

# The legisprudential role of national parliaments in the European Union

## KEY FINDINGS

- **National parliaments' contribution to the law-making process at European level should focus on the overall rationality of the draft legislative proposals. The Early Warning Mechanism must not be limited to considerations regarding the breach of the principle of subsidiarity, but also encompass the principle of conferral and the principle of proportionality.**
- **The so-called "green card" would be a significant way to channel the impetus and knowledge of national parliaments into the legislative procedure at European level.** National parliaments must not be assigned a right of initiative, but could be able to require the competent EU organs the presentation of proposals on certain policy issues or the review of existing legislation.
- **The so-called "red card" would strengthen the role of national parliaments concerning the control of compliance with the principle of subsidiarity review and would transform them in the main guardians of such a principle.** However, it would require an amendment to the treaties. Other arrangements such as an *ex ante* intervention of the European Court of Justice deserve further consideration.
- **The Political Dialogue procedure could be enhanced to acknowledge the legisprudential role here assigned to national parliaments,** encompassing configurations akin to the green or red card without the need to amend the Treaties.

## 1. THE NATIONAL PARLIAMENTS OF EU MEMBER STATES: FROM REACTIVE CONTROL INSTANCES TO LEGISPRUDENTIAL ACTORS IN THE LAW-MAKING PROCESS

This briefing addresses the role of national parliaments in the law-making process of the European Union (EU) or, more broadly, the governance system of the (EU)<sup>1</sup>. National parliaments, for several years, lost importance as the European integration process unfolded<sup>2</sup>. However, this has been gradually changing, especially since the 2009 Treaty of Lisbon<sup>3</sup>. It is noteworthy that in the new Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (IIA)<sup>4</sup>, the "three Institutions reiterate the role and responsibility of National Parliaments as laid down in the Treaties, in Protocol No 1 on the role of National Parliaments in the European Union annexed to Treaty on European Union, to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community and in Protocol No 2 on the application of the principles of subsidiarity and proportionality, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union" (recital 4). Furthermore, the European Parliament decision of 9 March 2016 on the conclusion of an Interinstitutional Agreement on Better Law-Making between the European Parliament, the

Council of the European Union and the European Commission (2016/2005(ACI))<sup>5</sup> “highlights the important role given to national parliaments by the Lisbon Treaty” (par. 12.).

Article 12 of the Treaty on the European Union (TEU) expressly acknowledges that national parliaments “contribute actively to the good functioning of the Union”, and grant them several participation rights at the European level, such as access to information vis-à-vis the EU institutions, control of the subsidiarity principle, and participation in the revision of the treaties<sup>6</sup>. This recognition of rights breaks with the received view tending to confine national parliaments to domestic affairs or to scrutinising the conduct of national governments on issues of interest to the community and their voting on EU measures at the Council<sup>7</sup>.

The recent changes to the role of national parliaments in European affairs stem, in part at least, from an attempt to bolster the democratic foundation of the EU<sup>8</sup>. Granting a more central and influential role to democratically elected national parliaments is a plausible strategy for addressing the presently felt dissatisfaction with the “dual legitimation model” (which ensures the democratic legitimacy of the Union by the European Parliament, directly representing the peoples of Europe, and the European Council or the Council, gathering the governments of Member States, in turn accountable to national parliaments)<sup>9</sup>. Besides a further link between citizens and EU institutions, especially European decision making procedures, there is the added hope that a greater role for national parliaments will foster popular support for the European project<sup>10</sup>.

In fact, the introduction of the Early Warning Mechanism (EWM), allowing for a more vigilant and active control of the principle of subsidiarity through the involvement of national parliaments<sup>11</sup>, has led some authors to conclude that national parliaments now constitute a “virtual third chamber” of the EU<sup>12</sup>, while still preserving the institutional structure laid down by the treaties<sup>13</sup>. Others, not going so far, still recognise that the EWM couples ingeniously the allocation of competences with democratic legitimacy<sup>14</sup>.

One should not however be unduly enthusiastic about the EWM<sup>15</sup>. First, as recognised in the literature, not only is it not “the case that the EWM has enhanced the democratic credentials of EU law-making”<sup>16</sup>, but the expectations of “a democratisation of EU ordinary law-making and a new European activism of the national parliaments” were “unrealistic or excessive”<sup>17</sup>. Second, the EU should ground its legitimacy on its own organs and institutions, instead of importing it from national parliaments. The strengthening of the European Parliament seems one the most promising paths to take<sup>18</sup>.

Nevertheless, we should not underscore the existence of a “European function” of national parliaments, comprising both indirect tasks, such as the revision of the treaties, control of national government, engagement with public opinion on European issues, and more direct tasks, such as the control of the subsidiarity principle; all of which conducted against the background of strong interparliamentary cross-border cooperation<sup>19</sup>.

All this raises theoretical questions on the position assumed by national parliaments in the governance system of the EU<sup>20</sup>. Indeed, a clear perspective on how to integrate national parliaments in the broader framework of the EU is key not only to identify their role, but also to understand what their role ought to be, especially their contribution to better law-making<sup>21</sup>.

To this end, we could marshal the work of several authors. That of Ben Crum and John Fossum, for instance, whose heuristic proposal of a European “multilevel parliamentary field” conceptually relates the several institutions that possess representative functions in the EU, bringing out their responsibility for voicing the interests of citizens in decision-making procedures<sup>22</sup>. It highlights the productive relationship between the European Parliament and national parliaments in terms of legitimising EU activity<sup>23</sup>. Alternatively, the idea of a “Euro-national parliamentary system” put forward by Cristina Fasone and Nicola Lupo also integrates the multidimensional institutional reality of the European Union, arguing that “the functions of representation, policy-setting and oversight are now necessarily networked and shared among the different parliaments in the EU”<sup>24</sup>. Additionally, the notion of a “Euro-national parliamentary system” underlines the plurality and diversity of present inter-institutional

relationships, namely between national parliaments, between the European Parliament and national parliaments, and between the European Parliament and the EU executive composed primarily by the Commission, the Council and the European Council<sup>25</sup>. Finally, we could speak of a “composite constitutional order”, as Leonard Besselink does, thus delineating a polycentric or composite form of democratic governance according to which national parliaments “must be considered part of the larger EU constitutional order”<sup>26</sup>. Again, the author highlights the legitimation benefit by postulating a form of composite democratic legitimacy through which national parliaments provide a sort of “derivative foundational legitimacy” that complements the “ordinary day-to-day political legitimation” provided by the European Parliament<sup>27</sup>.

It is against such a theoretical background that Article 12 TEU should be understood, and that the role of national parliaments in the EU should be discussed. Indeed, the participation of national parliaments in European law-making cannot be dissociated from a broader framework that makes sense of that participation in terms of the overall function or added value to the European integration process globally considered. Moreover, we should always bear in mind, as Marco Goldoni puts it, that “the contribution of national parliaments has to favour and not to hamper European politics”<sup>28</sup>.

Obviously, the purpose of national parliaments’ involvement is not exhausted by the role of bolstering the democratic legitimacy of the EU<sup>29</sup>. We should discover and recognise a generic *legisprudential role* of national parliaments, based upon different mechanisms<sup>30</sup> such as the information rights conceded to them, the procedure of the EWM ensuring respect for the principle of subsidiarity, or even the Political Dialogue device<sup>31</sup> establishing a direct and non-binding channel of communication between the parliaments and the Commission concerning draft legislative proposals. Furthermore, this perspective seems in accordance with the view expressed in Par. 12 of the previously mentioned European Parliament decision of 9 March 2016 (2016/2005(ACI)).

The attribution of a legisprudential role to national parliaments is inspired by the theory of jurisprudence advanced by Luc J. Wintgens<sup>32</sup>. Jurisprudence is envisaged as a “legal theory of legislative law-making”, ambitioning the “rational creation of legislation and regulation” and entailing a principle of coherence, “that norms make a sense as whole”, a principle of alternativity, “that an external limitation be justified as an alternative for failing social interaction”, a principle of temporality, in that “the limitation [...] must be justified as ‘on time’”, meaning that “legislators must argue why a norm or external limitation is necessary now ‘all things considered now’”, and a principle of necessity of the normative density, i.e. “why the normative density of an external limitation is necessary”, according to which “the means with the lowest impact on freedom are to be preferred over any other”<sup>33</sup>.

National parliaments can thus be viewed as actors that, within the networked governance system of the EU, are capable and should be able to influence and promote the rationality of the output of the EU law-making process<sup>34</sup>. Be it in a more or less binding way, open to discussion and balance<sup>35</sup>, national parliaments could focus on the justification, quality, effectiveness and even reasonableness of EU legislation. After all, national parliaments are legislative bodies in the Member States, hence adept at legislating. If we re-read Article 12 TEU on this light, then to “contribute actively to the good functioning of the Union”, in terms of law-making, means that we should give an opportunity to national parliaments for questioning the systematic coherence and goals of draft legislative proposals (coherence), the justification for intervention or regulation at the European level in substitution to the national level (alternativity, concerning subsidiarity), the ongoing desirability of norms (temporality) as well as the overall proportionality of the intended EU regulation (necessity of the normative density)<sup>36</sup>.

This framework contains the guidelines to be used in analysing in this briefing the current characteristics of the EWM, the proposal of the so-called “green card” and of the “red card”, adding to the current “yellow” and “orange” cards according to what is defined in the Protocol

(No 2) of the Lisbon Treaty on the application of the principles of subsidiarity and proportionality (hereafter the Protocol 2).<sup>37</sup>

With the background idea of national parliaments as legisprudential actors, we hope to overcome those views that circumscribe national parliaments to mere “policy shapers”, influencing governmental positions to be adopted at EU level, or “government watchdogs”, holding governments accountable and scrutinising their activity<sup>38</sup>. In accordance with the spirit and rules of the Treaty of Lisbon<sup>39</sup>, we envision national parliaments as taking an active role at European procedures<sup>40</sup>, as “European players”, engaging and communicating with EU Institutions and European decision makers<sup>41</sup>. With the expected systemic advantage of making each part responsive to the arguments and concerns of the others<sup>42</sup>.

The analysis of the current EWM is particularly relevant now, since it appears as a novel opportunity for national parliaments to intervene in the law-making process<sup>43</sup>. The next chapter will focus on the features of this mechanism that in due time could strengthen the legisprudential role of national parliaments<sup>44</sup>.

## **2. THE EARLY WARNING MECHANISM, THE “GREEN CARD” AND THE “RED CARD” FROM A LEGISPRUDENTIAL PERSPECTIVE**

We now turn to three topics of inquiry. First, the EWM instituted by the Protocol 2, and its scope of review. Second, how a “green card” would fit the understanding of national parliaments as legisprudential actors. Third, a similar exercise regarding the so-called “red card”.

### **The Early Warning Mechanism and the scope of review: conferral, subsidiarity and proportionality**

One of the main political and academic discussions regarding the EWM designed in the Protocol 2 concerns the scope of review granted to national parliaments. The question is whether national parliaments should in their reasoned opinions focus exclusively on the eventual violation of the principle of subsidiarity, as a more literal interpretation of Article 6(1) would suggest, or whether they can also raise objections to draft legislative proposals on considerations pertaining to the principle of proportionality, and even to the principle of conferral, insofar as Article 5 of the Protocol 2 provides that legislative drafts be justified with regard to both the principle of subsidiarity and that of proportionality.

The principle of subsidiarity (Article 5 TEU) is indeterminate<sup>45</sup>, as is generally the case with legal principles<sup>46</sup>. In fact, their fecundity relies, in part, in that indeterminacy. We join those that do not necessarily view the principle of subsidiarity as establishing a preference for the lowest level of action, be it national, regional or local<sup>47</sup>, but as a principle that postulates the exercise of competences by the decision-making level best positioned for attaining a certain objective<sup>48</sup>.

The principle of subsidiarity is a legal principle, enshrined in legal documents, viz. The treaty, and subject to judicial review for its enforcement (independently of the method and intensity of this review)<sup>49</sup>. It is, of course, a principle with important political implications and, consequently, may also be understood as a political principle<sup>50</sup>. It should, however, be noted that to describe the intervention of national parliaments as ex-ante political control<sup>51</sup>, or to point out that parliaments are essentially political institutions does not diminish the legal nature of the EWM<sup>52</sup>. First, national parliaments present both a political (state organ) and legal (legislator) nature. Second, when national parliaments assess the violation of legal principles in draft legislative proposals, they are taking a mainly legal, if not quasi-judicial, role<sup>53</sup>; even though their assessments do not interfere with the competence of the European Court of Justice (ECJ) to authoritatively and definitively resolve any legal question brought before it, stating what the law is<sup>54</sup>.

The Protocol 2 recognises the value of indeterminacy by emphasizing procedural, as opposed to material, questions when addressing compliance with the principle of subsidiarity<sup>55</sup>. Some literature even claims that we faced a “de-materialization” of the subsidiarity test when compared to the situation under previous Protocol No. 30 to the Amsterdam Treaty of 1997<sup>56</sup>. The Protocol 2 grants greater flexibility regarding the normative concretisation of the principle by the different actors involved<sup>57</sup>, while still permitting auxiliary recourse to Protocol No. 30 to the Amsterdam Treaty<sup>58</sup>. Furthermore, procedural duties, especially justification, may well offer new grounds for serious judicial review by the ECJ of compliance of any measure with the (procedural dimension of the) principle of subsidiarity<sup>59</sup>.

This briefing focuses on the scope of the review to be executed by national parliaments within the EWM instituted in the Protocol 2, as opposed to focusing on the requirements of subsidiarity as laid down in art. 5 TEU (the negative requirement: “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”; and the positive requirement: “can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”)<sup>60</sup>.

Even though the Protocol 2 expressly indicates that national parliaments shall analyse compliance with the principle of subsidiarity (Article 6(1)), this should be interpreted as also encompassing the principle of conferral and the principle of proportionality<sup>61</sup>. The literature on the topic has underlined the difficulty of separating the three principles in a subsidiarity review within the EWM, the separation of the principle of subsidiarity from that of proportionality being particularly difficult, as both are designated by the Treaty of Lisbon as principles that guide competence exercise.

First, it could be argued that the conferral of powers is a necessary pre-condition to the subsequent application of the principle of subsidiarity, so that the absence of a European competence implies a violation of subsidiarity<sup>62</sup>. Second, there is the more delicate question regarding subsidiarity and proportionality, as they are both mentioned in the Protocol 2 and both must be accommodated by European institutions in draft proposals<sup>63</sup>. Bearing in mind that Article 5 TEU expressly mentions that the Union shall act only if and *insofar* as the objectives of the intended action cannot be sufficiently achieved by Member States, it is difficult to exclude from a subsidiarity review considerations pertaining to proportionality, since subsidiarity itself appears to have an inbuilt dimension of proportionality (“insofar”)<sup>64</sup>. Consequently, the respect for subsidiarity requires that the measure to be adopted by the EU appears as appropriate, indispensable and congruent in face of the objective pursued<sup>65</sup>. Indeed, it falls within the scope of a subsidiarity review to appreciate how the measure relates to the problem it intends to solve (adequacy and necessity of the measure), if the least intrusive or burdensome mode of action was chosen (for instance, a Directive instead of a Regulation)<sup>66</sup>, and if other alternatives were considered by the instance advancing the measure.

Taking all into consideration, attention should be paid to the proposal found in the literature of a comprehensive model of subsidiarity review inclusive of the three following questions: *can* the European Union act? (competence); *shall* the European Union act? (subsidiarity *stricto sensu*); *how* shall the European Union act? (proportionality)<sup>67</sup>. Such a model would be in accordance with the legisprudential role here assigned to national parliaments concerning the principles of coherence, alternativity and necessity of normative density that should normatively guide the creation of legislation at the EU level<sup>68</sup>. At the same time, it would allow the EWM to have a broad scope of review within its current configuration, perhaps to the extent of including objections of national parliaments pertaining to the effectiveness and political expediency of the legislative proposal, as Ian Cooper advocates<sup>69</sup>. In fact, if national parliaments are expected to pay attention to the overall rationality of the EU legislative procedure and its outputs<sup>70</sup>, there is no reason to keep from the opinions issued in the EWM considerations regarding the ability of a proposed measure to achieve its objective (after all, the principle of subsidiarity calls for a test of insufficiency of Member States, and of comparative effectiveness through the undertaking of European action<sup>71</sup>) or the values and

interests of parliaments that conflict with the sense or intention of the proposal being adopted<sup>72</sup>.

### **The “green card”**

The subsidiarity review mechanism as instituted by the Protocol 2 calls on national parliaments to take a mostly reactive role regarding draft legislative proposals at the European level. In fact, through the EWM, national parliaments can force the Commission to review a proposal or, if sufficient political pressure is felt, to withdraw it (neither the “yellow card” of Article 7(2) nor the “orange card” of Article 7 (3) impose upon the Commission the duty to give up the intended legislation, but just to reanalyse it and justify any subsequent decision)<sup>73</sup>. Comparatively, the Political Dialogue procedure is usually more constructive and proactive<sup>74</sup>.

It is thus no wonder that the so-called “green card” is an idea that gathers so much support<sup>75</sup>. It is a device whose main purpose is to allow national parliaments to be more active in the legislative procedure, be it by addressing requests to the Commission to present draft legislative proposals on specific policy issues, or to amend and review existing legislation<sup>76</sup>.

Even though several models for the “green card” have been put forward, ranging from a more restrictive (national parliaments would only be able to give cause to the review or repeal of existing legislation)<sup>77</sup> to a more emancipative configuration (national parliaments would be able not only to provoke the review or repeal existing rules, but also ignite the legislative procedure by the Commission)<sup>78</sup>, we would be favourable to the broader configuration, in that it is most in harmony with the legisprudential role of national parliaments. Conceptually, a “green card” should be envisioned as a way through which national parliaments, on the one hand, may address the necessity and justification of legislation (which concerns mainly the principle of alternativity) and, on the other hand, act upon the desirability to scrutinise existing legislation and change it or eliminate it when appropriate in their view (which concerns the principle of temporality, since the justification for legislation or some of its content may lose grounds as time passes)<sup>79</sup>. This, in sum, represents the legisprudential value of a “green card”<sup>80</sup>.

A possible path would be to create such a mechanism through treaty amendment. This, however, does not gather much support. A viable, if more informal, alternative would be to enhance the Political Dialogue procedure or follow up with an initiative of this kind<sup>81</sup>, so as to ensure an articulation between national parliaments and the Commission, so that the Commission truly takes into account the requests to propose or review (amend or repeal) legislation that a group of national parliaments addresses to it<sup>82</sup>. It remains open to political discussion and compromise the definition of the threshold that should be attained to trigger a green card<sup>83</sup> binding the Commission to present new legislation or changes to previous legislation or, at least, to justify to national parliaments the decision to omit such a step<sup>84</sup>. However, it seems to us that it should be a relatively low threshold (for instance, around ¼ or 1/3 of current votes), so that the mechanism has practical significance and an incentive is created for national parliaments to use it, thus promoting their engagement with European affairs and strengthening interparliamentary cooperation<sup>85</sup>.

### **The “red card”**

Another issue that should be viewed in a legisprudential light is that of the so-called “red card”. This mechanism is supposed to give national parliaments the possibility of vetoing or blocking a draft legislative proposal, thus forcing the Commission to drop it when a substantial number of national parliaments sustains that it violates the principle of subsidiarity (in its broadest sense as argued in this paper earlier)<sup>86</sup>.

Before approaching this matter, it is relevant to highlight that the fundamental question lying behind the mechanism of subsidiarity control, in general, and the red card, in particular, is always the following: who should have the power to determine if the principle of subsidiarity has been breached?<sup>87</sup>

In our opinion, the Lisbon Treaty, especially with its Protocol 2, attempted an answer in order to tighten the compliance with subsidiarity. The solution was to assign to national parliaments such a task, therefore implying they were the ones best positioned and best suited to provide the control felt as needed. This allows an escape from the paradox or dilemma that would arise in case the control of subsidiarity rested solely upon EU institutions: in that case, those to be objects of control (the Commission and the legislators of the EU) would simultaneously be the subjects of the control<sup>88</sup>. EU institutions being the ones responsible for controlling the compliance with the subsidiarity principle, they would in a certain sense provide a sort of self-control: those against which the subsidiarity principle is supposed to function, in terms of limiting the exercise of competences, would be their guardians<sup>89</sup>.

However, it must be recognised that, at least from a legal point of view, parliaments are not able to currently exercise a strong subsidiarity control<sup>90</sup>. Both the "yellow card" and the "orange card" do not bind the Commission to automatically withdraw its proposal<sup>91</sup>. Actually, the latter takes the issue specifically to the knowledge of the European Parliament and the Council (Article 7(3) of the Protocol 2) – again, both EU institutions<sup>92</sup>.

Consequently, a "red card" could mean a strong empowerment of national parliaments at the European level<sup>93</sup>. The threshold to trigger it would naturally have to be very high, perhaps around 2/3 of the votes in order to avoid confusion with both the "yellow" and "orange" cards that could be maintained in parallel.

It seems to us, however, that treaty change would be required to formally accommodate such power of the national parliaments. It has also been suggested that in order to avoid the introduction of a new institute, one could just informally deal with the actual available "cards" as political "red cards"<sup>94</sup>.

Notwithstanding, it should be noted that other arrangements could also serve as a "red card" if configuring it as a veto right of national parliaments seems too much. In fact, from a strict legal point of view, the "red card" could be linked to an intervention of the ECJ through an ex ante legal review of the contentious draft legislative proposals when required by a certain number of national parliaments<sup>95</sup>. Therefore, if serious doubts can be raised concerning the compliance with subsidiarity, the ECJ could authoritatively clarify the issue even before the legislative procedure is concluded. Even though this would require an amendment to the Treaty<sup>96</sup>, it draws inspiration from Article 218(11) TFEU<sup>97</sup>. The main drawback of this solution is that it would bring the ECJ right into the middle of a very politicised dispute between the Commission and the national Parliaments regarding the principle of subsidiarity. The main advantage would consist in forcing the ECJ to have a legal take on issues of subsidiarity even before the measures are adopted, thus promoting case law on the matter.

In ultimate analysis, the "red card" should not be overvalued. It is important to bear in mind that until today, only three "yellow cards" have been shown and no "orange card" has been triggered according to Article 7(3) of the Protocol 2, thus indicating the improbability of occurrence of "red cards" with even higher threshold. Furthermore, the political influence and pressure conveyed by both the "yellow" and the "orange" cards deserves not to be overlooked<sup>98</sup>.

- <sup>1</sup> For an overview of the europeanisation of national parliaments, please see Olivier Rozenberg and Claudia Hefftlar, « Introduction », in Claudia Hefftlar / Christine Neuhold / Olivier Rozenberg / Julie Smith (Ed.), *The Palgrave Handbook of National Parliaments and the European Union*, Hampshire : Palgrave Macmillan, 2015, pp. 6 ff.
- <sup>2</sup> See Olivier Rozenberg and Claudia Hefftlar (2015), p. 6. Questioning the so-called « de-parliamentarization thesis » with empirical data, see Katrin Auel, Olivier Rozenberg and Angela Tacea, « Fighting back ? And, If So, How ? Measuring Parliamentary Strength and Activity in EU Affairs », in Claudia Hefftlar / Christine Neuhold / Olivier Rozenberg / Julie Smith (Ed.), *The Palgrave Handbook of National Parliaments and the European Union*, Hampshire : Palgrave Macmillan, 2015, pp. 60-93.
- <sup>3</sup> For a more detailed overview of the gradual increase on the role of national parliaments in European affairs, see Anna Wetter, « Mapping out the Procedural Requirements for the Early Warning Mechanism », in Anna Jonsson Cornell and Marco Goldoni (Ed.), *National and Regional Parliaments in the EU-Legislative Procedure Post-Lisbon*, Portland : Hart, 2017, pp. 70-72; Tapio Raunio, "National Parliaments and European Integration: What we Know and Agenda for Future Research", *The Journal of Legislative Studies* 15 (2009), pp. 317-334; Robert Schütze, "Subsidiarity after Lisbon: reinforcing the safeguards of federalism?", *Cambridge Law Journal* 68 (2009), pp. 525-536; Philipp Kiiver, "The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity", *Maastricht Journal of European and Comparative Law* 15 (2008), pp. 77-83.
- <sup>4</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016Q0512\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016Q0512(01)&from=EN)
- <sup>5</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0081+0+DOC+XML+V0//EN>
- <sup>6</sup> See Christian Calliess, in Calliess/Ruffert (Hrsg.), *EUV/AEUV*, 4. Aufl., München : C. H. Beck, 2011, Art. 12, Rn. 8 ff. (p. 195 ff.).
- <sup>7</sup> See Katrin Auel and Thomas Christiansen, "After Lisbon: National Parliaments in the European Union", *West European Politics* 38 (2015), pp. 261-281.
- <sup>8</sup> See Calliess (2011), Rn. 2 (p. 193), and Afke Groen and Thomas Christiansen, « National Parliaments in the European Union : Conceptual Choices in the European Union's Constitutional Debate », in Claudia Hefftlar / Christine Neuhold / Olivier Rozenberg / Julie Smith (Ed.), *The Palgrave Handbook of National Parliaments and the European Union*, Hampshire : Palgrave Macmillan, 2015, p. 44.
- <sup>9</sup> See Ian Cooper, "Bicameral or Tricameral? National Parliaments and Representative Democracy in the European Union", *Journal of European Integration* 35 (2013), pp. 531-546; Carina Sprungk, "A New Type of Representative Democracy? Reconsidering the Role of National Parliaments in the European Union", *Journal of European Integration* 35 (2013), pp. 547-563.
- <sup>10</sup> See Olivier Rozenberg and Claudia Hefftlar (2015), p. 11.
- <sup>11</sup> See Afke Groen and Thomas Christiansen (2015), p. 57, sustaining that the EWS « marked a shift from an indirect and rather passive role for national parliaments to direct involvement at the EU level ».
- <sup>12</sup> See Ian Cooper, « A 'Virtual Third Chamber ? for the European Union ? National Parliaments after the Treaty of Lisbon », *West European Politics* 35 (2012), pp. 441-465.
- <sup>13</sup> See Calliess (2011), Rn. 40 (p. 203).
- <sup>14</sup> See Christian Calliess, *Die neue Europäische Union nach dem Vertrag von Lissabon*, Tübingen : Mohr, 2010, p. 185, and Calliess (2011), Rn. 40 (p. 203).
- <sup>15</sup> Some rightly highlight the limitations concerning the democratic input provided by national parliaments in the current framework of their participation. See Afke Groen and Thomas Christiansen (2015), p. 43.
- <sup>16</sup> We quoted Marco Goldoni and Anna Jonsson Cornell, « The Trajectory of the Early Warning Mechanism », in Anna Jonsson Cornell and Marco Goldoni (Ed.), *National and Regional Parliaments in the EU-Legislative Procedure Post-Lisbon*, Portland : Hart, 2017, p. 353. See also Pieter De Wilde, "Why the Early Warning Mechanism does not Alleviate the Democratic Deficit", *OPAL Online Paper No. 6/2012*, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2128463](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128463).
- <sup>17</sup> Anna Jonsson Cornell and Marco Goldoni, « Introduction », in Anna Jonsson Cornell and Marco Goldoni (Ed.), *National and Regional Parliaments in the EU-Legislative Procedure Post-Lisbon*, Portland : Hart, 2017, p. 3.
- <sup>18</sup> See Calliess (2010), p. 218.
- <sup>19</sup> This is the thesis of Martina Mayer, *Die Europafunktion der nationalen Parlamente in der Europäischen Union*, Tübingen : Mohr, 2012, pp. 80 ff.
- <sup>20</sup> See Tapio Raunio, "The Gatekeepers of European Integration? The Functions of National Parliaments in the EU Political System", *Journal of European Integration* 33 (2011), pp. 303-321.
- <sup>21</sup> As evidenced by Olivier Rozenberg and Claudia Hefftlar (2015), pp. 22 ff.
- <sup>22</sup> See Ben Crum and John E. Fossum, « The Multilevel Parliamentary Field : a framework for theorizing representative democracy in the EU », *European Political Science Review* 1 (2009), pp. 249-271.
- <sup>23</sup> See Ben Crum and John E. Fossum (2009), pp. 261-263.
- <sup>24</sup> See Cristina Fasone and Nicola Lupo, « Introduction », in Nicola Lupo and Cristina Fasone (Ed.), *Interparliamentary Cooperation in the Composite European Constitution*, Portland : Hart, 2016, pp. 9-11.
- <sup>25</sup> See Cristina Fasone and Nicola Lupo (2016), pp. 10-11.
- <sup>26</sup> See Leonard FM Besselink, « The Place of National Parliaments within the European Constitutional Order », in Nicola Lupo and Cristina Fasone (Ed.), *Interparliamentary Cooperation in the Composite European Constitution*, Portland : Hart, 2016, pp. 30-32.
- <sup>27</sup> See Leonard Besselink (2016), pp. 36-37.

- <sup>28</sup> Marco Goldoni, « The Instrumental Value of Horizontal Parliamentary Cooperation : Subsidiarity Review and Political Dialogue », in Nicola Lupo and Cristina Fasone (Ed.), *Interparliamentary Cooperation in the Composite European Constitution*, Portland : Hart, 2016, p. 173. For his part, Calliess (2011), Rn. 65 (p. 209), stresses that the strengthening of the role of national parliaments should not be seen as some sort of « renationalization » of the EU, nor should it aim for that.
- <sup>29</sup> See Marco Goldoni (2016), p. 174.
- <sup>30</sup> About these mechanisms and their relevance to assure that national parliaments become an « integral part of a truly composite constitutional order », please read Leonard Besselink (2016), pp. 31-33.
- <sup>31</sup> For a more in-depth analysis of the Political Dialogue, please read Davor Jancic, « The Barroso Initiative : Window Dressing or Democracy Boost », *Utrecht Law Review* 8 (2012), pp. 78-91.
- <sup>32</sup> Please read Luc J. Wintgens, *Legisprudence. Practical Reason in Legislation*, Surrey : Ashgate, 2012.
- <sup>33</sup> Read Luc J. Wintgens (2012), pp. 1-6 and 231 ff.
- <sup>34</sup> Somehow Ian Cooper, « Is the Early Warning Mechanism a Legal or a Political Procedure ? Three Questions and a Typology », in Anna Jonsson Cornell and Marco Goldoni (Ed.), *National and Regional Parliaments in the EU-Legislative Procedure Post-Lisbon*, Portland : Hart, 2017, p. 48, hints at this legisprudential role when he writes that the EWM could instigate « a constructive argument with the Commission over whether and how the EU should legislate ».
- <sup>35</sup> For instance, the European Parliament underscores the role of national parliaments in the Political Dialogue framework in Par. 12 of the European Parliament decision of 9 March 2016 (2016/2005(ACI)).
- <sup>36</sup> These overall concerns are mirrored in Par. 22 of the IIA.
- <sup>37</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E%2FPRO%2F02>
- <sup>38</sup> For a list of several ideal types of parliamentary participation in EU affairs, please read Olivier Rozenberg and Claudia Hefftlar (2015), pp. 27 ff.
- <sup>39</sup> See Calliess (2010), pp. 182 ff.
- <sup>40</sup> Read Afke Groen and Thomas Christiansen (2015), p. 45, advocating a direct participation of national parliaments in the EU's policy-making process « that goes beyond oversight and control over the executive ».
- <sup>41</sup> For this type of parliamentary participation in EU affairs, read Olivier Rozenberg and Claudia Hefftlar (2015), pp. 34-35, and Carina Sprungk (2013), pp. 556 ff.
- <sup>42</sup> See Mayer (2012), p. 149. Calliess (2011), Rn. 68 (p. 210), also underlines the positive effects of the national parliaments' involvement in terms of enhancing the acceptability and transparency of the European decision procedures.
- <sup>43</sup> See Afke Groen and Thomas Christiansen (2015), p. 47.
- <sup>44</sup> Please read Afke Groen and Thomas Christiansen (2015), pp. 57-58, especially when the authors underline how « the introduction of the EWM in the Lisbon Treaty marked a shift from an indirect and rather passive role for national parliaments to direct involvement at the EU level, albeit in an essentially limited and advisory capacity ». Consequently, the authors hint that in the future perhaps that advisory role of national parliaments could evolve « into that of a significant actor and potential veto-player in the EU decision-making process ».
- <sup>45</sup> See Christian Calliess, in Calliess/Ruffert (Hrsg.), *EUV/AEUV*, 4. Aufl., München : C. H. Beck, 2011b, Art. 5, Rn. 20 (p. 121).
- <sup>46</sup> See Robert Alexy, *Theorie der Grundrechte*, Frankfurt am Main : Suhrkamp, 1994, pp. 92-93.
- <sup>47</sup> With such interpretation, see UK House of Lords European Union Committee, *The Role of National Parliaments in the European Union*, London, 2014, p. 26 ; Mayer (2012), p. 122.
- <sup>48</sup> See Calliess (2011b), Rn. 56-59 (p. 134), with a conceptual distinction between « conservative subsidiarity » and « progressive subsidiarity ». See also Koen Lenaerts and Piet Van Nuffel, *European Union Law*, London : Sweet & Maxwell, 2011, p. 134.
- <sup>49</sup> See Calliess (2011b), Rn. 67 (p. 137), and Ian Cooper (2017), p. 31, underlining that the ECJ tends to be deferential to the European legislator regarding the subsidiarity appreciation.
- <sup>50</sup> See Ian Cooper (2017), pp. 29-30. Also Afke Groen and Thomas Christiansen (2015), pp. 52-53.
- <sup>51</sup> See Calliess (2011b), Rn. 65 (pp. 136-137), and Mayer (2012), p. 126.
- <sup>52</sup> Jörgen Hettne, « Reconstructing the EWM ? », in Anna Jonsson Cornell and Marco Goldoni (Ed.), *National and Regional Parliaments in the EU-Legislative Procedure Post-Lisbon*, Portland : Hart, 2017, p. 55, attempts to formulate a sort of *tertium genus* (in between the legal and political realms) by formulating that the EWM presents itself as a « political control of a constitutional nature within a very narrow legal framework ».
- <sup>53</sup> See Marco Goldoni and Anna Jonsson Cornell (2017), p. 337.
- <sup>54</sup> According to art. 8 of the Protocol n. 2 to the Lisbon Treaty, the ECJ has jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act.
- <sup>55</sup> See Calliess (2011b), Rn. 60-64 (pp. 135-136).
- <sup>56</sup> See Calliess (2010), pp. 204-205.
- <sup>57</sup> It's interesting to note that the House of Lords (2014), p. 26, affirms the following : « we do not think that it would be sensible to attempt a more precise definition of the subsidiarity principle than the definition that is already set out in the EU Treaties ». For a list of aspects that may be considered in evaluating whether subsidiarity has been complied with or not, see Calliess (2011b), Rn. 42 (p. 129), mentioning, among others, the type, dimension and intensity of the problem to be solved ; whether several or all Member States are affected by that problem ; the transnational dimension of the measure to be taken ; the reasonableness of the gains in terms of integration when compared to Member States' competence loss ; the « european added value » of a european

- measure. Also Koen Lenaerts and Piet Van Nuffel (2011), p. 135.
- <sup>58</sup> See Calliess (2011b), Rn. 33 (p. 125).
- <sup>59</sup> See Calliess (2011b), Rn. 75 (p. 140), and Anna Wetter (2016), pp. 82-84.
- <sup>60</sup> With detail see Calliess (2011b), Rn. 31 ff. (pp. 124 ff.).
- <sup>61</sup> See Ian Cooper (2017), p. 21 ; Jörgen Hettne (2017), p. 63 ; Davor Jancic, « The Game of Cards : National Parliaments in the EU and the Future of the Early Warning Mechanism and the Political Dialogue », *Common Market Law Review* 52 (2015), pp. 939-976 ; House of Lords (2014), p. 27 ; Philipp Kiiver, *The Early Warning System for the Principle of Subsidiarity*, London : Routledge, 2012, pp. 97-100 ; Philipp Kiiver, « The conduct of subsidiarity checks of EU legislative proposals by national parliaments : analysis, observations and practical recommendations », *ERA Forum* 12 (2012), pp. 535-547 ; Calliess (2011b), Rn. 36-37 (p. 202) ; Takis Tridimas, *The General Principles of EU Law*, 2<sup>nd</sup> Edition, Oxford : Oxford University Press, 2006, pp. 175 ff. The European Parliament decision of 9 March 2016 (2016/2005(ACI)) stresses the role of national parliaments regarding both the principles of subsidiarity and proportionality.
- <sup>62</sup> See Ian Cooper (2017), pp. 33-34 ; Davor Jancic (2015), pp. 953 ff. ; Calliess (2010), p. 206.
- <sup>63</sup> Which serves as further argument to sustain that the subsidiarity review encompasses also the respect for the principle of proportionality. See Calliess (2010), p. 206.
- <sup>64</sup> See Calliess (2011b), Rn. 36 (p. 126), mentioning how some literature interprets the negative criteria of subsidiarity in terms of the « necessity of the measure », which obviously concerns one dimension of proportionality ; Koen Lenaerts and Piet Van Nuffel (2011), p. 144 ; House of Lords (2014), p. 25 ; Ian Cooper (2017), pp. 31-32, calling proportionality the « sister principle » to subsidiarity ; Marco Goldoni and Anna Jonsson Cornell (2017), p. 341.
- <sup>65</sup> See Calliess (2010), p. 210. With more detail, regarding this criteria of proportionality, see also Calliess (2011), Rn. 45 ff. (pp. 130 ff.).
- <sup>66</sup> See Calliess (2010), p. 212, presenting a « hierarchy of means » which the author derives directly from the principle of proportionality. That hierarchy of means implicates a primacy of mutual recognition instead of harmonization, of framework rules instead of detailed rules, of non-binding measures instead of Directives, of Directives instead of Regulations. See also Calliess (2011b), Rn. 47-55 (pp. 131-133).
- <sup>67</sup> See Calliess (2010), pp. 207-212. With identical reasoning see also Ian Cooper (2017), pp. 30.
- <sup>68</sup> Jörgen Hettne (2017), p. 65, advocates that subsidiarity review should be so wide as to « include the main constitutional principles of the Union ».
- <sup>69</sup> See Ian Cooper (2017), pp. 34-39. For instance, Jörgen Hettne (2017), p. 55, sustains that « the Commission should not have any superior right to determine which arguments fall within the scope of the principle of subsidiarity ».
- <sup>70</sup> That is exactly what we think happened with the first yellow card to the proposal for a 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 » in 2012 (known as Monti II Regulation). In this case and in our view, national parliaments assumed a true jurisprudential role. See in the literature Frederico Fabbrini and Katarzyna Granat, « 'Yellow Card, But No Foul' : The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike », *Common Market Law Review* 50 (2013), pp. 115-144, and Marco Goldoni, « The Early Warning System and the Monti II Regulation : The Case for a Political Interpretation », *European Constitutional Law Review* 10 (2014), pp. 90-108.
- <sup>71</sup> See Koen Lenaerts and Piet Van Nuffel (2011), p. 134.
- <sup>72</sup> All of this could, in turn, approximate the EWM from a model of policy arguing as proposed by Ian Cooper (2017), pp. 45-49.
- <sup>73</sup> See Goldoni (2016), p. 178 (« Subsidiarity review has a negative function in EU law-making ») ; Marco Goldoni and Anna Jonsson Cornell (2017), p. 354 (« the EWM [...] does not lend itself to being an affirmative instrument »).
- <sup>74</sup> See Goldoni (2016), pp. 178-179, underlining the « logic of positive contribution to EU law » subjacent to the Political Dialogue procedure.
- <sup>75</sup> See Davor Jancic (2015), pp. 965-967.
- <sup>76</sup> See Jörgen Hettne (2017), p. 57. The author also establishes a paralell between that possibility and those opened to the European Parliament, to the Council and even to the citizens in articles 225 TFEU, 241 TFEU and 11 Par. 4 TEU.
- <sup>77</sup> It seems to be the stance of the House of Lords (2014), p. 20.
- <sup>78</sup> See Tweede Kamer, *Ahead in Europe. On the Role of the Dutch House of Representatives and national parliaments in the European Union*, May 2014, p. 14 (available at : [https://www.tweedekamer.nl/sites/default/files/field/uploads/Ahead%20in%20Europe\\_tcm181-238660\\_0.pdf](https://www.tweedekamer.nl/sites/default/files/field/uploads/Ahead%20in%20Europe_tcm181-238660_0.pdf)). The literature usually divides between a « Dutch approach », a « Danish approach » and a « House of Lords approach ». See Marco Goldoni (2017), p. 179 ; Marco Goldoni and Anna Jonsson Cornell (2016), p. 349.
- <sup>79</sup> Concerning the multiple tasks that can be assigned to a « green card » procedure », se Marco Goldoni (2017), p. 180.
- <sup>80</sup> Besides, this could instrumentally serve to incentivate the ex post evaluation of existing legislation, a purpose mirrored in Par. 20 of the IIA of 13 April 2016 and which seeks to ensure the efficiency, effectiveness, relevance, coherence and value added of EU legislation (Par. 22 of the mentioned IIA).
- <sup>81</sup> Perhaps preferred by the European Parliament when one takes into consideration Par. 12 of the European Parliament decision of 9 March 2016 (2016/2005(ACI)).
- <sup>82</sup> See the trial green card on food waste initiated by the UK on 9 June 2015 : <http://www.parliament.uk/documents/lords-committees/eu-select/green-card/green-card-letter-to-np->

[chairs.pdf](#). See Marco Goldoni (2017), p. 179 ; Marco Goldoni and Anna Jonsson Cornell (2016), p. 349. In the literature, see Davor Jancic (2015), p. 965.

<sup>83</sup> This is a contentious subject as shown by COSAC, *Twenty-fourth Bi-annual Report : Developments in European Union*, 2015, p. 14 (available at : <http://www.cosac.eu/documents/bi-annual-reports-of-cosac/>).

<sup>84</sup> See Hettne (2017), p. 63.

<sup>85</sup> From our point of view, the purpose of the green card should not be seen as that of bolstering the democratic legitimacy of the EU, but rather to productively use the energy and impetus of national parliaments for the European law-making process. See in this regard Marco Goldoni and Anna Jonsson Cornell (2016), p. 350.

<sup>86</sup> See Jörgen Hettne (2016), p. 56, that is fundamentally against the transformation of the EWM into a veto mechanism.

<sup>87</sup> See Ian Cooper (2016), pp. 23 ff.

<sup>88</sup> See Mayer (2012), p. 123.

<sup>89</sup> See Calliess (2011b), Rn. 61 (pp. 135-136).

<sup>90</sup> See Ian Cooper (2016), p. 26.

<sup>91</sup> See in detail Jörgen Hettne (2016), pp. 55-56.

<sup>92</sup> Agreeing in principle with this framework, see Jörgen Hettne (2016), p. 57. Critically, see Mayer (2012), p. 130.

<sup>93</sup> Jörgen Hettne (2016), p. 58, even finds that it would « influence the division of powers in the Union », but that depends on the concrete configuration given to the « red card ». See Davor Jancic (2015), pp. 962-964.

<sup>94</sup> See regarding this approach Jörgen Hettne (2016), p. 57.

<sup>95</sup> Advocating for such mechanism of ex ante legal review, see Jörgen Hettne (2016), p. 64.

<sup>96</sup> See Jörgen Hettne (2016), p. 67.

<sup>97</sup> See Marco Goldoni and Anna Jonsson Cornell (2016), p. 339.

<sup>98</sup> See Marco Goldoni and Anna Jonsson Cornell (2016), p. 347.

#### DISCLAIMER

The content of this document is the sole responsibility of the author and any opinions expressed therein do not necessarily represent the official position of the European Parliament. It is addressed to Members and staff of the EP for their parliamentary work. Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

This document is available at: [www.europarl.europa.eu/studies](http://www.europarl.europa.eu/studies)

Contact: [poldep-citizens@ep.europa.eu](mailto:poldep-citizens@ep.europa.eu)

Manuscript completed in 2017

© European Union

Internal ref.: 583.133



ISBN 978-92-846-0745-7 (paper)  
ISBN: 978-92-846-0746-4 (pdf)  
CATALOGUE: QA-01-17-196-EN-C+N  
doi:10.2861/275021 (paper)  
doi10.2861/18351 (pdf)