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## **Destined for Irrelevance? Subsidiarity Control by National Parliaments (WP)**

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## **Destined for Irrelevance? Subsidiarity Control by National Parliaments (WP)**

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### **Abstract**

The Lisbon Treaty introduced the 'early-warning mechanism', with national legislatures assigned the right to monitor whether initiatives for EU laws comply with the principle of subsidiarity. Does the mechanism really empower national parliaments by giving them a collective veto in EU politics or will it remain largely unused by domestic MPs? This paper leans towards the latter interpretation, arguing that the whole mechanism was mainly introduced in response to legitimacy concerns. It is a rather harmless procedure, with only a marginal impact on the EU's legislative process. The incentive structure simply works against individual MPs, political parties or parliaments making active use of this instrument. When placed in the larger context of the role performed by national parliaments in EU politics, the early-warning mechanism can be seen to reinforce the perception of domestic MPs acting as the 'gatekeepers' of European integration.

### **Introduction**

The role of national legislatures in the EU's political system first received serious political and academic attention in the mid-1990s in connection with debates on how to cure the EU's democratic deficit (Norton, 1995; Raunio, 1999; Raunio & Hix, 2000). Since then the role of national parliaments has featured quite prominently on the research agendas of both parliamentary and EU scholars, with several comparative research projects on national parliamentary scrutiny of EU policies completed during the first decade of the new millennium (Maurer & Wessels, Eds., 2001; Auel & Benz, Eds., 2005; Szalay, 2005; Gates, 2006; Kiiver, 2006; Kiiver, Ed., 2006; Holzacker & Albæk, Eds., 2007; O'Brennan & Raunio, Eds., 2007; Tans *et al.*, Eds., 2007; Barrett, Ed., 2008).

Thanks to this lively academic debate we are now in a much better position to evaluate how national legislatures contribute to European integration.<sup>1</sup> While national parliaments have certainly been late adapters to integration, there is no doubt that they exercise

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<sup>1</sup> For reviews of the literature, see Goetz & Meyer-Sahling (2008) and Raunio (2009).

tighter scrutiny of their governments in EU matters than before. This is only natural as integration has taken major steps forward since the late 1980s, with the competence of the EU extending to basically all policy sectors. National parliaments have responded quite logically to this empowerment of the EU: they have all established a European Affairs Committee (EAC) for coordinating parliamentary work in European matters, specialised committees have started to play a bigger role in processing EU issues and, in general, it appears that national MPs pay more attention to European affairs.

In the 1990s also, the collective role of national parliaments first appeared on the agenda, with political debates focusing on the prospects of consolidating interparliamentary cooperation. In the European Convention a separate Working Group (WG IV), entitled 'The Role of National Parliaments', was established for meeting the demands of the 'Laeken Mandate'.<sup>2</sup> The role of national parliaments in monitoring the subsidiarity principle was primarily discussed in WG I on 'The Principle of Subsidiarity'. And the Lisbon Treaty is the first time that national parliaments are mentioned in the actual main text of the EU's 'constitution' –as opposed to Protocols and Declarations attached to previous Treaties–. According to Article 10 (2) 'Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens'.<sup>3</sup> National parliaments have some specific rights referred to in Article 12 (which lists the basic functions of the national parliaments), such as having a stronger role in Treaty revision through both the simplified revision procedures and the institutionalisation of the Convention procedure. The Lisbon Treaty also has two Protocols about national parliaments: the Protocol on the Role of National Parliaments in the European Union (No 1) and the Protocol on the Application of the Principles of Subsidiarity and Proportionality (No 2). The former is designed to make national MPs better informed about the European decision-making process and essentially strengthens and consolidates similar provisions attached to the Maastricht and Amsterdam Treaties.

But the real novelty of the Lisbon Treaty is the 'early-warning mechanism', with the national legislatures assigned the right to monitor whether initiatives for EU laws comply with the principle of subsidiarity according to the rules explained in the latter protocol

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<sup>2</sup> Declaration no. 23 of the Treaty of Nice (Treaty of Nice, *Official Journal* C 80, 10/III/2001) had listed four key questions which the next Intergovernmental Conference was to address, and one of them was 'the role of national parliaments in the European architecture'. The Laeken Declaration from December 2001 set more precise questions about national parliaments: 'Should they be represented in a new institution, alongside the Council and the European Parliament? Should they have a role in areas of European action in which the European Parliament has no competence? Should they focus on the division of competence between Union and Member States, for example through preliminary checking of compliance with the principle of subsidiarity?' ('Laeken Declaration – The Future of the European Union', The Laeken European Council, 14-15/XII/2001).

<sup>3</sup> 'Consolidated version of the Treaty on European Union', *Official Journal of the European Union*, C 83/13, 30/III/2010.

(see the Appendix).<sup>4</sup> Under this mechanism a national parliament can, within eight weeks from the date of transmission of a draft legislative act, send the EU institutions (primarily the Commission) a reasoned opinion stating why it considers that the legislative initiative does not comply with the principle of subsidiarity.<sup>5</sup> When doing this the national parliament should, where appropriate, consult regional parliaments with legislative powers. Each national parliament has two votes and in bicameral systems each of the two chambers has one vote. If the reasoned opinions represent at least one third of all the votes allocated to the national parliaments ('yellow card'), the draft must be reviewed. After the review the Commission may decide to maintain, amend or withdraw the draft.

Under the co-decision procedure, another procedure is also in force. If the reasoned opinions represent at least a simple majority<sup>6</sup> of the votes allocated to national parliaments ('orange card'), the opinions of both national parliaments and the Commission<sup>7</sup> are submitted to the European Parliament (EP) and the Council. If 55% of the members of the Council or a simple majority in the EP agree that the proposal breaches the principle of subsidiarity it shall not be given further consideration. Finally, where a national parliament believes that the adopted law infringes the principle of subsidiarity, it may ask its national government to bring a case before the European Court of Justice (ECJ). This stage does not mean any substantive changes to the existing arrangements. Already now, any member state, perhaps at the request of its parliament, can bring actions before the EJC if it thinks that the EU has no right to legislate on the subject matter.

What is the actual impact of the early-warning mechanism? Does it really empower national parliaments by giving them a collective veto in EU politics or will it remain

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<sup>4</sup> There are two differences between the first version of the early-warning mechanism found in the Constitutional Treaty and the version in the Lisbon Treaty. In line with a similar change made to the Protocol on the Role of National Parliaments in the European Union, national parliaments have eight weeks from the date of transmission of a draft legislative act to submit their reasoned opinions whereas in the Constitutional Treaty that time period was six weeks. Also, the special procedure about subsidiarity control under the co-decision procedure that involves the Council and the European Parliament was not included in the Constitutional Treaty. For the text of the first version, see 'Protocol on the Application of the Principles of Subsidiarity and Proportionality, Treaty establishing a Constitution for Europe', *Official Journal of the European Union* 2004/C 310/01. Barrett (2008) provides an excellent account of the (non-)importance of these differences.

<sup>5</sup> In the Convention and the subsequent debates many have voiced concerns about national parliaments becoming only involved in the initial stages of the legislative process, as the amendments by Council and the EP may significantly alter the contents of the proposal, and hence also at least theoretically make it problematic in terms of subsidiarity even if the original draft act did not violate the subsidiarity principle (Maurer, 2008, p. 82).

<sup>6</sup> The terminology here is confusing for in reality the reasoned opinions must represent at least half of the total votes allocated to the parliaments (absolute majority).

<sup>7</sup> As Barrett (2008) points out, this may give the Commission an advantage as it can respond to the complaints of national parliaments and defend its case by putting forward contrary arguments or explanations. It should also be noted that the EP and Council only become involved if the Commission chooses to maintain the original proposal. If the Commission withdraws or amends it, then the procedure is completed.

largely unused by domestic MPs? This paper leans towards the latter interpretation, arguing that the whole mechanism was mainly introduced in response to legitimacy concerns. The next section introduces the arguments put forward both for and against this mechanism, concluding that the incentive structure simply works against the early warning system becoming an important instrument for domestic legislatures. The third section examines the early 'real-life' experiences of the subsidiarity control mechanism. The final section contextualises the procedure and argues that it can reinforce the perception of domestic MPs acting as 'gatekeepers' of European integration.

### **Will National Parliaments Really Care About Subsidiarity?**

There is no denying the novelty aspect of the early-warning mechanism. While both the role of national parliaments and the proper application of the subsidiarity principle had been on the EU's agenda for at least a decade, the Convention was really the first time that a connection between the two was firmly established.<sup>8</sup> Perhaps this novelty aspect explains the academic interest shown in the subsidiarity control mechanism. However, most of the publications have (understandably) consisted of legal commentary or speculation on the procedure and its potential consequences. It is nonetheless possible to identify, both from that literature and from political discourse, some arguments put forward both for and against the mechanism –or perhaps it is better to differentiate between more positive readings of the mechanism and those scholars who see it as bringing little added value to either the work of national parliaments or to EU politics–. These arguments can be placed under three headings: the (low) salience of subsidiarity, interparliamentary cooperation and the incentives of political parties and MPs.

#### *The (Low) Salience of Subsidiarity*

Many commentators have argued that the early-warning mechanism can increase the 'ownership' of EU matters among national MPs. It can make national parliaments feel that they have a say in the EU policy process and this can produce a potentially very significant 'spill-over' effect, making at least some of them invest more resources in scrutinising EU matters. It can also force the Commission to be more detailed and explicit in its arguments for why new EU-level legislation is called for. However, establishing new procedures for carrying out subsidiarity control or even amending the overall rules of parliamentary scrutiny of EU affairs do not automatically imply active use of the early-warning mechanism.

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<sup>8</sup> When addressing the French National Assembly on 3 February 1994, the Foreign Minister Alain Juppé had expressed his hope that national parliaments would be empowered to challenge EU laws on the grounds that they violated the subsidiarity principle. While many of the proposals calling for a chamber of national MPs had argued that such a body should have a role in monitoring the compliance of EU legislation with subsidiarity, the kind of mechanism that emerged during the Convention was by and large a novelty. (Rittberger, 2005, p. 191 & 196).

First, it is essential to examine what it actually is that national parliaments monitor. While the Commission must justify its draft legislative acts both in terms of the principles of subsidiarity and proportionality, the potential reasoned opinions of national parliaments should only deal with the issue of subsidiarity. According to that principle, ‘in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’, whereas according to the proportionality principle, ‘the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’.<sup>9</sup>

This means that the scope of the review is rather narrow as it is restricted to those policy areas where competence is shared between the EU and the member states. Of course, that category of powers contains a wide range of important policies, but at the same time the early-warning mechanism excludes both those matters that fall under the exclusive competence of the EU and ‘soft law’ type policy coordination processes such as the Open Method of Coordination that are often employed in questions where the competence belongs to the member states. The mechanism does not allow either the national parliaments to challenge the existing *acquis communautaire* or the Commission’s right of initiative. Reasoned opinions should also naturally focus on whether the proposal at hand violates the subsidiarity principle, not the actual policy contents of the draft legislation. This may be sometimes difficult to do and can frustrate MPs who might otherwise be interested in the policy area or in using the early-warning mechanism.<sup>10</sup>

The image of Commission and other EU institutions, constantly stretching and overstepping the limits of their powers, is also somewhat outdated. There appears to be a broad consensus, also among national MPs, that the overwhelming majority of the Commission’s legislative proposals have not been problematic in terms of the subsidiarity principle. The empirical record also supports this view, as national governments and parliaments have not raised concerns about the Commission’s initiatives breaching the subsidiarity principle. Besides, the Commission probably knows the dangers involved in national parliaments or governments publicly criticising its initiatives for violating the subsidiarity principle. Particularly, the more Eurosceptical media would have an interest in highlighting such incidences, thus fuelling perceptions of the Commission (and the EU) misusing their powers.

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<sup>9</sup> Article 5, ‘Consolidated version of the Treaty on European Union’, *Official Journal of the European Union* C 83/13, 30/III/2010.

<sup>10</sup> As concerns over subsidiarity can be difficult to separate from concerns about the policy contents of the initiative, the mechanism can be used by a parliament that simply does not agree with a certain initiative, disguising its concerns as a violation of the subsidiarity principle. However, it is probable that such a strategy would not work as legal experts would soon notice the false argumentation.



Also, the rules of the early-warning mechanism work against the active deployment of the system. It is quite unlikely that a sufficient number of national parliaments should agree that the same legislative proposal violates the subsidiarity principle. And even if parliaments could muster the required amount of votes for showing the 'yellow card', the Commission still holds the ultimate power in the process and can ignore the national parliaments' opinions. However, it is more likely that the Commission would at least partially revise its proposal as otherwise it could be blamed for not listening to national parliaments, the representatives of the people. Under the 'orange card' procedure the fate of the reasoned opinions will also depend on the Council and the EP. Giving parliaments the power of veto ('the red card') would thus have provided national MPs with a considerably stronger incentive for taking the early warning system seriously.<sup>11</sup> However, it is understandable why the 'red card' alternative was not chosen as it could have provided national parliaments with a (potentially) effective mechanism for blocking a significant amount of EU legislation.

Obviously, one can argue that particularly Eurosceptical MPs would be interested in the mechanism, subjecting Commission initiatives to detailed scrutiny. However, it is more likely that MPs who are either against the EU or worried about further centralisation shall primarily focus on preventing the transfer of new policy-making powers to the European level. After all, the Lisbon Treaty strengthens the role of national parliaments in Treaty amendments, both through the simplified revision procedures<sup>12</sup> and the institutionalisation of the Convention procedure. And even if the minority of MPs dealing with the issue, either in the EAC or in the specialised committees, would like to use the mechanism, it should be remembered that governments rule with the support of their parliamentary groups (that normally have the majority of the seats). Hence, governing parties would probably not want to submit a reasoned opinion unless this was also in the interest of the government (see below).

#### *Interparliamentary Cooperation*

The new mechanism will undoubtedly make serious demands on the exchange of information between national parliaments, as each legislature will need information if the other parliaments are planning to submit reasoned opinions. National parliaments are

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<sup>11</sup> An amendment discussed in the Convention proposed a collective right of veto to national parliaments: if two-thirds of parliaments rejected a proposal on the grounds of subsidiarity principle, then the Commission would have been forced to withdraw it.

<sup>12</sup> According to Article 48 of the Treaty on European Union in all cases where the Treaty on the Functioning of the European Union Title V of the Treaty on European Union provides for the Council to act by unanimity, the European Council may decide to authorise the Council to act by a qualified majority in that area or case. Where the Treaty on the Functioning of the European Union states that legislative acts are adopted by a special legislative procedure, the European Council may adopt a decision allowing that such acts shall fall under the co-decision procedure. In both cases, initiatives of this sort taken by the European Council shall be notified to national parliaments. If any national parliament opposes it within six months of the date of such notification, the decision shall not be adopted.

helped in this by COSAC<sup>13</sup> and the parliament holding its presidency, that coordinates various interparliamentary activities, and by the IPEX (Interparliamentary EU Information Exchange). IPEX has a website ([www.ipex.eu/ipex/](http://www.ipex.eu/ipex/)) to facilitate the exchange of views between parliaments on draft EU legislation, including opinions on whether the proposals comply with the subsidiarity principle. The database of IPEX contains a complete catalogue of Commission documents since 2006. Each legislative proposal has a webpage from which users can access national scrutiny pages and see whether parliaments have submitted reasoned opinions on the text.

Many scholars have argued that the early-warning mechanism will intensify interparliamentary cooperation, with such European networking bringing added value to national legislatures. Meetings of national MPs will facilitate the sharing of best practices and the identification of mutual problems and, through regular dialogue with the EP, national MPs would receive information that contributes to effective government scrutiny. For example, Cooper (2006) has argued that under the early-warning mechanism national parliaments constitute a 'virtual third chamber', with the legislatures interacting not face-to-face but on-line, exchanging information and views about policy issues under consideration. Crum & Fossum (2009) even envision a 'multi-level parliamentary field', with the early-warning mechanism probably facilitating such interparliamentary cooperation.

However, it can plausibly be argued that –beyond IPEX and using COSAC to exchange views about subsidiarity– the early-warning mechanism will not result in any substantial increase in the level of interparliamentary activities. The literature has clearly demonstrated the limits of interparliamentary cooperation and the rather low interest shown by national MPs in forging links with the EP, or in involving Members of the European Parliament (MEP) in their work.<sup>14</sup> While contacts between EP and national parliaments have become more institutionalised and regular over the years (Neunreither, 2005; Larhant, 2005), there is little reason to expect that such contacts would intensify in

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<sup>13</sup> COSAC stands for Conference of Community and European Affairs Committees of Parliaments of the European Union ([www.cosac.eu](http://www.cosac.eu)). The biannual COSAC meetings bring together delegations from the EACs of the national parliaments and the EP. COSAC decides normally by consensus, but following a rule change adopted in May 2003, its non-binding decisions (called 'contributions') can be passed with three quarters of the votes cast (which must constitute at least half of all votes). COSAC also has a secretariat in Brussels. Interestingly, the Protocol on the Role of the National Parliaments in the European Union attached to the Treaty of Amsterdam (*Official Journal* C 340, 10/XI/1997) had stated that 'COSAC may address to the European Parliament, the Council and the Commission any contribution which it deems appropriate on the legislative activities of the Union, notably in relation to the application of the principle of subsidiarity, the area of freedom, security and justice as well as questions regarding fundamental rights'. However, COSAC never submitted any contributions on subsidiarity, in part because of 'disagreements about the question of whether national parliaments (via COSAC) should become players in the decision-making process at European level' (Knudsen & Carl, 2008, p. 480).

<sup>14</sup> The best and most thorough analysis of these constraints is provided by Kiiver (2006), who argues convincingly why such interparliamentary networking is bound to remain of limited importance.



the future. The calendars of parliamentarians are quite full, and timetable problems are indeed one of the reasons why most national parliaments and their committees seldom invite MEPs to their meetings. More importantly, there seems to be a misplaced assumption in the literature that interparliamentary cooperation would necessarily benefit MPs' policy expertise. Parliamentarians can arguably get similar information much more easily from other sources: from national ministries or interest groups or from direct contacts with EU institutions.

The deliberations and outcome of the Convention also confirmed that politicians throughout the EU display hardly any support for the establishment of a collective organ of national MPs or for changing the consultative role of COSAC. While interparliamentary cooperation has thus become institutionalised and brings added value to the legislatures and their EACs, the available evidence also indicates that the current forms and levels of such cooperation are unlikely to change in the future.<sup>15</sup> However, at least the links between national parliaments and the Commission have become stronger. The Lisbon Treaty improved the rights of national parliaments to receive both legislative and non-legislative documents directly from the EU's institutions, and the Commission adopted already in May 2006 a Communication to the Council named 'A Citizens' Agenda – Delivering Results for Europe' (COM(2006) 211 final), stating that it would, from 1 September 2006, transmit directly all new legislative proposals and consultation papers to national parliaments, inviting them to react –not only regarding subsidiarity but to the proposals as such–. Overall, it appears that the Commission is nowadays much more willing to enter into a genuine dialogue with national parliaments, and appreciates their input, including views expressed during the preparatory stage of drafting legislative proposals.

#### *The Incentives of Political Parties and MPs*

The discussion so far has focused on the rules of the early-warning mechanism and their implications for the use of the procedure. The rather narrow scope of issues being monitored probably works against parliaments making active use of the procedure, while the substantial increase in on-line interparliamentary communication should not be equated with increases in meetings between parliamentarians. But probably the main reason why national parliaments can be expected to pay relatively little attention to the early-warning mechanism is the incentive structure of political parties and individual MPs. After all, European parliamentary democracy is effectively party democracy. Government formation is based on bargaining between political parties, with the opposition parties trying to unseat the cabinet or increase their support in the run-up to the next elections. Parties are also responsible for setting the parliamentary rules of procedure: the agenda and powers of committees and the plenary as well as the rights of

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<sup>15</sup> See the '[Guidelines for Interparliamentary Cooperation in the European Union](#)', adopted by the Conference of Speakers of the European Union Parliaments in Lisbon on 21 June 2008, which lists the objectives and frameworks for interparliamentary cooperation.

individual members and party groups are all decided by political parties. Most MPs in turn are primarily concerned about the goals of re-election, policy influence and career advancement. Considering these factors, it is essential to understand the incentives of political parties and MPs when analysing the impact of the early warning system.

Perhaps the biggest question mark or problem with the early-warning mechanism is that through making national parliaments direct participants in the EU's legislative process, it goes in a way against the very principle of parliamentary democracy. The defining criterion of parliamentary democracy is that the government is accountable to the legislature and can be voted out of office by it. The parliament (the principal) delegates policy-making powers to the executive (its agent), which then rules with the support of the legislature. But now the subsidiarity control mechanism can reverse these roles. If a parliament rejects an initiative on the grounds of it breaking the subsidiarity principle, it could then adopt a different stand from the body (the government) which it supposedly controls. This might be potentially damaging for the government that has been consulted when drafting the initiative (and has probably already discussed this initiative in the Council). As a result it is in the interest of the government to ensure that the position of the parliament is the same as its own (and vice versa). Of course, there is the possibility of the government knowing that it might end in the losing minority in the Council and hence asking the parliament to contest the initiative on the grounds of subsidiarity. But the main point is that parliaments will probably send a reasoned opinion only if this is also in the interest of their government (eg, Kiiver, 2006, p. 162-163; Barrett, 2008).

Turning from political parties to individual MPs, when choosing what issues to focus on they make a rational calculus, weighing the costs and benefits of various parliamentary activities. Considering that re-election and policy influence are probably the primary goals of most MPs, focusing on EU matters or more specifically on the early-warning mechanism is not a very attractive option for most parliamentarians. In terms of re-election, EU policy may be important for the constituencies (eg, through attracting regional policy funds), but not necessarily for the voters who still base their voting choices primarily on domestic issues.<sup>16</sup> As for policy influence, the ability of an individual legislator to influence politics at the European level is probably close to zero, including under the early-warning mechanism.

Furthermore, the early-warning mechanism can also be very demanding for individual MPs, particularly in parliaments with scarce administrative resources, as they will need knowledge of both EU law and the actual policy area to determine whether the proposal is in breach with the subsidiarity principle. As summarised by Peters (2009, p. 42): 'The *ex ante* review of proposals from the Commission is a cumbersome task for

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<sup>16</sup> For example, in her case study of the Danish scrutiny system, Møller Sousa (2008, p. 441) shows how the incentive structure works against more active involvement in European affairs, with the MPs feeling that neither the media nor the voters are interested in EU matters.

parliamentarians... Parliaments are not at their best in exercising routine mechanisms of a technical nature. They are not suited to play this kind of inspectorial role. Members of parliament would rather spend their time in involvement in short-term national issues that attract the attention of voters. Those parliamentarians who are interested in re-election should not become too involved in subsidiarity questions’.

This explanation, focusing on the incentives and strategies of individual MPs and political parties, can of course be extended to explaining variations in the level of parliamentary scrutiny of EU affairs (see Saalfeld, 2005; Raunio, 2005a). That is, MPs ‘delegate’ rather than ‘abdicate’ EU matters to the governments –in a similar way in which they delegate policy-making authority to governments in other less salient matters–. The early-warning mechanism is an entirely voluntary process, and it is very likely that parliaments will use it with varying degrees of interest. Indeed, as is the case with overall scrutiny of the government in EU matters, it is probable that only a minority of national parliaments will adopt a comprehensive approach to this new system, subjecting most legislative initiatives to careful examination. Furthermore, it is a plausible hypothesis that those parliaments which are either already more strongly involved in EU politics or that represent more Eurosceptical electorates will make more active use of the mechanism.

The preceding discussion has examined the various arguments put forward regarding the early-warning mechanism. It is fair to summarise that the views of most of the politicians and scholars have ranged from moderate optimism to varying degrees of indifference or even opposition to the introduction of the system. The early warning system can thus be depicted as a relatively harmless procedure, established primarily to inject legitimacy to EU governance. To quote Rittberger (2005, p. 191-192): ‘member state politicians held that [national parliaments] were a key to strengthen the democratic legitimacy of the EU by bringing it “closer to the citizens”. It was thus seen as a logical and widely accepted argument that the political institutions that were seen to have suffered most from ever more transfers of sovereignty to the European level –[national parliaments]– should be entitled to have a say regarding the application of the principle of subsidiarity, putting –if deemed necessary– a brake on the appropriation of policy-making competencies by the Commission’. This mechanism was thus mainly introduced in response to legitimacy concerns, and it is very likely that its impact will remain modest (Verges Bausili, 2002; Raunio, 2005b and 2007; Rittberger, 2005, p. 181-192; Kiiver, 2006, p. 153-168).<sup>17</sup>

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<sup>17</sup> One can also argue that the whole subsidiarity control mechanism presents no major change as national parliaments have always been able to voice concerns about subsidiarity breaches as part of their normal scrutiny of EU documents. Also the Commission has justified its proposals in terms of subsidiarity, and according to an inter-institutional agreement also the Council and the EP must examine whether the Commission’s initiatives comply with the subsidiarity principle (Kiiver, 2006, p. 153; Maurer, 2008, p. 93).

Having sketched out the arguments and debate about the early-warning mechanism, the next section examines briefly the early record of using the system. The section is largely based on material available at the COSAC website.<sup>18</sup>

### **Early Experiences**

National parliaments decided at the XXII meeting of COSAC to conduct a series of COSAC-coordinated subsidiarity pilot checks in order to see how the mechanism worked. Eight such trial runs were conducted by the end of 2009. Response rates by parliaments increased during this period, with a high of 36 chambers<sup>19</sup> performing the subsidiarity scrutiny in the final check carried out in late 2009.<sup>20</sup>

Examining the parliamentary procedures adopted to implement the early-warning mechanism, we see significant variations between the legislatures.<sup>21</sup> In 19 chambers the EAC scrutinises the proposals together with one or more specialised committees. In eight chambers the EAC is the only actor involved, while in seven chambers the EAC plays no role as the scrutiny is carried out by the specialised committees. Regarding which actor has the right to decide the matter, 13 chambers report that each subsidiarity procedure is concluded by the plenary regardless of whether a committee believes there is a breach of the subsidiarity principle. In seven chambers the plenary becomes only involved in cases where the committees think that the proposal violates the subsidiarity principle, while in five chambers the involvement of the plenary is optional. Finally, in five chambers the decision is taken by the EAC. The overwhelming majority of chambers had made use of IPEX during these checks.

Turning to the main problems identified by national parliaments, legislatures have complained that even eight weeks is not enough for conducting a thorough subsidiarity check. Many chambers also voiced concerns about the difficulties involved in separating subsidiarity issues from both proportionality matters and the actual policy contents of the proposals. Not surprisingly, the parliaments have not found the Commission's initiatives to breach the subsidiarity principle. For example, in the final eighth check, referred to

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<sup>18</sup> In addition to the documents available at the actual subsidiarity control webpage ([www.cosac.eu/en/info/earlywarning/](http://www.cosac.eu/en/info/earlywarning/)) several of the bi-annual reports also deal with the early-warning mechanism.

<sup>19</sup> The word 'chambers' is used here as the replies to COSAC are provided by both houses of bicameral parliaments. Of the 27 EU countries, 14 have a unicameral and 13 a bicameral parliament. Hence the total number of chambers is 40.

<sup>20</sup> On the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (COM (2009) 154 final). See [www.cosac.eu/en/info/earlywarning/successions.pdf/](http://www.cosac.eu/en/info/earlywarning/successions.pdf/).

<sup>21</sup> Many of the parliaments are yet to decide how the mechanism is to be implemented. The following summary is mainly based on the 13<sup>th</sup> bi-annual report of COSAC (2010, p. 20-24). For information on country-specific details, see the replies to that report ([www.cosac.eu/en/documents/biannual/13replies.pdf/](http://www.cosac.eu/en/documents/biannual/13replies.pdf/)).

above, one chamber, the Belgian Senate, found the proposal to violate the subsidiarity principle while some other chambers expressed concerns about the proposal in terms of the proportionality principle, its legal basis or policy contents. In general, national parliaments have not been entirely happy with the Commission's justifications for the laws regarding compliance with the subsidiarity principle. Parliaments have also stressed the need to invest resources in exchange of information, preferably as early as possible so that parliaments could learn about subsidiarity concerns expressed by other chambers. On a more positive note, many chambers have used the opportunity provided by the early-warning system and Lisbon Treaty more generally to revise national laws or parliamentary procedures related to EU scrutiny (see also COSAC, 2007, p. 6-14; COSAC, 2008, p. 15-23; COSAC, 2010, p. 11-16).

### **Concluding Discussion**

What lessons can we draw from the introduction and early record of the subsidiarity control mechanism? Essentially it appears that the arguments put forward about its rather modest impact are valid. National parliaments will probably use it with varying degrees of interest, depending on the salience of Europe and of the individual legislative initiatives.<sup>22</sup> It is also unlikely that national parliaments could muster the sufficient number of votes to show the 'yellow' or 'orange' cards to the Commission, at least not without the support of a large number of national governments. Hence it will probably remain a rather harmless procedure, with only a marginal impact on the EU's legislative process. After all, why else would national governments have been so willing to introduce it in the first place? Indeed, one can argue that the whole mechanism was introduced in the Convention to win the support of national parliaments for the Constitutional Treaty, while those parliaments and governments that were not so interested in the system or even against it agreed to its introduction because they saw it as bringing little if any change to the EU's policy process.

At the same time, we must acknowledge the more positive aspects of the mechanism. It has already forced the Commission to pay more attention to its justifications of legislative texts, and, more importantly, several parliaments have introduced reforms which facilitate a more effective scrutiny of EU matters. Whether these legislative and procedural changes result in more stringent scrutiny of the government remains to be seen, but any developments in the direction of more active parliamentary involvement in EU politics are surely welcomed by those who have expressed concerns about the weak role of national parliaments in the Union.

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<sup>22</sup> It must be remembered that the COSAC-led trial runs were specifically designed to test how the mechanism works in practice. Hence the relatively high levels of participation achieved in those checks may tell us very little about how often each parliament executes the check in the future.



Finally, it is worth contextualising the early-warning mechanism. The new role accorded to national parliaments in monitoring subsidiarity can also be seen as reinforcing the perception of domestic MPs acting as ‘gatekeepers’ of European integration. Indeed, even the term early-warning mechanism implies a kind of a negative power, with national parliaments receiving advance warning of new legislative proposals. Also the constitutionalisation of the Convention procedure and the strong role of national parliaments in the simplified revision procedures –which both, in fact, reduce the likelihood of the subsidiarity control mechanism being used– mean that domestic MPs are now more effectively the ‘guardians of the Treaties’.<sup>23</sup> When thus the core functions of national parliaments in EU politics –scrutiny of governments, monitoring subsidiarity and approving Treaty amendments– are examined together it becomes evident that domestic MPs get involved in EU governance in a rather one-sided fashion (see also Kiiver, 2006; Auel, 2007). National parliaments control Brussels-bound Ministers and safeguard sovereignty, perhaps at the expense of activities that would connect the electorate more strongly to EU politics.

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<sup>23</sup> There is also the possibility or danger of parliaments not becoming more strongly involved in day-to-day EU affairs as they now that they can ultimately veto any Treaty amendments or the move to qualified majority voting or co-decision procedure in specific policy areas.



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## **Appendix: PROTOCOL (No 2) ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY**

THE HIGH CONTRACTING PARTIES,

WISHING to ensure that decisions are taken as closely as possible to the citizens of the Union,

RESOLVED to establish the conditions for the application of the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union, and to establish a system for monitoring the application of those principles,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

### *Article 1*

Each institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union.

*Article 2*

Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal.

*Article 3*

For the purposes of this Protocol, 'draft legislative acts' shall mean proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank, for the adoption of a legislative act.

*Article 4*

The Commission shall forward its draft legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator.

The European Parliament shall forward its draft legislative acts and its amended drafts to national Parliaments.

The Council shall forward draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank and amended drafts to national Parliaments.

Upon adoption, legislative resolutions of the European Parliament and positions of the Council shall be forwarded by them to national Parliaments.

*Article 5*

Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

#### *Article 6*

Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

If the draft legislative act originates from a group of Member States, the President of the Council shall forward the opinion to the governments of those Member States.

If the draft legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the opinion to the institution or body concerned.

#### *Article 7*

1. The European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, shall take account of the reasoned opinions issued by national Parliaments or by a chamber of a national Parliament.

Each national Parliament shall have two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote.

2. Where reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the draft must be reviewed. This threshold shall be a quarter in the case of a draft legislative act submitted on the basis of Article 76 of the Treaty on the Functioning of the European Union on the area of freedom, security and justice.

After such review, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.

3. Furthermore, under the ordinary legislative procedure, where reasoned opinions on the non-compliance of a proposal for a legislative act with the principle of subsidiarity represent at least a simple majority of the votes allocated to the national Parliaments in



accordance with the second subparagraph of paragraph 1, the proposal must be reviewed. After such review, the Commission may decide to maintain, amend or withdraw the proposal.

If it chooses to maintain the proposal, the Commission will have, in a reasoned opinion, to justify why it considers that the proposal complies with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinions of the national Parliaments, will have to be submitted to the Union legislator, for consideration in the procedure:

(a) before concluding the first reading, the legislator (the European Parliament and the Council) shall consider whether the legislative proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national Parliaments as well as the reasoned opinion of the Commission;

(b) if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration.

#### *Article 8*

The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.

In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted.

#### *Article 9*

The Commission shall submit each year to the European Council, the European Parliament, the Council and national Parliaments a report on the application of Article 5 of the Treaty on European Union. This annual report shall also be forwarded to the Economic and Social Committee and the Committee of the Regions.