

A Yellow Card for the Striker:

National Parliaments And the Defeat of EU Regulation on

the Right to Strike

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In May 2012 national parliaments of the EU issued their first yellow card under the Early Warning Mechanism of the Treaty of Lisbon. A sufficient number of them raised objections to a legislative proposal – the *Monti II* Regulation regarding the right to strike – that the Commission was required to review the proposal, which it subsequently withdrew. This outcome was, demonstrably, not a coincidence but the product of extensive interparliamentary coordination, enabled by the initiative of one determined parliament (Denmark’s *Folketing*), a well-timed COSAC meeting, and the network of national parliament representatives in Brussels. A dynamic political process was set in motion in which a number of parliaments joined the effort to obtain a yellow card by, in effect, “voting against” *Monti II* before the eight-week deadline. The episode shows that, despite claims to the contrary, national parliaments have the capacity and willingness to use their new powers to exercise a collective influence in EU affairs.

Keywords: Early Warning Mechanism; European Union; *Monti II* regulation; national parliaments; subsidiarity; yellow card.

I. Introduction: Harmless Procedure or Lever of Parliamentary Influence?

On the evening of 22 May, 2012, the *Tweede Kamer*, the lower house of the Netherlands parliament, adopted a “reasoned opinion” (RO) objecting to a legislative proposal of the European Union (EU). The proposal, known by the nickname *Monti II*, was controversial because it was widely seen as hurting the interests of EU workers by limiting their right to strike. National parliaments had been newly empowered, under the Early Warning Mechanism (EWM) established by the Treaty of Lisbon, to raise subsidiarity-based objections to EU legislative measures in the first eight weeks after they were proposed. The *Tweede Kamer* was the last national parliamentary chamber to voice its objections to *Monti II* before the eight-week period elapsed, doing so in the waning hours of the final day. In the end, twelve parliamentary chambers – seven unicameral parliaments, plus five single chambers from bicameral systems – passed ROs. This meant that under the rules of the EWM, the very first “yellow card” had been triggered. As a consequence, the institution which had proposed *Monti II*, the Commission, was required to review it, after which it had three options: it could maintain, amend, or withdraw the proposal. In September 2012, the Commission decided to withdraw it. Thus for the first time, national parliaments (NPs) had collectively intervened in the legislative process of the EU – to decisive effect.¹

¹ For this article, 31 officials from the parliaments of 17 EU member states – including national parliament representatives (NPRs) from 15 parliamentary chambers, the Permanent Member of the COSAC Secretariat, and the IPEX Information Officer – as well as one European Parliament official and one Commission official, answered questions on background between October 2012 –

The occasion of the first yellow card – and the fact that it precipitated the withdrawal of the targeted legislation – challenges the commonly held view that the EWM is toothless. Around the time of its inception one scholar judged it to be a “rather harmless procedure, with only a marginal impact on the EU’s legislative process” (Raunio 2010: 13), and most academic observers who looked at the EWM took a similar view (Bellamy and Kröger 2012; De Wilde 2012; Fraga 2005; Kiiver 2006). Three kinds of mutually-reinforcing obstacles – logistical problems, incentive problems, and weaknesses inherent to the EWM – stood to prevent NPs from using the EWM to substantially affect EU legislation (Cooper 2012: 449-451). It was widely doubted whether they had either the capacity (given the weakness of interparliamentary coordination) or the willingness (given the perceived apathy of a majority of NPs) to coordinate their efforts in order to gain sufficient support to achieve a yellow card, which – even if obtained – would not constitute a veto of the proposal.

June 2013. Long interviews in Brussels (26-29 November 2012, 3-7 June 2013), as well as by telephone and email, were supplemented by short interviews on the margins of plenary COSAC meetings in Nicosia (14-16 October 2012) and Dublin (23-25 June 2013). Two NPRs also shared their contemporaneous notes with the author. A number of officials read and gave comments on an earlier draft of this paper. In addition, five national MPs, including the Danish and Latvian European Affairs Committee (EAC) Chairs, answered questions on the record. The author warmly thanks all interviewees.

The finding that there was extensive coordination among national parliaments in the case of *Monti II* was also amply confirmed in the COSAC biannual report (COSAC 2013a: 26-34; for details, see the various answers to Question 4.8 in COSAC 2013b).

This article explains how these various obstacles were overcome in the case of the *Monti II* yellow card, by offering a detailed reconstruction of the events as they unfolded between March-May 2012. It is a dramatic story with unexpected twists and a nail-biting climax, the outcome of which was uncertain until the very end. Yet while it played out mostly in public view, it is still largely unknown to the public as it unfolded not in a single location but in parliaments and committee chambers scattered across the capitals of Europe. Even most of those who were directly involved – of which many were interviewed for this article – only know a part of the story and not the whole. This article enables a systematic reassessment of the effectiveness of the EWM in light of the experience of the first yellow card, and the scholarly literature which had mostly predicted that it would have little impact (see Section II). After a brief review of the *Monti II* proposal itself (Section III), a process-tracing analysis shows how NPs effectively used a number of tools of interparliamentary coordination (Section IV) that initiated a dynamic political process in which a number of NPs were influenced to pass ROs in the final days before the deadline (Section V). This outcome necessitates a scholarly reassessment of the EWM (Section VI) which, it is concluded, represents a new arena for democratic politics in the EU (Section VII).

II. A “Deviant Case” to Test the Effectiveness of the EWM

What does the story of *Monti II* contribute to the debate over whether the EWM enhances the influence of national parliaments in EU affairs? Of course, the mere fact that the yellow card happened does not disprove the sceptics, who only predicted that such an occurrence would likely be rare, and of little consequence even if it does occur (de Wilde 2012; Raunio 2010). Indeed, the fact that only *one*

legislative proposal received a yellow card among the hundreds subject to review by NPs under the EWM in its first three years of operation (2010-2012) might reasonably be taken as evidence that the system has had little impact.³ On the other hand, one might infer that the yellow card was not designed to be a routine occurrence but a kind of “alarm bell” triggered in unusual circumstances, and therefore even such a low number does not disprove the efficacy of the EWM (Cooper 2012).⁴ Either way, *Monti II* is not a representative case but a deviant case: its analysis cannot tell us how the EWM works in typical circumstances but can give us crucial insight into the unusual set of conditions that may result in a yellow card.

The principal value of a case study of *Monti II* is that it can test some of the predictions made concerning the internal dynamics of the EWM, and tell us under what conditions a yellow card is likely in the future. Most importantly, it can reveal the extent of interparliamentary coordination. If it turns out to have been minimal or ineffective in this case, then this lends credence to the sceptical view that if a yellow

³ A second yellow card was reached in October 2013, in response to the proposal to create a European Public Prosecutor’s Office (EPPO) (COM/2013/0534). As of mid-2014, there had not yet been an “orange card,” which requires a majority of votes under the EWM.

⁴ The EWM could also be effective in the absence of a yellow card, either by deterring the Commission from proposing subsidiarity-violating legislation in the first place (de Wilde 2012), or by giving NPs influence in the ensuing legislative process (Cooper 2013b). However, neither of these circumstances is relevant in the case of *Monti II*: the Commission was not deterred from proposing it, but also withdrew it before it entered the normal EU legislative process.

card occurred it would be, “essentially... a coincidental sum of otherwise unrelated events” (Kiiiver 2006: 164): if so, the first yellow card was *sui generis*. On the other hand, if interparliamentary coordination turns out to have been extensive, and instrumental in NPs’ reaching the 18-vote threshold,⁵ then it is likely that the circumstances can be replicated and repeated. Prior to *Monti II* there had been three proposals which received enough ROs to rise at least halfway to the yellow card threshold – proposals concerning seasonal workers (9 votes),⁶ a common corporate tax base (14 votes)⁷ and border controls (10 votes)⁸ – so it is not altogether surprising that it was eventually reached. While the subject matter of *Monti II* was politically salient it was not exceptionally controversial: a legislative proposal in this area had long been promised by the Commission, but strong opposition only arose in reaction to the actual text of the measure, which was seen as more damaging to workers’ rights than had been expected (see Section III).

Sceptics made three kinds of arguments about the likely ineffectiveness of the EWM: first, NPs generally lack the logistical capacity needed to reach the yellow card threshold; second, they lack a strong incentive to work to obtain a yellow card; and third, even if a yellow card were obtained this would not matter, as it would still not signify an increase in the influence of NPs on EU affairs. First, logistically, it is difficult for individual parliaments, deliberative institutions with already busy schedules, to properly vet large numbers of – often quite technical and complex – EU

⁵ The threshold became 19 votes after the accession of Croatia on 1 July 2013.

⁶ COM/2010/0379. See also Cooper (2013b).

⁷ COM/2011/0121.

⁸ COM/2011/0560.

legislative proposals and come to a decision regarding their subsidiarity compliance within an eight-week deadline. Moreover, interparliamentary cooperation is limited (Kiiver 2006; Raunio 2010: 7-9), and provides few tools that would enable the coordination of a yellow card. As all parliaments are formal equals, they have no “leader” to rally opposition to a given measure. Moreover, face-to-face meetings between parliamentarians from different member states are infrequent: for example, COSAC, a meeting of members of European Affairs Committees (EACs) of all EU parliaments, takes place just twice a year. And while NPs do have tools of information exchange (e.g. the IPEX website, and the network of national parliament representatives (NPRs) in Brussels), these are quite weak in comparison to, for example, those employed by national *governments*, who have representatives meeting on a continuous and permanent basis in the Council and COREPER.

Second, it is argued that NPs – whether on the level of whole chambers, political parties, or individual MPs – have little incentive to invest their limited time and resources in participating in the EWM, as it is extremely unlikely to pay off either in terms of electoral advantage at the national level or changed policy outcomes at the EU level (Raunio 2010). Moreover there is great variation between NPs in their mode of EU scrutiny and their relations with their respective governments, as well as a number of other attributes (see Kiiver 2006: 19-22, 138; Kiiver 2012: 48-62) and their propensity to involve themselves in the EWM is likely to vary accordingly.

The lack of incentive seemed borne out by early experience. Between 2004-2009, COSAC conducted eight “subsidiarity tests” in which NPs vetted EU proposals under conditions intended to simulate the EWM; this was a useful learning experience, but none of the tests reached the yellow card threshold (Kiiver 2012: 91-92; see also Knutelská 2013). And in the initial 20 months of the EWM, 10 of the 40

parliamentary chambers in the EU issued no ROs at all, and 9 chambers issued only one (Bellamy and Kröger 2014). Between 2010-2012, the 38 parliamentary chambers in EU-27⁹ produced a total of 172 ROs, an average of 4.5 reasoned opinions per chamber. However, a majority of the ROs (95, or 55%) emerged from just seven particularly prolific chambers – the Swedish *Riksdag* (34), the Luxembourg *Chambre des Députés* (13), the French *Sénat* (11), the Polish *Sejm* (10), the Polish Senate (9), the Dutch *Tweede Kamer* (9) and the UK House of Commons (9) – six of which were among the chambers that passed ROs in the case of *Monti II*. Most NPs seemed largely apathetic to the EWM while the majority of ROs were produced by a handful of particularly active chambers: this meant that, arithmetically, it would be quite difficult to reach the threshold for a yellow card (de Wilde 2012: 14).

Third, sceptics argued further that even if a yellow card were reached, this would not signify that NPs have gained influence, because their position in relation to their own governments and EU institutions would be essentially unchanged.

Regarding domestic government-parliament relations, one argument is that the EWM offers a parliament little influence in comparison to that which can be gained by effective oversight of its own government's position in the Council. Another argument, conversely, is that under the EWM a parliament could become a mere tool

⁹ Although the Spanish and Irish parliaments are bicameral, they have joint scrutiny systems, and so are counted as unicameral for the purpose of this calculation. These figures are drawn from the Commission's annual reports on relations with national parliaments, available at:

<http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm>.

of its government, who will instruct it to pass ROs against proposals that the government opposes. Regarding EU institutions, it is argued that parliaments gain no influence through the EWM because it does not give them a right to actually veto a legislative proposal: a yellow card is merely advisory, leaving it up to the Commission to decide whether to maintain, amend or withdraw the proposal; and even in the case of an orange card, if the Commission maintains the proposal then the final decision is in the hands of the European Parliament (EP) and the Council.

These arguments about the EWM will be reassessed in light of the experience of the first yellow card, below (Section VI). It should be emphasized that the analytical focus here is on the effectiveness of the EWM: does it enhance the influence of NPs in the politics of the EU? Limitations of space do not permit consideration of related but ancillary questions, such as whether the EWM subverts parliamentary democracy in the EU by blurring the existing lines of delegation and accountability in which national *governments* are the sole representatives of the member states at the EU level and are in turn responsible to NPs at the national level (Cooper 2013a; De Wilde 2012; Fraga 2005; Raunio 2010). Other omitted questions concern the nature of the subsidiarity review under the EWM (Cooper 2006; Fabbrini and Granat 2013; Goldoni 2014; Kiiver 2006, 2012): is it political or legal-technical in nature, are NPs appropriate subsidiarity watchdogs, and is it legitimate for them to raise essentially political, rather than purely subsidiarity-based, objections to a proposal? Also beyond the scope of this article is the broader question of whether NPs constitute a collective entity at the EU level, e.g. a “virtual third chamber” (Cooper 2012). However, as will be seen below, NPs did in some ways act like participants in such a chamber, insofar as they coordinated their efforts to gather a sufficient number of “votes” to reach the threshold for a yellow card.

III. The Proposed *Monti II* Regulation

The Commission formally adopted the *Monti II* legislative proposal on 21 March 2012, but the EWM clock began ticking on 27 March, the day that it sent a *lettre de saisine* to NPs officially notifying them that, as the proposal had now been transmitted in all official languages, they could address a RO to the EU institutions within the subsequent eight-week period. Under the EWM, two “votes” are allotted to the NP of each member state (regardless of population size) – one per chamber in bicameral systems, and two for each unicameral parliament – making a total of 54 votes in EU-27. There were 13 bicameral parliaments and 14 unicameral parliaments, 40 chambers in total (although the bicameral chambers in Ireland and Spain exercised joint scrutiny). A yellow card required the passage of ROs by chambers representing a minimum of 18 votes, one third of the total, by 22 May.

Limitations of space do not permit a full summary of the *Monti II* proposal and the NPs’ reasons for opposing it (for contrasting views, see Fabbrini and Granat 2013; Goldoni 2014). Its full title is the “Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services” (COM/2012/0130). It is nicknamed *Monti II* because it is in part modelled after the “Monti Regulation” of 1998. Its purpose was to reconcile collective action rights (especially the right to strike) with the economic freedoms of the internal market, in the wake of two controversial 2007 judgements of the ECJ, *Viking* and *Laval* (see Blauburger 2012; Davies 2008).

Unusually, the legal basis of the proposal was the “flexibility clause” (Art. 352 TFEU) which empowers the EU to take action in a circumstance where it lacks a power specified by the Treaty. This meant that the proposal would require unanimous approval in the Council, as well as the approval of the EP. This was a “special” (rather than the “ordinary”) legislative procedure, which meant for NPs that it was subject to the yellow card but not the orange card under the EWM. In addition, many thought that it should be subject to heightened scrutiny as it meant that the EU would be exercising powers not specified in the treaty; in fact, post-Lisbon statutes in at least two member states (Germany and the UK) required that the approval of any EU measure based on the flexibility clause must be authorized by a prior act of parliament, or else the government is obliged to vote against it in the Council.

As required by the treaty, NPs objected to *Monti II* on the grounds that it violated the principle of subsidiarity, although these objections frequently overlapped with broader objections on policy grounds, or to its legal basis. The most common objections were: the legislation is unnecessary because existing national arrangements are sufficient to address the problem; the legislation has no value-added vis-à-vis the current legal status quo; EU intervention in this area might disturb well-functioning national arrangements; and the proposal does not achieve its objectives of clarifying the relationship between social rights and economic freedoms or reconciling them in practice in cross-border situations. While the opponents to *Monti II* within the NPs came from across the political spectrum, and many were motivated more by protecting national autonomy than workers’ rights *per se*, there is on balance a leftward tilt to the campaign against it. Broadly, it was a yellow card for – that is to say, in defense of – the striker.

IV. Tools of Interparliamentary Coordination

Any effort to coordinate the various NPs of the EU to act in concert to achieve a yellow card is presented with a host of logistical problems. Each parliament tends to work slowly, according to its own timetable, and according to its own unique set of procedures. Ultimately, the decision to pass a RO is a matter for the discretion of each parliamentary chamber. Moreover, as all NPs within the EU are formal equals, and all actions by NPs in the EWM are voluntary, a yellow card must be the result of a spontaneous, self-organizing, bottom-up process. This said, NPs do have some tools of interparliamentary coordination at their disposal which proved useful in this case. First of all, it is often the case that one parliamentary chamber will take on the role of “initiator” (“leader” is perhaps too strong a word, given that it lacks any power to coerce or reward), the first to move to adopt a reasoned opinion and then to encourage others to do so. In the case of *Monti II*, the initiator was the parliament of Denmark, which in turn (as we shall see) made use of the other tools of interparliamentary coordination to amplify its influence. Second, there are various interparliamentary meetings which provide important networking opportunities, such as COSAC, the twice-yearly gathering of EAC members from all EU parliaments (Knudsen and Carl 2008). COSAC has often been derided as a mere talking shop – it has no independent decision-making power – but it does provide an opportunity for national parliamentarians to meet together on a face-to-face basis, which proved extremely valuable in this case. Third, there is the network of national parliament representatives (NPRs): almost all NPs have civil servants stationed in Brussels as permanent representatives (Christiansen et al. 2013), and they played a crucial role in coordinating the response to *Monti II*. Finally, there is IPEX, an online platform for interparliamentary exchange (Knutelská 2013). This is an indispensable tool for the

sharing and public dissemination of information related to parliamentary scrutiny of EU matters; however, IPEX did not play an important instrumental role in interparliamentary coordination in the run-up to the yellow card, because it did not contain the most up-to-date information about what was going on in each parliament.¹¹ That information was in the hands of the NPRs in Brussels.

In the case of *Monti II*, the Danish *Folketing* played the role of “initiator,” acting rapidly to adopt the first RO, based on a conscious decision to try to persuade other NPs to do so with the express goal of achieving the first yellow card. In the *Folketing*, scrutiny of EU affairs, including the power to adopt a RO, is centralized in the EAC. When the EAC chair, Eva Kjer Hansen, saw that all parties in the committee were opposed to *Monti II*, she realized that the measure’s odium made it a likely target of widespread opposition among NPs, and thus a good candidate for the first yellow card under the EWM.¹² The Danish EAC expedited its scrutiny of *Monti II* with the intention of using the coming COSAC meeting in Copenhagen to rally opposition to the measure. The EAC initiated scrutiny of *Monti II* on 21 March, the day of its adoption by the Commission, and decided on 23 March to draft a RO. Normally, the EAC would consult the relevant sectoral committee (in this case, the

¹¹ IPEX does have internal forums in which NPs can privately exchange information about parliamentary scrutiny. However, they are not used. (Interviews with NP officials.) See also criticism of IPEX from Czech, Dutch, and Italian parliaments in COSAC (2013b: 73, 116, 238). All ROs and documents related to the scrutiny of *Monti II* cited in this paper can be accessed from the dedicated page on the IPEX website: <<http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20120130.do>>.

¹² Interview with Eva Kjer Hansen, Danish EAC Chair.

Employment Committee) for its opinion on subsidiarity compliance, but this step was skipped in order to speed up the process. The EAC decided unanimously on 20 April to adopt a draft RO. It formally adopted its RO on 3 May, on behalf of the whole parliament, and was the first parliamentary chamber to do so. It should be emphasized that it was an initiative of the Danish parliament (not the government) to pass a RO in opposition to *Monti II* and encourage other NPs to do likewise. The Danish government had produced an explanatory memorandum that expressed misgivings about *Monti II* on political grounds, but did not allege a subsidiarity breach. Moreover, while Denmark was governed by a centre-left coalition with a Social Democrat prime minister, the push for a reasoned opinion in the EAC was led by the chair, a member of the opposition Liberal (*Venstre*) party.

National parliamentarians were given an opportunity to discuss the *Monti II* proposal in person at the COSAC meeting in Copenhagen, on 22-24 April. Fortuitously, this fell right in the middle of the eight-week scrutiny process for *Monti II* and was hosted by the Danish parliament, by virtue of Denmark holding the Council presidency in the first half of 2012. The draft RO that had been adopted by the Danish EAC on 20 April was quickly translated into English and circulated to other NP delegations in attendance in Copenhagen. The Danish parliament did not use its formal agenda-setting powers as chair to put *Monti II*, or even more general subsidiarity issues, onto the public agenda of the Copenhagen COSAC. Instead, the Danish delegation, and the Danish EAC chair in particular, used the occasion to informally approach members of other parliaments on the margins of the COSAC meeting, and in the meetings of the political groups, to inform them that they would be adopting a RO in opposition to *Monti II*, and to sound out others regarding whether they might do the same. Whether it made a difference that such unofficial advances

came from the chair of the meeting is uncertain. But it is likely that the fact that the COSAC meeting took place at all, allowing the participants in the EWM to meet on a face-to-face basis, spurred some NPs to pass ROs which they would not have otherwise. For example, at that time (this has since been remedied) the Latvian parliament did not have a system in place to review EU legislation for its subsidiarity compliance; when the Danish EAC chair personally approached her Latvian counterpart at the Copenhagen meeting to discuss *Monti II*, this prompted the Latvian EAC to put the matter on its agenda, which led to the first-ever RO passed by the Latvian parliament.¹³ Such advances were probably more effective with NPs in which the decision to adopt a RO is made by the EAC (e.g. Latvia) than by the sectoral committee (e.g. the Belgian *Chambre des Représentants*), because it is the members of the former who generally attend COSAC meetings.

The coordinating role of the NPRs was also crucial. In mid-2012 every NP, with the exception of Slovakia, had at least one staff representative to the EU institutions in Brussels. The NPRs all work in close proximity to one another, in a suite of offices provided courtesy of the EP. This group meets on a weekly basis at Monday Morning Meetings (MMMs), which are also attended by officers from IPEX and COSAC – but not from other EU institutions, unless they are invited for the occasion – to discuss internal issues, including matters of subsidiarity control in NPs. They are also continuously in contact with one another through a common email list and can share documents privately on a common server. As envoys from the home parliament they are primarily conduits of information, telling people back home what

¹³ Interview with Zanda Kalniņa-Lukaševica, Latvian EAC chair; interviews with NP officials. See also COSAC (2013b: 269).

is going on in Brussels and vice versa. But theirs is also an interpretive role, in both directions: they view events in Brussels through a parliamentary lens, reporting back home with an eye to what national parliamentarians care about; and they interpret and explain events in their home parliaments for their colleagues in Brussels (Dias Pinheiro 2012: p.112-113). Having this group in place makes it possible for each NP to know, in real time, the state of play in other NPs of the subsidiarity review of a given proposal. In the case of *Monti II*, it was the Danish NPR who notified his colleagues at the MMM on 26 March, that his parliament would be closely reviewing the proposal for its subsidiarity compliance: once the Danish RO was adopted, he created a jointly accessible document on the common server with a box for each NP, so that each NPR was prompted to insert current information about the status of *Monti II* in his or her home parliament and update it whenever its status changed. In this way, as the scrutiny process for *Monti II* unfolded in parliaments across the EU and the number of ROs mounted towards the yellow card threshold, the NPRs were able to keep an accurate and up-to-date “vote count” under the EWM as the deadline approached.¹⁴

V. The Timing and Sequence of Reasoned Opinions

Attention to detail must be paid when reconstructing the process in which votes accumulated against the *Monti II* proposal under the EWM, because each parliament has different procedures for adopting a RO, with its own combination of

¹⁴ Interviews with NP officials. NPs have reported that the NPRs/MMM was the most important network/method of information exchange for the scrutiny of *Monti II* (COSAC 2013a: 31).

competent bodies – EAC, sectoral committee, and/or plenary – involved in the process. In seven of the twelve chambers (the French *Sénat*, the Polish *Sejm*, the UK House of Commons, and the unicameral chambers of Luxembourg, Finland, Portugal, and Malta), ROs are adopted by the plenary on the recommendation of the EAC, with the sectoral committee(s) consulted to varying degrees; in two chambers (the Swedish *Riksdag* and the Netherlands’ *Tweede Kamer*) a RO is normally adopted by the plenary on the recommendation of the sectoral committee; in two chambers (Denmark and Latvia) the EAC itself adopts the RO; and in one (the Belgian *Chambre des Représentants*) the sectoral committee does so. Reconstructing the story is further complicated by the fact that, in the case of *Monti II*, some parliamentary chambers deviated from their normal procedures – for example, the *Tweede Kamer* passed a RO in plenary even though the sectoral committee failed to recommend one – which attests to the momentum that was building towards a yellow card. In addition, it is important to distinguish between the date on which each chamber made the political decision to adopt a RO, and the date of its formal adoption (see Table 1). For example, ROs were formally adopted by the UK House of Commons and the French *Sénat* on 22 May, the final day, but the political decision had effectively been made much earlier, and these earlier decisions would have been known to other NPs and factored in to the running tally of EWM votes kept by the NPRs during the process.¹⁵

¹⁵ Where committee and plenary were both involved, the day of the committee meeting is treated here as the date when the political decision to adopt a RO was made, in chambers where (a) the decision on *Monti II* was made by consensus, and/or

[INSERT TABLE 1 ABOUT HERE]

When the timing and sequence of ROs is reconstructed (see Table 1) a distinct pattern emerges. Whereas those chambers that are among the most “prolific” participants in the EWM (having passed 9 or more ROs in the first three years) decided to adopt ROs relatively early in the eight-week review period for *Monti II*, those chambers which are among the most “reticent” (having passed 4 or fewer ROs in the first three years) adopted theirs relatively late. After Denmark passed its RO, five prolific chambers – the French *Sénat*, the Swedish *Riksdag*, the Polish *Sejm*, the UK House of Commons and the Luxembourg *Chambre des Députés* – moved to adopt ROs between late April and mid-May. (The exception is the *Tweede Kamer* which, for reasons discussed below, was the last chamber to adopt its RO.) In the French *Sénat*, the EAC unanimously adopted a draft RO quite early, on 25 April; after the sectoral committee took no decision on it, and no party group requested a plenary debate, the RO was deemed to be adopted on 22 May. In the Swedish *Riksdag*, the decision was made in the Labour Market Committee, which decided to draft a RO on 26 April, which it adopted unanimously on 3 May, and which was formally adopted in the plenary on 11 May. In the UK House of Commons, on 9 May the European Scrutiny Committee agreed a detailed report on the proposal, including a draft RO; this RO was eventually passed by the plenary on 22 May. In the Polish *Sejm*, on 27 April the EAC found the proposal incompatible with the principle of subsidiarity; the plenary adopted a RO to that effect on 11 May. The Luxembourg *Chambre des*

(b) a committee decision whether or not to adopt an RO is rarely or never overturned by the plenary.

Députés passed a RO by consensus in its Committee on Labour and Employment on 14 May, and then through the plenary on 15 May.

Given that these five are among the handful of EU chambers that pass the most ROs, it is not altogether surprising that they passed them in the case of *Monti II*. If only these six chambers – the Danish initiator and the five prolific chambers that followed – passed ROs, then there would have been just nine votes, half of those needed for a yellow card. What made it possible to reach the threshold of 18 votes was the late intervention of five reticent chambers – the parliaments of Finland, Portugal, Latvia, Malta, and the Belgian *Chambre des Représentants* – four of which made the political decision to pass a RO only in the final week before the deadline. It is the actions of these five reticent chambers, as well as the *Tweede Kamer*, which deserve closer attention here. These chambers took their decisions with the knowledge that a yellow card was within reach as the deadline was approaching.

The Finnish *Eduskunta* takes a particular view of its role in EU-related matters. Generally, the *Eduskunta* exercises strong and active scrutiny of the Finnish government's conduct of EU policy, but it takes a skeptical view of inter-parliamentary cooperation and political dialogue with the Commission, which it views mostly as a waste of time: moreover, it takes the view that in the EWM a RO should be addressed to subsidiarity as narrowly defined in the treaty, and not as an opportunity to comment on the substance of the proposal (Eduskunta 2013). Yet these scruples were put to the test when the *Eduskunta* was confronted with *Monti II*, which threatened – as in Denmark and Sweden – the model of industrial relations common to the Nordic countries, in which arrangements are made at the national

level.¹⁶ On 8 May, the Labour and Equality Committee of the Eduskunta adopted a report recommending a RO on *Monti II*; on 11 May, the Grand (European Affairs) Committee adopted its report finding *Monti II* to be in breach of subsidiarity. Finally, the RO was formally adopted in the plenary by unanimity on 15 May.

The Portuguese parliament is by far the most prolific parliament in the informal political dialogue – it has sent literally hundreds of letters to the Commission – but it is relatively reticent in the EWM: it issued only one RO prior to *Monti II*. On 15 May, the EAC of the Portuguese *Assembleia da República* proposed a RO finding a subsidiarity breach. This was surprising because it seemed to overturn the opinions of two sectoral committees, those on Constitutional Affairs and on Social Security and Labour, which had previously adopted reports finding that *Monti II* did not breach subsidiarity. However, the rapporteur in the Committee on Social Security and Labour was an opposition Socialist MP, Maria Helena André, who had previously been Minister of Labour and, before that, deputy secretary-general of the European Trades Unions Congress (ETUC); her report of 30 April was in fact a guarded critique of the proposal, saying that while it goes “in the right direction,” it is problematic “in its current form” as it “limits the right to take collective action” (p.14). This provided ammunition for the EAC, which proposed a RO, which was adopted by the plenary on 18 May.

On that same day, four days prior to the deadline, the EAC of the Latvian *Saeima* – which had never before passed a RO – also decided that *Monti II* was in breach of subsidiarity, and passed a RO on behalf of the whole chamber. As

¹⁶ For a comparison of the Nordic parliaments’ approaches to the EU, the EWM and *Monti II*, see Cooper 2015 (forthcoming).

mentioned above, this decision was influenced by the personal contact between the Danish and Latvian EAC chairs at the Copenhagen COSAC meeting. In Malta, a working group within the House of Representatives found a *prima facie* breach of subsidiarity in the case of *Monti II* on 8 May. After receiving the opinion of an outside legal expert and the explanatory memorandum from the Maltese government – both of which agreed that the proposal violated subsidiarity – the Foreign and European Affairs Committee recommended a RO on 21 May, which received its final, formal approval the next day. As the parliaments of Finland, Portugal, Latvia and Malta are all unicameral, their ROs represented two votes apiece towards the yellow card, despite the small size of the nations they represent. In the EWM, Malta’s House of Representatives – representing some 400,000 people – has twice as many votes as the UK House of Commons on which it is modelled.

On the morning of the final day, the vote tally stood at 17 certain or near-certain votes, one vote short of a yellow card. At this point there was an unexpected intervention from the Belgian *Chambre des Représentants*.¹⁷ This chamber has an unusual arrangement in which the relevant sectoral committee, rather than the EAC or the plenary, may pass a RO on behalf of the whole chamber. Prior to *Monti II*, only two ROs had been adopted by the *Chambre des Représentants*, and both of those came from a different sectoral committee than the one in this case. In the Committee on Social Affairs, the idea of passing a RO objecting to *Monti II* was first put forward

¹⁷ According to interviews, the action of the Belgian chamber came as a complete surprise to the other NPRs in Brussels. Ironically, they were better informed about events in Lisbon, Riga, and Valletta than about the plans for a last-minute RO being prepared just across town in the Belgian parliament.

by an opposition Green MP, Zoé Genot. Yet when the Committee met on 22 May, it was another MP, Myriam Vanlerberghe from the governing Flemish Socialist Party, who arrived with the text for a RO, already approved by six committee members from the six governing parties. (The Minister for Employment, also a Flemish Socialist, had already made known that she opposed *Monti II*; the text of the RO echoed many of the points made by the minister in her letter to the committee.) She explained to her colleagues the significance of the vote under the EWM, and the possibility of a yellow card. This RO was adopted by the committee at about 3 pm on 22 May, bringing the total number of votes in the EWM to 18, the threshold for a yellow card.

In the *Tweede Kamer*, the decision whether to recommend a RO on *Monti II*, which normally would have been taken in the relevant sectoral committee, was delayed by the fall of the government on 21 April. It was not until 15 May that the Social Affairs and Employment Committee finally met for a vote on *Monti II*, which failed to muster a majority in favour of a RO. While that normally would have put the issue to rest, it was revived when the necessary 30 votes were gathered to put the question on the agenda of the plenary, scheduled for 22 May. The debate took place in the evening, around 7:15 pm; the assembled members knew of the Belgian RO and that the vote total was very close to the yellow card threshold (the exact number was still uncertain, as not all ROs had been uploaded to the IPEX website). The Minister for Social Affairs and Employment was actually present in the chamber, voicing the government's opinion that a RO was unnecessary because *Monti II* would be more appropriately addressed later, when it comes up in the Council. Despite this, the parties of the right and left joined to vote in favour of a RO, so in the end the plenary vote was unanimous. This was the first time that the plenary had, in effect, overturned the subsidiarity decision of a committee. With just a few hours to spare,

the last – as it turned out, the nineteenth – vote was cast in the EWM, and the yellow card was passed.¹⁸

VI. Revisiting the Previous Arguments About the EWM

We are now in a position to revisit the above arguments about the effectiveness of the EWM (see Section II) in light of the experience of the *Monti II* yellow card. First, and most obviously, the experience shows that NPs, individually, have the logistical capacity to pass the required number of ROs within the eight-week deadline – albeit just in the nick of time. This reflects the fact that, individually, NPs have generally adapted their internal workings to meet the demands of the new procedures introduced by the Treaty of Lisbon. Notably, at least one chamber, the Belgian Senate, seriously considered passing a RO but could not organize a plenary vote before the deadline, and one other, the Czech Senate, passed one after the deadline had passed, which did not count towards the yellow card; this suggests that the vote count would have been higher if the review period were longer.

¹⁸ From the point of view of each chamber, its vote is cast at the moment when the RO is formally approved according to its own internal rules. Yet for it to be fully official, and known to the wider world, it must be transmitted by parliamentary officials to the Commission and uploaded to IPEX. In fact, six ROs were uploaded to IPEX in the final 24 hours. While the *Tweede Kamer* was the final vote in the EWM, it was not the last RO to come in – that was the UK House of Commons. The IPEX Information Officer was in the office until midnight that night to see that the last ROs came in before the deadline. (Interviews with NP officials.)

More importantly, the experience shows that NPs as a group have logistical tools with which to coordinate their efforts to achieve a yellow card. Early in the process, one chamber can act as an “initiator” by being the first to identify a proposal as problematic and pass a RO against it, thereby alerting other NPs and encouraging them to do the same. In the middle of the process, an interparliamentary meeting can facilitate an exchange of views on the substance of the proposal and spread awareness of the extent of opposition to it among NPs. And towards the end, the network of NPRs can provide NPs with timely information about the “vote count” that can influence their decision on whether to adopt a RO before the deadline. Certainly, all these elements came together to facilitate the *Monti II* yellow card, but that is not an entirely improbable confluence of events. First, it is not uncommon for one chamber or another to step forward as “initiator,” leading opposition to a given legislative proposal.¹⁹ Second, while the timing of the COSAC meeting in the April 2012 was fortuitous, interparliamentary meetings are becoming more frequent, creating opportunities for informal networking as occurred in the case of *Monti II*. For example, before 2012 there was only one major twice-yearly interparliamentary conference – i.e. COSAC (created in 1989) – but now there are three, after the creation of the Interparliamentary Conference on CFSP-CSDP in 2012, and the “Article 13” Conference on Economic Governance in 2013.²⁰ Third and finally, the network of NPRs is now a permanent feature of the interparliamentary landscape that

¹⁹ Interviews with NP officials.

²⁰ See Cooper 2014. At the first “Article 13” Conference in Vilnius in October 2013, the author observed representatives from the *Tweede Kamer* lobbying other parliaments to pass ROs against the EPPO proposal, with the explicit aim of achieving a second yellow card.

will continue to facilitate information-sharing among NPs as they interact under the EWM.

Second, regarding incentives, close process-tracing of the *Monti II* experience shows that, whatever their reasons, many individual parliamentarians do, as a matter of observable fact, involve themselves in the EWM. In many chambers it was the advocacy of a single MP – often one who had previously worked in proximity to EU institutions – that succeeded in putting the question on the parliament’s agenda and/or pushing through a RO. For example, the Danish EAC chair, Eva Kjer Hansen, formerly an MEP, succeeded in gathering support for the yellow card not only within her own chamber but in other parliaments as well.²¹ Her example challenges the assertion that, “As for policy influence, the ability of an individual legislator to influence politics at the European level is probably close to zero, including under the early-warning mechanism” (Raunio 2010:10).

While most NPs seemed to lack interest in the EWM during the COSAC tests and in the early period after it was first launched, this is belied by the fact that their scrutiny activities, including the number of ROs produced, has increased steadily since its establishment.²² The COSAC tests were a hypothetical exercise undertaken before the Treaty of Lisbon became law, about which Knutelská (2013: 47) astutely observed that “...the best incentive for interparliamentary cooperation is the introduction of actual competencies at the European level.” In a similar way, the

²¹ For examples of how the Danish *Folketing* has long acted as a political entrepreneur of interparliamentary cooperation, see Cooper 2015 (forthcoming).

²² The total numbers of ROs in each of the first four years of the EWM were 36 (2010), 65 (2011), 71 (2012), and 88 (2013).

prospect of actually reaching the yellow card threshold can change the incentive for fence-sitting parliaments, since they see that they may contribute to a successful outcome; indeed, this dynamic appears to be part of the reason for the late surge in ROs in the case of *Monti II*. While it is true that only seven prolific chambers produce the majority the ROs under the EWM – and six of these passed ROs in the case of *Monti II* – a political dynamic may develop in which the more reticent chambers may be persuaded to pass ROs if they see a yellow card is within reach.

Third, what of the claim that even if a yellow card is passed this does not really enhance the influence of NPs over EU affairs, either vis-à-vis their own governments or in relation to EU institutions? Against the argument that NPs should focus on scrutiny/control at the national level rather than engaging at the EU level through the EWM, the case of *Monti II* shows that there need not be a tradeoff between these roles, but they are in fact largely complementary. Most parliamentary chambers that passed a RO were in effect also instructing their government to oppose *Monti II*, at least as it was originally proposed, and in some cases these instructions would probably be considered binding, whether politically (e.g. in the Nordic states) or legally (e.g., in the UK, due to the use of the flexibility clause). Conversely, there is little evidence that parliaments were merely tools of their governments: in almost every chamber that passed a RO – with possible exception of the Belgian *Chambre des Représentants* – the impetus came from the parliament, not the government.²³ As

²³ However, in Spain, the government may have influenced the decision *not* to pass a RO. There, an opposition Socialist MP, Ramón Jáuregui, drafted a RO objecting to *Monti II*, but it was voted down in the EAC by the right-leaning parties of government. (Interview with NP official.)

Monti II would have required unanimity in the Council (see Section III), each government effectively had a veto over the legislation, and thus did not need the help of its parliament to block the proposal. While the policy preferences of government and parliament were almost always closely aligned – in opposition to *Monti II* – they did not always agree tactically on whether to use the EWM to advance those preferences. In three countries – Denmark, the UK, and the Netherlands – the government took the view that the proposal was problematic on substantive grounds but did not violate the principle of subsidiarity; indeed, in the Netherlands, the government minister continued to argue against a RO in the final debate in the *Tweede Kamer* before it was adopted. In at least two countries, Malta and Latvia, the government did not take a position on the legislation until the parliament asked for it; in these cases, the government effectively went along with the parliament’s opinion. The very earliness of the EWM requires parliaments to publicly give their opinion on a legislative measure, often before their respective governments have determined their position on the proposal.

Finally, sceptics argue that NPs have gained little or no influence because final decisions over EU legislation remain in the hands of the Commission, Council and EP. Indeed, the first yellow card, issued in May 2012, was merely advisory, only requiring that the Commission review *Monti II*, after which it could have amended it or maintained it unchanged. In the event, the Commission withdrew the proposal in September 2012, but in a manner that seemed to minimize the role of NPs, insisting that *Monti II* was in compliance with the principle of subsidiarity but was being withdrawn because it “...is unlikely to gather the necessary political support within the European Parliament and Council to enable its adoption.” The latter point is certainly true. In the Council, it is very unlikely that *Monti II* would have gained the

necessary unanimous approval, given that a number of national ministers of Employment and Social Affairs had expressed preliminary misgivings about the proposal as early as 25 April, when it was discussed informally in the relevant Council group (EPSCO). Moreover, in the EP, where majority approval would have been required, opposition spread to the point that in July a number of leaders of EP party groups took the very unusual step of writing to the Commission to insist that *Monti II* should be withdrawn,²⁴ and indeed, its eventual withdrawal was welcomed both on the left (S&D²⁵, Greens²⁶) and the right (EPP²⁷, ECR²⁸). From this perspective, *Monti II* was doomed with or without a yellow card.

So did the yellow card even matter? Ultimately, opposition to *Monti II* became so widespread that its failure was overdetermined, i.e. an effect with multiple causes, any one of which could have been determinative. Yet even if the yellow card was not the *fundamental* cause of the demise of *Monti II*, it was the *proximate* cause, in that it influenced the timing of the decision to withdraw.²⁹ The yellow card forced the hand of the Commission, requiring it to make a positive decision about the fate of

²⁴ Interview with Commission official.

²⁵ Available at: <<http://www.socialistsanddemocrats.eu/newsroom/monti-ii-dropped--sd-meps-will-keep-fighting-social-rights#1>>.

²⁶ Available at: <<http://www.greens-efa.eu/right-to-strike-7988.html>>.

²⁷ Available at:

<<http://www.eppgroup.eu/press/showpr.asp?prcontroldoctypeid=1&prcontrolid=11384&prcontentid=18976&prcontentlg=en>>.

²⁸ Available at: <<http://ecrgroup.eu/?p=7038>>.

²⁹ Interview with Commission official.

the proposal. Even if it stood little chance of final passage, the proposal could have languished in legislative limbo indefinitely in the absence of a yellow card. Thus it may be said with certainty that NPs *precipitated* the demise of the legislation.

VII. Conclusion: An “Isoglucose Moment” for National Parliaments?

With the passage of the first yellow card, and the subsequent withdrawal of the targeted legislation, the NPs have shown themselves to be a collective force in EU politics. While they do not, as a group, have the power to veto an EU proposal, they can intervene in the EU legislative process in a way that gives them influence over the final outcome. In historical perspective, their common position is in some ways comparable to that of the EP in the 1980s – for example after the 1980 *Isoglucose* ruling, the upshot of which was that the other EU institutions could no longer simply ignore the EP’s opinion on proposed EU legislation.³⁰ While the circumstances are not identical, the *Monti II* yellow card presents a similar historical moment, in that it represents the first time that NPs asserted themselves in the EU legislative process in a way that the EU institutions could not ignore.

³⁰ In *Isoglucose*, the European Court of Justice ruled that the Council must await the opinion of the EP before adopting legislation under the “consultation” procedure. In fact, a closer (but less famous) historical analogue to the first yellow card was the Benzene Directive (1988), which was the first legislative proposal to fail partly due to the opposition of the EP which, under the “cooperation” procedure, had influence over legislation but not an outright veto (Corbett et al. 2011: 258-264). On the analogy between the “cooperation” procedure and the EWM, see Cooper (2012: 448-449).

The EWM was originally devised by the European Convention with a dual purpose, not only to introduce a new subsidiarity check on proposed legislation, but also to give NPs a greater say in the affairs of the EU in the hope that this would diminish the democratic deficit (Cooper 2006). It would be premature to draw, from a single case, conclusions as to whether the latter goal is being achieved. Moreover, considering that only a minority of chambers passed ROs, the yellow card does not prove that NPs are a collective actor at the EU level. However, many NPs did at least act like participants in a “virtual third chamber” (Cooper 2012) in the following way: they monitored and influenced one another as they decided how to cast their “votes” within a political procedure oriented towards reaching a voting threshold that, when reached, had legislative consequences. In conclusion, on the evidence of the first yellow card, the EWM is not primarily a legal or technical exercise. Rather, it is new arena for democratic politics in the EU.

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Table 1. Timing and sequence of political and formal decisions to adopt ROs on *Monti II* (2012), and total ROs produced by each chamber between 2010-2012.

Parliament/ Chamber	Political Decision to Adopt RO	Cumulative Vote Total	Formal Adoption of RO	Total ROs 2010-2012
Denmark	20 April	2	3 May	6
French <i>Sénat</i>	25 April	3	22 May	11
Sweden	3 May	5	11 May	34
UK House of Commons	9 May	6	22 May	9
Polish <i>Sejm</i>	11 May	7	11 May	10
Finland	11 May	9	15 May	2
Luxembourg	14 May	11	15 May	13
Portugal	15 May	13	18 May	2
Latvia	18 May	15	21 May	1
Malta	21 May	17	22 May	3
Belgian <i>Chambre des Reprs.</i>	22 May	18	22 May	4
Netherlands <i>Tweede Kamer</i>	22 May	19	22 May	9