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## **National Parliaments in the EU: after Lisboa and beyond subsidiarity**

**The (positive) side-effects and (unintended)  
achievements of the Treaty provisions**

*Maria Teresa Paulo*

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# National Parliaments in the EU: after Lisboa and beyond subsidiarity

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*Maria Teresa Paulo*

## Introduction

Celebrating the first<sup>1</sup> “yellow card” of the Early Warning System (EWS) in the 20th anniversary of the Treaty of Maastricht is, indeed, a charming coincidence. Why? Because it was in Maastricht - in the city which was named by the Roman Empire as Mosae Trajectum (Maastricht), which means crossing-place over the Maas river - that the twelve EU Member-States decided to include, for the first time, a declaration on the role of national Parliaments in the European Union (EU).

This bridge metaphor may then lead us to a discussion on the connection between national parliaments (NPs) and the EU, as an additional attempt to democratise (and legitimise) the European legislative process and to link it to citizens. The intention of bringing EU closer to the citizens was further developed in Amsterdam, with the inclusion of a Protocol devoted to the role of NPs in the EU, and then deeply debated at the Convention, which delivered the (failed) Constitutional Treaty and opened the path to Lisbon.

This article aims, then, to contribute to the understanding of NP dynamics engendered by the implementation of the Treaty of Lisbon since 2009, mostly due to the subsidiarity clause. It largely focuses on the (positive) side-effects of the Treaty provisions on NPs, which are claimed to be more meaningful than the rather limited scope of the legal framework which shape them.

The main question nowadays is, thus, how to interpret both the role provided to twenty-seven Member State parliaments in EU affairs by the Treaty of Lisbon and its concrete implementation.

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<sup>1</sup> Twelve national Parliaments/Chambers (19 votes) claimed a breach of the subsidiarity principle on an EU draft legislative act - 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), Brussels, 21.3.2012, a.k.a. Monti II, available at <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20120130.do> - i.e., they have considered that the EU is not competent to legislate on that specific matter, especially in what concerns the implications on the right to strike, which should rather be dealt at national level.

## NP's doorway into the Treaty of Lisbon

In fact, Lisbon provides NPs with new responsibilities toward EU matters, which may be generally listed as follows:

1. Broader access to information for NPs (forwarded directly and timely by EU institutions);
2. EU communication/notification procedures towards NPs;
3. NP participation in EU evaluation and control mechanisms (e.g. Europol and Eurojust);
4. Monitoring the principle of subsidiarity (NPs' ability to express their *reasoned opinion* on whether an EU draft legislative act complies with the principle of subsidiarity: the 8-week *early warning system*);
5. Further interparliamentary cooperation.

Indeed, for the first time in the history of EU Treaties, NPs are named in the body of the treaty and not just in an annexed declaration or protocol.

There are forty seven mentions of "national parliaments" in the Treaty and it devotes an entire article to summarise the main roles granted to NPs regarding the EU decision-making process. Article 12 TEU states that *national Parliaments contribute actively to the good functioning of the EU*, namely by:

- scrutinizing the respect for the principle of subsidiarity<sup>2</sup> by EU legislative draft acts, i.e. by generating a sort of alarm (the so called *early warning system*)<sup>3</sup> every time the EU proposes legislation in an area of shared competences with Member-States, where NPs consider that it should rather be dealt with at national level, i.e. by themselves;
- participating in some procedures regarding the Area of Freedom, Security and Justice (AFSJ), e.g. Eurojust, Europol, etc.<sup>4</sup>;
- participating in the Treaty Revisions<sup>5</sup>;
- having a say concerning other State applications to join the Union<sup>6</sup>; and
- having veto power over the use of both the *passerelle clause*<sup>7</sup> (when the Council decides to move from unanimity to qualified majority voting on measures concerning family law with cross-border implications) and the *flexibility clause*<sup>8</sup> (when the EU considers that there is a

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<sup>2</sup> Protocol 2, annex to the Treaty on the Functioning of the European Union ((22): 206-209).

<sup>3</sup> Article 5 (3) TEU; Article 12, b) TEU, Article 69 TFEU and annexed Protocols no. 1 and no. 2.

<sup>4</sup> Article 12, c) TEU; Articles 69, 70, 71, 85 and 88 TFEU.

<sup>5</sup> Article 12, d) TEU and Article 48 TFEU.

<sup>6</sup> Article 12, e) TEU and Article 49 TFEU.

<sup>7</sup> Article 48 (7) TEU and second and third subparagraphs of Article 81 (3) TFEU.

<sup>8</sup> Article 352, (2) TFEU.

need for an EU initiative in an area where the Treaty does not attribute that competence to the EU).

Considering the above, the main benefit of the Treaty of Lisbon for NPs is the fact that it provides them with information on the main EU decision-making dossiers<sup>9</sup>. Moreover, it also provides NPs with a (decisive) say regarding some EU critical decisions, with the option to scrutinize EU draft legislation and, above all, with the possibility of forwarding the results of their scrutiny to the Presidents of the Commission, Council and EP.

However, this possibility of sending the results of parliamentary work on EU matters is restricted to: draft *legislative* acts, matters falling within the *shared legislative competences* between EU and Member-States, a timeframe of 8 weeks and, above all, the submission of a *reasoned opinion* on the (non)observance of the subsidiarity principle, i.e., stating the reasons why a draft legislative proposal fails to comply with the principle of subsidiarity (*early warning system*).

Having all those constraints in mind, this article claims that EWS' intangible side effects, rather than its tangible provisions, appear to be *the* major outcome of the new provisions: to raise national parliaments' awareness of EU matters and to set up a communicative routine among NPs on EU affairs. And, by doing so, ultimately, NPs may indeed end up providing an added (not competitive) way to democratise and legitimise EU legislation, based on their representative and plural institutional nature and on their direct and close relations with citizens.

## The Early Warning System

The Early Warning System (EWS) - with its intricate yellow, orange and red card procedures - is ultimately the most tangible instrument for reinforcing the role of NPs regarding the EU legislative process under the Treaty of Lisbon.

According to this system, each NP has 2 votes, out of a total of 54 and when 1/3 of the NPs (or 1/4 on matters relating to the AFSJ) forward *reasoned opinions* on a certain draft legislative act, the European Commission (EC) is required to reconsider (1/3 is equivalent to 18 votes and 1/4 to 14 votes) and, ultimately, it may either maintain, withdraw or amend the draft. This is informally called the "yellow card" as it is supposed to warn/advise the EU legislator that maybe it should leave that particular legislative initiative to Member-States.

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<sup>9</sup> NP directly receive all consultation and planning documents from the Commission, as well as draft legislation issued by any institution or group of Member States, including the information regarding the mentioned notification procedures.

Furthermore, in the course of the ordinary legislative procedure (co-decision), if a simple majority of the NPs (28 votes) opposes the draft, the European Commission is required to review it and if it decides to maintain the draft unchanged, the reasoned opinion from the Commission and the opinions of the NPs are forwarded to the Council and EP for consideration. In this case, if the Council, by a majority of 55%, or the EP, by a simple majority, considers that the draft does not comply with the subsidiarity principle, it has to be withdrawn. This is the so called “orange card”.

Lastly, following the adoption of the legislation, Member States - on behalf of their NPs - may bring legal action on grounds of infringement of the principle of subsidiarity and the EU Court of Justice is entitled to pronounce on such appeals. This cements the so called “red card”.

By the time Lisbon came into force, at the end of 2009, the question was how the European Commission, and then the other EU institutions, would deal with these provisions. Which documents would the Commission consider to be subject to the subsidiary check? How would such documents be identified? Would the Commission communicate to NPs when all language versions had been sent out and the 8-week- period was starting? How would it consider the reasoned opinions issued by NPs on EU draft legislative acts in order to reach the required 1/3 or ¼ threshold? Would all NPs have to take issue with the same article of the draft? And would they have to base their opinions on the same argument? How would EU institutions interpret the “shared reasons” referred to in Article 7.3 (a) of Protocol no. 2? Would the Commission answer the reasoned opinions after the 8-week period? Would there be English and French versions of these answers? Would the Commission inform NPs, just after the 8-week period had elapsed, about the total number of reasoned opinions received? Moreover, would the Commission notify NPs about the effects of the reasoned opinions on the text of a draft legislative act?

All those questions were deeply debated and the European Commission decided on a wider political approach towards the EWS in order to maximise the input of NPs reasoned opinions to its draft legislative acts. Consequently, both the EU institutions and NPs undertook internal procedural changes in order to guarantee the implementation of the EWS.

However, according to table in annex 1, in 2010, the first year of implementation of the Treaty of Lisbon, only 34 of a total of 386 opinions sent to the European Commission were, in fact, *reasoned opinions*, i.e., only 8% of the NP contributions sent were actually stating that a certain draft legislative act was not complying with the principle of subsidiarity (Article 6 of Protocol no. 2 of the Treaty of Lisbon). And those 34 reasoned opinions were not all on the same proposal, which means that, during the first year of the implementation of Lisbon, the required threshold for a “yellow card” was never reached. Furthermore, 25/40 Parliaments/Chambers only sent four or fewer opinions to the EC during 2010 (see also Barrett (1): 12).

As demonstrated in the table of annex 1, from 2006 (*Barroso's initiative/political dialogue*) to 2011, NPs sent 1725 opinions to the EC on EU proposals.

Considering the entry into force of the Treaty of Lisbon in the end of 2009, 34 *reasoned opinions* were sent in 2010 and 63 in 2011, in a total of 97 *reasoned opinions* forwarded to the EU institutions under the Treaty of Lisbon's provisions.

This clearly demonstrates that the *political dialogue* platform was used much more than strict scrutiny of the subsidiarity principle via *reasoned opinions*. Of course this happens for several reasons and mostly because EU institutions are not forwarding legislative drafts with doubtful subsidiarity grounds on a daily basis. But, in our view, it clearly means that parliamentarians are much more interested in debating and forwarding their opinions on the substance of EU draft legislation.

The tenth most participative parliaments (including *opinions* and *reasoned opinions*) have been the Portuguese *Assembleia da República*, the Italian *Senato della Repubblica*, the Swedish *Riksdag*, the Czech *Senát*, the German *Bundesrat*, the French *Sénat*, the UK *House of Lords*, the Italian *Camera dei Deputati*, the Danish *Folketinget* and the Romanian *Senatul* (see annex 1).

As far as the *reasoned opinions* are concerned, the five most participative have been the Swedish *Riksdag*, the Luxembourg *Chambre des Députés*, the Polish *Senat*, the Polish *Sejm* and the UK *House of Commons* (see annex 1).

As a result of the evolution of NPs' exercise of Lisbon provisions, two years after the entry into force of the Treaty of Lisbon, an EWS "yellow card" was reached. That took place on the 22<sup>nd</sup> of May 2012, with 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<sup>10</sup>. For the first time - after three "almost" cases<sup>11</sup> in the first two years of the Treaty of Lisbon's

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<sup>10</sup> Indeed, this case may have major potential institutional consequences, first of all because of its implications with the right to strike and, consequently, because it brings a new element to the European Court of Justice's interpretation concerning the EU status regarding economic and social rights.

<sup>11</sup> - The Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, gathered 10/18 votes, from the Austrian Nationalrat and Bundesrat, the Czech Poslanecká sněmovna and Senát, the Dutch Eerste Kamer and Tweede Kamer, the Lithuanian Seimas, the Polish Senat, the UK House of Lords, which found a breach of the subsidiarity principle and expressed reservations regarding the social rights provided for in the proposal, and, according to IPEX, motivated the signing of "important information to exchange" on the draft act by fourteen Chambers (the Austrian Nationalrat and Bundesrat, the Czech Poslanecká sněmovna and Senát, the Dutch Tweede Kamer and Eerst Kamer, the French Sénat, the German Bundesrat, the Latvian Saeimas, the Polish Sejm and Senat, the Portuguese Assembleia da República, the Swedish Riksdag and the UK House of Commons, although only the Austrian Nationalrat, the Finish Eduskunta, the Portuguese Assembleia da República and the UK House of Commons received an answer from the European Commission - COM(2010)379, Brussels, 13.7.2010,

implementation - the EWS threshold was finally reached. Twelve Parliaments/Chambers – the Belgian *Chambre des représentants*, the Danish *Folketinget*, the Finish *Eduskunta*, the French *Sénat*, the Latvian *Saeima*, the Luxembourg *Chambre des Députés*, the Maltese *Kamra tad-Deputati*, the Polish *Sejm*, the Portuguese *Assembleia da República*, the Swedish *Riksdag*, the Dutch *Eerste Kamer* and the UK *House of Commons* – adopted *reasoned opinions* (i.e. 19/18 votes) clearly stating to the EU legislators that this issue should be tackled by Member States. Two Parliaments – the Latvian *Saeima* and Lithuanian *Seimas* – found the proposal to be in breach of the proportionality principle.

Contradicting the views of numerous scholars, this first “yellow card” proved that it is possible for a sufficient number of NPs to agree that the same legislative proposal violates the subsidiarity principle. Even if it will probably occur very rarely and with limited effects, and even taking into consideration that “the Commission still holds the ultimate power in the process and can ignore the national parliament’s opinions” (RAUNIO (15):7), it is still doubtful that the “yellow card” just represents “a rather harmless procedure, with only a marginal impact on the EU’s legislative process” (RAUNIO (15):2) with no political significance.

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available at <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20100379FIN.do>; see also 16th COSAC biannual report on EU Practices and Procedures, October 2011, published at

<http://www.cosac.eu/documents/bi-annual-reports-of-cosac/>, p. 29. Moreover, according to the above mentioned COSAC biannual report (p. 51), the fourth recital to the Preamble of the draft legislative resolution makes explicit reference to the reasoned opinions of six Parliaments/Chambers, i.e. the Austrian Nationalrat and Bundesrat, the Czech Poslanecká sněmovn, and Senát, and the Dutch Eerste Kamer and Tweede Kamer;

- The Proposal for a Directive for a Council directive on a Common Consolidated Corporate Tax Base (CCCTB), was fully scrutinized by 18 Chambers and gathered 13/18 votes, from the Bulgarian Narodno sabranie, the Dutch Eerster Kamer, the Irish House of Oireachtas, the Maltese Il-Kamra Tad-Deputat, the Polish Sejm, the Romanian Camera Deputaților, the Slovak Narodna rada, the Swedish Riksdag and the UK House of Commons and, according to IPEX, motivated the signing of “important information to exchange” on the draft act by six Chambers (the Belgian Chambre des représentants, , the Czech Senát, the Dutch Tweede Kamer, the Luxembourg Chambre des Députés and the Slovakian Národná radat), although only the Czech Senát, the UK House of Commons, the Slovakian Národná radat and the Swedish Riksdag received an answer from the European Commission - COM(2011)121, Brussels, 16.3.2011, available at <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20110121FIN.do>; see also 16th COSAC biannual report on EU Practices and Procedures, October 2011, published at <http://www.cosac.eu/documents/bi-annual-reports-of-cosac/>, p. 29;

- The proposal for a regulation of the EP and of the Council amending regulation (EC) no. 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, gathered 10/18 votes, from the Dutch Tweede Kamer and Eerste Kamer, the French Assemblée nationale, the Portuguese Assembleia da República, the Romanian Senatul, the Slovakian Národná rada and the Swedish Riksdag, and motivated the signing of “important information to exchange” on the draft act by nine Chambers (the Czech Senát, the Dutch Tweede Kamer, the French Sénat and Assemblée Nationale, the Italian Camera dei Deputati, the Lithuanian Seimas, the Polish Sejm and Senat and the Portuguese Assembleia da República), although only the Swedish Riksdag received an answer from the European Commission. Finally, it was fully scrutinised by 20 Chambers – (COM(2011)560), Brussels, 16.9.2011, available at <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20110560.do>.



More noteworthy, however, is that during the 8-week period for national parliamentary scrutiny, an exceptionally busy exchange of information among European Affairs Committees and National Parliament Representatives (NPRs)<sup>12</sup> on NPs' feedback regarding the EU draft act took place, specifically among the most active/interested archipelago of Parliaments/Chambers on the proposal under scrutiny.

What this article tries to demonstrate is that this “yellow card” was the expected result of a substantial network developed among NPs, at least since 2009, with the purpose of informing one another about their concerns about EU initiatives and, in this way, contributing to the creation of a “community of communication” (PASKALEV (13): 12). This communication network generated a spillover effect which resulted in the pronouncement of so many Parliaments/Chambers on this specific EU draft legislation, something which was considered by many to be nearly impossible.

In fact, since Lisbon, all NPs are empowered to scrutinize the same EU draft, at the same time and for a common purpose, a momentum which Ian Cooper interprets as a possible “virtual third chamber” that, in 8 weeks, analyzes, debates and deliberates over the same EU legislative text (COOPER (4): 7). Still, two and a half years after the entry into force of Lisbon, this is the only example of a EWS “yellow card” and much has yet to come.

## **Possible reasons behind the low number of NP's reasoned opinions**

Though NPs' scrutiny activity has increased from 2010 to 2011, the EWS still remains *more dignified than efficient* (Barrett (1): 15). The reasons for this are numerous, but we can maybe gather them into five ideas:

The first refers to the management constraints regarding the implementation of the EWS in NPs: do NPs have enough information (namely from their own governments)? Does this information come on time? Do NPs have enough time to deal with it? Do NPs have the appropriate capacities or are they lacking the means (mainly human resources) to respond to this new prerogative?

The second argument focuses on whether the EWS exercise is worthwhile, i.e., if NPs' efforts really make a difference, if NPs' inputs are taken into account in the EU's approved legislation. The answer to this question is, then, directly proportional to the parliamentarians' motivation to scrutinise EU draft legislative acts.

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<sup>12</sup> Officials appointed by NP to act as their eyes and ears in Brussels.

The third idea links to the question of whether the parliamentary work devoted to the scrutiny of EU draft legislation is perceived to contribute to MP re-election. If not, MPs may prefer to exercise their mandate in other ways. However, more than any other factor, this item depends on the action of the MP in charge of a dossier and on his/her ability to demonstrate the importance and possible impact of a given EU draft legislative act in a specific sector, mostly if he/she stands for an opposition party. However, a close relationship with stakeholders and the organisation of public hearings with media coverage is usually an important asset for an MP seeking inclusion by his/her party in the list for re-election. Additionally, safeguarding a position within his/her own party as one of the specialised/credible voices to speak on EU matters may also be a skill which may contribute to guarantee his/her name in the electoral lists and, consequently, his/her re-election, because every party needs an MP with this profile in “the team”. In fact, this re-election variable turns out to be crucial in the equation which determines parliamentarians’ political engagement in EU matters.

Fourthly, there is the argument that NPs are still not very professional in drafting the *admissibility criteria* regarding draft legislative acts and that, even when NPs send their opinion on time and identify the problematic aspects of a proposal, if the conclusion does not explicitly state that those reasons amount to a violation of the principle of subsidiarity, it automatically converts a potential *reasoned opinion*, or even a *reasoned opinion* in substance, into *just* an opinion, i.e., a contribution to the political dialogue (Kiiver (10): 8).

Lastly, the variable of the political approach comes back to the equation. On the one hand, parliamentarians seem to be much more interested in the substance of EU draft legislative acts than in scrutinising their compliance with the principle of subsidiarity. Even though title of Protocol no. 2 (principle of subsidiarity and principle of proportionality) is misleading, NPs are entitled to issue reasoned opinions only regarding the level at which a given draft legislative act (on shared competences) should be issued: at EU level or at national level (principle of subsidiarity). The limitation of the scope of the reasoned opinion is then undeniable (Barrett (1): 5). Parliamentarians’ scrutiny/political work seeks to avoid, in practice, this narrow treaty-based approach and tends to go far beyond subsidiarity, focusing on the political analyses of the proposal, on their attempts to influence the national position and the EU players on that issue and, last but not the least, on warning stakeholders about the upcoming EU legislation.

On the other hand, it may occur that after having scrutinised the proposal and having identified its reservations, parliamentarians simply do not phrase their arguments as subsidiarity complains because they do not want to clearly and openly position themselves against the proposal and they do not want their vote to count against the proposal. It may happen for political reasons or in order not to harm the domestic institutional balance. Namely, most of the time, NPs are not

willing to bypass their government in the context of EU affairs, unless they want to endorse their government's position against a proposal or when the topic is considered to be a crucial political issue.

The occasionally substantial ambivalence of NPs' opinions may thus be a political strategy to avoid, in many cases, the use of an undesirable veto, while stating the parliament's claims regarding the legal basis, the subsidiarity justification, the proportionality effects and, above all, the substance of the draft act in question.

The significant EWS side effect or (unintended) achievements

In fact, Lisbon had an effect on parliaments' relations with the EU institutions (mainly with the EC), on parliaments' relations with the government, on parliaments' role as *transmission belts* between citizens, associations, social and economic interest groups, stakeholders and the EU legislative making process, on parliaments' relations with the *community* of NPs, on the politicization of EU outputs at the national level and on the sense of ownership of the European project at national level through NPs' *ex ante* political input.

Specifically, the EWS has generated a remarkable dynamic in five main domains:

1. The work of EU institutions;
2. Redressing the domestic institutional balance of powers between legislatures and executives;
3. Communication with citizens and stakeholders;
4. Interparliamentary co-operation among NPs;
5. Reforming the parliamentary EU-related legal framework, procedures and resources.

This article argues that although the legal implications of Lisbon might not be that far-reaching, they have triggered some quite interesting unintended achievements.

Accordingly, in the view of the author, the most important outcome of the EWS is not the possibility of NPs exercising a veto regarding an EU draft legislative act, but rather its side effects. For instance, the EWS seems to have developed into a legal accountability tool to improve the quality of the EU institutions' justifications for the compliance of legislative proposals with the subsidiarity principle (Kiever (10): 107-108; RAUNIO (15): 13). Indeed, the simple fact that EU institutions have to care more about the justification regarding the need of acting at European level (subsidiarity justification of an EU draft legislative act) and that NP became an item on theirs' agenda is, by itself, an important added value of the EWS.

As far as the second idea is concerned, the implementation of the EWS has led, first of all, to NPs having direct and timely access to EU draft legislative acts, and to a certain sense of urgency regarding NPs' scrutiny work: as stated above, NPs receive a subsidiarity letter (*lettre de saisine*) from the EU institutions and have 8 weeks to issue a decision regarding the compliance of a draft legislative act with the principle of subsidiarity. This is completely new.

On the one hand, this factor has led to the increased participation of legislatures in national will-formation and in the exercise of testing arguments regarding EU draft acts with their governments, and, on the other hand, it has also contributed to the development of the parliamentary communicative role toward citizens and stakeholders (De Wilde (5): 6), making them both aware of the legislative activity at EU level regarding a particular policy field and of its foreseen impact in a certain sector.

Indeed, one of the major challenges of NPs' EU scrutiny is to try to reach a political momentum both at EU and national level and to catch media attention to broadcast their message (De Wilde (5): 4), sometimes acting as a transmission belt for public opinion interests and demands to the EU system (Barrett (1): 16).

EWS will not solve or *alleviate the EU democratic deficit*, but will it help? (De Wilde (5): 14). The EWS could be compared to the traditional vote of (no-)confidence in a parliamentary system, the importance of which is not measured by how often political parties are using it or even by its results; nevertheless, there are no doubts as to the political significance of its existence. Accordingly, the EWS has been, more than a tool to obstruct the EU legislative process, *a collective warning of difficulties* to be addressed by the EU institutions, namely by the European Commission on its proposals (Barrett (1): 11).

Regarding the increasing effect of interparliamentary co-operation among NPs, the question to be asked is: what happens during the eight-week period of the EWS? We are aware that when the eight-week period *elapses*, NPs (should) upload their scrutiny results to IPEX and that the EC also publishes the results on its website. But, by that time no communication or exchange of information between NPs can possibly influence any NP's position.

The most interesting exchange of information among NP takes place *during* the eight week timeframe, when, at the same time, all NPs are scrutinising<sup>13</sup> the very same EU draft legislative act. So, through which channels does this exchange happen?

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<sup>13</sup> One should not forget that eight NP (Austria, Belgium, Germany, Italy, Spain, Finland, Portugal and United Kingdom) still have to coordinate their internal scrutiny decision-making process with Regional

## European Affairs Committee teams and Permanent Representatives in Brussels

As it is not feasible to organise a joint parliamentary meeting within every 8-week timeframe, NPs have been using the already-existing structures. Thus, when scrutinising an EU draft act, parliamentarians often ask their EAC teams and NPRs for further information regarding the positions of other NPs and of EU institutions on that matter.

Currently, 39/40 Parliaments/Chambers are represented in Brussels<sup>14</sup>. But it wasn't always like this. There were mainly four periods during which NPs decided to appoint their NPRs to Brussels: the first took place during the 1990s, with the Danish *Folketing* in 1991, followed by the Finnish *Eduskunta*, the Italian *Camera dei Deputati*, the France *Sénat* and the United Kingdom *House of Lords*; the second period happened during and right after the Convention (2002-2003), with the Latvian *Saeima*, the Lithuanian *Seimas*, the French *Assemblée nationale*, the Polish *Sejm* and the Irish *Houses of the Oireachtas*; then, after the 2004/2007 Enlargements; and, lastly, after the signing of the Treaty of Lisbon.

NPRs' main responsibility - although, of course, depending on the profile set by each and every Parliament/Chamber - is to connect their parliamentary demands and interests with Brussels sources of information: on the one hand, collecting first-hand information from the EU institutions and from the NPRs' network in order to forward it to their NPs (mainly to the EAC and sectorial committees) and, on the other hand, spreading their parliamentary (reasoned) opinions to the EU network.

This exchange of information begins occasionally, among the interested NPs, at an earlier stage, during the pre-legislative phase, when the European Commission publishes its green and white papers, which are then used when the draft legislative act is forward to NPs under Protocol no. 2 of the Treaty of Lisbon.

The disclosure of information, within the EWS 8-week period, about possible subsidiarity concerns or any other kind of concerns remains a political decision of each and every NP/Chamber. Once scrutinising a draft legislative act, MPs who identify major questions in the

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Parliaments (Article 6 of Protocol no. 2 annexed to the Treaty on the Functioning of the EU). On this subject, consult the REGPEX, launched in February 2012, by the Committee of Regions (<http://extranet.cor.europa.eu/subsidiarity/regpex/Pages/Early-Warning-System.aspx>), which is a database for the exchange of information among the institutions and bodies which participate to the subsidiarity monitoring network (SMN) established by the Committee of Regions (regional governments and assemblies).

<sup>14</sup> Exception made to the Slovak *Národná rada*, following a political decision from the current ruling party.

draft act - whether subsidiarity, or proportionality, or legal basis, or even substance questions - tend to use the EAC staff and the Brussels network of NPRs in order to, on the one hand, spread their views on the EU proposal to their counterparts in other NPs and, on the other hand, to obtain feedback from other NPs regarding the same dossier. Which, inspired by Hanna Arendt's wording, could contribute to the creation of a sporadic "virtual agora, where MPs from various member states can meet as peers on any occasion" to debate a common subject (PASKALEV (13): 10).

In this way, a national parliament can either play the role of inspiring other parliaments with its arguments, or/and can be inspired by the views of the NPs which share their specific concerns. Undeniably, the EWS "creates incentives for a greater exchange of information between the NPs as each parliament will need information if one of the others is planning to submit an opinion stating that the initiative breaches the principle of subsidiarity" (FRAGA (6): 499).

Over the last two years, the Brussels-based network of NPRs have attempted to be the core of this 8-week, feverish exchange of information among interested NPs, informing one another if they have possible subsidiarity concerns on a specific proposal.

This dynamic generated an intensive and totally new flow of information among the most active (KORHONEN (11): 6) or entrepreneurial (PASKALEV (13): 8) Parliaments/Chambers<sup>15</sup>, which has been forming a *critical mass of parliaments* (KORHONEN (11): 7) capable of issuing reasoned opinions on the same EU draft during the same time frame.

Every week, NPRs gather at their MMM (Monday Morning Meeting), at the European Parliament - where their offices also stand -, in order to exchange information: both asked for and delivered by their capitals (mostly EACs and sectorial committees).

The MMM's weekly agenda comprises a timed discussion for scrutiny and subsidiarity issues<sup>16</sup>, where each NPR is supposed to update the NPR group on his/her NP/Chamber's scrutiny work regarding the proposals under examination within the framework of Protocol no. 2. Having said that, it is also worth noting that NPRs have a significant range of different profiles and approaches

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<sup>15</sup> Kaisa KORHONEN divides the most active chambers into two groups: the ones which forward negative reasoned opinions (Austria, Czech Republic, Denmark, France, Germany, Italy, Lithuania, Luxemburg, the Netherlands, Poland, Sweden and the UK) and those, using an "imaginative move", which issue positive opinions.

<sup>16</sup> Apart from that, NPR also exchange information regarding the organization of the MMM's agendas, news on political developments in their Member States; technical internal problems related to the NPR EP offices; forthcoming interparliamentary meetings programmes; and messages from the NPR from the troika or trio EU presidency or COSAC secretariat.

to their roles during the 8-week period, though some have more information to exchange than others.

Indeed, NPRs have turned out to be a fact-finding platform serving the national parliamentary scrutiny process and, potentially, an informal subsidiarity clearing-house during the EWS 8 weeks, depending on the kind of information NPRs are able to exchange.

For the aforementioned reason, it is often argued that either this network of NPRs upgrades its information channels regarding the scrutiny activity of their own NPs, or else this crucial exchange exercise may, as time and experience passes by, be directly performed by the EAC teams<sup>17</sup>, which are the ultimate source of substantial, accurate and updated information.

Despite that and mostly since the entry into force of the Treaty of Lisbon, NPRs' weekly meetings also welcome Brussels-based Commissioners or Commission policy advisers who come to present the European Commission's proposals, either legislative or pre-legislative. More and more, commissioners look to the NPRs' network in Brussels as a direct channel to transmit and explain their upcoming proposals along with their backing arguments to NPs.

NPRs in Brussels are often asked "what NPs think" about a certain proposal or initiative. However, there is no such thing as "the NPs' position". There are always, if not 40, 27 positions on different issues or, every now and then, a coalition of like-minded NPs can happen (which varies according to the different dossiers at stake) and, contrary to the Council, where the 27 positions must reach consensus by the end of the process or, if that is not possible, member states vote, NPs do not. Regarding NPs in the context of the EWS, one cannot expect a final collective decision, but, at most, a threshold. As a rule, pluralism is the keyword regarding NP's collective approach.

In order to gather information during the 8-week period, NPRs have been performing an important role in networking, i.e., in deepening their institutional relations with their NP counterparts, their national PERMREP in Brussels, the European Commission, the EP and the Council.

When monitoring a specific proposal process, NPRs often use their communication channel with their Member State's permanent representation in Brussels, mainly with the diplomat in charge of relations with the EP and with colleagues in charge of the identified national priority dossiers (e.g. ECOFIN, JHA, Agri, etc.). This has proved to be a useful channel in order both to feed the

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<sup>17</sup> Sometimes through its IPEX correspondents, i.e. the network of officials in charge in each Parliament/Chamber for the updating of its Parliament/Chamber EU scrutiny page. Although they still have substantial different profiles from NP to NP, which have reflections in the timely and accurate upload of information on the scrutiny of EU draft acts.

parliamentary process of pronouncement with relevant and timely Brussels-based information and, then, to forward the (reasoned) opinion of the Parliament to the right people in the EU institutions, as an added input to build up the *national position* in the Council debates, along with the work done in the capital between the Parliament and the Government.

The relations of NPRs with the European Commission, either in the context of the “*Barroso Initiative/political dialogue*” or within the Treaty-based provisions, either in a pre-legislative phase or during the legislative phase, also offer added value to the parliamentary scrutiny. Again, and above all, regarding the identified national priority dossiers (e.g. special engagement with the EC’s DGs), one of their tasks is also to get to know on what subject, and on what timetable, the Commission is working on (communications, white papers, green papers, proposals for directives, public consultations, etc., regarding specific themes of national priority interest) and, later, in the legislative process, trying to learn whether the Commission is amending (or not amending) a certain proposal, following first/second readings, conciliation, trialogues, etc., in order to feed the NPRs’ process of scrutiny with relevant and timely information.

As far as the EP is concerned, first of all, it is important to remember that NPR’s offices are situated on the same floor at one of the EP buildings, close to the EP Directorate in charge of relations with NPs. At the EP, NPRs’ network is essentially based in two directions. First, NPRs develop their connections with the EP administrative bodies, mainly with the above mentioned Directorate, the DG Presidency and with the EP Committees, moreover, especially with those in charge of the identified national priority dossiers. Secondly, with the MEPs, both with their *national MEPs* and with the EP *Rapporteurs* of the proposals their NPs are interested in, following their work both in committee meetings in Brussels and in plenary discussions, mainly in Strasbourg. Thus, NPRs collect relevant and timely information to provide for their NPs’ process of pronouncement and, then, forward the (reasoned) opinion of their NPs to the interested MEPs in the EP, as an EU co-legislator.

In order to guarantee that all of this exchange works, NPRs also devote their efforts to developing relationships at home, connecting with the parliamentary committees’ work (EACs and sectorial committees), with the Speaker’s office and with the SG’s services.

NPRs are also asked to assist MPs in Brussels meetings and to organise bilateral meetings with other MPs on specific dossiers. These meetings seem to happen more often since the entry into force of the Treaty of Lisbon, although on an ad-hoc basis and between interested MPs.

Furthermore, there is COSAC, where parliamentarians sitting on EACs meet and debate specific proposals on-going during the legislative process, as well as a range of interparliamentary



meetings (Speakers Conference, joint sectorial committee meetings, joint parliamentary meetings, ad hoc meetings on a specific EU proposal, etc.) between national parliaments and the European Parliament, although with little space for effective dialogue to take place.

In fact, it is true that before the Treaty of Lisbon the first “clients” of NPRs were the EU institutions, although, after Lisbon, the NPRs’ network itself, due to the EWS, stepped up to the podium as the major “clients” of NPRs.

Every time a draft legislative act refers to sensitive or traditionally sovereign legislative fields, such as civil rights, social rights, taxes or borders, NPs tend to react and this reaction leads to an additional need for exchanging information among NPs in order to collect arguments from one another, fundamentally in order to monitor the possibility of reaching the EWS “yellow card” threshold.

Considering the experience of the implementation of the Treaty of Lisbon so far, in fact “the subsidiarity control mechanism is likely to work only through interparliamentary dialogue (...) there is a demand for more far-reaching coordination among parliaments” (KORHONEN (11): 7) which are working in a synchronised routine over the same EU proposals and debating them within the party-political frameworks of each Parliament/Chamber.

In the author’s view, the outcome of the EWS cannot only be measured by how often it reaches a “yellow card”, but by the way the use of this treaty prerogative by NPs contributes to generating variable informal alliances between NPs, depending on the topic at hand, which then provide political indications to EU institutions on their positions regarding certain matters.

## What for?

The final questions regarding the EWS are: does the work of national parliaments matter? Does it make any difference? Are NPs’ (reasoned) opinions considered as just additional *lobby* papers or as a potential (and useless) system *brake*? Can NPs be considered as added partners who enrich the pluralism of the democratic EU legislative debate? Should NPs continue to be involved through (negative) *reasoned opinions* or should NPs evolve towards a regular (constructive) *political dialogue* with all the EU institutions on the substance of EU draft acts? Instead of trying to pull the legislative initiative down to the national level, through the “yellow card” mechanism, shouldn’t NPs develop their ability to scrutinise the substance of legislative initiatives to be dealt with at EU level? And, last but not least, are NPs’ opinions and remarks taken on board at the final stage of the EU legislative process by EU legislators? If so, in which cases and how often? This has yet to be explored.

The EWS is what it is. No more, no less. What we know is that, since the Treaty of Maastricht, NPs have been demanding a more diverse role than just that of *ex post* rubber-stampers in the EU legislative ratification process. This has been achieved, not due to the EWS, but because of the communicative dynamics generated from the Treaty provisions. And, of course, due to the consequences of the financial crisis, which promoted a major engagement of NPs in the EU political debate, especially on budgetary policies<sup>18</sup>.

Besides being seen as a lobby group, or an annoying potential blockage or source of disruption, NPs may be perceived as valuable (if not indispensable) partners in the decision-making process, *ex ante*, as a vocal platform for the citizens' wants, needs and interests at EU level, as playing a certain consultative role with respect to the European Commission, as complementing the EP's approach and as participating in the formation of their respective governments' positions in the Council.

Although, it has also been argued that it would have been more useful to strengthen relations between citizens and parliaments (NPs and EPs), NPs and governments, the EP and the Council, the EP and EC and EC and Council, than to create - with the EWS and the political dialogue - a new mechanism for interaction between NPs and the Commission (De Wilde<sup>19</sup>).

Nonetheless, the first two years since Lisbon provide us with evidence enough to sustain the claim that NPs are not willing to confine their scrutiny efforts only to performing subsidiarity checks on EU draft legislation, but want to be able to add substantive political value to the EU legislative process.

The interaction between NPs' subsidiarity checks and substantive input can be envisaged as a contribution that enhances the accountability, the democracy and the legitimacy of the EU's law-making process and helps to overcome the EU's democratic deficit, widening the debate to include a multilevel flow of inputs, from EU institutions, governments, NPs and citizens. Indeed the EWM "will provide sufficient incentive for NPs to engage at least occasionally in substantive

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<sup>18</sup> For instance, the recently approved "Fiscal Compact", part of the Treaty on Stability, Coordination and Governance has a specific provision about the involvement of NPs: in Chapter V (GOVERNANCE OF THE EURO AREA), Article 13 states that "As provided for in Title II of Protocol (No 1) on the role of national Parliaments in the European Union annexed to the European Union Treaties, the European Parliament and the national Parliaments of the Contracting Parties will together determine the organisation and promotion of a conference of representatives of the relevant committees of the European Parliament and representatives of the relevant committees of national Parliaments in order to discuss budgetary policies and other issues covered by this Treaty".

<sup>19</sup> Presented at Panel 1- The Early Warning System: Scope and Effect - of the Conference on Parliaments in the European Union after Lisbon, held in Maastricht, 23-24 February 2012 organised by the Observatory of National Parliaments after Lisbon (OPAL).

discussions on draft European legislation (...) Even when nothing happens in terms of power politics, there may be significant difference in terms of public resonance” (PASKALEV (13): 7-8).

Having said that, the fact that parliamentarians have now a say in a wide range of EU affairs after Lisbon, has compelled the majority of NPs to modify their legal statutes to reinforce the role of the Parliament with respect to EU affairs (changing their Constitutions, legal acts, rules of procedure, etc.). Consequently, these new Treaty provisions has also motivated NPs to perform systematic *ex ante* scrutiny of EU draft proposals in a more comprehensive way, often introducing a parliamentary scrutiny reserve and, increasingly, including the participation of all parliamentary sectoral committees.

The Lisbon provisions also added a sense of urgency to the NPs’ scrutiny activities and represented an additional incentive for NPs to deliver more structured and timely feedback on EU matters in the form of formal (reasoned) opinions, which also led to an increase in parliamentary (committee and plenary) debates on the substance of specific EU draft legislation, which in turn “can increase the ‘ownership’ of EU matters among national MPs” (RAUNIO (15):5).

Indeed, the EWS “provides the institutional framework for public deliberation on practically all issues of European governance, *within* the NPs and also *between* them” (PASKALEV (13): 1). It consequently raises awareness of EU affairs in the domestic political sphere, which enables NPs, on the one hand, to better influence their governments’ position in the Council and, on the other hand, to try to exercise direct influence over the EU institutions – through all the provisions which foresee a role for NPs - and, thus, to become additional actors in European multi-level governance.

The expansion of communicative channels among NPs due to their scrutiny work on EU initiatives over the past two years, as an effect of the implementation of the Treaty of Lisbon, has contributed to the development of a “network for transnational communication and criticism”, a “network of discursive public spheres” towards a “*demoi-cracy*”, i.e. “the creation of a network democracy”, which “legitimizes the [EU] rulemaking” (PASKALEV (13): 10, 1 and 9).

One may then conclude, firstly, that despite the fact that the EWS has not been used effectively, the side effects of this treaty-based system cannot be underestimated, as it has produced some remarkable (unintended) outcomes, which, we consider, may contribute to bringing new and pluralist democratic elements to the EU legislative debates.

Secondly, we conclude that the scrutiny effort from national parliamentarians will not be confined to subsidiarity questions and, therefore, that the role of NPs in EU affairs will tend to go far beyond subsidiarity, towards the political debate on the substance of legislation and pre-

legislative participation. And, moreover, while focusing on substance and holding concrete policy debates on the impact of EU proposals, parliamentarians will be better equipped to engage the plenary, the media and the citizens in EU affairs and, therefore, to enhance their (reasoned) opinions on subsidiarity issues.

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## Annex I

According to the annual reports on relations between the European Commission (EC) and NP, the total number of NP's opinions (Op) - political dialogue - received by the EC since 2006 and reasoned opinions (RO) forward by NP since the entry into force of the Treaty of Lisbon (1<sup>st</sup> December 2009) can be analysed as follows:

Parliament/ Chamber	2006 <sup>20</sup>	2007 <sup>21</sup>	2008 <sup>22</sup>	2009 <sup>23</sup>	2010 <sup>24</sup>		2011 <sup>25</sup>		Totals		
	Op	Op	Op	Op	RO	Op	RO	Op	RO	Op	Total
Assembleia da República (Portugal)	0	19	65	47	0	106	1	183	1	420	421
Senato della Repubblica (Italy)	0	0	8	17	1	71	3	76	4	172	176
Riksdag (Sweden)	0	17	16	18	3	20	11	42	14	113	127
Senát (Czech Republic)	2	9	11	27	1	29	0	43	1	121	122
Bundesrat (Germany)	6	15	18	16	1	23	1	33	2	111	113
Sénat (France)	18	22	13	12	3	3	1	4	4	72	76
House of Lords (United Kingdom)	4	14	12	14	2	12	1	16	3	72	75

20 European Commission's 2008 annual report (19): 9-10.

21 Idem.

22 Idem, ibidem.

23 European Commission's 2009 annual report (18): 11.

24 European Commission's 2010 annual report (17): 11-12.

25 European Commission's 2011 annual report (16): 10-11.

Camera dei Deputati (Italy)	1	0	6	9	0	25	2	28	2	69	71
Folketinget (Denmark)	2	10	11	12	2	11	1	14	3	60	63
Senatul (Romania)	0	0	0	0	0	9	2	33	2	42	44
Camera Deputaților (Romania)	0	0	0	0	0	0	2	40	2	40	42
Chambre des Députés (Luxembourg)	2	0	2	3	3	7	7	14	10	28	38
Bundesrat (Austria)	0	0	4	10	2	13	1	3	3	30	33
Narodno Sabranie (Bulgaria)	0	0	1	2	0	0	2	19	2	22	24
Nationalrat (Austria)	0	0	0	4	1	12	0	7	1	23	24
Bundestag (Germany)	1	2	2	3	1	6	1	6	2	20	22
Vouli ton Ellinon (Greece)	0	0	3	10	0	4	0	4	0	21	21
Sejm (Poland)	1	0	5	0	2	2	5	5	7	13	20



House of Commons (United Kingdom)	1	1	1	0	3	3	3	8	6	14	20
Senat (Poland)	1	0	0	0	4	5	4	4	8	10	18
Tweede Kamer (Netherlands)	2	1	5	7	0	1	1	1	1	17	18
Both Chambers (Netherlands)	-	-	-	8	2	2	2	3	4	13	17
Houses of the Oireachtas (Ireland)	0	1	7	6	0	3	-	-	0	17	17
Seimas (Lithuania)	2	1	0	3	2	4	0	4	2	14	16
Eerste Kamer (Netherlands)	0	0	0	4	0	3	0	6	0	13	13
Poslanecká sněmovna (Czech Republic)	1	0	1	1	1	3	0	5	1	11	12
Chambre des représentants (Belgium)	0	1	1	2	0	1	1	4	1	9	10
Sénat (Belgium)	2	0	2	2	0	0	1	2	1	8	9
Both Chambers (Spain)	-	-	-	-	-	4	2	2	2	6	8

Kamra tad-Deputati (Malta)	0	0	0	1	0	0	2	2	2	5	7
Assemblée nationale (France)	1	1	0	2	0	0	1	2	1	6	7
Saeima (Latvia)	0	0	2	3	0	1	0	1	0	7	7
Vouli ton Antiprosopon (Cyprus)	0	0	2	1	0	1	1	1	1	5	6
Národná rada (Slovakia)	1	0	0	0	0	0	2	2	2	3	5
Eduskunta (Finland)	1	0	0	0	0	1	1	2	1	4	5
Országgyűlés (Hungary)	1	1	0	3	0	0	0	0	0	5	5
Riigikogu (Estonia)	2	0	2	1	0	0	0	0	0	5	5
Both Chambers (Romania)	-	-	-	-	-	2	-	1	-	3	3
Državni zbor (Slovenia)	1	0	0	2	0	0	0	0	0	3	3
Dail Eiream (Ireland)	-	-	-	-	-	-	1	1	1	1	2

Državni svet (Slovenia)	0	0	0	0	0	0	0	0	0	0	0
<b>TOTAL</b>	<b>53</b>	<b>115</b>	<b>200</b>	<b>250</b>	<b>34</b>	<b>386</b>	<b>63</b>	<b>621</b>	<b>97</b>	<b>1628</b>	<b>1725</b>

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