



European  
University  
Institute

ROBERT  
SCHUMAN  
CENTRE FOR  
ADVANCED  
STUDIES

# WORKING PAPERS

RSCAS 2016/18  
Robert Schuman Centre for Advanced Studies

Is the Subsidiarity Early Warning Mechanism a Legal  
or a Political Procedure?  
Three Questions and a Typology

Ian Cooper



European University Institute  
**Robert Schuman Centre for Advanced Studies**

**Is the Subsidiarity Early Warning Mechanism a Legal or a  
Political Procedure? Three Questions and a Typology**

Ian Cooper

EUI Working Paper **RSCAS** 2016/18

This text may be downloaded only for personal research purposes. Additional reproduction for other purposes, whether in hard copies or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper, or other series, the year and the publisher.

ISSN 1028-3625

© Ian Cooper, 2016

Printed in Italy, April 2016

European University Institute

Badia Fiesolana

I – 50014 San Domenico di Fiesole (FI)

Italy

[www.eui.eu/RSCAS/Publications/](http://www.eui.eu/RSCAS/Publications/)

[www.eui.eu](http://www.eui.eu)

[cadmus.eui.eu](http://cadmus.eui.eu)

## **Robert Schuman Centre for Advanced Studies**

The Robert Schuman Centre for Advanced Studies (RSCAS), created in 1992 and directed by Professor Brigid Laffan, aims to develop inter-disciplinary and comparative research on the major issues facing the process of European integration, European societies and Europe's place in 21<sup>st</sup> century global politics.

The Centre is home to a large post-doctoral programme and hosts major research programmes, projects and data sets, in addition to a range of working groups and *ad hoc* initiatives. The research agenda is organised around a set of core themes and is continuously evolving, reflecting the changing agenda of European integration, the expanding membership of the European Union, developments in Europe's neighbourhood and the wider world.

Details of the research of the Centre can be found on:

<http://www.eui.eu/RSCAS/Research/>

Research publications take the form of Working Papers, Policy Papers, and e-books. Most of these are also available on the RSCAS website:

<http://www.eui.eu/RSCAS/Publications/>

The EUI and the RSCAS are not responsible for the opinions expressed by the author(s).



## **Abstract**

This Working Paper investigates whether the Early Warning Mechanism (EWM), in which national parliaments check the legislative proposals of the European Union (EU) for their subsidiarity compliance, is essentially a legal or a political procedure. This is closely related to the longstanding debate over whether the principle of subsidiarity itself is a legal or a political concept. Unpacking this debate reveals three distinct questions. First, should subsidiarity and the EWM be studied by legal scholars or political scientists? Second, should subsidiarity and the EWM be implemented by legal or political institutions? And third, do subsidiarity and the EWM entail a legal or a political mode of reasoning? A thoroughgoing theoretical and historical analysis shows that there is persistent disagreement among academic observers and political practitioners alike concerning the legal or political nature of the EWM. Building upon this analysis, it is possible to construct a typology of three approaches to subsidiarity and the EWM: Legal Rule-Following, Political Bargaining, and Policy Arguing.

## **Keywords**

Early Warning Mechanism; European Union; national parliaments; subsidiarity.





## I. Introduction: Legal or Political? A Highly Instructive Question\*

Is the Early Warning Mechanism (EWM), in which national parliaments check the legislative proposals of the European Union (EU) for their subsidiarity compliance, essentially a legal or a political procedure? This is a difficult question that reasonable people, both academic observers and political practitioners, disagree over how to answer. The nature and purpose of the EWM has always been ambiguous and contested: this was true when it was originally conceived in the European Convention (2002-2003) and when it was codified in the Treaty of Lisbon (2009), and it has continued to be so as the EWM has been worked out in practice. The role of national parliaments in the EWM has been likened on one hand to a Council of State, conducting an advisory “legal review” of EU legislation,<sup>1</sup> and on the other to a “virtual third chamber,” a political body with the power to intervene in the EU’s legislative process.<sup>2</sup> Even after the EWM has been in operation for five years, it is not obvious which description is closer to the truth.

This question is also, as it turns out, highly instructive: the simple legal-versus-political dichotomy covers a number of inter-related debates, and an analysis of these gives us a more nuanced overview of the competing interpretations of the EWM. This question is inextricably linked to the deeper, normative question of whether the principle of subsidiarity, around which the EWM revolves, is fundamentally a legal or political concept. Most of this chapter is devoted to “unpacking” this debate, which reveals three distinct questions. First (Section II), should subsidiarity and the EWM be studied by legal scholars or political scientists? A review of the literature shows that these disciplines approach the subject in different, but complementary ways. A second question (Section III) is, should subsidiarity and the EWM be implemented by legal or political institutions? A historical review shows that the implementation of the principle of subsidiarity in the EU has always been primarily the responsibility of political institutions. The EWM is an innovation only in that it brings in a new bunch of political institutions, national parliaments, as subsidiarity watchdogs. The European Court of Justice (ECJ) has the authority to interpret the relevant subsidiarity provisions of the EU treaties, but it has never substantially exercised it. The third question (Section IV) is, do subsidiarity and the EWM entail a legal or a political mode of reasoning? The answer depends on one’s understanding of the principle of subsidiarity, both in itself and as it relates to adjacent treaty principles (proportionality, conferral) and, at a further remove, political concerns (policy effectiveness, political expediency).

Building upon this analysis, a typology (Section V) is presented in which there are not just two but *three* broad approaches to the EWM – one “legal” and two “political.” These are ideal types (although exemplified by certain participants, in parentheses below), and each depends on a different understanding of subsidiarity. The first approach is *Legal Rule-Following* (Commission, Finnish *Eduskunta*), in which subsidiarity is a quasi-legal rule whose requirements may be clearly ascertained. National parliaments defer to the Commission’s interpretation of subsidiarity, based on a system of rigorous impact assessment. If national parliaments have other concerns about a proposal (e.g. proportionality, policy substance), they raise them in the Political Dialogue rather than the EWM. The second approach is *Political Bargaining* (Danish *Folketing*, Dutch *Tweede Kamer*), in which

---

\* This Working Paper is an early version of a chapter in a forthcoming book: Anna Jonsson Cornell and Marco Goldoni (eds.), *National and Regional Parliaments in the EU-Legislative Procedure Post-Lisbon: The Impact of the Early Warning Mechanism* (Oxford: Hart Publishing, forthcoming 2016).

<sup>1</sup> P Kiiver, *The Early-Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality*, (Abingdon, Routledge, 2012), 126-133.

<sup>2</sup> I Cooper, ‘The watchdogs of subsidiarity: national parliaments and the logic of arguing in the EU’, (2006) *Journal of Common Market Studies* 44(2): 283. I Cooper, ‘A “virtual third chamber” for the European Union? National parliaments after the Treaty of Lisbon’, (2012) *West European Politics* 35(3): 441 – 65. I Cooper, ‘Bicameral or tricameral? National parliaments and representative democracy in the European Union’, (2013) *Journal of European Integration* 35(5): 531–46.

subsidiarity is an endlessly flexible concept which may be interpreted so as to allow or prohibit almost any course of EU action. National parliaments use the EWM when they see it is in their political interest to oppose an EU measure. They will seek to build a coalition to achieve a yellow or orange card. The third approach is *Policy Arguing* (Swedish *Riksdag*, UK House of Commons), in which subsidiarity is a vague but nevertheless useful concept. The EWM enables a policy argument between the Commission and national parliaments concerning whether and how the EU should legislate in particular circumstances. To be clear, the point of this section is to sketch out the three approaches, using certain parliaments as illustrative examples,<sup>3</sup> not to comprehensively categorize all the national parliaments; furthermore, throughout the paper I refer to some EU legislative proposals to illustrate my points – in particular the two proposals that were the targets of the first two yellow cards – but no attempt is made to provide a comprehensive legislative history of the EWM. Finally, the chapter concludes (Section VI) by pointing out that the EWM remains a contested procedure in that the participants cannot agree on the social rules governing it. However, the Commission has recently signalled that it may be open to a more explicitly political EWM in the future.

## II. Are Subsidiarity and the EWM Best Studied by Legal Scholars or Political Scientists?

First of all, should subsidiarity and the EWM be studied by political scientists or legal scholars? This is, in context, a foolish question, given that the growing body of literature on this subject – including, of course, the many exemplary works within this volume – features scholars from both disciplines. It would be a mistake to assume that legal scholars would automatically adhere to a narrow, legalistic approach to the EWM, and that political scientists would favour a broader, more explicitly political, approach. In fact, the existing scholarship on the EWM does not fit this pattern, as a “narrow-vs.-broad” debate may be discerned within both disciplines. For example, the authors of one legal commentary on the first use of the “yellow card” – in the case of the “Monti II” Regulation on the right to strike – argued that the national parliaments went beyond their role by raising objections that were not strictly based on subsidiarity concerns; they argued that the proposal was clearly compliant with subsidiarity, implying in effect that the yellow card was a misuse of the EWM.<sup>4</sup> Other legal theorists, however, have written approvingly of the “political approach”<sup>5</sup> that was evident in the case of the first yellow card and of national parliaments’ “creative” use of the subsidiarity framework.<sup>6</sup> Political scientists, too, differ in whether they envisage the subsidiarity review under the EWM in broad or narrow terms. From one perspective that adopts a flexible understanding of subsidiarity, the EWM could lessen the democratic deficit by giving national parliaments greater influence at the EU level, so that they become a “virtual third chamber” for the EU.<sup>7</sup> Against this view, others have argued that the EWM will not reduce the democratic deficit, in part because violations of subsidiarity are rare occurrences, and that national parliaments would be well advised to focus their attention elsewhere in

---

<sup>3</sup> Empirically, I drew liberally from the trove of useful information, both country-specific and comparative, to be found in C Heffler, C Neuhold, O Rozenberg, and J Smith, *The Palgrave Handbook of National Parliaments and the European Union*, (London, Palgrave, 2015), as well as the various contributions to this volume.

<sup>4</sup> F Fabbrini and K Granat ‘Yellow card, but no foul: the role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike’, (2013) *Common Market Law Review* 50(1): 115– 143.

<sup>5</sup> M Goldoni ‘The Early Warning System and the Monti II regulation: the case for a political interpretation’, (2014) *European Constitutional Law Review* 10(1): 90– 108.

<sup>6</sup> M Bartl ‘The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit’, (2015), *European Law Journal*, 21(1): 24.

<sup>7</sup> I Cooper, ‘A “Virtual Third Chamber” (n 2).

order to increase their influence in the EU.<sup>8</sup> These examples show that disciplinary affiliation does not determine an author's attitude towards the correct use of the procedure.

There is, however, a deeper and more pervasive difference between the two disciplines, that emerges from their respective methodologies. These lead them to address quite different questions, which naturally yield different kinds of results. On the whole – at the risk of generalizing – legal scholars who study the EWM are interested in how it will affect the legal and constitutional order of the EU. When considering a specific case – e.g. a yellow card – they tend to engage in a textual analysis of the reasoned opinions of the national parliaments, in order to compare their reasoning to that of the Commission. Political scientists, by contrast, are more interested in how the EWM will affect political outcomes. They are less interested in the substantive content of reasoned opinions; rather, they are more likely to see the EWM as a political tool, and to ask under what circumstances it is likely to be wielded by national parliaments and what effect it may have. The contrast between the two disciplinary approaches is vividly on display in their respective analyses of the *Monti II* yellow card: whereas legal scholars debate the relative merits of the opinions of the national parliaments and the Commission,<sup>9</sup> political scientists analyse the tools of interparliamentary coordination that were activated in order to make the yellow card happen, in addition to debating the political importance of the outcome.<sup>10</sup>

In general, these two disciplinary approaches are complementary, in that each one has its respective strengths, and insofar as one may have weaknesses or blind spots these may be compensated for by the strengths of the other. For example, it seems that political scientists' disciplinary perspective allows them, on the whole, to adopt a more flexible understanding of subsidiarity within the context of the EWM. Legal scholars tend to emphasize the narrow scope of the EWM which, whether they like it or not, they perceive as intractable.<sup>11</sup> Even those who regret such narrowness, expressing a belief that the role of national parliaments in EU policy scrutiny should be expanded beyond mere subsidiarity control, do not see a way out of the conundrum – at least short of treaty change. They do not see what seems obvious to political scientists: that the EWM is a tool which national parliaments may adapt for their particular purposes, and that they may reinterpret subsidiarity in a way that allows them to challenge an EU legislative proposal on other grounds, such as legal basis, proportionality, and policy effectiveness. As it happens, this is the approach to the EWM which many national parliaments have taken, as discussed below.

Another strength of the political scientist's method is that the rigorous comparison of national parliaments' approaches to the EWM, often using quantitative methods, may yield unexpected insights. For example, it is often assumed that it is the "strong" parliaments – those considered to have the most institutional capacity to scrutinize their own governments – that would be most likely to extend their influence to the EU level by, for example, participating in the EWM. Conversely, it is sometimes posited that "weak" parliaments would be more likely to participate because, having little national-level influence over their own governments' conduct of EU affairs, they would instead focus their attention on EU-level procedures such as the EWM. However, an empirical analysis of the recent use of the EWM shows with bracing clarity that neither supposition turns out to be true: "There was no

---

<sup>8</sup> P De Wilde 'Why the Early Warning Mechanism does not alleviate the democratic deficit,' (2012) Maastricht: OPAL Online Paper No. 6/2012. T Raunio, 'Destined for irrelevance? Subsidiarity control by national parliaments' (2010) Madrid: Elcano Royal Institute, Working Paper 36/2010.

<sup>9</sup> F Fabbrini and K Granat 'Yellow card, but no foul' (n 4). M Goldoni 'The Early Warning System and the Monti II regulation' (n 5).

<sup>10</sup> I Cooper, 'A yellow card for the striker: national parliaments and the defeat of EU legislation on the right to strike,' (2015) *Journal of European Public Policy* 22 (10), 1406-1425.

<sup>11</sup> G Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) *European Law Journal*, Vol. 21, No. 1, January 2015, 15-16. G Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time,' (2006) *Common Market Law Review* 43: 67-68

correlation, negative or positive, between the institutional strength of the chambers and the number of opinions they sent within the EWM or the Political Dialogue.”<sup>12</sup> Evidently, it is not enough that national parliaments are able to act, but they also must be willing. Further studies have attempted to go beyond institutional capacity to inquire whether the variation between national parliaments’ propensity to participate in the EWM may be explained according to incentive-related factors, such as party-political contestation or the salience and urgency of draft legislative acts,<sup>13</sup> or public opinion regarding the EU.<sup>14</sup> Yet such quantitative methods, so beloved of political scientists, cannot analyse more subtle differences in the approach of national parliaments to the EWM, including contrasts in their legislative cultures and in their normative interpretation of subsidiarity.<sup>15</sup> To fully understand such differences requires a qualitative methodological approach, such as is commonly employed by legal scholars – as well as some political scientists – that entails a close, substantive reading of texts, such as the reasoned opinions of the national parliaments.

In lieu of a one-dimensional continuum separating “strong” from “weak” parliaments in varying degrees, there have been attempts both by legal scholars and political scientists to develop typologies that classify national parliaments according to their differing approaches to EU affairs generally or the EWM specifically. One political science study identified “modes of parliamentary activity in EU affairs” with which to identify five groups of parliaments/chambers according to which type of activity they emphasize in EU affairs, which are: Scrutinizers (scrutiny in committee), Debating arenas (plenary debates), Policy shapers (mandates and resolutions), Commission watchdogs (Political Dialogue and EWM), and Scrutiny laggards (none). It is the fourth of these that is most relevant for scholars of the EWM, because a parliament/chamber that aspires to be a “Commission watchdog” will invest its resources in EU-level engagement at the expense of domestic scrutiny. Unfortunately, this study did not yield results specific to the EWM, because to arrive at their measure of EU-level engagement the authors combined each parliament/chamber’s number of reasoned opinions under the EWM with its number of contributions under the Political Dialogue, which tend to be more numerous.<sup>16</sup> As a result, the only “Commission watchdogs” they identify are the Portuguese parliament and the Italian Senate, both of which have been particularly active in the Political Dialogue but not in the EWM.

One legal scholar, Philipp Kiiver, produced a typology of four kinds of parliaments/ chambers, classified specifically according to how they approach the EWM: the Literalists, who faithfully adhere to a narrow check of the subsidiarity compliance of a legislative proposal, as required by the treaty (including, e.g. the two Dutch chambers and the French *Sénat*); the Pseudo-colegislators, who ignore the formal limits of the EWM and treat it as a policy consultation (including e.g. the German

---

<sup>12</sup> K Auel, O Rozenberg and A Tacea, ‘Fighting Back? And, if so, how? Measuring Parliamentary Strength and Activity in EU Affairs,’ (2015) in Hefftlér et al. *The Palgrave Handbook of National Parliaments and the European Union* (n 3) 86.

<sup>13</sup> K Gattermann and C Hefftlér ‘Beyond Institutional Capacity: Political Motivation and Parliamentary Behaviour in the Early Warning System,’ (2015) *West European Politics*, 38:2, 305-334. Perhaps the most significant finding of this study (at 322), though one not emphasized by the authors, is that the likelihood that any one chamber will pass a reasoned opinion under the EWM rises sharply if a large number of other chambers have already done so (statistically, the probability is 21% higher if ten other chambers have passed a reasoned opinion than if none have done so). This suggests that many parliaments are more likely to pass a reasoned opinion if they think a yellow card is likely, in line with what I call a “political bargaining” approach to the EWM (see Section V, below.)

<sup>14</sup> C Williams 2015 ‘Issuing Reasoned Opinions: The Determinants of Usage of the Early Warning System,’ (2015), ms., European University Institute.

<sup>15</sup> One legal scholar undertook an analysis to see whether the type of scrutiny system employed by a parliament (centralised, decentralised, or mixed) affected its level of activity in the EWM, but she found no robust relationship. K Granat *National Parliaments and the Policing of the Subsidiarity Principle* (Ph.D. Dissertation, European University Institute, Florence, 2014) 160-161

<sup>16</sup> During the period examined, 2010-2012, there were more than eight times as many Political Dialogue contributions (1324) as reasoned opinions (161). The latter were overshadowed by the former, despite being accorded double weight by the study’s authors. Auel et al. ‘Fighting back?’ (n 12) 71, 76.

Bundesrat and the UK House of Lords); the Pre-emptors, who generally decline to participate in the EWM but choose to react instead to EU consultation documents (e.g. the Nordic parliaments of Denmark, Sweden and Finland); and the Absentees, who tend not to participate in the EWM at all (mostly parliaments in Southern and Eastern Europe).<sup>17</sup> There is much to quibble with in this typology, including whether the parliaments/chambers cited as examples belong in these categories. For example, the three Nordic parliaments, which Kiiver puts together in the same category, have in practice acted very differently in the EWM. Measured by the numbers of reasoned opinions passed, the Swedish *Riksdag* has been by far the most active parliament in the EWM, whereas the Finnish *Eduskunta* has been among the least active, and the Danish *Folketing* has been close to the average.<sup>18</sup> It is argued below (Section V) that these three parliaments, while similar in many other ways, actually exemplify three very different approaches to the EWM. Moreover, the two Dutch chambers and the French *Sénat* – which Kiiver calls Literalists – raised objections to the EPPO proposal which were roundly rejected by the Commission for going beyond the scope of the subsidiarity review.<sup>19</sup> To be fair, Kiiver’s typology was speculative, based not on an analysis of the EWM in operation but on an analysis of the subsidiarity tests that were conducted by COSAC between 2004-2009, prior to the entry into force of the Treaty of Lisbon. During the COSAC tests the Dutch chambers did take a Literalist approach (similar to what I call Legal Rule-Following in my own typology) but since then they have changed their methods, leading to “a politicization of the process, whereby reasoned opinions are increasingly used to support or undermine a policy.”<sup>20</sup> (In my own typology, below, I classify the *Tweede Kamer* as an exemplar of the Political Bargaining approach.) Another problem is that, in practical terms, it may be difficult to distinguish Literalists from Absentees: both types will seldom issue reasoned opinions, but for different reasons – the former out of respect for the narrow scope of the EWM, and the latter due to a lack of capacity, lack of interest, or both.<sup>21</sup> But my principal complaint about this typology is that it fails to capture the most salient differences between the approaches of national parliaments to the EWM, which is a reflection of their disparate approaches to the norm of subsidiarity (see Section V).

### **III. Should Subsidiarity and the EWM be Implemented by Legal or Political Institutions?**

A more practical question concerning the EWM is whether it is and/or ought to be implemented by legal institutions (e.g. courts) or by political institutions (e.g. parliaments). This is closely related to the question of whether the principle of subsidiarity itself should be interpreted primarily by legal or political institutions. The second question predates the first, because subsidiarity was introduced into EU law in the Maastricht Treaty (1992), long before the EWM was first devised by the European Convention (2002-2003) as a system that would delegate the role of subsidiarity watchdogs to a set of political institutions, the national parliaments. During the intervening decade, subsidiarity was a

---

<sup>17</sup> P Kiiver, *The Early-Warning System* (n 1), 136-139.

<sup>18</sup> I Cooper ‘The Nordic parliaments and the EU,’ in C Grøn, P Nedergaard and A Wivel (eds), *Still the other European Community? The Nordic Countries and the European Union*, (Abingdon: Routledge, 2015), 104–21. See also the chapter by A Jonsson Cornell, this volume.

<sup>19</sup> Commission Communication of 27 November 2013, (COM (2013) 851 final) 5.

<sup>20</sup> A-L Högenauer, ‘The Dutch Parliament and EU Affairs: Decentralizing Scrutiny,’ in Hefftlér et al. *The Palgrave Handbook of National Parliaments and the European Union* (n 3) 261.

<sup>21</sup> For example, the Estonian parliament’s low level of participation in the EWM may be attributed in part to its “pro-European stance” but also to a “lack of resources and staff.” P Ehin ‘The Estonian Parliament and EU affairs: A Watchdog that does not Bark?’ in Hefftlér et al. *The Palgrave Handbook of National Parliaments and the European Union* (n 3) 524.

subject studied more by legal scholars than by political scientists, and the scholarship focused most often on the role of the European Court of Justice in subsidiarity control.<sup>22</sup>

However, it should be noted that even during this period the official EU position was that the primary responsibility for ensuring subsidiarity compliance lay with the EU's political institutions, and not with the ECJ. It is true that while the Maastricht treaty codified the principle in Article 3b TEU, it said little about how and by whom it should be implemented. But after a negative referendum result in Denmark threw the ratification of Maastricht into doubt, European leaders seized on the treaty's subsidiarity provisions as a means to prove to the public that the EU would respect the autonomy of the member states and exercise its powers with self-restraint. To this end, they developed a set of substantive and procedural guidelines for the implementation of subsidiarity and proportionality which were appended to the European Council conclusions in Edinburgh (1992), and eventually incorporated into a protocol attached to the Amsterdam Treaty (1997). The procedural guidelines are addressed to the political institutions of the EU:

[The] Amsterdam protocol... sets out detailed *procedural* guidelines which require the political institutions to give due consideration to subsidiarity and proportionality at each stage of the legislative process – that is, whenever a measure is initiated, amended or adopted. The Commission, as the institution which formally proposes legislation, must do four things: it must consult widely before proposing legislation, justify the relevance of its proposals with regard to subsidiarity, minimize the financial and administrative burdens of legislation and submit an annual report to the other institutions on the implementation of Article 3b (Art. 9). The European Parliament and the Council of Ministers, in turn, are enjoined to consider Commission proposals, as well as any suggested amendments, for their compatibility with Article 3b (Art. 11).<sup>23</sup>

The Amsterdam protocol was silent on the role of the ECJ in the implementation of subsidiarity. However, there is little doubt that the ECJ has the authority to interpret the principle, insofar as it is incorporated into the EU treaties and is, consequently, justiciable.

Subsidiarity after Maastricht was implemented as a “norm of self-limiting governance” intended to change the legislative culture of the EU so that it legislated less often (subsidiarity *per se*) and in a less intrusive manner (proportionality). It was not a separation-of-powers, “checks and balances” system in which an over-zealous legislative branch would be restrained by the countervailing power of the judicial branch; rather, the legislative branch (which in this context includes the Commission, with its formal right of initiative) was expected to reform itself from within. Many have interpreted the ECJ's steadfast refusal to exercise a robust review of EU legislation for its compliance with the principle as a sign that subsidiarity has been ineffective. However, arguably the relevant test of subsidiarity's post-Maastricht effectiveness is not whether it was used in judicial review but whether it had an impact on the EU's legislative output. From this perspective, in retrospect, did it work? The Commission, for its part, insisted that it made a difference. In its annual reports on the application of the principles of subsidiarity and proportionality, published under the rubric of “Better Lawmaking,” it cited a year-on-year decline in the number of Commission proposals for new legislation during this period – the number fell by more than half between 1990 and 2002 – as evidence that a changed legislative culture had taken hold in the EU.<sup>24</sup> Indeed, there was a concomitant decline in the overall volume of EU legislation over the same period, which could be taken as evidence that subsidiarity was having an effect.<sup>25</sup>

---

<sup>22</sup> See e.g. A Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford: Oxford University Press, 2002).

<sup>23</sup> I Cooper, ‘The Watchdogs of Subsidiarity’ (n 2) 285-286.

<sup>24</sup> See the Commission report of 12 December 2003, *Better Lawmaking 2003* (COM 770 final) 31.

<sup>25</sup> I Cooper ‘Subsidiarity and Autonomy in the European Union,’ in L Pauly and W Coleman, eds. *Global Ordering: Institutions and Autonomy in a Changing World* (Vancouver: UBC Press, 2008), 234-254.

However, whatever the practical impact of subsidiarity after Maastricht, it was perceived as inadequate; for this reason, part of the mandate of the European Convention was to improve the implementation of the principle of subsidiarity. The Convention created a “Working Group” on subsidiarity, which directly addressed the question of whether a new subsidiarity control mechanism should be “legal” or “political” in nature, for example by determining which kinds of institutions – judicial, technical, or political – should be involved in its implementation:

[The] working group on subsidiarity considered but ultimately rejected subsidiarity review mechanisms of a largely technocratic or judicial nature. These included: the creation of a new, *ad hoc* body to monitor the application of the principle of subsidiarity; the appointment within the Commission of a ‘Mr or Mrs Subsidiarity’; the creation of an *ad hoc* chamber within the ECJ responsible for questions of subsidiarity; and an *ex ante* judicial mechanism to scrutinize an EU legislative act after it is adopted but before it enters into force. These mechanisms were found unsuitable because the working group agreed that subsidiarity is ‘a principle of an essentially political nature’ ... which should be monitored by political institutions.<sup>26</sup>

In place of a judicial or technocratic solution, the Convention quite deliberately devised the EWM as a system involving political institutions, making national parliaments into subsidiarity watchdogs. That much is obvious. Moreover, they are political institutions with a particular bias: they may be expected, on balance, to favour an interpretation of subsidiarity that restrains the actions of the EU. This is because when the EU takes action in policy fields where competence is shared with the member states, this necessarily encroaches on national parliaments’ own field of action. It is fair to presume, then, that national parliaments were chosen not as disinterested arbiters but precisely because they have an interest in promoting certain kinds of outcomes.<sup>27</sup>

From this perspective the EWM marks a change in the EU’s approach to subsidiarity, bringing it closer to a “checks and balances” system. Unlike the post-Maastricht approach, which attempted to change the EU’s legislative culture from within, the EWM empowers a group of external political actors as a restraining force. Of course, by this standard it is quite a weak “check” on EU legislation. That was especially true of the version that emerged in the Constitutional Treaty, which was merely advisory. As originally designed, national parliaments’ only means of intervention in the EU legislative process was a “yellow card,” wherein one third of them (with a voting system adjusted to allow for bicameralism) could force the review of a legislative proposal that allegedly violates the principle of subsidiarity; this is effectively advisory because the proposing institution, usually the Commission, is not required to withdraw the proposal but may instead amend it or maintain it unchanged. In the transition to the Treaty of Lisbon, the EWM was strengthened to also include the possibility of an “orange card”: if a majority of national parliaments raise subsidiarity-based objections to a proposal, this triggers a vote in the EU’s two legislative chambers, either of which may immediately vote to reject it (by a vote of 55% of the members of the Council, or by a majority of votes cast in the EP). The addition of the orange card still did not give national parliaments a veto over EU legislation – it is not a “red card” – but it did nonetheless increase their influence within the EU legislative process, insofar as their intervention can lead to the rejection of a proposal if another of the principal EU institutions may be persuaded to agree. National parliaments would only need to convince the Commission to withdraw the proposal, or either the Council or the EP to vote it down. Arguably, empowering national parliaments in this way made them EU-level actors in their own right, and collectively a “virtual third chamber” for the EU. For the present discussion, the point to emphasize is that the addition of the “orange card” reinforced the political nature of the EWM, insofar as it left the ultimate decision over a contested proposal in the hands of political institutions – i.e. the

---

<sup>26</sup> I Cooper, ‘The Watchdogs of Subsidiarity’ (n 2) 290-291.

<sup>27</sup> A Dashwood ‘The Relationship Between the Member States and the European Union/European Community,’ (2004) *Common Market Law Review*, 41(2) 368.

Commission, which despite its technocratic pedigree is a thoroughly political institution, and the Council and the EP, the two bodies which together constitute the “EU legislator.”<sup>28</sup>

Up to this point we have not discussed the ECJ – obviously a legal, rather than political, institution – which is also ascribed a role by the treaty in subsidiarity control. My description of the EWM as a procedure that only involves “political” institutions requires a certain sleight of hand, in that it depends on defining the EWM as the procedure set out only in Articles 6 and 7 of Protocol 2 (TEU/TFEU). The role of the ECJ is set out in Article 8, which states that the ECJ

shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought... by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.

Since Maastricht it had been widely accepted that the ECJ had jurisdiction over the judicial interpretation of the relevant subsidiarity provisions of the treaty; the innovation in this article is to state that such actions may be brought by a member state “on behalf of” its national parliament or a chamber thereof. This gives national parliaments the standing of “indirect semi-privileged applicants” before the ECJ – indirect because they must bring the action of annulment via their governments, and semi-privileged because it only concerns one of their institutional prerogatives, subsidiarity control.<sup>29</sup>

For this provision of the treaty to have practical consequences, two things must happen. First, national parliaments must bring actions – or, more precisely, they must request that their governments bring actions – to the ECJ challenging the subsidiarity compliance of EU legislation. Second, the ECJ must prove willing to seriously consider such challenges. The first of these seems quite likely to happen sooner or later, particularly in the case of an EU legislative proposal that has passed into law despite the subsidiarity-based objections of one or several national parliaments. However, the second occurrence is much less likely, given the ECJ’s reluctance to touch the issue. Imagine, for a moment, the circumstances: if the legislation in question were passed by the ordinary legislative procedure, this would presumably mean that the Commission, Council and EP had all broadly supported the measure – support which implies that all three have endorsed the measure’s compliance with subsidiarity. The ECJ would be accused of rampant judicial activism if it were to take the side of a disgruntled national parliament to, in effect, overrule the considered opinion of the three principal political institutions of the EU.<sup>30</sup> Historically, the ECJ has also been extremely reluctant to disapply an EU law for lacking a legal basis in the EU treaties, even though its authority to do so is unequivocal, and the legal principle at stake – that of conferral – is relatively clear. In the case of a subsidiarity-based challenge, both its authority and the principle at stake would be much more ambiguous.

This example raises a broader question that is central to this debate: under the rules of Protocol 2, who has final authority over the application of the principle of subsidiarity – political institutions or legal institutions? Within the EWM – by which I refer simply to the system of reasoned opinions, yellow cards, and orange cards – the application of the principle of subsidiarity is entirely in the hands

---

<sup>28</sup> It has previously been argued that national parliaments are now collectively in a position something like that of the EP in the 1980s, with influence in the legislative process of the EU but lacking a veto over the final outcome. I Cooper “A ‘Virtual Third Chamber’” (n 2) 448-449. From this perspective the first successful use of the yellow card, which prompted the withdrawal of the targeted Monti II Regulation, represents an “Isoglucose moment” for national parliaments, analogous to the first occasion when the EP succeeded in forcing the other EU institutions to consider its opinion. In fact, a closer historical analogue is the Benzene Directive of 1988, the first legislative proposal to fail in part due to opposition from the EP. I Cooper ‘A Yellow Card for the Striker,’ (n 10) 1420-1421, 1423n.

<sup>29</sup> K Granat *National Parliaments and the Policing of the Subsidiarity Principle* (n 15), 188. This author performs a systematic comparison of the national parliaments’ arrangements for ex post subsidiarity review, finding that “parliaments that are perceived as strong scrutinisers have been granted much more independence in the subsidiarity action.” (188)

<sup>30</sup> A Toth, ‘A Legal Analysis of Subsidiarity,’ in D O’Keeffe and P Twomey (eds), *Legal Issues of the Maastricht Treaty* (London, Chancery, 1994), 48.



of political institutions, although no single institution has final interpretive authority. In the first instance it is a dialogue – or more pointedly, an argument – between the Commission and the national parliaments: the institution proposing new legislation, almost always the Commission, must justify the proposal with respect to subsidiarity; national parliaments may respond with reasoned opinions challenging the Commission’s justifications; and the Commission must respond to national parliaments with further justifications of its position. In the case of a yellow card, the Commission must choose whether to maintain, amend, or withdraw the proposal; if it chooses to maintain or amend, the final decision on the proposal – also by implication a decision on its subsidiarity compliance – is in the hands of the Council and the EP. In the case of an orange card, if the Commission chooses to maintain the proposal, its fate then lies with the Council and the EP, either of which may immediately vote it down. In this way, the *ex ante* application of the subsidiarity principle is in the hands of political institutions. However, could it be said that a legal institution, the ECJ, has the ultimate say over the *ex post* application of subsidiarity, by virtue of its standing as the final interpretive authority of the EU treaties? Recall the example cited above. If the ECJ disagrees with the national parliament’s contention that the EU law in question violates subsidiarity, it would not, as a legal institution, be asserting its own interpretation of subsidiarity over that of a political institution, the national parliament. It would be more apt to say that the ECJ would be deferring to the interpretation of subsidiarity endorsed by the principal political institutions of the EU – the Commission, Council, and EP.

#### **IV. Should Subsidiarity and the EWM Entail a Political or Legal Mode of Reasoning?**

Whereas previous questions (legal scholars vs. political scientists, political vs. legal institutions) were something of a diversion, here I think we come to the heart of the matter regarding the nature of the subsidiarity review. Even if it is conceded that the EWM is a procedure that mostly or entirely involves political institutions, this still leaves open the question of whether it entails a form of reasoning that is essentially legal or political. How should the participants in the EWM approach the problem? Some have argued that national parliaments – which are, evidently, political institutions – must nonetheless act like legal institutions when they participate in the EWM. Kiiver has said that national parliaments in the EWM engage in “what can best be described as legal review”: they “...behave in a court-like manner, accepting or at least attempting to use subsidiarity as a legal principle.”<sup>31</sup> On the other hand, national parliaments could approach the EWM simply as an opportunity to influence policy and legislative outcomes at the EU level, as participants in a “virtual third chamber.”<sup>32</sup>

Here I will set aside certain procedural questions concerning the nature of the subsidiarity review, such as whether inadequate justification of a measure should itself be treated as a subsidiarity breach, or whether the parts of a legislative package should be considered separately or together. Rather, I wish to focus on the most important substantive questions that arise in the EWM. What is the nature of the subsidiarity norm? What is its relationship to the “adjacent” treaty principles of proportionality and conferral?<sup>33</sup> What is its relationship to the broader political principles of policy effectiveness and political expediency? And is it justifiable for national parliaments to raise these other issues in their reasoned opinions under the EWM?

---

<sup>31</sup> P Kiiver, *The Early-Warning System* (n 1), 76.

<sup>32</sup> I Cooper, ‘A “Virtual Third Chamber”’ (n 2).

<sup>33</sup> Kiiver refers to conferral and proportionality as principles that are “adjacent” to subsidiarity, and he argues convincingly that – even from a strictly legal point of view – it is justifiable for national parliaments to include them in their grounds for review under the EWM. P Kiiver, *The Early-Warning System* (n 1), 23, 97-100.

## *Subsidiarity*

First of all, what is the nature of the principle of subsidiarity? What is, as it were, its ontological status? This has been the subject of a great deal of philosophical rumination, as subsidiarity has origins in the social teachings of the Roman Catholic Church and deeper roots in European thought, extending back to Thomas Aquinas and even Aristotle.<sup>34</sup> But here we will focus on the concept as it is commonly used in the constitutional parlance and political practice of the EU – where it remains deeply contested. Perhaps the first question to ask is, is subsidiarity determinate? Is it possible to discover, with some degree of certainty (or at least confidence) exactly which potential actions of the EU are permitted or proscribed by subsidiarity? Some find it to be an endlessly malleable concept so open to interpretation that it could allow almost any course of action to be either prohibited or permitted (or even required). The opposing view is that subsidiarity, at least as it is defined in the EU treaties, is relatively straightforward and concrete. A middle view is that subsidiarity is “vague but not meaningless,” whose requirements are not self-evident but may be discovered and elaborated through a rational, analytical process (such as an impact assessment) or even through an interpretive and/or adversarial process, such as the EWM.

This leads to the question of whether the subsidiarity is a “legal” norm or something different – a “political” norm, for lack of a better term. This question also concerns its relationship to the adjacent principles of conferral and proportionality. It will be recalled that EU actions are governed by these three principles, first codified in the Maastricht Treaty. In theory the EU legislator is required to ask three consecutive questions before legislating: First (principle of *conferral*), does the EU have the legal power, conferred by the treaty, to take action in a given circumstance? Second (principle of *subsidiarity*), is EU action appropriate in this instance? Third (principle of *proportionality*), are the means chosen the least burdensome required to achieve the purpose? It is possible to view all three principles as similar in kind, as legal principles that demarcate, in progressively finer detail, the boundary that separates the EU’s field of competence from that of the member states.

Yet a different perspective is that the latter two principles are different in kind from the first: that even after it is determined that the EU has the power under the treaty to act, it is still subject to certain constraints concerning whether it should do so (subsidiarity) and, if so, to what extent (proportionality). Even if EU action is *legal*, it is not necessarily *appropriate*. The idea that the latter two principles are different from the first was underlined in the Lisbon Treaty, when it stated, “The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.” Subsidiarity and proportionality could be seen as together comprising a “norm of self-limiting governance” placing normative limits on the actions of the EU: in fields where competence is shared between the EU and the member states, the EU should only take action when necessary (subsidiarity); and in all fields, it should act in the least intrusive way (proportionality). In other words, the EU has some political discretion in the manner in which it uses its legal powers, and it ought to do so with self-restraint. Looked at in this way, the boundary separating the EU’s field of competence from that of the member states is not a precisely demarcated borderline but rather an indistinct *frontier* insofar as EU action may or may not be warranted under particular circumstances – indeed, the actions of the EU may expand and recede in response to changing circumstances.<sup>35</sup>

Arguably, the decision of whether and how to legislate involves a different kind of reasoning from the determination of whether a legal basis for such legislation exists. It involves political judgement to decide whether it is preferable for action to be taken at the EU level or left to the member states. If so,

---

<sup>34</sup> C Millon-Delsol *L'Etat subsidiaire* (Paris: Presses Universitaires de France, 1992).

<sup>35</sup> One section of the Subsidiarity Protocol to the Amsterdam Treaty says, “Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified.” (Art. 3)

then it is not only the case that the EWM chiefly involves political institutions, as pointed out above, but also that these should adopt a political form of reasoning within it. National parliamentarians need not think and act “in a court-like manner.” Rather, they need only think and act like legislators. If this analysis of subsidiarity is correct, it would also justify the ECJ’s reticence with respect to subsidiarity: its reluctance to police the principle may be read simply as deferring to the judgement of the EU’s political institutions as to how it should be interpreted and implemented.

Another question concerning subsidiarity is whether this principle can be separated from, or is inextricably linked to, related principles that are used as criteria by which to judge an EU legislative proposal, which are: proportionality, conferral, policy effectiveness, and political expediency. This is a philosophical question concerning the ontological status of subsidiarity, but it also has practical implications for the EWM. The European Commission insists that the EWM should be confined to the principle of subsidiarity, and that if national parliaments wish to raise objections on these other grounds they should do so through the Political Dialogue.<sup>36</sup> The position of at least some national parliaments, whether stated explicitly or implied in their reasoned opinions, is that it is legitimate to raise these other concerns because they are so closely related to subsidiarity that they are an intrinsic part of the review of a measure’s subsidiarity compliance. From this perspective, the correct understanding of subsidiarity is as a principle with a broad scope that to some extent encompasses these other concerns which become, by extension, elements of the review process under the EWM. However, each of the four above-mentioned criteria entails a somewhat different argument for its inclusion. Let us examine them one by one.

### ***Proportionality***

Proportionality is the “sister principle” to subsidiarity in EU law: the two are paired together in the Lisbon Treaty’s “Protocol (no. 2) on the Application of the Principles of Subsidiarity and Proportionality.” Indeed, the protocol stipulates that, “Each institution shall ensure constant respect for the principles of subsidiarity and proportionality” (Art. 1), and that, “Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality” (Art. 4). But when setting out the specifics of the EWM (Art. 6-7) and appeal before the ECJ (Art. 8), proportionality is excluded and subsidiarity is the sole principle at issue in the national parliaments’ reasoned opinions or any further action of the Commission, the EU legislator (Council and EP) or the ECJ.

There is a logic to this exclusion. In the simplest terms, the subsidiarity question is either/or: to claim that a legislative proposal violates subsidiarity is to allege, in effect, that no legislation is needed. By contrast, to claim a proportionality violation is to object to the proposal in its current form – as overly intrusive or burdensome – but at the same time to agree, in effect, that some legislation may be necessary. Confining the review to subsidiarity makes it easier to treat all reasoned opinions as equivalent, as votes against a legislative proposal to be tallied towards a yellow or an orange card. To include proportionality would turn the system into a dialogue, with national parliaments offering constructive criticism as to how the legislation should be improved.<sup>37</sup> By this logic, objections purely on proportionality grounds should be excluded from the EWM and made in the context of the Political Dialogue.

However, there are cracks in this logic. The protocol states that, when faced with a yellow card, the Commission (or other proposing body) must review the proposal, after which it has three options: it

---

<sup>36</sup> Procedurally, the Commission does not contest the substantive content of reasoned opinions when counting them as “votes” under the EWM. For example, even though it regarded many of the reasoned opinions in response to Monti II and EPPO as off-point, the Commission acknowledged that a yellow card had been passed in both cases. However, when giving a substantive response in the context of the EWM, it disregards those elements of national parliaments’ arguments that it considers to be not based on subsidiarity.

<sup>37</sup> I Cooper, ‘The Watchdogs of Subsidiarity’ (n 2) 300-302.

may decide “to maintain, amend or withdraw the draft” (Art. 7(2)). However, if national parliaments object purely on subsidiarity grounds – arguing that no legislation is needed – then surely the Commission should only have *two* options, either to maintain or withdraw, because the reasoned opinions would provide no guidance as to how to *amend* the proposal.<sup>38</sup> What this example suggests is that the distinction between subsidiarity and proportionality is not nearly so clear-cut. Indeed, some have noted that the treaty’s definition of subsidiarity also includes an element of proportionality, stating that, “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” (Art. 5(3) TEU, emphasis added).<sup>39</sup> Some national parliaments agree. The Swedish Riksdag’s Committee on the Constitution has stated that the above wording implies that subsidiarity control also includes aspects of proportionality; in a concrete example, the Riksdag’s Committee on Transport and Communications submitted a reasoned opinion on proportionality grounds, stating among other things that the proposal (on high-speed electronic communications networks) should have employed a less intrusive legislative instrument – a directive instead of a regulation.<sup>40</sup> However, the Commission maintains that such arguments are out of place in the EWM; such was its response, in the case of the second yellow card, to the French *Sénat* which had passed a reasoned opinion expressing approval for the creation of a European Public Prosecutor’s Office but questioning certain elements of the proposal.<sup>41</sup>

### **Conferral**

As noted above, the question of whether the EU has the legal power to take action is different in kind from whether such action is appropriate in a given circumstance: whereas conferral governs the “limits” of Union competences, subsidiarity (along with proportionality) governs their “use” (Art. 5(1) TEU). It has been argued that if a legislative proposal does not have a correct legal basis in the EU treaties then it also, by definition, violates the principle of subsidiarity; by extension, it is perfectly valid for a national parliament to allege a breach of the principle of conferral in a reasoned opinion under the EWM.<sup>42</sup> On the other hand, it may be argued that while national parliaments are well-equipped for the task of subsidiarity control, they do not have the expertise to assess the legal basis of a legislative proposal in comparison either to the ECJ or the EU’s political institutions.<sup>43</sup>

However, it is not always possible to draw a neat line separating the principles of conferral and subsidiarity. Many supposed that the introduction of subsidiarity into the EU treaty would lead to a wholesale reordering of competences between the EU and the member states. Indeed, the Laeken Declaration, which set out the mandate of the European Convention, seemed to conflate conferral and subsidiarity when it tasked the Convention to examine the role of national parliaments, asking among other things whether they should “...focus on the division of competence between Union and Member States, for example through preliminary checking of compliance with the principle of subsidiarity?”<sup>44</sup> Because most EU competences are shared with the member states, when the EU takes action in those areas it is to some extent staking out new territory along the frontier that separates the two spheres of competence. The fact is that many national parliaments review the legal basis of EU legislative

---

<sup>38</sup> I Cooper, ‘The Watchdogs of Subsidiarity’ (n 2) 301-302.

<sup>39</sup> P Kiiver, *The Early-Warning System* (n 1), 99-100.

<sup>40</sup> H Hegeland ‘The Swedish Parliament and EU Affairs: From Reluctant Player to Europeanized Actor’ in Heffler et al. *The Palgrave Handbook of National Parliaments and the European Union* (n 3) 434.

<sup>41</sup> Commission Communication of 27 November 2013, (COM (2013) 851 final) 5, 10. On the Commission response to the Swedish reasoned opinion on EPPO, see A Jonsson Cornell, this volume.

<sup>42</sup> P Kiiver, *The Early-Warning System* (n 1), 98.

<sup>43</sup> K Granat *National Parliaments and the Policing of the Subsidiarity Principle* (n 15) 88-90. F Fabbrini and K Granat ‘Yellow card, but no foul’ (n 4) 122-124.

<sup>44</sup> European Council, ‘Laeken Declaration on the Future of the Union,’ 15 December 2001.

proposals as part of their review under the EWM. On the other hand, the Commission "...has thus far never been materially influenced by the legal basis arguments raised by national parliaments."<sup>45</sup>

A concrete example demonstrates some of the difficulties of separating the review of a measure's subsidiarity compliance from that of its legal basis. The Monti II Regulation regarding the right to strike, the object of the first yellow card, received twelve reasoned opinions from national parliaments, with at least ten of them also raising objections concerning its legal basis.<sup>46</sup> The Commission had grounded the proposal in Article 352 TFEU, the "flexibility clause," which gives the EU the power to legislate if action "...should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers." The Commission justified its use of this "catch-all" provision on the grounds that even though the treaty does not empower the EU to pass legislation to regulate the right to strike – it is excluded from the relevant treaty article – the ECJ had decided that this right was nevertheless subject to EU law, and may be abridged if it conflicts with the economic freedoms of the internal market. When a proposal is based on Article 352, questions related to its compliance with the principles of conferral and subsidiarity respectively are difficult to disentangle. Whereas conferral concerns the *limits* of EU competences and subsidiarity concerns their *use*, this distinction breaks down when the flexibility clause is employed, because its *use* has the effect of redefining the *limits* of the legislative competence of the EU.

### ***Policy Effectiveness***

A broader question to be asked is whether it would be legitimate for national parliaments to use the EWM to object to EU legislative proposals on more explicitly political grounds. The principles of conferral and proportionality are "adjacent" to subsidiarity in the sense that the three of them appear together in Article 5 TEU as consecutive tests of the appropriateness of EU legislation; they are closely related to subsidiarity, even though observers disagree as to whether it is valid for national parliaments to invoke them in their reasoned opinions under the EWM. But all three of these principles could be construed as representing narrow, technical questions that are far removed from the primary concerns of national parliaments, i.e. the content of the proposal and its political implications. However, I believe it is too vague to put all "political" objections into a single, general category. Here let us make an important distinction between objections to an EU proposal based on doubts about whether it will achieve its stated objective (policy effectiveness) and objections based on the values and/or interests of the parliaments or parliamentarians concerned (political expediency).

Policy effectiveness is simply the principle that legislation should be designed to achieve its stated purposes. Far from being a legal or technical question, the policy effectiveness criterion is focused squarely on the substantive content of a proposal. Now, is this criterion a valid ground for a national parliament to submit a reasoned opinion under the EWM? An objection to a legislative proposal on these grounds would not primarily be about competence, but rather a claim that it is fundamentally misconceived or unworkable. In a way it would be similar to a proportionality objection, in that the parliament in question could agree with the policy ends that the measure is supposed to achieve, but disagree with the means chosen to achieve it; however, rather than claiming that the proposal is too burdensome or intrusive, the parliament would be saying that it is ill-designed. In an EWM with a narrow scope, such as is favoured by the Commission, such an objection would be out of bounds. Yet if one looks carefully at the relevant treaty provision it seems to require a legislative proposal must meet the test of policy effectiveness in order to be compliant with the principle of subsidiarity. After all, it is commonly interpreted as containing two separate tests, those of "insufficiency" and "comparative effectiveness":

---

<sup>45</sup> K Granat *National Parliaments and the Policing of the Subsidiarity Principle* (n 15) 262-263.

<sup>46</sup> K Granat *National Parliaments and the Policing of the Subsidiarity Principle* (n 15) 258-260.

Under the principle of subsidiarity, 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 (Article 5 (2) TEU).

These two tests, which are inter-related, stipulate that EU action should take place only when member state action is insufficient and the objectives of the proposed action can be “better achieved” at EU level. Needless to say, if a proposed EU action fails the test of policy effectiveness, then it also fails the “comparative effectiveness” test, and thus does not comply with the principle of subsidiarity.

But isn't almost any proposed EU action likely to be far more effective than a patchwork of member state laws? In response, let us look again at the case of the Monti II Regulation. One of the common complaints (among many) of the national parliaments in their reasoned opinions was that this proposal simply would not work. They said, in effect, that it was logically incoherent, and for this reason would not achieve the stated objective of the legislation, which was to “clarify” the law regarding the right to strike. To understand their point, we must delve into the substance of the proposal. The legislation was a response to ECJ decisions (*Viking*, *Laval*, and others) dealing with situations where labour unions had taken collective action targeting cross-border businesses – where, in other words, the right to strike was in conflict with internal market freedoms (the freedom of establishment and the freedom to provide services). The ECJ recognized the right to strike but declared that it was not absolute, and must give way to internal market freedoms in certain circumstances. The Commission intended to remedy the resulting legal uncertainty by regulating the right to strike with positive EU legislation, without fundamentally altering the legal status quo established by the ECJ decisions. And so the Commission proposed the Monti II Regulation, which included language (Article 2 of the proposal) intended to explain that the right to strike and internal market freedoms coexist, and that each “shall respect” the other:

The exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms.<sup>47</sup>

This Solomonic pronouncement – the crux of the Monti II proposal – recognizes that these two fundamental values coexist, implicitly in tension with one another, but it does not state which should take precedence over the other.<sup>48</sup>

The complaint of many national parliaments was in effect that the Monti II Regulation was misconceived, insofar as it would not achieve its stated objective of clarifying the relationship between the right to strike and the economic freedoms of the internal market. The Danish *Folketing* stated that the provision “does not provide further clarity”<sup>49</sup> regarding the relationship between these two principles, a sentiment echoed later in the reasoned opinion of the Dutch *Tweede Kamer*.<sup>50</sup> The Luxembourg *Chambre des Députés* remarked that in Article 2, “the two general principles seem to

---

<sup>47</sup> Commission, ‘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,’ 27 March 2012 (COM/2012/0130) 18.

<sup>48</sup> A spirited defense of the Monti II proposal is put forward by anonymous authors, writing pseudonymously as “The Adoptive Parents,” who were involved in its drafting. The Adoptive Parents, ‘The Life of a Death Foretold: The Proposal for a Monti II Regulation,’ in *Viking, Laval and Beyond*, Mark Freedland and Jeremias Prassl, eds. (Oxford, Hart Publishing, 2014), pp.95-109.

<sup>49</sup> Reasoned Opinion of the *Folketing*, 3 May 2012, 1. All the reasoned opinions of national parliaments on Monti II can be accessed from the relevant page on the IPEX website: << <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20120130.do>>> (accessed 15 November 2015).

<sup>50</sup> Reasoned Opinion of the *Tweede Kamer*, 22 May 2012, 1.

neutralize each other.”<sup>51</sup> The Latvian *Saiema* noted that the text is “not unmistakably clear and definite,” citing Article 2 as an example.<sup>52</sup> The Maltese Parliament wrote: “The Regulation does not clarify.”<sup>53</sup> Some parliaments explicitly connect subsidiarity with policy effectiveness, making clear that the measure fails the subsidiarity test *precisely because* it would not achieve its stated goal: for example, the Finnish *Eduskunta*’s reasoned opinion stated that the proposal

fails, in its current wording to meet its goal of clarifying the current legal situation (the Laval and Viking Line cases). Consequently, the proposal is contrary to the principle of subsidiarity and proportionality.<sup>54</sup>

Probably the most cogent critique along these lines came from the Swedish Riksdag. The reasoned opinion is worth quoting at length:

The key provision of the proposal is Article 2 that basically states that the exercise of economic freedoms should be consistent with the exercise of the right to collective action, including the right to strike, and vice versa. The Riksdag has difficulty seeing how the proposal, in its current state, contributes to the clarification of the relationship between liberties and rights that is the proposal’s purpose according to the explanatory memorandum. The Riksdag cannot see either that the regulation would create greater legal certainty in this regard. Nor can the Riksdag see how the proposal would be “reducing tensions between the national industrial relation systems and the freedom to provide services” which is stated as essentially the basis of the proposal. It is thus difficult to see how the proposal could help achieve any of the objectives referred to in the Treaty, which is a prerequisite for the flexibility clause to be used.<sup>55</sup>

The Riksdag focused on the “policy effectiveness” criterion as it is implicit in Article 352 (the flexibility clause), but its reasoning could just as easily be applied to the test of comparative effectiveness in Article 5 (2) TEU.

It should be emphasized that an objection on the basis of the policy effectiveness is different both from an objection on principle to any EU action, and from a purely political objection that the proposal runs against the interests and/or values of the parliament involved.<sup>56</sup> Many on the left would have preferred that instead of attempting to balance the right to strike with the economic freedoms, the legislation should simply have asserted that the first takes precedence over the second; certainly, such a formulation would reflect the political preferences of some parliamentary chambers, but it also would also be more likely to clarify the legal situation, which would make for more coherent legislation that would be, by extension, compliant with subsidiarity. This seems to have been the position of the French *Sénat*, which stated in its reasoned opinion that in order to make the proposal comply with subsidiarity, Article 2 should be redrafted to state *only* that the exercise of the freedom of establishment and the freedom to provide services respect the fundamental right to collective action, including the right to strike.<sup>57</sup> However, even if the proposal were redrafted in this way its

---

<sup>51</sup> Reasoned Opinion of the Luxembourg *Chambre des Députés*, 15 May 2012, 1.

<sup>52</sup> Reasoned Opinion of the Latvian *Saiema*, 18 May 2012, 3.

<sup>53</sup> Reasoned Opinion of the Maltese Parliament, 22 May 2012, 6.

<sup>54</sup> Reasoned Opinion of the Finnish *Eduskunta*, 15 May 2012, 1.

<sup>55</sup> Reasoned Opinion of the Swedish *Riksdag*, 11 May 2012, 2.

<sup>56</sup> Fundamentally, the question of policy effectiveness is an empirical question, even if it is laden with normative concerns; in this, it is distinct from the wholly normative question of whether a particular policy outcome is desirable or morally worthy. This was noted in a previous work, which stated that the EWM “...would in part be an argument about the empirical nature of the world, concerned with objective facts (are the actions of the Member States in a particular area insufficient?) and with cause-and-effect relationships (will the proposed EU action actually achieve its intended purpose?).” I Cooper, ‘The Watchdogs of Subsidiarity’ (n 2) 298.

<sup>57</sup> Reasoned Opinion of the French *Sénat*, 22 May 2012, 3. The original text reads as follows: “Pour être conforme au principe de subsidiarité, l’article 2 devrait être rédigé de la façon suivante: « L’exercice de la liberté d’établissement et de la libre prestation des services énoncées par le traité respecte le droit fondamental de mener des actions collectives, y compris le droit ou la liberté de faire grève. »”

effectiveness would still be uncertain, because ordinary legislation cannot necessarily overturn the decisions in *Viking* and *Laval* which were based on the ECJ's interpretations of the relevant provisions of the EU treaties. For this reason, the European Trades Union Congress actually proposed changing the EU treaties to add a Social Progress Protocol stating clearly that the right to strike takes precedence over the economic freedoms.<sup>58</sup> Of course, this would involve a far more burdensome legal instrument than *Monti II*, a treaty amendment rather than a regulation, and thus would tend in the opposite direction from the principle of proportionality. Even so, such a proposal would arguably be more likely to meet the test of policy effectiveness insofar as it would bring clarity to the relationship between the right to strike and the economic freedoms.

### ***Political Expediency***

There is yet one more general reason that a national parliament might use the EWM to raise objections to an EU legislative proposal – if it is judged to contravene the values and/or interests of a majority of its members. Theoretically, such an argument could be “purely political,” entirely separate from the principles of conferral, proportionality, and even policy effectiveness. Let us suppose, for the sake of argument, that a national parliament agreed that the EU had the legal power to take action in a given area (conferral), that the proposal in question was proportionate to the ends sought (proportionality) and likely to achieve its stated goal (policy effectiveness), but still objected to it on ideological grounds and/or because it ran against the interests of an important constituency, however defined. In such a case, the parliament could even agree that some EU action is indeed necessary (thus passing the subsidiarity test, narrowly defined) but disagree with the particular course of action chosen. In such circumstances the parliament could be inclined to use the EWM simply as a political tool with which to oppose the measure. Of course, the Commission's view is that such opposition should instead be channelled through the Political Dialogue. But the parliament may prefer to use the EWM after observing that the Commission is more likely to take their concerns seriously if they are put formally in a reasoned opinion rather than a contribution to the Political Dialogue. Certainly, in the case of a yellow card the Commission is legally required to respond to national parliaments' concerns, though not necessarily to accede to them. Now, would it be illegitimate for a national parliament to “knowingly” object to an EU legislative proposal on purely political grounds – under, as it were, false pretenses?

Even if it seems to violate the letter of the EU treaties, a purely political approach to the EWM is defensible – certainly on pragmatic grounds, but also even on the grounds of democratic legitimacy. Pragmatically, national parliaments might justify their actions by noting that they are only doing their job to the best of their ability by making use every tool at their disposal, in defense of the values and/or interests of their constituents. They might also argue, also pragmatically, that they should make maximal use of the limited powers bestowed on them by the EU treaties; this has been, in effect, the strategy of the European Parliament over decades, allowing it to parlay its initially limited powers into significant influence – and, eventually, much more substantial powers. Furthermore, they could argue that the democratic legitimacy of the EU is enhanced by the increased involvement of national parliaments in its legislative process via the EWM; this, again, is similar to the arguments made historically in order to justify the European Parliament's use of its powers to the maximum. After all, a large part of the rationale for giving national parliaments a direct role in EU politics was that this would somehow reduce the democratic deficit. The design of the EWM was, at the very least, ambiguous as to whether its main purpose was to improve the democratic legitimacy of the EU or the subsidiarity compliance of EU legislation.<sup>59</sup> By these standards a national parliament would be justified even in a willful misuse of the EWM to achieve purely political goals.

---

<sup>58</sup> Commission, ‘Proposal for a Council Regulation’ (n 47) 5, 7.

<sup>59</sup> I Cooper, ‘The Watchdogs of Subsidiarity’ (n 2).



Yet in practice it is difficult to separate purely politically-motivated objections to a proposal from those based on a sincere belief that does not comply with the principle of subsidiarity. If a national parliament is convinced that a proposal is truly odious, contravening the core values or interests of its constituents, then it will be loath to accept that it passes the test of “necessity” and is consequently subsidiarity-compliant. It is difficult to identify empirical cases where it can be said with certainty that a parliamentary chamber adopted a reasoned opinion for purely political motives, merely using subsidiarity as a pretext. This is even true in cases where it seems obvious to some commentators that the legislative proposal at issue unquestionably complies with subsidiarity. The subsidiarity-compliance of the Monti II Regulation was taken as self-evident by the Commission – which initially declined even to respond individually to the arguments of national parliaments – and other observers, because it dealt with cross-border issues that could only be regulated at the EU-level.<sup>60</sup> Similarly, the proposal to create the EPPO was thought by many to easily pass the subsidiarity test, given that this body – whose creation is clearly authorized by the treaty – must by definition be an EU-level entity. If these proposals are taken to be self-evidently subsidiarity compliant then the implication is the actions of national parliaments in passing reasoned opinions is brazenly political, and in effect a misuse of the EWM. Yet in both these cases many national parliaments at least managed to muster cogent arguments to make the case that they in fact ran afoul of subsidiarity.

What this section has shown is that the ontological status of subsidiarity remains contested, and this has practical effects for the EWM. National parliaments often disagree with the Commission (and among themselves) as to how to define subsidiarity, both in itself and in its relationship to a number of related principles. National parliaments have at various times used these other principles – proportionality, conferral, policy effectiveness, and political expediency – as a basis for their objections to EU proposals in their reasoned opinions. It is important to acknowledge that justifications may be found both for a narrow EWM focused strictly on subsidiarity, and for a broad EWM that also may include these other principles. However, even within the latter “broad” approach it is also important to distinguish between a position maintaining that subsidiarity as a concept is so flexible that it is essentially meaningless, and one in which subsidiarity is still a useful concept in that it is “vague but not meaningless.” In the first of these, the distinction between subsidiarity and these other principles collapses, so that an objection on subsidiarity grounds is effectively indistinguishable from an objection on the grounds of political expediency. In the second, subsidiarity is still a distinct principle, while it overlaps with the principles of proportionality, conferral and policy effectiveness (but not political expediency). Looked at in this way, we may discern three approaches to the EWM based on whether one conceives of subsidiarity as definite, elastic or ambiguous.

## **V. Three Approaches to the EWM: Legal Rule-Following, Political Bargaining, and Policy Arguing**

The forgoing analysis has brought to the fore many of the complex questions that are subsumed within the debate over whether the EWM is fundamentally a legal or a political procedure. In the remaining pages I will build upon the previous analysis in order to construct my own typology of approaches to the EWM. I posit that rather than there being merely two approaches, legal and political, it is more useful to conceive of three, one “legal” approach and two different “political” approaches. This builds on an analysis that was published a decade ago, based on the version of the EWM in the Constitutional Treaty, years before it was strengthened (with the addition of the orange card) in the Treaty of Lisbon and finally put into practice; that analysis speculated that if and when the EWM came into force, it could take shape either as a system in which national parliaments merely use it as a tool to oppose legislative proposals that they dislike (now referred to as “political bargaining”), or a system in which national parliaments engage in a constructive argument with the Commission over when and how the

---

<sup>60</sup> See the letter from Commissioner Maroš Šefčovič to national parliaments, 12 September 2012. The Adoptive Parents, ‘The Life of a Death Foretold’ (n 48). F Fabbrini and K Granat ‘Yellow card, but no foul’ (n 4).

EU should legislate (now referred to as “policy arguing”).<sup>61</sup> Now that the EWM has come into operation, these two approaches (both of which are broadly “political”) may be glimpsed in the actions of some of the parliamentary chambers participating in the EWM. Yet there is also a third, broadly “legal” approach, approved most notably by the Commission and certain other parliamentary chambers, in which the participants set out to ascertain how subsidiarity should be applied in a given circumstance, and then put it into practice (which I will call “legal rule-following”). Each of these three approaches depends on its own particular understanding of subsidiarity. Looking back, what is perhaps most surprising is that even after five years of being in operation, the EWM has still not “taken shape” as one type of system or another, as there remains profound disagreement among the participants as to its nature and purpose. What follows is an attempt to map out this disagreement.

Some points of clarification should be made before describing this three-way typology in detail. First, the use of the term “approaches” may imply that I am aiming to categorize the varying parliamentary chambers according to their actions in the EWM. Yet, strictly speaking, these three are not traits or attitudes that inhere in individual actors; rather, they are modes of interaction, and are inherently social. This typology is based on a theory developed by Thomas Risse<sup>62</sup> in which there are three logics of social action governing different social situations, each of which involves a different form of rationality, leading to the adoption of a different kind of behaviour: the logic of appropriateness (normative rationality, rule-following behaviour), the logic of consequences (instrumental rationality, bargaining behaviour) and the logic of arguing (argumentative rationality, arguing behaviour).<sup>63</sup> These are ideal types, and any real-life social situation will involve a mixture of these three logics and their concomitant forms of rationality and behaviour. This is also true of the three approaches to be outlined here, each of which may be glimpsed at various times in the real-life interaction of the participants in the EWM. Indeed, this is a large part of the problem why, even after five years, there is still no consensus on how the participants in the EWM should conduct themselves or what they should expect it to accomplish. The reason that confusion continues to reign in the EWM is that the participants do not agree on what kind of interaction it is, and what social rules should apply.

The three approaches – legal rule-following, political bargaining, and policy arguing – are sketched out here (see Table 1). Each approach entails a different understanding of the principle of subsidiarity, its relationship to other related principles and its normative implications. The differing interpretations of subsidiarity have practical consequences for how national parliaments interact with the Commission and with one another. While I will not attempt to categorize all national parliamentary chambers according to the three approaches, I will give examples of EWM participants that come closest to each of them.

---

<sup>61</sup> I Cooper, ‘The Watchdogs of Subsidiarity’ (n 2).

<sup>62</sup> T. Risse 2000 Risse, T. ‘Let’s Argue! Communicative Action in World Politics.’ (2000) *International Organization*, Vol. 54, No. 1, pp. 1–39.

<sup>63</sup> My previous work predicted that the EWM would be a contest between the logic of consequences and the logic of arguing; it treated the logic of appropriateness as a “background condition” rather than a separate approach in its own right. I Cooper, ‘The Watchdogs of Subsidiarity’ (n 2) 297. Here all three are presented as equally plausible social logics for the EWM.

**Table 1. Three Approaches to the EWM**

	<b>Legal Rule-Following</b>	<b>Political Bargaining</b>	<b>Policy Arguing</b>
<i>Logic of Social Action</i>	Logic of Appropriateness	Logic of Consequences	Logic of Arguing
<i>How clear are substantive requirements of subsidiarity?</i>	Definite: Self-evident, or determinable through process of consultation, impact assessment	Elastic: Very unclear – Open to multiple, competing interpretations	Ambiguous: Somewhat unclear – may be clarified through the process of EWM itself
<i>Subsidiarity vis-à-vis Related Principles?</i>	Separate: (Other Concerns Raised in Political Dialogue)	Continuous (including with Political Expediency)	Overlapping (with Conferral, Proportionality, Policy Effectiveness)
<i>National parliaments see Commission as...</i>	Partner	Adversary	Interlocutor
<i>Relationship among national parliaments</i>	Disregarding	Coalition-building	Persuading
<i>Ideal Result of NPs' Intervention</i>	Intervene to Prevent Manifest Errors	Become Veto-Players on Salient Issues	Reshape Proposals, Improve Public Policy
<i>Exemplary Actors</i>	Commission, Finnish <i>Eduskunta</i>	Danish <i>Folketing</i> , Dutch <i>Tweede Kamer</i>	Swedish <i>Riksdag</i> , UK House of Commons

### ***Legal Rule-Following***

In the first approach, subsidiarity is a (quasi-) legal rule, and the purpose of the EWM is to enable the EU to legislate in a manner that complies with it. The practical requirements of subsidiarity for EU legislation are definite: if they are not self-evident, they are at least determinable, in the sense that they may be discovered through a rational process – such as the Commission’s elaborate systems of consultation and impact assessment. Subsidiarity is also clearly separable from the related principles of conferral, proportionality, policy effectiveness and political expediency. As a result national parliaments can and should narrow the substantive focus of the EWM to subsidiarity only; if they wish to raise objections to an EU proposal based on these other principles, they must do so through the Political Dialogue, or address their concerns to their respective governments who act as the representatives of the member states in the Council. Because subsidiarity is a narrowly-defined principle, and the Commission has internal expertise in determining its requirements, in practice it will be a rare occurrence for there to be an EU legislative proposal that violates it. Therefore, the EWM should in practice be seldom used, activated only on those rare occasions where the Commission has made a manifest error in its reasoning with respect to subsidiarity. On those occasions, the national parliaments can use their reasoned opinions to helpfully point out the error to the Commission, acting much like a Council of State, using the EWM much like a legal *ex ante* check on the constitutionality of a legislative proposal. In doing so, each national parliament will in general focus on the legislative proposal and its dialogue with the Commission – which it will view more as a partner than an adversary – and disregard the opinions of other national parliaments.<sup>64</sup> In this approach, national parliaments act solely in an individual capacity and do not form a collective. They are nothing but a

<sup>64</sup> The EP seems be of a similar opinion: its Constitutional Committee (AFCO) expressed the view that “the control of subsidiarity was not a collective exercise, but an individual one of every Parliament/Chamber.” COSAC Twenty-second Biannual Report, 4 November 2014, 38.

“phantom collective,” and if a yellow card occurs it will not be the result of interparliamentary coordination but merely “a coincidental sum of unrelated events.”<sup>65</sup>

It seems clear that this is the approach to the EWM favoured by the Commission. The Commission has consistently favoured an EWM focused solely on subsidiarity, narrowly defined. To this end, the Commission has, within the EWM context, been dismissive of objections raised by national parliaments in their reasoned opinions that are not, in the Commission’s eyes, strictly subsidiarity-related. Are there also some national parliamentary chambers that favour such an approach? For many chambers, it is difficult to say: whereas a great number of them only rarely pass a reasoned opinion to raise objections to an EU legislative proposal, such inactivity may simply reflect a lack of capacity to intervene rather than a sincere belief that all such proposals are subsidiarity-compliant. However, some parliamentary chambers have shown that they have the capacity to act but do not do so. One example is the Finnish *Eduskunta*, which is consistently ranked as among the “strongest” parliaments in the EU; however, the *Eduskunta* is primarily focused on controlling the Finnish government’s position on EU affairs, and it generally refrains from participating in the EWM and other forms of interparliamentary cooperation. Moreover, it adheres to a narrow interpretation of subsidiarity and rejects the use of the EWM as a means to voice political opposition to EU proposals.<sup>66</sup> This means, in effect, that the *Eduskunta* supports the “legal rule-following” approach to the EWM. This could also be said of those chambers that most actively participate in the Political Dialogue, such as the Portuguese parliament<sup>67</sup> and the Italian *Senato*,<sup>68</sup> but rarely pass reasoned opinions under the EWM. These chambers obviously have the capacity to communicate their views to the Commission, but they choose to act informally through the Political Dialogue rather than through the EWM, thus implicitly recognizing the boundary between the principle of subsidiarity and other principles which may be construed as “related” under the EWM.

### **Political Bargaining**

In the second approach, subsidiarity is an elastic concept with no fixed meaning. In practical terms, it can be employed to justify almost any position in favour of or in opposition to EU action in a given circumstance. This means that it is not possible to differentiate between subsidiarity and the related principles of conferral, proportionality, and policy effectiveness. Moreover, a reasoned opinion raising subsidiarity objections will be indistinguishable from one that is based on political expediency alone. In other words, national parliaments will simply adopt reasoned opinions in response to EU legislative proposals that they oppose for political reasons, using subsidiarity as a pretext. National parliaments will prefer to use the EWM rather than the Political Dialogue because it offers them greater leverage in the EU’s legislative process, and the division between the two channels of communication with the Commission relies on a meaningless distinction between subsidiarity and other concerns. National parliaments will tend to see the Commission as an adversary. Also, they will be intensely interested in what is going on in other parliamentary chambers, counting votes under the EWM. In the case of a proposal they find objectionable, they will seek to build a coalition of chambers in opposition, with the aim of gathering enough votes under the EWM to achieve a yellow card or an orange card. In such cases the national parliaments would most closely resemble a “virtual third chamber” in which they

---

<sup>65</sup> P Kiiver, *The National Parliaments in the European Union: A Critical View on EU Constitution-Building*, (The Hague: Kluwer Law International, 2006) 162, 164.

<sup>66</sup> T Raunio, ‘The Finnish Eduskunta and EU: The Strengths and Weaknesses of a Mandating System,’ in Heffler et al. *The Palgrave Handbook of National Parliaments and the European Union* (n 3) 416.

<sup>67</sup> D Jančić, ‘The Portuguese Parliament and EU Affairs: From Inert to Agile Democratic Control,’ in Heffler et al. *The Palgrave Handbook of National Parliaments and the European Union* (n 3) 379-380.

<sup>68</sup> S Cavatorto, ‘Italy: Still Looking for a New Era in the Making of EU Policy’ in Heffler et al. *The Palgrave Handbook of National Parliaments and the European Union* (n 3) 222-223. See also the chapter by N Lupo, this volume.

seek to maximize their legislative leverage on salient issues, making them a collective “veto-player” – or something close to it – in the EU’s legislative process.

While no national parliamentary chambers perfectly exemplify this approach to the EWM, two that come close are the Danish *Folketing* and the Dutch *Tweede Kamer*. Both of these parliaments take an explicitly political approach to the EWM and both have at times acted strategically to rally other national parliaments to oppose a legislative measure with the specific goal of achieving a yellow card.<sup>69</sup> While the Danish parliament is not one of the most active participants in the EWM – the number of reasoned opinions it passes is actually close to the average – the *Folketing* was the first chamber to pass one in opposition to the Monti II Regulation, and after that it deliberately set out to persuade other parliaments to do the same, raising the issue with them at an interparliamentary meeting that took place in Copenhagen during the eight-week review period.<sup>70</sup> Similarly, the *Tweede Kamer* tried to persuade other national parliaments to oppose the proposal for the creation of the EPPO, raising the issue with them at an unrelated interparliamentary meeting that took place in Vilnius during the eight-week review period.<sup>71</sup>

However, even some parliaments or chambers that only rarely participate in the EWM may also adopt this approach. Many may participate only selectively because they have decided that such a course of action is in their political interest. They may calculate that in most cases, even if they find a EU legislative proposal objectionable, it is not worth their time to pass a reasoned opinion because a yellow card is highly improbable. Yet on those rare occasions when the level of opposition reaches the point that a yellow card is within reach, they may judge it worthwhile to pass a reasoned opinion in the last stages of the process. An example of this kind of approach may be found in the actions of certain parliaments in the case of the Monti II yellow card. A detailed reconstruction of the timing and sequence of the various reasoned opinions in that case revealed an interesting pattern. Relatively early in the eight week review period, most of the parliaments/chambers that made a political decision to pass a reasoned opinion were those that had most frequently done so in the past. However, most of the reasoned opinions which came in the final week before the deadline – and which proved decisive in providing the necessary votes to reach the yellow card threshold – were passed by parliaments/chambers that had hitherto rarely or never passed a reasoned opinion under the EWM.<sup>72</sup> This “bandwagoning” occurred only at the point when it became apparent that the “vote count” was nearing the threshold for a yellow card, and that the participation of the additional parliaments/chambers would indeed make a difference. The pattern revealed in this episode accords with the more general finding that, on the whole, any given parliament or chamber is more likely to pass a reasoned opinion objecting to a proposal if many others have already done so,<sup>73</sup> reflecting its increased incentive due to the prospect of a successful outcome, i.e. a yellow card. This dynamic shows that even among the majority of parliaments/chambers that have seldom passed reasoned opinions, there may be many adherents of the political bargaining approach.

### ***Policy Arguing***

The third approach occupies a middle ground between the other two regarding the norm of subsidiarity. In this approach subsidiarity is neither definite nor elastic, but rather ambiguous. As a concept it is vague but it is not meaningless, and it can prove useful in critically analysing a

---

<sup>69</sup> Another chamber that has at times actively encouraged other parliaments to take part in the EWM is the Czech Senate. M Hrabálek and A Strelkov, ‘The Czech Parliament and European Integration,’ in Hefftlér et al. *The Palgrave Handbook of National Parliaments and the European Union* (n 3) 501-503.

<sup>70</sup> I Cooper, ‘A Yellow Card for the Striker’ (n 10) 1411-1414.

<sup>71</sup> I Cooper, ‘A Yellow Card for the Striker’ (n 10) 1423n.

<sup>72</sup> I Cooper, ‘A Yellow Card for the Striker’ (n 10) 1414-1417.

<sup>73</sup> K Gattermann and C Hefftlér ‘Beyond Institutional Capacity’ (n 13) 322.

prospective action of the EU. A similar point may be made concerning subsidiarity's relationship to other, related, principles: it is neither neatly separable nor indistinguishable from them; rather, it remains a distinct concept, but it overlaps heavily with the related principles of conferral, proportionality and policy effectiveness. As a result, according to this approach (and unlike the legal rule-following approach) it is legitimate for a national parliament to raise, within the EWM itself, objections to an EU legislative proposal on the basis of these other concerns when they are closely related to subsidiarity concerns; such objections need not be relegated to the Political Dialogue. However (unlike the political bargaining approach), objections based purely on political expediency should be excluded from the EWM, although objections that are more broadly "political" will often be included. According to this approach, the role of national parliaments is to put forward arguments to fundamentally challenge the justifications put forward by the Commission (or other proposing body) that a given EU legislative proposal is indeed necessary and appropriate, and thereby subsidiarity compliant. The Commission is neither a partner nor an adversary, but rather an *interlocutor* in an argument over whether (subsidiarity) and how (proportionality) the EU should legislate in a given circumstance. National parliaments are not indifferent to one another's positions, but they are less concerned with building a coalition of like-minded chambers to pass a yellow or orange card than with persuading their peers to add their voices of to the argument with the Commission over whether the proposed legislation is appropriate in a given circumstance. In order for the argument to be constructive, each side would need to listen to the other and be open to persuasion. Ideally, the involvement of national parliaments would result in the reshaping of legislative proposals in a way that improves public policy. If the EWM were to develop along these lines it would also resemble a "virtual third chamber," but one in which the principal activity is policy deliberation rather than legislative bargaining.

The Swedish *Riksdag* is the parliamentary chamber that best exemplifies this approach;<sup>74</sup> the UK House of Commons is another possible example.<sup>75</sup> The *Riksdag* has produced by far the greatest number of reasoned opinions among the national parliaments of the EU. This reflects, in part, peculiarities of its internal arrangements.<sup>76</sup> In the *Riksdag*, responsibility for vetting EU legislative proposals and drafting reasoned opinions lies not with its European Affairs Committee but with fifteen sectoral committees, which means that the workload is shared out and their policy expertise is brought to bear; moreover, MPs examine every legislative proposal without preselection by parliamentary administrators. The *Riksdag* also feels free to raise objections within the EWM on other grounds than (narrowly-defined) subsidiarity, such as conferral, proportionality, or (as argued above in the case of Monti II) policy effectiveness. The *Riksdag* does not raise these other issues in the Political Dialogue, in part because, according to its own internal rules of procedure, any opinions pertaining to EU legislative files must be channelled through the EWM. But although it is very active in passing reasoned opinions under the EWM, the *Riksdag* is less inclined than some other parliaments – such as the *Folketing* or the *Tweede Kamer* – to reach out to other parliaments to try and build a coalition to achieve a yellow or orange card.<sup>77</sup>

---

<sup>74</sup> See A Jonsson Cornell, 'The Swedish Riksdag as Scrutinizer of the Principle of Subsidiarity,' (forthcoming 2016) *European Constitutional Law Review*.

<sup>75</sup> The House of Commons "...is primarily concerned with the legal aspects of the subsidiarity control mechanism, in contrast to some parliaments which appear to use the EWM to highlight legislation they do not like or which breaches proportionality, something that is not covered by Lisbon. The House of Lords, given the policy-oriented structure of its Sub-Committee system, takes a more longitudinal interest in the overall direction of EU policy." A Huff and J Smith, 'Westminster and the European Union – Ever Increasing Scepticism?' in Heffler et al. *The Palgrave Handbook of National Parliaments and the European Union* (n 3) 323. See also the chapter by A Cygan, this volume.

<sup>76</sup> H Hegeland 'The Swedish Parliament and EU Affairs,' (n 40) 432-436.

<sup>77</sup> I Cooper, 'The Nordic parliaments and the EU,' (n 18).

## **VI. Conclusion: It Takes Two to Tango**

Even after it has been in operation for five years, the EWM remains an essentially contested procedure: the participants – mainly national parliaments and the Commission – do not agree over its nature and purpose. The EWM does not yet have a settled “social logic.” While the disagreement is often described as a debate between a legal and a political interpretation, it has been argued here that there are fundamentally three different approaches to the EWM, one legal (legal rule-following) and two political (political bargaining, policy arguing). Each of these approaches relies on its own understanding of the nature of subsidiarity and its relationship to associated principles, and of the relationship of national parliaments with the Commission and with one another. While these three potential social logics of the EWM are ideal types, certain participants may be identified as exemplars of each of the approaches. The Commission, in particular, exemplifies the legal rule-following approach, insofar as it insists that the EWM should be focused solely on the principle of subsidiarity, narrowly defined, and that any other concerns should be channelled through the Political Dialogue. And while the Commission has generally been *procedurally* responsive to the concerns of national parliaments – responding individually, in writing, to each opinion – it rarely or never concedes any *substantive* point regarding subsidiarity. This is illustrated by the Commission response to the two yellow cards under the EWM. In the first case, the Commission withdrew the Monti II Regulation, but it insisted that the reason was not the concerns of national parliaments about subsidiarity but rather the lack of political support in the Council and the EP.<sup>78</sup> In the second case, the Commission maintained the EPPO proposal unchanged, dismissing as outside the scope of the EWM the concerns raised by national parliaments that were not based on a narrow definition of subsidiarity. In both cases the yellow card left the Commission seemingly unshaken in its conviction that its own interpretation of subsidiarity was essentially correct.

The second approach, that of political bargaining, is exemplified by those parliaments – such as the Danish *Folketing* and the Dutch *Tweede Kamer* – which promote the use of the EWM as a political tool that national parliaments can use to enhance their influence in EU affairs. These chambers may even seek the achievement of a yellow card as an end in itself, independently of the substance of the proposal at hand, as a demonstration that the system works.<sup>79</sup> Such a strategy may be read as a reasonable response to the Commission’s position: if a national parliament perceives that the Commission is unwilling to entertain any opposing arguments regarding subsidiarity, then it may decide that its most effective move is to pass a reasoned opinion under the EWM, which (unlike the Political Dialogue) legally obliges the Commission at least to respond to their concerns, if not to accede to them.

In the third approach, national parliaments raise thoughtful objections to EU legislative proposals with the intention of instigating a constructive argument with the Commission over whether and how the EU should legislate. A decade ago this author thought, perhaps in an idealistic flight of fancy, that this would be the best possible outcome of the EWM: it would result in improved public policy and more subsidiarity-compliant EU legislation.<sup>80</sup> Some parliamentary chambers, most notably the Swedish Riksdag, participate in the EWM in a way that suggests they seek such an argument with the Commission. However, such a constructive argument has not come about for the simple reason that the Commission has not been willing to engage in one. The problem, in short, is that it takes two to tango.

---

<sup>78</sup> I Cooper, ‘A Yellow Card for the Striker’ (n 10) 1420.

<sup>79</sup> Prior to the first yellow card, an EU expert at the *Tweede Kamer* told an interviewer, “we want to be a pioneer in the issuance of a yellow card. It does not really matter what topic. It is just to test the system, how it works and what the Commission does.” A-L Högenauer, ‘The Dutch Parliament and EU Affairs’ (n 20) 262.

<sup>80</sup> I Cooper, ‘The Watchdogs of Subsidiarity’ (n 2).

More recently, there has been some indication that the Commission may be willing to consider changing its approach towards national parliaments, subsidiarity and the EWM. The number of reasoned opinions from national parliaments grew steadily year-on-year between 2010-2013, but then fell sharply in 2014.<sup>81</sup> This reflected in part a diminishment in the overall number of new legislative proposals in 2014, due to the EP elections and the anticipated installation of the new Commission. But it also reflected the fact that the new Commission promised increased respect for subsidiarity and far fewer new legislative proposals than what was previously the norm. If this continues, the reduced output of EU legislative proposals will likely mean that there will be fewer reasoned opinions from national parliaments. In addition, the new Commission included for the first time the position of a “First Vice-President” whose role, in part, is to act as a legislative gate-keeper, responsible for the application of subsidiarity. One month after taking office, this First Vice-President, Franz Timmermans – who is also responsible for inter-institutional relations, including relations with national parliaments – spoke at the COSAC meeting in Rome, saying the following:

I think that the Commission should be more proactive in coming to national parliaments whenever there is an issue that is of importance related to Europe in national parliaments. If national parliaments take the trouble to scrutinize European proposals, and they then flag a yellow card, the Commission should respond. ... And it should not respond along bureaucratic lines, it should respond in a political way. Because we all know that sometimes a yellow card is raised because there is a problem with subsidiarity or proportionality, and sometimes a yellow card is raised because there is more a problem with the content of a proposal. And then to dismiss that on procedural grounds I think is not the attitude the Commission should take. We should engage and explain in the national parliaments why we have decided to take a certain initiative. We should take on board the criticism formulated in national parliaments.<sup>82</sup>

These remarks, which signal an openness to a more political approach to the EWM, were greeted warmly by the assembled national parliamentarians. At the time of writing, it is still early in the life of the new Commission, which has not yet been faced with a yellow card. As a result, it is too soon to tell whether this change in tone will result in an overall change in the social dynamics of the EWM.

---

<sup>81</sup> According to the Commission’s Annual Reports on the application of the Principles of Subsidiarity and Proportionality, the total numbers of ROs in each of the first five years of the EWM were 36 (2010), 65 (2011), 71 (2012) 88 (2013), and 21 (2014). Commission, ‘Annual Report 2014 on Subsidiarity and Proportionality, 2 July 2015. I Cooper, ‘A Yellow Card for the Striker’ (n 10) 1423n.

<sup>82</sup> Remarks of Franz Timmermans, 1 December 2014. Transcribed by the author.



**Author contacts:**

**Ian Cooper**

RSCAS

European University Institute

Via delle Fontanelle 19

50014 San Domenico di Fiesole

Italy

Email: [ian.cooper@eui.eu](mailto:ian.cooper@eui.eu)