

Reinterpretation of the Scope of the Early Warning System by National Parliaments: Yellow Card against the Revision of the Posted Workers Directive*

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1. Introduction

The functioning of the Early Warning System (EWS) so far has demonstrated different and even conflicting approaches of the institutions of the European Union (EU) and National Parliaments (NPs) to the scope and nature of the EWS. In this regard, this paper aims at analyzing how NPs of Member States (MSs) reinterpret the scope of the scrutiny of EU legislative proposals in the framework of the EWS. The strictly formalistic reading of the EWS in the Treaties and the Protocols defines the EWS as a narrow mechanism for the scrutiny of the compliance of the legislative proposals with the subsidiarity principle, the point stressed by the Commission and some scholars.¹

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¹ 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

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In contrast, several scholars assert that also the scrutiny of the principle of proportionality in the framework of the EWS is inevitable since the principle of subsidiarity and the principle of proportionality are interlinked and ‘even overlap in some manner’ which makes strict separation of these principles impossible, and due to the necessity of consideration of the principle of proportionality in assessing the efficacy of EU legislation.² Moreover, according to some authors, the political nature of NPs presupposes the political interpretation of the EWS on the part of NPs who are predisposed to use the EWS as a political instrument to contain competence creep of EU institutions and to protect national constitutional essentials from the adverse effect of EU decision-making.³

The Lisbon Treaty introduced among other novelties the EWS for the subsidiarity monitoring to address ‘democratic deficit’ and ‘democratic disconnect’ problems in European governance. The former problem is characterized by the incapability of the EU decision-making to ensure ‘government of the people, by the people and for the people’.⁴ The latter is defined as the ‘disconnect’ between the bureaucratic and distant EU governance and the national institutions as the sources of democratic and constitutional legitimacy.⁵ The subsidiarity is one of the fundamental principles for the Union competences alongside with the principle of conferral and the principle of proportionality, which consider a specific question in the vertical allocation of powers between the EU and the MSs, since the conferral principle asks “can” the EU take a proposed measure,

an EU Regulation on the Right to Strike, in *Common Market Law Review*, vol. 50, 2013, p. 115.

² S. Gernat, *Interpreting Subsidiarity – How to Develop into a Constitutional Principle?*, in *MaRBLLe Research Papers*, vol. 4, 2013; K. Borońska- Hryniewiecka, *Democratizing the European Multi-level Polity? A (re-) Assessment of the Early Warning System*, in *Yearbook of Polish European Studies*, 2013.

³ M. Goldoni, *The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation*, in *European Constitutional Law Review*, vol. 10, p. 90 ss.

⁴ P. De Wilde, *Why the Early Warning Mechanism Does Not Alleviate the Democratic Deficit*, in *OPAL Online Paper*, vol. 6, 2012, p. 6.

⁵ P.L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State*, Oxford, 2010, p. 10.

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the subsidiarity principle asks “if” the EU must defer to the MSs in relation to the proposed measure, and the proportionality principle asks “how” the proposed measure may be taken.⁶ In this regard, the EWS was expected to make NPs into ‘subsidiarity watchdogs’, because they lose most from transferring the competences to the EU institutions.⁷

To date, three so-called ‘yellow card’ procedures have been triggered against the proposals on the Monti II Regulation, the Regulation on the establishment of the European Public Prosecutor's Office (EPPO) and the revision of the Posted Workers Directive (PWD).⁸ The Commission decided to withdraw the proposal on the Monti II regulation, whereas it maintained the EPPO proposal without any amendments, though in both cases stated that the objections raised by NPs regarding the principle of subsidiarity are either groundless or addressed the aspects of the proposals which were beyond the scope of EWS. In this regard, some scholars defined the EPPO case as ‘a major disincentive to even think of a yellow card’ and doubted the practical value of the EWS for NPs.⁹ However, the facts that, after the decrease in the number of reasoned opinions in 2014 and 2015 (24 and 8 reasoned opinions respectively) mostly due to the Commission’s Presidency elections and the low number of the proposals, in 2016 the NPs issued 65 reasoned opinions (the third highest annual number of reasoned opinions since the introduction of

⁶ G.A. Moens and J. Trone, *The Principle of Subsidiarity in EU Judicial and Legislative Practice: Panacea or Placebo?*, in *Journal of Legislation*, vol. 41, 2014, p. 66.

⁷ I. Cooper, *Bicameral or Tricameral? National Parliaments and Representative Democracy in the European Union*, in *Journal of European Integration*, vol. 35, 2013, p. 536.

⁸ The Commission’s proposal for a Council Regulation on the exercise of the right to collective action in light of the freedom of establishment and freedom to provide service (COM(2012) 130 final); the Commission’s proposal on the Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final); the Commission’s proposal for a Directive amending the Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (COM(2016) 128 final).

⁹ D. Bokhorst, A. Schout and J.M. Wiersma, *The Emperor's New Clothes? A Political Evaluation of the Early Warning Mechanism*, in *The International Spectator*, vol. 50, 2015, p. 101.

the EWS after 84 in 2012 and 70 in 2013),¹⁰ and the triggered third yellow card confirms that the EWS remains as an important instrument for the NPs to have a say at the EU level.

The studies on the EWS addressed its different aspects such as the incentives for the NPs to submit reasoned opinions,¹¹ the typology of the NPs based on their approaches to the EWS,¹² the indirect impact of the EWS on the scrutiny of EU affairs by NPs,¹³ the role of public attitudes in the usage of the EWS.¹⁴ Against this background, this study explores the reinterpretation of the EWS by NPs by considering to what extent NPs go beyond the subsidiarity scrutiny, as it is foreseen by Treaty on European Union (TEU) and the Protocol no. 2, in their objections over the different aspects of the legislative proposals. This objective is pursued by testing the hypotheses, which are formulated based on the examination of the two previous yellow card cases and of the academic literature on the functioning of the EWS, against the qualitative analyses of the reasoned opinions in the third “yellow card” case.

The paper is structured as follows. First, the evolvement of the subsidiarity principle in EU legal framework and the functioning of the EWS are discussed, and the hypotheses are presented on the basis of the review of the academic literature on the EWS. The next section (III) provides the overview of the Monti II and the EPPO cases with regard to their relevance with the hypotheses. The section IV considers the revision of the PWD case and tests the hypotheses

¹⁰ The Commission, Annual Report 2016 on Subsidiarity and Proportionality (COM(2017) 600 final).

¹¹ K. Gattermann and C. Heffler, *Beyond Institutional Capacity: Political Motivation and Parliamentary Behaviour in the Early Warning System*, in *West European Politics*, vol. 38, 2015, p. 305 ss.

¹² I. Cooper, *Is the Subsidiarity Early Warning Mechanism a Legal or a Political Procedure? Three Questions and a Typology*, in *EUI Working Paper RSCAS*, vol. 18, 2016, p. 6.

¹³ E. Miklin, *Beyond Subsidiarity: the Indirect Effect of the Early Warning System on National Parliamentary Scrutiny in European Union Affairs*, in *Journal of European Public Policy*, vol. 24, 2017, p. 366 ss.

¹⁴ C.J. Williams, *Issuing Reasoned Opinions: The Effect of Public Attitudes towards the European Union on the Usage of the “Early Warning System”*, in *European Union Politics*, 2016, p. 1ss.

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through analysing the reasoned opinions, and discusses the politicization of the EWS in this case. The final part presents conclusions on the topic.

2. The Principle of Subsidiarity and the Early Warning System

2.1. The EWS in the EU legal framework

The national parliaments were considered as the main “losers” and the “victims” of European integration,¹⁵ because of the transfer of their legislative competences over the essential issues to the European institutions, while the role of the executives in EU policy-making was strengthened, and due to ‘the informational asymmetries between the legislature and the executive’ in the light of the lack of guaranteed access to the information about the supranational negotiations and decision-making process.¹⁶ However, the NPs had series of functions relevant to the European integration, including the authorisation of the ratification of Treaties, the designation of their representatives within the European Parliament (until the direct elections of 1979), the parliamentary control of the governments, who represented MSs in the Council and the European Council.¹⁷ The introduction of the Treaty of Lisbon marked a watershed in this regard with the empowerment of NPs in a number of ways.¹⁸ As several scholars have

¹⁵ T. Raunio, *The Gatekeepers of European Integration? The Functions of National Parliaments in the EU Political System*, in *Journal of European Integration*, vol. 33, 2011, p. 303 ss.

¹⁶ C. Fasone and D. Fromage, *From Veto Players to Agenda-Setters? National Parliaments and Their ‘Green Card’ to the European Commission*, in *Maastricht Journal of European and Comparative Law*, vol. 23, 2016, p. 295; R. Bellamy and S. Kröger, *Domesticating the Democratic Deficit? The Role of National Parliaments and Parties in the EU’s System of Governance*, in *Parliamentary Affairs*, 2012, p. 8.

¹⁷ N. Lupo, *National Parliaments in the European Integration Process: Re-aligning Politics and Policies*, in M. Cartabia, N. Lupo and A. Simoncini, *Democracy and Subsidiarity In the EU: National Parliaments, Regions and Civil Society in the Decision-making Process*, Il Mulino, 2013.

¹⁸ A. Högenauer, C. Neuhold and T. Christiansen, *Parliamentary Administrations in the European Union*, London, 2016.

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noticed, among these new competences of NPs have been entrusted with in Lisbon Treaty, the subsidiarity monitoring is a crucial one for the day-to-day functioning of the Union.¹⁹ In this regard, the paper continues with the overview of the evolvement of subsidiarity as a general principle of EU Law.

The principle of subsidiarity made its first substantive appearance in the primary law of the EU in the 1986 Single European Act with the Article 130r (4) of the (then) Treaty on European Economic Community requiring the Community to take actions relating to the environment if the objectives of the action can be better attained at Community level than at the level of the individual MS. The subsidiarity principle became a general principle of EU law with entry into force of the Maastricht Treaty.²⁰ The principle of subsidiarity was expected to mitigate the fears of “Eurosceptics” about the EU institutions’ competence creep since the principle could set the limits to legislative and regulatory centralization.²¹

The substantive and procedural guidelines for the implementation of the principles of subsidiarity and proportionality were eventually incorporated into a protocol included in the Amsterdam Treaty of 1997. The Protocol on the application of the principles of subsidiarity and proportionality’ annexed to the Treaty stated that for any proposed Community legislation, the reasons on which it is based shall be stated in order to justify its compliance with the principles of subsidiarity and proportionality, the reasons must be substantiated by qualitative or, wherever possible, quantitative

¹⁹ D. Jančić, *The Game of Cards: National Parliaments in the EU and the Future of the Early Warning Mechanism and the Political Dialogue*, in *Common Market Law Review*, vol. 52, 2015, p. 939 ss; P. Kiiver, *The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity*, in *Maastricht Journal of European and Comparative Law*, vol. 15, 2008, p. 77 ss.

²⁰ C. Fasone, *Competing Concepts of Subsidiarity in the Early Warning Mechanism*, in *LUISS School of Government Working Paper Series*, vol.4, 2013, p. 10 ss.

²¹ T.O. Hueglin and A. Fenna, *Comparative Federalism: A Systematic Inquiry*, 2nd edition, University of Toronto Press, 2015, p. 157.

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indicators.²² The Protocol elaborated upon the scope of the principle by including the necessity and EU added value tests (Lisbon Treaty doesn't include these tests, though the Commission has stated that it will continue to use those tests as part of its guidelines), which had to be satisfied for EU action to be consistent with subsidiarity.²³ Moreover, the Protocol endorsed subsidiarity as the 'dynamic concept', which can either extend or limit the competences of EU institutions.²⁴

In the Lisbon Treaty, the principle of subsidiarity is defined in article 5(3) TEU. The subsidiarity principle has an important role in the functioning of the EU 'as an elevator in the relationship between the EU's centre and the periphery'.²⁵ Thus, the Lisbon Treaty allocates central role in subsidiarity monitoring to NPs and expands the scope of the principle of subsidiarity to subnational level by explicit reference to them.

The procedural aspects of the EWS are elaborated in the Protocol on the application of the principles of subsidiarity and proportionality attached to the Lisbon Treaty. The Article 2 of the Protocol requires the Commission to consult widely before proposing legislative act. According to the Article 4 and the Article 5, the Commission (the EP or the Council if they proposed the draft act) shall send draft legislative acts, which shall be justified with regard to the principles of subsidiarity and proportionality, to NPs at the same time with to the Union legislator. The proposal should contain a detailed statement making it possible to appraise its compliance with the principles of subsidiarity and proportionality. The Commission

²² European Union, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts of 10 November 1997.

²³ G. A. Moens and J. Trone, *Subsidiarity as Judicial and Legislative Review Principles in the European Union*, in M. Evans and A. Zimmermann (eds), *Global Perspectives on Subsidiarity*, New York, 2014, p. 172.

²⁴ O. Pimenova, *Subsidiarity as a 'Regulation Principle' in the EU*, in *The Theory and Practice of Legislation*, vol. 4, 2016, p. 381.

²⁵ G. Martinico, *Dating Cinderella: On Subsidiarity as a Political Safeguard of Federalism in the European Union*, in *European Public Law*, vol. 17, 2011, p. 652.

shall substantiate its reasons for preferred Union level of acting with qualitative and, wherever possible, quantitative indicators.

According to the Article 6 of the Protocol, upon the receiving of the draft legislative act there is an 8 week window for NPs, during which the Council shall not place the draft legislative act on its agenda or adopt a position, to send the reasoned opinions to the Commission, stating why the draft does not comply with the principle of subsidiarity. Although, the direct requirements for the form and content of the reasoned opinions are absent in the EU law, following criteria for reasoned opinions can be generated from the Article 6 of Protocol no. 2: originate in a national parliament or chamber thereof; concern a draft legislative act of the EU; be sent in time; contain reasons; and allege a violation of the principle of subsidiarity.²⁶ In practice, the period for issuing the reasoned opinion may be both longer (the countdown for this procedure starts when the draft legislative act is transmitted in all official languages of the EU and the month of August is not counted because of a summer recess of NPs) and shorter (in the cases of urgency procedures which are stipulated in the Article 4 of the Protocol no. 1).

Two votes are assigned to each NP. In bicameral parliamentary system, each of two chambers has one vote. If the number of votes against particular draft legislative act reaches one-third of the all votes allocated to NPs (19 out of 56 votes in EU of 28 MSs) the procedure referred to in jargon as the “yellow card” is triggered. This threshold is a quarter of the all votes if draft legislative act concerns the area of freedom, security and justice. In this case, after reviewing the draft, the Commission shall decide whether to maintain, amend or withdraw the draft and present the reasons for its decision. The “orange card” procedure is triggered when the number of the votes against draft legislation under the ordinary legislative procedure reaches a simple majority of the all votes (29 out of 56 votes in EU of 28 MSs). In this case, if the Commission, after reviewing the draft, decides to maintain the proposal, it will have to send a reasoned opinion to the Council

²⁶ P. Kiiver, *The Conduct of Subsidiarity Checks of EU Legislative Proposals by National Parliaments: Analysis, Observations and Practical Recommendations*, in *ERA Forum*, vol. 12, 2012, p. 535 ss.

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and the EP justifying the compliance of the draft legislative act with the principle of subsidiarity. Then, under Article 7(3), both the Council, by a majority of 55 % of its members, and the EP, by a simple majority, may decide to halt the legislative proposal on question.

The Treaties also include the ex-post subsidiarity mechanism, which is envisaged in the Article 8 of the Protocol. The NPs through their governments may bring forward an action against the legislative acts on the grounds of infringement of the principle of subsidiarity in CJEU. Moreover, this sort of action may be brought by the Committee of the Regions against the legislative acts for the adoption of which the consultation with the Committee is required by the Treaties.

However, the current form of the principle of subsidiarity has provoked a degree of criticism among scholars. Cardwell argues that subsidiarity is a mostly subjective and vaguely defined principle partly because of the lack of clarity provided by CJEU,²⁷ who ‘applied a very weak standard of review for both substantive and procedural compliance with the subsidiarity principle’.²⁸ Other scholars argue that the principle of subsidiarity can’t create a framework for the scrutiny of the particular proposal’s goals, since ‘if an issue is already configured as a European ... problem, the analysis is automatically predisposed to designate the EU as the only appropriate level of governance’.²⁹ In this regard, the paper continues with the overview of the academic literature on the participation of the NPs in the functioning of the EWS.

²⁷ P. J. Cardwell, ‘The ‘Hokey Cokey’ Approach to EU Membership: Legal Options for the UK and EU’, in *Journal of European Public Policy*, vol. 23, 2016, p. 1285 ss.

²⁸ G.A. Moens and J. Trone, *The Principle of Subsidiarity in EU Judicial and Legislative Practice*, cit., p. 101.

²⁹ M. Bartl, *The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit*, in *European Law Journal*, vol. 21, 2015, p. 27.

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Yellow Card against the Revision of the Posted Workers Directive**2.2. The analyses of the functioning of the EWS in academic literature*

The NPs' attitude toward the principle of subsidiarity and the EWS evoked an intense debate among scholars. Particular interest is attached to the scope of objections raised in the reasoned opinions of NPs, as those objections seem to consider not only the subsidiarity compliance but also the other aspects of the legislative proposal which are beyond the textual understanding of the EWS as a strictly subsidiarity monitoring mechanism.³⁰

As some authors argue, almost all NPs examine the compliance of the draft proposal with the principle of proportionality since they consider that subsidiarity checks would be ineffective otherwise and many of them find it difficult to separate the two concepts.³¹ In this regard, the report of the Conference of Parliamentary Committees for Union Affairs (COSAC) demonstrates that 37 out of 41 responding parliamentary chambers consider the principle of proportionality when scrutinising draft legislative acts and 28 of them 'do not believe that subsidiarity checks are effective without the inclusion of a proportionality check'.³² In the case of Monti II regulations, many of the NPs in their reasoned opinions, including the Finnish Eduskunta, the Maltese Kamra tad-Deputati and the UK House of Commons, objected the proportionality of the proposed measures.³³ In their reasoned opinions against the EPPO proposal, some NPs, including Swedish Riksdag, French Senate and Cypriot House of

³⁰ I. Cooper, *A Yellow Card for the Striker: National Parliaments and the Defeat of EU Legislation on the Right to Strike*, in *Journal of European Public Policy*, vol. 22, 2015, p. 1406; D. Fromage, *The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member State Parliaments?*, in *Yearbook of European Law*, 2015, p. 1 ss.; A.J. Cornell, *The Swedish Riksdag as Scrutiniser of the Principle of Subsidiarity*, in *European Constitutional Law Review*, vol. 12, 2016, p. 294 ss.; M. Goldoni, *op. cit.*

³¹ K. Borońska-Hryniewiecka, *Democratizing the European Multi-level Polity*, *cit.*; S. Piedrafita, *EU Democratic Legitimacy and National Parliaments*, in *CEPS Essay*, vol. 7, 2013.

³² COSAC, Eighteenth Bi-annual Report of 27 September 2012.

³³ F. Fabbrini and K. Granat, *op. cit.*

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Representatives, substantiated their subsidiarity-breach claims with proportionality arguments.³⁴

Hypothesis 1. The NPs considers that the principle of subsidiarity and the principle of proportionality are interdependent and the draft legislative acts should be tested on the compliance with both principles in the framework of EWS.

Fabbrini and Granat argue that procedural dimension of the subsidiarity review can be regarded instrumental to the evaluation of the material subsidiarity, though the NPs, in their reaction to the Monti II proposal, attached only insignificant attention on the compatibility of the proposal with the procedural dimension of subsidiarity.³⁵ On the contrary, Moens and Trone note several cases, when the House of Commons, the Spanish Parliament, the Hungarian Parliament and the Dutch Parliament objected to the legislative proposals on the ground of the insufficiently detailed statement justifying the compliance of the proposal with the principle of subsidiarity.³⁶ Kiiver states that the objections about alleged lack or insufficiency of the necessary justification of EU proposals are routine since the violation of the burden of justification by Commission can be considered to constitute a procedural breach of the subsidiarity principle.³⁷ In this regard, in the EPPO proposal case majority of NPs accentuated the lack of suitable justification of the Commission for the proposal.³⁸

Hypothesis 2. NPs scrutinize the compliance of the proposal with the principle of subsidiarity by considering not only the material substance of subsidiarity but also by addressing the procedural dimension of subsidiarity.

As Jančić argues, the NPs are prone to stretch the scope of subsidiarity scrutiny through challenging not only the proportionality

³⁴ D. Fromage, *op. cit.*

³⁵ F. Fabbrini and K. Granat, *op. cit.*

³⁶ G.A. Moens and J. Trone, *The Principle of Subsidiarity in EU Judicial and Legislative Practice*, cit., p. 91, 92.

³⁷ P. Kiiver, *The Conduct of Subsidiarity Checks of EU Legislative Proposals by National Parliaments*, cit.

³⁸ D. Fromage, *op.cit.*

but also the legal basis, the content and the merits of the proposal.³⁹ This broad interpretation of EWS is explained by the fact that its application depends in great part on a political evaluation on the part of NPs.⁴⁰ In this regard, some authors insist that the scope of EWS should be strictly limited to the principle of subsidiarity.⁴¹ Though the Political Dialogue initiated by the then Commission President José Manuel Barroso allows NPs to enter into dialogue with the Commission regarding the various aspects of the legislative proposals other than the subsidiarity, this informal procedure is non-binding and ‘wholly dependent on the Commission both for its existence and for its impact’.⁴² Hence, the broad interpretation of the EWS by NPs is inevitable, taking into account that as political actors NPs may use the EWS in a way that allows them to pursue political objectives through challenging an EU legislative proposal on the grounds other than subsidiarity.⁴³

Hypothesis 3. In line with their perception of the EWS as not merely technical but also political control, NPs use the EWS to raise objections on the policy content and the merits of the draft legislative proposals.

3. The Monti II Regulation and EPPO Proposal

3.1. Yellow Card against the Monti II Regulation

The Commission’s proposal for a Council Regulation on the exercise of the right to collective action in light of the freedom of establishment and freedom to provide service (COM(2012) 130 final,

³⁹ D. Jančić, *The Game of Cards*, cit., p. 961.

⁴⁰ K. Borońska-Hryniewiecka, *Legitimacy through Subsidiarity? The Parliamentary Control of EU Policy-Making*, in *Polish Political Science Review*, vol. 1, 2013, p. 73.

⁴¹ F. Fabbrini, *The Principle of Subsidiarity*, in iCourts Working Paper Series, vol. 66, p. 1; F. Fabbrini and K. Granat, *op. cit.*

⁴² D. Jančić, *The Game of Cards*, cit., p. 941.

⁴³ K. Borońska-Hryniewiecka, *Legitimacy through Subsidiarity*, *op. cit.*; I. Cooper, *Is the Subsidiarity Early Warning Mechanism a Legal or a Political Procedure?*, cit.

so-called Monti II proposal), finally transmitted in all official languages on 27 March 2012, was the first draft legislative act against which the yellow card was triggered. The proposal aimed at developing a legal framework for regulation of transnational collective action rights (especially the right to strike) and reconciling them with the economic freedoms of the EU. The proposal was provoked particularly by two controversial judgments of the CJEU, *Viking* and *Laval*, which ‘recognized the right to strike but placed restrictions on it when it targets a cross-border business exercising the freedom of establishment’.⁴⁴ The social partners criticized those judgements of the CJEU for designing a more restrictive standard of protection for the right to strike in cases of transnational industrial actions than that prevailing in many MSs and the case-law of the European Court of Human Rights.⁴⁵

To address this issue, the Commission presented a proposal ‘which would enhance legal certainty and strike a more appropriate balance between social rights and free movement rules in the EU’.⁴⁶ The Commission decided that Article 352 TFEU (so-called flexibility clause, which empowers the Commission to take action in order to attain particular objectives of the Treaties when the necessary powers are not provided by the Treaties) is the appropriate legal basis for the proposal.⁴⁷ The Commission’s main argument for the respect for subsidiarity was that the objectives of the proposal, taking into account their transnational and cross-border nature, cannot be achieved by the MSs alone and requires EU level action.

The proposal encountered the strong opposition from NPs, 12 of which (7 unicameral parliaments and 5 chambers from bicameral parliaments – representing 19 votes) transmitted the reasoned opinions against the proposal to the Commission by the deadline of 22 May. Although all those reasoned opinions argued that the Monti II was not compatible with the principle of subsidiarity, they also

⁴⁴ I. Cooper, ‘The Nordic Parliaments’ Approaches to the EU: Strategic Coordinator, Comprehensive Scrutinizer, Reluctant Cooperator and Outside-Insider, in *ARENA Working Paper*, 2015, p. 4.

⁴⁵ M. Goldoni, *op. cit.*, p. 94.

⁴⁶ F. Fabbrini and K. Granat, *op. cit.*

⁴⁷ COM(2012) 130 final.

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included objections regarding the content, the legal basis and the proportionality of the proposed action.⁴⁸ One of the main concerns of the NPs regarding the content of the proposal, including the Belgian Chamber des Représentants, the Portuguese Assembleia da República, was that the proposal would destroy well-functioning national arrangements in this area.⁴⁹ The Latvian Seima, the Swedish Riksdag contested its legal basis on the ground that the proposal did not indicate which of the Treaty objectives it wanted to pursue.⁵⁰ In its reasoned opinion, the UK House of Commons concluded that the draft legislative act was incompatible with the principle of subsidiarity since the Commission had failed to present clear evidence of the necessity of the proposed action.⁵¹

The Commission decided to withdraw the proposal, though the Commission insisted that the proposal was compatible with the subsidiarity and the NPs' arguments had failed to identify the subsidiarity breach.⁵² However, the Commission 'recognised the difficulty of obtaining "the necessary political support" for the proposal in the last stages of the decision-making process' within the EP and the Council.⁵³ The 'flexibility clause' as the legal basis of the proposal required unanimous approval of the proposal in the Council which in the light of the negative reactions by NPs was almost impossible to achieve. Thus, it is indisputable that the reasoned opinions and 'the echo of the first 'yellow card' influenced the decision of the Commission to withdraw the proposal.⁵⁴

⁴⁸ I. Cooper, *A Yellow Card for the Striker*, cit.

⁴⁹ M. Goldoni, *op. cit.*, p. 98.

⁵⁰ F. Fabbrini and K. Granat *op. cit.*, p. 136.

⁵¹ The UK House of Commons Reasoned opinion of 22 May 2012.

⁵² Letter to NPs from Commissioner Maroš Šefčovič, Brussels, 12 September 2012

⁵³ N. Lupo, *National and Regional Parliaments in the EU Decision-making Process, after the Treaty of Lisbon and the Euro-crisis*, in *Perspectives on Federalism*, vol. 5, 2013.

⁵⁴ C. Fasone and D. Fromage, *From Veto Players to Agenda-Setters?*, cit., p. 304.

3.2. *The reaction of National Parliaments to EPPO Proposal*

The second yellow card was triggered against the Commission's proposal for the Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final, so-called EPPO proposal), which was finally transmitted to the NPs on 21 August 2013. The Commission's decision to propose the creation of EPPO ensued from its assessment that the MSs, who have had exclusive competences on the prosecution of the crimes against the Community's financial interests until recently, were not adequately equipped and motivated to counteract such offences.⁵⁵

The Commission indicated the Article 86 TFEU, which envisages that the Council may establish the EPPO from Eurojust in order to combat crimes affecting the Union's financial interests, as the legal basis of the proposal. Thus, 'there was no doubt that the Commission had the competence to make such a proposal'.⁵⁶ The Commission justified the compliance of the proposal with the principle of subsidiarity by stating that the proposed action had an intrinsic Union dimension, objectives of which could only be achieved at Union level by reason of its scale and effects, since the authorities of the MSs didn't cope with fighting effectively against offences affecting the Union budget on their own.⁵⁷

Despite the fact that the EPPO proposal with its particular legal basis was expected 'by many to easily pass the subsidiarity test',⁵⁸ 14 NPs (representing 18 votes) issued reasoned opinions and triggered the yellow card (the threshold was a quarter of total votes in the Area of Freedom, Security and Justice). This can be explained by the fact

⁵⁵ A. Pitz, *National Parliaments Overcoming Collective Action Problems Inherent in the Early Warning Mechanism: The Cases of Monti II and EPPO*, in *LUISS School of Government Working Paper Series*, vol. 22, 2014.

⁵⁶ D. Fromage and V. Kreiling, *National Parliaments' Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive*, in *European Journal of Legal Studies*, vol. 10, 2017, p. 125.

⁵⁷ COM(2013) 534 final.

⁵⁸ I. Cooper, *Is the Subsidiarity Early Warning Mechanism a Legal or a Political Procedure?*, cit.

that, the Article 86 empowers the Council to establish an EPPO without obliging it to do so.

In their reasoned opinions, the House of Lords, Irish Oireachtas, Dutch Chambers expressed that they were against the creation of EPPO,⁵⁹ whereas French Senate, Polish Senate, Maltese House of Representatives objected the proposed structure and prerogatives of EPPO.⁶⁰ Slovenian Parliament argues that while the creation of EPPO as such doesn't violate the principle of subsidiarity, the Commission did not sufficiently explain why the objective could not be attained at a national level and with the already existing EU institutions.⁶¹ Moreover, some of the NPs challenged other aspects of the legislative act such as proportionality and the content. In its reasoned opinion, Swedish Riksdag presented broad proportionality argument against the proposal by applying 'a two-tier proportionality test'.⁶²

The Commission after reviewing EPPO proposal declared to maintain the proposal without amendments, concluding that the proposal complied with the principle of subsidiarity.⁶³ The Commission's decision to pursue the proposal without amendments, in spite of required unanimous approval in the Council according to the Article 86 TFEU, is thought by many to be linked with the possibility envisaged in the Treaties for enhanced cooperation on this issue among at least 9 MSs.⁶⁴ Fabbrini argues that, by its decision to maintain the proposal while discarding the arguments which fell

⁵⁹ The UK House of Lords, Reasoned opinion of 24 October 2013; Dáil Éireann, Reasoned opinion of 23 October 2013, Seanad Éireann, Reasoned opinion of 24 October 2013; The Dutch Eerste Kamer, Reasoned opinion of 17 October, 2013; The Dutch Tweede Kamer, Reasoned opinion of 10 October 2013.

⁶⁰ The French Senate, Reasoned opinion of 28 October 2013; The Polish Senate, Opinion of 9 October 2013, Maltese House of Representatives 28 October 2013.

⁶¹ The Slovenian National Assembly, Reasoned opinion of 25 October 2013.

⁶² A.J. Cornell, *op. cit.*, p. 313.

⁶³ COM(2013) 851 final.

⁶⁴ D. Bokhorst, A. Schout and J.M. Wiersma *op. cit.*; J.J.E. Schutte, *Establishing Enhanced Cooperation Under Article 86 TFEU*, in L.H. Ekelens, A.W.H. Meij and M. Pawlik (eds), *The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon?*, New York, 2015.

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outside the scope of subsidiarity and thus making clear the limits of the EWS, the Commission re-established a proper institutional balance between NPs and EU institutions, which seemed to be damaged in the first yellow card case.⁶⁵ However, the Commission reviewed its EPPO proposal more comprehensively than the Monti II proposal and replied individually to each NP, which considered the issues beyond the subsidiarity. Some of the NPs, which submitted a second and even a third contribution, and the Commission subsequently continued to exchange the views over the proposal. Thus, as many scholars states, despite of the lack of the direct impact to EU legislative process, the second yellow card can be considered more effective than the first yellow card because of the reinforcement of the deliberative nature of EWS through improvement of the dialogue between NPs and the Commission.⁶⁶

*4. Third Yellow Card against the Revision of Posted Workers Directive**4.1. The Commission's Proposal for the Revision of the Posted Workers Directive*

The third yellow card was triggered against the Commission's proposal for a Directive amending the Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (COM(2016) 128 final, the revision of so-called PWD), which was presented on 8 March 2016. This proposal follows the Commission's commitment announced in its Political Guidelines and in its Work Programme 2016 to the targeted revision of the PWD in order 'to address unfair practices and promote the principle that the same work at the same place should be remunerated in the same manner'.⁶⁷

⁶⁵ F. Fabbrini, *op. cit.*

⁶⁶ C. Fasone and D. Fromage, *National Parliaments and the EU Commission's Agenda: Limits and Recent Developments of a Difficult Partnership*, in Max Weber Programme, vol 18, 2015, p 31 ss; D. Jančić, *The Game of Cards*, cit.

⁶⁷ COM(2016) 128 final.

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The PWD of 1996 was an attempt to find a proper balance between the workers' rights and the free provision of services in the regulation of the transnational provision of services. However, the relevance of the balance struck decreased in the light of several socio-economic, political, legal and jurisprudential developments.⁶⁸ Between 2010 and 2014 the number of posted workers increased by 44.4% and equalled to 1.92 million postings, accounting for 0.7% of EU workforce.⁶⁹ These relatively modest numbers are of particular importance for some MSs such as Slovenia, Slovakia and Poland where posted workers account for 6%, 4% and 3% of employment respectively, or some sectors including construction sector and manufacturing industry, which account for 42% and 21.8% of total postings respectively within the EU.⁷⁰ The EU enlargement of 2004 and 2007 resulted in the substantial increase of the ratio of highest to lowest national median wages across the EU. Moreover, the interpretation given to the provisions of PWD by the CJEU in the *Viking*, *Laval*, *Commission v. Luxembourg* and *Rüffert* illustrated 'the difficult reconciliation between the two objectives pursued by the Directive'.⁷¹

Consequently, the EU legislators adopted Enforcement Directive 2014/67/EU (due to be transposed in MSs by 18 June 2016) to clarify rules for the application of the PWD and to address the fraud and abuses in this sphere. According to the Commission, the Enforcement Directive doesn't address the issues covered by the proposed revision, and thus, these two legislations are 'complementary to each other and mutually reinforcing'.⁷² The proposed revision includes several amendments designed 'to avoid distortion of the single market and

⁶⁸ C. Dhéret and A. Ghimis, *The Revision of the Posted Workers Directive: Towards a Sufficient Policy Adjustment?*, in *EPC Discussion Paper*, 2016.

⁶⁹ SWD(2016) 52 final.

⁷⁰ M. Barslund and others, *Posted Workers – for Some It Matters*, in *CEPS Policy Insights*, vol. 37, 2017; R. Zahn, *Revision of the Posted Workers' Directive: Equality at Last?*, in *CETLS Online Paper Series*, vol. 5, 2016.

⁷¹ D. Fromage and V. Kreilinger, *op. cit.*, p. 135.

⁷² COM(2016) 128 final

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ensure a level playing field' for businesses.⁷³ The proposal replaces the reference to 'minimum rates of pay' with the term 'remuneration' and stipulates that 'the rules on remuneration applicable to local workers, stemming from the law or collective agreements universally applicable' must apply to posted workers as well.⁷⁴ The proposal also requires that the conditions to be applied to workers hired by cross-border agencies must be those that are applied to workers hired by national agencies. The Commission proposed to limit the duration of posting to 24 months, beyond which the host MS the labour law of this country will apply to a posted worker.⁷⁵

The Commission grounded the proposal on the same legal basis, Article 53(1) and 62 TFEU, with the PWD it was to amend. The Commission justified the compliance of the proposal with the principle of subsidiarity by briefly stating that 'amendment to an existing Directive can only be achieved by adopting new Directive'.⁷⁶ By providing this extremely short justification, the Commission seems to follow the same logic of reasoning it applied in one instance, when the Commission explained 'the omission of a subsidiarity justification on the ground that the proposal was for an amendment of an existing Regulation, so that the subsidiarity justification for the original Regulation continued to apply'.⁷⁷

4.2. The Reasoned opinions of National Parliaments against the Proposal

The third yellow card was triggered by NPs of eleven MSs (representing 22 votes on the whole) on 10 May 2016. All of the NPs which issued reasoned opinions, except Danish Folketing, represent

⁷³ D. Jančić, *The Third Yellow Card on Posted Workers and the Way Forward* in D. Jančić (ed), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?*, Oxford University Press, 2017, 303.

⁷⁴ COM(2016) 128 final.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ G.A: Moens and J. Trone, *The Principle of Subsidiarity in EU Judicial and Legislative Practice*, cit., p. 93.

the MSs from Central and Eastern Europe: Romania (both Chamber of Deputies and Senate), the Czech Republic (both the Chamber of Deputies and the Senate), Poland (both the Sejm and Senate), Lithuania, Croatia, Latvia, Bulgaria, Hungary, Estonia and Slovakia. Moreover, both chambers of Italian parliament, the UK House of Commons, the French Senate, the Spanish Cortes Generales and the Portuguese Assembly sent contributions ‘in the framework of the political dialogue mainly considering the proposal as compatible with the principle of subsidiarity’ (the French National Assembly also sent opinion on 13 August 2016 after the Commission’s response to the yellow card was published).⁷⁸

The NPs objected to the proposal not only on the grounds of its compliance with the principle of subsidiarity but also considered diverse aspects of the legislative draft. Ten out of fourteen reasoned opinions include explicit and implicit objections on the ground of the proportionality of the proposed measures and the proportionality principle *per se* (Bulgarian Assembly, both chambers of the Czech Parliament, Hungarian Assembly, Latvian Saeima, Lithuanian Seimas, Polish Senate, both chambers of the Romanian Parliament and Slovakian Parliament). The Hungarian Assembly, for instance, argues that the proposed legislative act doesn’t conform to the proportionality principle since it would significantly limit the freedom to provide services and distort competition among companies to such extent, which cannot be justified by the introduction of equal pay.⁷⁹ The Bulgarian Assembly criticizes that the proposal introduces ‘an additional administrative burden, without clarifying what the actual benefit for the posted workers would be’, hence doesn’t comply with the principle of proportionality.⁸⁰ It is interesting to note that, the reasoned opinions of the Lithuanian Seimas, the Czech Chamber of Deputies and the Romanian Senate unambiguously illustrate their interpretation of the EWS as the mechanism encompassing both subsidiarity and proportionality check, since the declarative parts of

⁷⁸ COM(2016) 505 final.

⁷⁹ The Hungarian National Assembly, Reasoned opinion of 10 May 2016.

⁸⁰ The Bulgarian National Assembly, Reasoned opinion of 20 April 2016.

those reasoned opinions summarize the non-compliance of the proposal with both principles.

There are also instances where the objections of NPs implicitly refer to the non-compliance of the proposal with the principle of proportionality. The Romanian Chamber of Deputies, for example, refers to the judgments of the CJEU which acknowledged that the protection of workers may justify barriers to the provision of services if only 'such barriers are appropriate and proportionate so as to ensure achievement of the legitimate objectives pursued', and states that, in this context, any amendments to the PWD shall be proposed only after the assessment of the effects of the Enforcement Directive.⁸¹

The perception of the EWS as including both the principles of subsidiarity and that of proportionality on the part of NPs ensues from several reasons. On the one hand, the facts that the Commission seemingly referred to proportionality arguments when tried to justify the compliance of the Monti II proposal with the principle of subsidiarity and 'that Protocol 2 and Article 5 TEU addresses the both principles together'⁸² may induce NPs to apply this interpretation of the EWS. On the other hand, as Fasone states, checking the compliance of proposals with the principle of subsidiarity by testing whether the action at Community level can be preferable 'by reason of its scale or effects' through providing qualitative and quantitative indicators, as it is required by the Protocol no. 2, and the CJEU's incorporation of a proportionality analysis into subsidiarity diffuse the boundaries between those two principles.⁸³

As Fromage and Kreilinger have noted, most of the NPs claimed that the proposal for the revision of the PWD breached the subsidiarity principle on the basis of procedural grounds.⁸⁴ Indeed, succinct subsidiarity justification presented by the Commission in the explanatory memorandum of the proposal, and the joint letter from European Trade Union Confederation (ETUC), BUSINESSSEUROPE, European Association of Craft, Small and Medium-Sized Enterprises (UEAPME) and the European Centre of Employers and Enterprises

⁸¹ The Romanian Chamber of Deputies, Reasoned opinion of 13 April 2016.

⁸² D. Fromage, *op. cit.*

⁸³ C. Fasone, *op. cit.*, p. 12.

⁸⁴ D. Fromage and V. Kreilinger, *op. cit.*

(CEEP) to the Commission, where they raised their concerns about the insufficient consultations with social partners regarding the proposal,⁸⁵ and other factors provided NPs with wide discretion to oppose the proposal on procedural bases. Hence, it is not surprising that all the reasoned opinions, except that of the Danish Folketing, the Polish Senate and the Estonian Riigikogu, contain the objections that the Commission had violated its obligation ensuing from Article 5 Protocol no 2, because of the lack of detailed statement justifying the compliance of the proposal with the principle of subsidiarity. The Croatian Parliament, for instance, argues that the proposal for the revision of the PWD does not contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality, and, thus, the Commission failed to substantiate the need for adopting the proposal.⁸⁶ Most of those reasoned opinions considered that also the Impact Assessment accompanying the proposal did not contain reliable qualitative or quantitative indicators justifying the subsidiarity compliance.

The prematurity of this proposal is another major objection raised by Croatian Parliament, Czech Senate, Estonian Riigikogu, Latvian Saeima, Lithuanian Seimas, both chambers of the Romanian Parliament, Slovakian Assembly, which doubt the conformity of the proposal with the principle of subsidiarity in procedural terms. All those reasoned opinions are in line with the Estonian Riigikogu to a certain extent, which argues that the proposal is premature since in the first place the Enforcement Directive shall be efficiently implemented, and proper impact analysis of the Directive shall be conducted before MSs assume new obligations.⁸⁷

Another main procedural argument put forward by the Czech Senate and the NPs of Romania (both chambers), Latvia, Lithuania and Slovakia concerns the obligation of the Commission ensuing from Article 2 Protocol no. 2 to consult widely before proposing legislative act by taking into account also the regional and local dimension of the action envisaged when appropriate. In particular, the Latvian Saeima

⁸⁵ ETUC, BUSINESSEUROPE, UEAPME and CEEP, Letter to President Juncker of 2 March 2016.

⁸⁶ The Croatian Parliament, Reasoned Opinion of 6 May 2016.

⁸⁷ The Estonian Riigikogu, Reasoned Opinion of 10 May 2016.

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argues that the Commission held not only insufficient consultation with MSs and social partners both in terms of quantity and quality, but also in preparing the proposal considered merely the positions of some MSs, whereas opposing opinions of a considerable number of MSs were ignored.⁸⁸

Jančić states that in their reasoned opinions against the proposal for the revision of the PWD, virtually all NPs considered the substance of the proposal.⁸⁹ This seems to be true except for the Danish Folketing, which supported the Commission's initiative aimed at ensuring equal pay for equal work. The only argument Danish Parliament put forward on the breach of subsidiarity concerns that the proposal results in the uncertainty of the national competence for regulating pay, and terms and conditions that apply to posted temporary workers.⁹⁰ For what concerns other NPs that raised objections to the content of the proposals, most of them challenged the legislative proposal as a means to reach the objective of 'equal pay for the same work at the same place' and considered that it could be achieved only through the economic development of individual MSs. Particularly, the Slovakian Parliament claims that the 'convergence of wage levels can be achieved only through economic development and not just with legal instruments'⁹¹.

Another significant object of criticism on the part of most NPs is the proposed introduction of the remuneration provisions instead of 'minimum pay rates', which is thought to pursue artificial convergence of pay rates in MSs while ignoring their different level of economic development. The Polish Sejm, for instance, asserts that the application of the minimum wage of the host state ensures appropriate social protection of posted workers and is sensible to natural differences in the level of economic development between MSs, and considers that convergence of wage levels in the MSs shall be result of economic growth, not of the legislative action.⁹²

⁸⁸ The Latvian Saeima, Reasoned Opinion of 5 May 2016.

⁸⁹ D. Jančić, *The Third Yellow Card on Posted Workers and the Way Forward*, cit.

⁹⁰ The Danish Folketing, Reasoned Opinion of 6 May 2016.

⁹¹ The Slovakian National Council, Reasoned Opinion of 10 May 2016.

⁹² The Polish Sejm, Reasoned Opinion of 13 April 2016.

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Several NPs also expressed concerns that the proposal will create unnecessary limits to the freedom to provide services through diminishing legitimate competitive advantages of service providers from 'low wage' countries. The Croatian Parliament stresses that the proposal introduces restrictions to the freedom to provide services within the EU and the 'labour cost is a legitimate element of companies' competitiveness in the EU internal market'.⁹³ Interestingly, the reasoned opinion of the Czech Chamber of Deputies clearly illustrates the political nature of its review of the proposal by stating that the proposal potentially endangers the Czech companies through undermining their competitive advantage in labor costs.⁹⁴

4.3. The response of the Commission to the reasoned opinions and further developments

On 20 July 2016, the Commission issued the Communication (COM(2016) 505final) as a response to the reasoned opinions of NPs against the proposal. The Commission 'carefully analysed the reasoned opinions' and concluded that the proposal complies with the principle of subsidiarity, thus there is no need for a withdrawal or an amendment of the proposal.⁹⁵ For what concerns the objections of NPs included in their reasoned opinions, the Commission divided them into four groups of subsidiarity arguments: 'the existing rules are sufficient; the Union is not adequate level of the action; the proposal fails to recognise explicitly MSs' competences on remuneration and conditions of employment; the justification contained in the proposal with regard to the subsidiarity principle is too succinct'.

The Commission, concerning the objections of NPs about the sufficiency of existing rules, asserts that under the current regulations the MSs have an option, but not the obligation, to apply same mandatory rules for the protection of both local and posted workers. Thus, the existing rules potentially cannot ensure a level playing field

⁹³ The Croatian Parliament (n 86).

⁹⁴ The Czech Chamber of Deputies, Reasoned Opinion of 31 March 2016.

⁹⁵ COM(2016) 505 Final.

between national and cross-border service providers and adequate protection of posted workers if MSs choose not to do so. Hence the obligation for all MSs to apply the rules in all sectors of the economy must be laid down at EU level. Furthermore, the Commission assures that the convergence of wages across MSs is not the objective of the proposal.⁹⁶

Regarding the NPs' claims about the inadequacy of EU level action, the Commission argues that if MSs act unilaterally to achieve the objectives of proposal, it can 'lead to a fragmentation of the Internal Market as regards the freedom to provide services' and will not provide legal consistency and clarity 'taking into account the inherent cross-border nature of the posting of workers'.⁹⁷ Moreover, the Commission refers to the decision of the Union legislature, which had determined that the above-mentioned objectives of the proposal would be better achieved at Union level by adopting the PWD and the Enforcement Directive.

Concerning the objections of the Danish Folketing about the lack of express recognition of MSs' competences, the Commission states that the proposal merely provides that the mandatory rules on remuneration should equally apply both to local and posted workers, and thus, the proposal does not regulate remuneration and does not define remuneration or its constituent elements at Union level.⁹⁸ As regards the national competence to determine the rights of temporary posted workers, according to the Commission, the proposal only requires that national temporary workers and temporary posted workers should be provided with same rights, the determination of which is in the competence of each MS.

The Commission, with respect to the objections about the lack of subsidiarity justification, recalls the decisions of the CJEU in the *Germany v Parliament and Council* (C-233/94) and the *Philip Morris* (C-547/14). In the former case, the CJEU decided that an implicit and rather limited reasoning is sufficient to justify compliance with the subsidiarity principle. In the *Philip Morris* case, the Court adjudicated

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

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that compliance with the obligation to justify the respect for the principle of subsidiarity ‘must be evaluated not only by reference to the wording of the contested act, but also by reference to its context and the circumstances of the individual case’, and that the Commission’s proposal and its IA should also be considered in this regard.⁹⁹ Based on this, the Commission states that the recitals and the IA report of the proposal have provided sufficient justification of the compliance of the proposal with the principle of subsidiarity.

However, as it was mentioned above, several NPs have criticized the IA report for lacking the detailed and objective evaluation of the impact of the proposal on several aspects. Jančić argues that, this particular IA report can be discarded as a credible piece of evaluation, since it states that a regulatory framework for the posting of workers ‘can only be established at EU level’, and thus, ‘pre-empts any role for NPs, given that the key question that requires explanation is outright answered in the positive’.¹⁰⁰ Moreover, the IA report was presented only in the English language which complicates its review by NPs, taking into account the short period of time they have for the whole subsidiarity scrutiny procedures.

The Commission, as it did in the second yellow card case, in the framework of the Political Dialogue also sent individual responses to each parliamentary chamber, which had transmitted the reasoned opinions. These responses considered the concerns of NPs over the aspects of the draft legislative act, which were allegedly beyond the scope of the subsidiarity scrutiny as envisaged in the EWS.

Since the Commission decided to maintain the proposal the legislative process on the revision of the PWD has continued. In the EP, the parliamentary committee responsible for the proposal is Employment and Social Affairs Committee (EMPL). On 12 October 2016 EMPL organized an interparliamentary committee meeting, where the sectoral committees of the NPs discussed the proposal. The EMPL prepared draft report on 16 October 2017 and the EP Plenary voted for the draft mandate to enter into informal negotiations with

⁹⁹ Ibid.

¹⁰⁰ D. Jančić, *The Third Yellow Card on Posted Workers and the Way Forward*, cit.

the Council.¹⁰¹ In the Council, the first compromise text was presented in March 2017, which led to the agreement over the definition of collective agreements and temporary agency workers, while no progress achieved on the introduction of remuneration. On 30 August 2017 under the Estonian Presidency of the Council was presented the compromise text which served as a base to the Council negotiations in October.¹⁰² On 23 October 2017, at the EPSCO Council in Luxembourg, the Council reached an agreement on its general approach on the proposal, with which the Council can start negotiations with the EP regarding the proposal.¹⁰³

On 1 March 2018 the seventh trialogue on the revision of PWD among the representatives of the Commission, the Council and the EP was concluded. As a result of trialogues, the EU institutions agreed on the 12 months limit with a possible extension of 6 months as maximum duration of posted workers, on enabling Member States with possibility whether to choose to ensure that posted workers are covered by representative collective agreements in all sectors, on the 2 years as the period of transposition of the Directive, and on the application of the new elements of this Directive to the transport sector once the sector-specific legislation (currently under negotiation) enters into force.

4.4. *National Parliaments and the politics in the revision of the PWD*

The empowerment of the NPs in the Lisbon Treaty is thought to be the measure to address the problem of legitimacy in the EU

¹⁰¹ European Parliament, *Revision of the Directive on the Posting of Workers - Labour Mobility Package*, <<http://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-labour/file-revision-of-the-directive-on-the-posting-of-workers-labour-mobility-package>> Accessed on 22.05.2018.

¹⁰² S. Richard, *The Revision of the Posted Workers Directive: How Can It Be Taken Further?*, in *European Issue*, vol. 446, 2017.

¹⁰³ The Council, *Posting of Workers: Council Reaches Agreement*, <<http://www.consilium.europa.eu/en/press/press-releases/2017/10/24/posting-of-workers-council-reaches-agreement/>> Accessed on 22.05.2018.

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decision-making process, which ensues from either ‘democratic deficit’ or ‘democratic disconnect’.¹⁰⁴ Although some scholars argue that those new powers, the EWS in particular, are insufficient to make much difference in this respect,¹⁰⁵ others state that the EWS can accelerate the Europeanization of NPs and creates ‘new arena for democratic politics in the EU’.¹⁰⁶ The latter is done through a broad interpretation of subsidiarity check on the part of NPs which enables ‘to transmit some features of the (usually quite «warm») national political debate to the («cold») EU decision-making process’.¹⁰⁷

The revision of the PWD is an interesting case in this regard since it demonstrates that the NPs can use the EWS as a key instrument to insert the domestic politics into the EU legislative process. The NPs’ reaction to the proposal reveals the existing the East-West divide over the issue of posted workers. All the NPs that raised objections (except Danish Folketing) represent new MSs from the Central and Eastern Europe, whereas the NPs who sent contributions supporting the proposal represent old MSs from the West. The analyses of the reasoned opinions illustrate that the NPs of new MSs mostly reflected the positions of their respective governments. Prior to the publication of the proposal, the governments of those MSs (except for Croatia) sent joint letter to the Commission on 31 August 2015 in the preparatory phase of the proposal, where they argued against the amendment of the PWD almost on the same basis with their NPs such as the prematurity of the revision, the inconsistency of ‘the equal pay for equal work in the same place’ principle with the single market.¹⁰⁸ On the other hand, on

¹⁰⁴ K. Auel and T. Christiansen, *After Lisbon: National Parliaments in the European Union*, in *West European Politics*, vol. 38, 2015, p 261 ss. S. Kröger and R. Bellamy, *Beyond a Constraining Dissensus: The Role of National Parliaments in Domesticating and Normalising the Politicization of European Integration*, in *Comparative European Politics*, vol. 14, 2016, p. 131.

¹⁰⁵ S. Kröger and R. Bellamy, *op. cit.*; K. Auel and C. Neuhold, *Multi-Arena Players in the Making? Conceptualizing the Role of National Parliaments since the Lisbon Treaty*, in *Journal of European Public Policy*, vol. 24, 2017, p. 1547 ss.

¹⁰⁶ K. Borońska-Hryniewiecka, *Democratizing the European Multi-level Polity*, *op. cit.*; Cooper, *A Yellow Card for the Striker*, *cit.*

¹⁰⁷ N. Lupo, *National Parliaments in the European Integration Process*, *cit.*

¹⁰⁸ SWD(2016) 52 final.

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18 June 2015 Austria, France, Belgium, Germany, Luxembourg and the Netherlands sent the joint letter, where they expressed their support for the proposed revision of the proposal.¹⁰⁹

The formation of those 'regional blocks' is indicative of 'the opposition between those who are in favour of more EU regulation ... and those who are against tighter EU regulation in this area'.¹¹⁰ Though Germany and France account for the highest absolute number of postings sent after Poland, new MSs such as Poland, Latvia, and Slovenia are among the highest net senders of posted workers, where their share in total employment is significantly higher than in old MSs.¹¹¹ Hence, the NPs from the new MSs seem to resort to the EWS for defending their national service providers who have the comparative advantage due to wage difference, whereas NPs of old MSs consider the proposal as an instrument to address the 'social dumping' problem. The split over the issue of the posted workers can also be observed between trade unions and the associations of service providers. The former are mostly in favour of the proposed revision for enhancing the rights and protection of the workers, while the latter for the most part consider the proposal as an excessive administrative burden impeding the transnational provision of services.

The use of the EWS by NPs in this manner can be linked with some peculiarities of the third yellow card case distinguishing it from two previous cases. The previous two yellow cards were raised against the proposals for Regulation which requested the unanimity in the Council, whereas the third yellow card concerned the proposal for Directive falling under the ordinary legislative procedure which requires a qualified majority in the Council. As Fromage and Krelinger have noted, even if all the 11 MSs whose NPs triggered the yellow card vote against the proposal in the Council, they can't halt the proposal provided that all other MSs vote in favour of the proposal by constituting the 'double majority'.¹¹² In this regard, the NPs' attempt to use the EWS for changing the content of the proposal can be

¹⁰⁹ Ibid.

¹¹⁰ D. Fromage and V. Krelinger *op. cit.*, p. 156.

¹¹¹ SWD(2016) 52 final.

¹¹² D. Fromage and V. Krelinger *op. cit.*, p. 157.

considered as an alternative way to influence the EU decision-making, in line with their national interests, through fulfilling their deliberative function at the EU level by addressing the salient public policy questions.

5. Conclusions

The study attempted to examine the scope of the scrutiny of the compliance of the draft legislative acts with the subsidiarity principle as NPs apply it. The yellow card cases demonstrated that the practical approach of the NPs to the EWS differs from the textual understanding of the EWS foreseen in the TEU and the Protocol no 2 and from the narrow interpretation of the EWS by the European institutions, particularly from that of the Commission.

The principle of subsidiarity has undergone the transformation from the 'norm of self-limiting governance', when it was for the first time recognized as the general principle of EU law in the Maastricht Treaty,¹¹³ to the principle expected to remedy the perceived 'democratic deficit' and 'democratic disconnect' in the European Governance through empowering the NPs with scrutiny powers within the EWS. However, the political nature of the parliamentary institutions mostly predetermines that it is hardly probable for the NPs to become subsidiarity guardians who consider the EWS as a strictly legal mechanism, but encourages them to apply the broader interpretation of the EWS.¹¹⁴

The reaction of the NPs to the revision of the PWD has demonstrated that their broad interpretation of the EWS considers both the principle of subsidiarity and the principle of proportionality to be included in their scrutiny rights, which is in line with the first hypothesis of this paper. As it occurred in two previous yellow card cases, in the third yellow card case, most of the reasoned opinions of NPs argued the noncompliance of the proposal with the principle of

¹¹³ I. Cooper, *Is the Subsidiarity Early Warning Mechanism a Legal or a Political Procedure?*, cit., p. 6.

¹¹⁴ K. Borońska-Hryniewiecka, *Legitimacy through Subsidiarity*, cit.

subsidiarity on the basis of the proportionality arguments and separately examined the compliance with the principle of the proportionality. On the one hand, this approach can be interpreted in the light of the inclination of the NPs for the broader interpretation of the EWS. On the other hand, the fact that even “narrow and legalistic” conceptualization of the principle of subsidiarity may be thought to include also the principle of proportionality due to the necessity of “comparative efficiency test” for the justification of the legislative proposal can be the reason for this approach.¹¹⁵

For what concerns the approach of the NPs to the examination of the compliance with the principle of subsidiarity, the revision of the PWD case has reasserted that the procedural dimension of the principle of subsidiarity has grown in importance for the NPs’ consideration, which supports the second hypothesis put forward by this study. All the NPs in their reasoned opinions, except for Danish Folketing, have noticed the breach of the principle of subsidiarity mostly on the basis of the assumption that the Commission had had not fulfilled its procedural obligations regarding the justification of the proposal for revision of the PWD. The reasons for resorting to the procedural dimension of the principle of subsidiarity are twofold. On the one hand, when the objectives of the legislative proposal have the explicit transnational character, it is indeed complicated for NPs to argue on the compliance of this particular proposal with the principle of subsidiarity in material terms. On the other hand, the Commission’s approach to the EWS embodied in its succinct statements justifying the compliance of the proposal with the principle of subsidiarity and insufficient public consultations in the preparatory phase provides NPs with the solid ground to object the proposal in procedural terms.

The use of the EWS by NPs for addressing the policy content and the merits of the proposal has been revealed in the analysis of the third yellow card case, which substantiates the third hypothesis of this paper. As it was mentioned in the section IV, all the NPs, except for Danish Folketing, attempted to influence the policy substance of the

¹¹⁵ M. Aaron, *The Principle of Subsidiarity and Institutional Predispositions: Do the European Parliament, the German Bundestag, and the Bavarian Landtag Define Subsidiarity Differently?*, in *CAP Working-Paper*, 2010, p. 19.

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legislative proposal, since they perceived it to be detrimental for the competitive advantage of their national service providers, and, thus, to their national interests. Hence, the third yellow card case has also demonstrated that the EWS may be used to insert the political debate over salient issues, which is inherent to domestic politics, into the EU decision-making on the part of NPs. In particular, in the revision of the PWD case, the politicization of the EWS has occurred in the form of East-West divide between new and old MSs, and the split between the trade unions and the associations of the service providers over the issue of posted workers.

It is evident that the opportunities to use the EWS for political objectives are limited due to the wording of the TEU and the Protocol no. 2. Neither the EWS can serve as an efficient instrument to make the NPs into 'virtual third chamber' for the EU on equal grounds with the Council and the EP, taking into account that the EWS doesn't envisage any veto powers for NPs such as 'red card'.¹¹⁶ However, the EWS provides the NPs with the forum to fulfil their deliberative function at the EU level, and, thus, to certain extent alleviate perceived 'democratic disconnect' in the EU governance.

Abstract: The Lisbon Treaty introduced the Early Warning System for the subsidiarity monitoring. The EWS empowers National Parliaments of the Member States with the right to submit reasoned opinions if they consider that the legislative proposal breaches the principle of subsidiarity and to trigger 'yellow card' or 'orange card' procedures. The three yellow cards triggered so far have demonstrated that the scope of the review on the part of the NPs is broader than it is foreseen in the Treaties. Thus, this article aims at analysing the approach of NPs towards the EWS with regard to the scope of their subsidiarity scrutiny through qualitative examination of the reasoned opinions in the third yellow card case. The study suggests that the practical scope of the NPs' subsidiarity scrutiny also

¹¹⁶ I. Cooper, *A 'Virtual Third Chamber' for the European Union? National Parliaments after the Treaty of Lisbon*, in *West European Politics*, vol. 35, 2012, p. 441 ss.

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includes the principle of proportionality, and the policy content and the merits of the proposal with particular consideration of the procedural dimension of the principle of subsidiarity.

Keywords: national parliaments - principle of subsidiarity - early warning system - yellow card - revision of the Posted Workers Directive

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