the Dutch *Tweede Kamer* already considers the respect of the principle of proportionality and the legal basis in its assessment of the respect of the principle of subsidiarity. COSAC, 24<sup>th</sup> bi-annual report, 2015, 18.

<sup>45</sup> European Parliament, Annual report 2014-2015 on relations between the European Parliament and national parliaments under the Lisbon Treaty, 2016, 26.

<sup>46</sup> Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union, 2.2.2016.

<sup>47</sup> COSAC, 23<sup>rd</sup> bi-annual report, 2015, 31f.

<sup>48</sup> C. Fasone and 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, 23(2), 294-316.

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