

# The Third Yellow Card against the Revision of the Posted Workers Directive: A Legal or a Political Interpretation of the Early Warning Mechanism?

By Qasim Hussein

Master thesis submitted to Dr. Mendeltje van Keulen in partial fulfilment of the requirements for a degree in

International Relations: European Union Studies (MA)

Leiden University

July 2020

Number of pages: 53

Word count: 21085

## Table of Contents

Introduction.....	3
Chapter 1. The Early Warning Mechanism: An Introduction.....	6
1.1 The Lisbon Treaty: Empowering the national parliaments.....	7
1.2. Subsidiarity monitoring in the post-Lisbon period.....	11
1.3. Conclusion.....	17
Chapter 2. The subsidiarity principle and the Early Warning Mechanism.....	18
2.1 The origins of subsidiarity.....	18
2.2 The inauguration and development of the subsidiarity principle in the EU legal order.....	19
2.3 The material and procedural dimension of the subsidiarity principle.....	22
2.4. The subsidiarity principle: A legal and a political principle.....	24
2.5. The legal and political interpretation of the Early Warning Mechanism.....	26
2.6. The first yellow card: Revolt against the Monti II proposal.....	28
2.7. The second yellow card: The EPPO proposal caught in the crossfire.....	31
2.8. Conclusion.....	34
Chapter 3. The third yellow card and the revision of the Posted Workers Directive.....	35
3.1 The short history and the contents of the Posted Workers Directive.....	35
3.2 The revision process of the Posted Workers Directive and the proposed amendments to the Posted Workers Directive.....	37
3.3 The reasoned opinions of national parliaments.....	40
3.4 Conclusion.....	42
Conclusion.....	43
Bibliography.....	46

## Introduction

In 2016, the European Union and its Member States experienced a very challenging year. The United Kingdom decided in a referendum to leave the European Union, the United States elected the anti-European and protectionist Donald Trump as its 45th President and Brussels and Nice were struck by terrorist attacks. The European Union also grappled with (the aftermath of) the so-called refugee crisis which magnified the already existing deficiencies of the Common European Asylum System (hereafter CEAS). At the height and in the immediate aftermath of the refugee crisis, the European Commission proposed measures to overcome this crisis which consisted of establishing a joint list of safe countries, creating 'hotspots' in Italy and Greece with the aim of helping local authorities to examine the many asylum applications and setting up the European Border and Coast Guard Agency.<sup>1</sup> But maybe more controversially, the Commission also desired to bring about a relocation mechanism for asylum seekers. In September 2015, the Council adopted two decisions using a qualified majority which stipulated that 160000 asylum seekers residing in Greece and Italy would be relocated to other Member States.<sup>2</sup> This emergency relocation mechanism meant to be temporary was fiercely contested as evidenced by the fact that four Member States from Eastern Europe, namely Czechia, Hungary, Slovakia and Romania voted against the second Council decision which took place on 22 September 2015. The resistance against the relocation mechanism from these and other Eastern European countries did not disappear after the lost vote in the Council. Slovakia and Hungary supported by Poland went to the European Court of Justice and argued for an annulment of the 2nd Emergency Relocation Decision.<sup>3</sup> Moreover, the government of Hungary's populist prime minister Viktor Orbán organized a referendum on the EU's refugee relocation plans in 2016 and campaigned vociferously against the plans of the EU. This referendum turned out to be a disastrous waste of money as the required threshold of 50 per cent was not reached.<sup>4</sup> But the opposition from Hungary and other Eastern European countries against any mechanism enabling a fair distribution of asylum applicants did signify that an ambitious and just reform of the entire architecture of the CEAS would be difficult to achieve. It was therefore not surprising that during the refugee crisis, the Commission and the Member States opted for a lowest common denominator approach by protecting the external borders of the EU through the establishment of the European Border and Coast Guard Agency and by externalizing European border control through the EU-Turkey Agreement.

In 2016, it was not only the CEAS that faced formidable challenges but the EU's Common Commercial Policy also encountered big obstacles. In October 2016, the regional parliament of Wallonia voted against the signature of CETA by the Belgian government in the Council which caused many headaches as CETA being designated a so-called 'mixed agreement' was

---

<sup>1</sup> Evelien Brouwer, 'Rechtsgeldigheid van het relocatiebesluit en de betekenis van het solidariteitsbeginsel in het EU-asielbeleid', in: *Nederlands tijdschrift voor Europees recht*, No. 9/10 (2017), p. 219.

<sup>2</sup> *Ibid.*, p. 220.

<sup>3</sup> Bruno De Witte and Evangelia (Lilian) Tsourdi, 'Confrontation on relocation – The Court of Justice endorses the emergency scheme for compulsory relocation of asylum seekers within the European Union: Slovak Republic and Hungary v. Council', in: *Common Market Law Review*, Vol. 55, No. 5 (2018), p. 1458.

<sup>4</sup> Andrew MacDowall, 'Voters back Viktor Orbán's rejection of EU migrant quotas', in: *Politico Europe*, 2 October 2016.

seen as requiring joint unanimous signing and ratification by the EU and its Member States.<sup>5</sup> The ‘Wallonian Saga’ which almost hindered the signing and conclusion of CETA between the EU and Canada but was eventually solved through an intra-Belgian declaration<sup>6</sup> severely tarnished the legitimacy and the effectiveness of EU’s trade policy. In the beginning of 2016, the Commission also had to trigger its rule of law framework for the first time against Poland when it announced that it would carry out a preliminary analysis of the developments taking place at the Polish Constitutional Tribunal. The events mentioned above and well-documented show that the EU faced a perfect storm in 2016 as the exclusive competences, the specific policies, the fundamental values and even the *raison d’être* of the EU were questioned by all sides.

What went largely unnoticed is that national parliaments also made themselves heard in 2016 by opposing one element of the ‘Social Europe’ agenda of the Juncker Commission or more accurately put the latter’s attempt to make a more social use of the internal market legal bases. In accordance with Protocol 2 annexed to the Lisbon Treaty, national chambers from eleven Member States issued a yellow card against the proposal to revise the Posted Workers Directive. By triggering the yellow card procedure, these national parliaments rejected the revision proposal on the grounds that it did not comply with the subsidiarity principle.<sup>7</sup> Since the entry into force of the Lisbon Treaty, national chambers have been able to rely on the provisions of Protocol 2 to control legislative proposals on the principle of subsidiarity. The process set out in Protocol 2 is better known under the name ‘Early Warning Mechanism’ and consists of a yellow and a orange card procedure. If national parliaments believe that a proposal is not in compliance with the subsidiarity principle, then they have the right to send reasoned opinions detailing their subsidiarity-related objections to the initiators of the draft legislation. These reasoned opinions could culminate in yellow or orange cards if the necessary thresholds are reached. Up until now, not one orange card has been issued, whereas the yellow card procedure has been launched three times. The first two yellow cards were issued against respectively the Monti II proposal dealing with the right to strike and the EPPO proposal which envisaged the inauguration of a European Public Prosecutor. And the proposal revising the framework governing the posting of workers thus received the third yellow card.

The focus of this thesis will be the third yellow card issued within the framework of the Early Warning Mechanism which is stipulated in Protocol 2. The thesis will answer the question whether national parliaments in their reasoned opinions which together form the third yellow card only paid attention to the subsidiarity principle and whether contrary to the text of Protocol 2 they also focused on other topics such as the legal basis, the proportionality principle and the substance of the proposal. The third yellow card has attracted academic scrutiny as is evident from the publication of various peer-reviewed articles containing different view points. These studies have respectively emphasized the issuing of the third yellow as a clear signal from East European national parliaments that they oppose ‘Social

---

<sup>5</sup> David Kleimann and Gesa Kübek, ‘The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15’, in: *Legal Issues of Economic Integration*, Vol. 45, No. 1 (2018), pp. 14-15.

<sup>6</sup> *Ibid.*, p. 15.

<sup>7</sup> Katarzyna Granat, ‘The Scope and Application of the EWS’, in: Katarzyna Granat ed., *The Principle of Subsidiarity and its Enforcement in the EU Legal Order: The Role of National Parliaments in the Early Warning System*, Oxford: Hart Publishing, 2018, pp. 86-90.

Europe<sup>8</sup>, the inadequacy of the Commission's response to the third yellow card<sup>9</sup> and the fact that the second and third yellow card were issued against proposals that did in fact respect the subsidiarity principle.<sup>10</sup> As such, the thesis will be a literature study focusing on all the three yellow cards in chronological order and making use of primary and secondary sources.

The first chapter in this thesis will describe the role of national parliaments in the post-Lisbon landscape and will show that the Lisbon Treaty has considerably strengthened the position of national parliaments. Moreover, it will focus on one of the main innovations of the Lisbon Treaty regarding the place of national parliaments within the constitutional architecture of the EU, namely the Early Warning Mechanism. The origins, virtues and problems of the Early Warning Mechanism will be explored in detail. The second chapter will pay attention to the introduction and nature of the subsidiarity principle in the EU and will explain that the principle of subsidiarity consists of two sides: a material and a procedural one. Furthermore, it will elucidate the role of subsidiarity in the EWM and it will demonstrate that the centrality of subsidiarity in the EWM is questioned given the fact that the EWM is often interpreted both in a legal and political manner. The last part of the second chapter will be devoted to the first two yellow cards, focussing on whether national parliaments in these instances chose to interpret the EWM in a strictly legal or a political fashion. The third and last chapter will be solely dedicated to the third yellow card, whereby in the first section the Posted Workers Directive and the revision proposal will be reviewed. The last part of the third chapter will answer the central question of this thesis namely whether in the reasoned opinions that together comprise the third yellow card, national parliaments only focused on the subsidiarity principle or whether they also decided to review other topics such as the legal basis, the proportionality principle and the substance of the (revision) proposal. In other words, was the third yellow card characterized by a legal or a political interpretation?

---

<sup>8</sup> Diane Fromage and Valentin Kreilinger, 'National Parliaments' Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive', in: *European Journal of Legal Studies*, Vol. 10, No. 1 (2017), pp. 125-160.

<sup>9</sup> Davor Jančić, 'EU Law's Grand Scheme on National Parliaments: The Third Yellow Card on Posted Workers and the Way Forward', in: Davor Jančić ed., *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?*, Oxford: Oxford University Press, 2017, pp. 299-312.

<sup>10</sup> Jacob Öberg, 'National Parliaments and Political Control of EU Competences: A Sufficient Safeguard of Federalism?', in: *European Public Law*, Vol. 24, No. 4 (2018), pp. 695-732.

## 1. The Early Warning Mechanism: An Introduction

On 10 May 2016, the threshold for a yellow card was reached. Parliamentary chambers from eleven Member States found the directive concerning the posting of workers in the framework of the provision of services not in compliance with the principle of subsidiarity. This directive was envisioned to amend the 1996 directive on posted workers in order to address unfair practices and to promote the principle of 'equal pay for equal work'.<sup>11</sup> But the intervention of national parliaments made the adoption of the above-mentioned piece of legislation uncertain. The Early Warning Mechanism has been in operation since the Lisbon Treaty of 2009 and has thus far witnessed the issuing of three yellow cards. The first yellow card was issued in 2012, whereas the threshold for the second yellow card was reached a year later in 2013. The first yellow card was targeted against the Monti ii Regulation which aimed to regulate the right to take collective action within the context of the freedom of establishment and the freedom to provide services. In 2013, national legislatures wrote enough reasoned opinions within the eight week deadline to reach the threshold for a yellow card whereby they protested against the establishment of the European Public Prosecutor's Office. In the case of the first yellow card, the efforts of the parliamentary chambers did pay off as the European Commission eventually decided to withdraw its proposal regarding the right to strike.<sup>12</sup> Of course, one could debate whether it was the yellow card that forced the Commission to abandon its plan to regulate the right to strike. As stipulated in the second protocol of the Lisbon Treaty, the Early Warning System does not formally grant national chambers a veto over European legislation. After the second yellow card, the Commission chose to move forward with its plan to create a European Public Prosecutor's Office even though one third of national chambers believed that the EPPO legislative proposal contravened the subsidiarity principle.<sup>13</sup> After the issuing of the third yellow card, the Commission also decided to continue with its efforts to revisit the Posted Workers Directive.<sup>14</sup> But before discussing the third yellow card and the revision proposal against which it is issued, it is of the utmost importance to understand how the Treaty of Lisbon made national parliaments one of the 'winners'<sup>15</sup> in the EU and to discuss the Early Warning Mechanism which is laid down in Protocol 2 of the Treaty of Lisbon. Therefore, this chapter shall discuss the provisions in the Lisbon Treaty that empowered the national parliaments. Moreover, it will explore the origins, virtues and problems of the Early Warning Mechanism.

---

<sup>11</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final, p. 2.

<sup>12</sup> Granat, 'The Scope and Application of the EWS', p. 80.

<sup>13</sup> *Ibid.*, pp. 83-85.

<sup>14</sup> Fromage and Kreilinger, 'National Parliaments' Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive', pp. 152-154.

<sup>15</sup> Christine Neuhold and Julie Smith, 'Conclusion: From 'Latecomers' to 'Policy Shapers'? – The Role of National Parliaments in the 'Post-Lisbon' Union', in: Claudia Heffler, Christine Neuhold, Olivier Rozenberg and Julie Smith eds., *The Palgrave Handbook of National Parliaments and the European Union*, Basingstoke: Palgrave Macmillan, 2015, p. 675.

## 1.1 The Lisbon Treaty: Empowering the national parliaments

The Treaty of Lisbon is regarded as 'the Treaty of Parliaments'<sup>16</sup> as it empowered the European Parliament and the national parliaments in a significant way. Under the Lisbon Treaty, the co-operation procedure was abolished and the co-decision procedure became the ordinary legislative procedure. Furthermore, the ordinary legislative procedure was extended to new policy areas, making the EP (almost) the equal of the Council of Ministers. The EP was not the only 'winner' of the Lisbon Treaty as the Treaty changes of 2009 also gave the national parliaments a more prominent role in the European decision-making. Adam Cygan has even described the provisions in the Lisbon Treaty, thereby referring specifically to Article 12 TEU and Protocol 2 (annexed to the Lisbon Treaty) which grant national parliaments the role of subsidiarity monitors as "the single most important development for national parliaments since their contribution was first recognised in Declaration 13 of the Treaty of Maastricht."<sup>17</sup> Declaration 13 of the Maastricht Treaty stated that greater involvement of national parliaments in the activities of the EU needed to be encouraged. Moreover, it stipulated that the exchange of information between the EP and the national parliaments needed to be stepped up and that national parliaments should receive Commission proposals in good time for information and examination. Lastly, it emphasized that it was necessary to increase contacts between the EP and the national parliaments, in particular through regular meetings between members of parliament and reciprocal access to each other facilities.

It is indeed the case that the Lisbon Treaty has significantly improved the status of national parliaments in the EU. The provisions of Article 12 TEU and Protocol 2 are however not the only stipulations in the Lisbon Treaty that have had or could have an impact on the workings of national parliaments as evidenced by the content of Protocol 1. In fact, it would be very difficult to fully understand the (new) role of national parliaments in the post-Lisbon period by solely looking at the provisions of Article 12 TEU and Protocol 2. Until the Lisbon Treaty, national parliaments mostly had an indirect participation in EU policy-making process as they were focused on controlling their national executives in the Council.<sup>18</sup> This task has remained very important as can be seen from Article 10 TEU that talks about the democratic credentials of the EU. This Article clearly states that the functioning of the European Union shall be founded on representative democracy. At Union level, it is the European Parliament that represents the European citizens, whereas Member States are represented in the European Council by their Heads of State and Government and in the Council of Ministers by their respective governments which are also accountable to their national parliaments and their citizens. The fact that governments which make up the Council are accountable to the national parliaments means that national parliamentarians have an important role to play in the scrutiny of their governments in the Council. National parliamentarians can indeed play a steering role in the Council negotiations as they can ask their governments to take their wishes

---

<sup>16</sup> Elmar Brok und Martin Selmayr, 'Der ‚Vertrag der Parlamente‘ als Gefahr für die Demokratie? Zu den offensichtlich unbegründeten Verfassungsklagen gegen den Vertrag von Lissabon', in: *Integration*, 31 (3) 2008, pp. 217-34.

<sup>17</sup> Adam Cygan, "Collective' subsidiarity monitoring by national parliaments after Lisbon: the operation of the early warning mechanism", in: Luca Rubini and Martin Trybus eds., *The Treaty of Lisbon and the Future of European Law and Policy*, Cheltenham: Edward Elgar, 2012, p. 59.

<sup>18</sup> *Ibid.*, p. 57.

into account or they can authorise their governments to take a position from which they can not deviate.

The provisions of Article 12 TEU and Protocol 1 and 2 of the Lisbon Treaty make it possible for the national legislatures to participate indirectly and directly in the decision-making of the EU. The Lisbon Treaty is the first treaty where the national parliaments are mentioned in the main text and not only in the Protocols and Declarations. The previous section showed that Article 10 TEU emphasizes the indirect role of national parliaments. Article 12 TEU for the most part lays down how national parliaments can directly contribute to the good functioning of the EU and confirms that national parliaments are an integral part of the EU's composite constitution.<sup>19</sup> It states that national parliaments contribute actively to the good functioning of the Union:

(a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;

(b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;

(c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty;

(d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;

(e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;

(f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.

The most important innovation can be found in paragraph b that gives parliamentary chambers the competence to control European legislation on subsidiarity.<sup>20</sup> But this new goal of seeing to it that the principle of subsidiarity is respected can only be achieved if national chambers are provided with the necessary documents on time and are engaged in some form of horizontal interparliamentary dialogue. That is why the incorporation of paragraphs a and f in Article 12 TEU should be applauded because these points are vital to make sure that the monitoring of subsidiarity by national legislatures which is also known as the Early Warning System functions smoothly and effectively. The fact that national parliaments now receive the draft legislative proposals directly from the European institutions thus means that it will be

---

<sup>19</sup> Leonard FM Besselink, 'The Place of National Parliaments within the European Constitutional Order', in: Cristina Fasone and Nicola Lupo eds., *Interparliamentary Cooperation in the Composite European Constitution*, Oxford: Hart Publishing, 2016, p. 29.

<sup>20</sup> Tobias Lock, 'Article 12 TEU', in: Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin eds., *Commentary on the EU Treaties and the Charter of Fundamental Rights*, Oxford: Oxford University Press, 2019, p. 120.

easier to write reasoned opinions within eight weeks to reach the threshold for a yellow or orange card. Moreover, interparliamentary cooperation between national parliaments is very much needed to encourage and convince other parliamentary chambers to draft reasoned opinions within the eight weeks and to issue yellow or orange cards.

Even though the EWM forms the most important innovation of the Lisbon Treaty, Article 12 TEU makes clear that national parliaments also have other means at their disposal to take part in and influence European affairs. Paragraph c in Article 12 gives national legislatures a central role in the evaluation mechanisms for the implementation of EU policies in the area of freedom, security and justice, in the evaluation of the activities of Eurojust and in the monitoring of Europol in accordance with Articles 70, 85 and 88 of the TFEU.<sup>21</sup> However, it has to be emphasized that in the post-Lisbon period national parliaments will have to share their powers to evaluate the actions of Eurojust and to oversee the activities of Europol with the European Parliament. Articles 85 and 88 of the TFEU which respectively describe the role of Eurojust and Europol explicitly state that the future evaluation and scrutiny of Europol and Eurojust will be carried out by the national parliaments and the European Parliament. Pursuant to Article 85 TFEU, Article 67 of the new Eurojust Regulation describes the involvement of national parliaments and the European Parliament in holding Eurojust accountable. In the recently adopted Europol Regulation, Article 53 entrusts national parliamentarians and members of the European Parliament with the supervision of Europol as stated in Article 88 of the TFEU.

Furthermore, Article 12 TEU accords national parliaments a role in the treaty revision and accession procedures in accordance with Articles 48 and 49 of the TEU.<sup>22</sup> Article 49 TEU describes in broad terms how any European state that respects the values of the Union as set out in Article 2 TEU and is willing to promote them can apply to become a part of the EU. If a state wishes to join the EU and subsequently makes an application, then the national parliaments will be notified of this application. At the end of the accession negotiations, national parliaments depending on their constitutional traditions also retain the possibility of not signing the Accession Treaty and thus blocking enlargement. Article 48 TEU stipulates that the Union Treaties can be amended through the ordinary revision procedure and the simplified revision procedures.<sup>23</sup> With regard to the ordinary revision procedure, this Article lays down that the government of any Member State, the European Parliament and the Commission may submit proposals to the Council to amend the Union Treaties. If any of the abovementioned actors decides to send its concrete proposals to the Council, then the national parliaments shall be notified. The role of national legislatures could be augmented in this procedure but that depends on the calculus of the European Council. If the European Council, after consulting the European Parliament and the Commission, decides by a simple majority to examine the proposed amendments, then the President of the European Council will have to convene a Convention which shall be composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. This Convention will have the task to scrutinize the proposed amendments and adopt by consensus a recommendation to a conference of representatives of the governments of the Member States. The Convention method which was

---

<sup>21</sup> Lock, 'Article 12 TEU', p. 122.

<sup>22</sup> Ibid., p. 123.

<sup>23</sup> Lock, 'Article 48 TEU', pp. 304-308.

first used to write the Constitutional Treaty in the early years of the noughties gives national parliaments a lot of clout to change the Treaties and to transform the way the Union works. But at the same time, it is also time-consuming and does not give national governments a dominant role in the treaty revision procedure. Moreover, the last time that the Convention method was utilized to change the Treaties resulted in a disastrous result with the rejection of the Constitutional Treaty in the two founding Member States. That is why it is unlikely that despite the very democratic nature of this variant of the ordinary revision procedure the Convention method will be used in the near future.<sup>24</sup> If the European Council does not want to convene a Convention, it has to decide this by a simple majority, after gaining the consent of the European Parliament. This second variant of the ordinary revision procedure is more likely to be used in the future as this method enables the national governments to remain in the driver seat and to fully control the revision procedure. This method which will likely be used to initiate a major overhaul of the Treaties enables the European Council to define the terms to the conference of representatives of the governments of the Member States. In this second variant of the ordinary revision procedure, national legislatures do not have the possibility to play a prominent and direct role and are relegated to the sidelines. They can of course put pressure on their own governments and the majority of the national parliaments also has the power not to ratify the amendments made to the Union Treaties. But these powers seem pale in comparison with the Convention method that provides national legislatures with direct and indirect avenues to influence the treaty revision procedure.

The Euro crisis has also shown that Member States are not willing to resort to the Convention method or the second variant of the ordinary revision procedure when they wish to make small changes to one of the two Union Treaties. In 2010, at the height of the Euro crisis, the European Council decided unanimously after consulting the European Parliament and the Commission to amend Article 136 TFEU which enabled the Member States to set up a bail-out mechanism outside the institutional framework of the EU by resorting to Article 48(6) TEU using a simplified revision procedure.<sup>25</sup> The Heads of State or Government of the Member States were entitled to use this method because the amendment rearranged Part Three of the TFEU and it did not enhance the competences of the Union. In this variant of the simplified revision procedure, national parliaments have a limited role to play as they can only put pressure on their governments and they can choose not to ratify the proposed amendments. But the amendment of Article 136 TFEU made clear that time pressure and the important nature of the treaty change pushed national parliaments to ratify the treaty change, thereby proving the point that national (and regional) legislatures have very little room to manoeuvre when faced with this variant of the simplified revision procedure and are almost bound to agree to a treaty amendment. National parliaments do however have a greater say in the second variant of the simplified revision procedure also known as the passarelle clause.<sup>26</sup> This clause refers to a decision of the European Council made by unanimity and after having obtained the consent of the European Parliament to authorise the Council to act by a qualified majority voting in a policy area where unanimity is the rule or to provide for legislative acts which are governed in accordance with a special legislative procedure to be adopted by the

---

<sup>24</sup> Lock, 'Article 48 TEU, p. 306.

<sup>25</sup> Willem Bovenschen, 'Economische Monetaire Unie: schulden crisis leidt tot fundamentele maatregelen', in: *Nederlands tijdschrift voor Europees recht*, No. 5 (2012), p. 183.

<sup>26</sup> See Art. 48(7).

ordinary legislative procedure. When the European Council desires to move ahead with the passarelle clause, it has to notify the national parliaments. If one national parliament makes its opposition against the initiative of the European Council to use the passarelle clause known within six months of the date of notification, then the European Council can not adopt a decision using the passarelle clause to change the Treaty on the Functioning of the European Union in a substantive way.<sup>27</sup> In the passarelle clause procedure, national parliaments are expected to be strong and active individual actors and to have a greater propensity to use their veto powers because of the sensitive subject matter and the peculiar nature of the whole process.

## 1.2 Subsidiarity monitoring in the post-Lisbon period

As mentioned earlier, the most important innovation in the Treaty of Lisbon regarding the role of national parliaments was the introduction of the Early Warning System consisting of a yellow and orange card procedure. This mechanism allows the national parliaments to control European legislation on the principle of subsidiarity and enables them to voice concerns about the compatibility of European legislative proposals with the subsidiarity principle. Article 12 TEU mentions that national parliaments contribute to the good functioning of the EU by among other things seeing to it that the principle of subsidiarity is respected but it does not provide details on how this subsidiarity monitoring system exactly works. The details are enumerated in Protocol on the Application of the Principles of Subsidiarity and Proportionality also known as Protocol 2 that deals in its entirety with the EWS. But before outlining how the EWS functions, it is of the utmost importance to explain the origins of the EWS and to provide an answer as to why the national legislatures have become the most significant guardians of the subsidiarity principle. In order to understand why the national parliaments were given the competence to control European legislation (excluding legislation that fall within the Union's sole competences) on the subsidiarity principle, one has to look carefully at the nature of European integration in the last two decades and at the academic and political debates about the existence of a democratic deficit in the EU.

It is an undeniable fact that the process of European integration has made some great strides in the last twenty years and that national parliaments in the EU Member States have seen their powers diminished. Not surprisingly, in the nineties and noughties, national legislatures were labelled as 'losers'<sup>28</sup> of and 'slow adapters'<sup>29</sup> to EU integration because they lost many legislative competences to the European level. According to some authors, the process of European integration and the strengthening of national executives at EU level led to the weakening of national parliaments (deparliamentization) in the EU.<sup>30</sup> The Maastricht Treaty tried to alleviate the effects of deparliamentization by increasing the legislative powers of the European Parliament and by introducing the principle of subsidiarity. But the question

---

<sup>27</sup> Lock, 'Article 48 TEU, pp. 307-308.

<sup>28</sup> Claudia Hefftlar and Olivier Rozenberg, 'Introduction', in: *The Palgrave Handbook of National Parliaments and the European Union*, p. 1.

<sup>29</sup> 'Major Findings', in: Andreas Maurer and Wolfgang Wessels eds., *National Parliaments on their Ways to Europe: Losers or Latecomers?*, Baden-Baden: Nomos, 2001, p.19.

<sup>30</sup> John O'Brennan and Tapio Raunio, 'Introduction: Deparliamentarization and European Integration', in: John O'Brennan and Tapio Raunio eds., *National Parliaments within the Enlarged European Union: From 'Victims' of Integration to Competitive Actors?*, London: Routledge, 2007, p. 2.

remained whether these measures made the EU more democratic. In the academic literature, there was a clear schism between proponents and opponents of the democratic deficit theory. The supporters of the democratic deficit theory alluded to the fact that the European Parliament was too weak to control the European Commission and that the national parliaments did not have the necessary levers of power to exercise oversight of their governments in the Council of Ministers. Moreover, they pointed to the fact that the European Parliament did not have the right to make legislative proposals and that as a result, it was not able to play a prominent role in the decision-making process of the EU.<sup>31</sup> These academics clearly worried about the lack of input legitimacy in the EU. However, there were also scholars such as Moravcsik and Majone who passionately defended the democratic track record of the EU. They argued that the EU was a regulatory state and that it had democratic legitimacy.<sup>32</sup> Emphasis was put on the fact that constitutional checks and balances with a clear delineation of competences and the principle of subsidiarity played a significant role in preventing the EU from becoming a 'super-state'. Besides, national states and parliaments still had firm control over salient issues such as taxation, health care and social security.<sup>33</sup>

Political debate closely followed and mirrored the academic debate and it intensified after the Maastricht Treaty. By the time of the Nice Treaty and the Laeken Declaration, many national European politicians wanted to give national parliaments more powers in the decision-making process of the EU in order to deal with the democratic deficit and the competence creep of the EU. They wanted to give national chambers a central role in the subsidiarity monitoring process because the national parliaments had lost many powers to the European level and they were seen as highly capable to detect local grievances about certain intrusive aspects of European legislation.<sup>34</sup> During the Constitutional Convention, specific proposals were thus tabled that aimed to give national parliaments a central role in the policing of the subsidiarity principle and some politicians even talked about creating a third chamber consisting of national parliamentarians alongside the European Parliament and the Council of Ministers.<sup>35</sup> This third chamber would have the competence to control European legislation on subsidiarity and would act as the political guardian of the subsidiarity principle. But this proposal received a lot of opposition from members of the European Parliament who feared that this body would become too powerful and would upset the institutional balance. Eventually, the participants in the Constitutional Convention reached an agreement as they called for the establishment of the Early Warning Mechanism. It is important to realize that the provisions relating to the Early Warning Mechanism in the Treaty of Lisbon are significantly different from the ones contained in the Constitutional Treaty. The Lisbon Treaty refers to a yellow and orange card system and gives national parliaments eight weeks to do a subsidiarity test and to write reasoned opinions if they find a breach of subsidiarity, whereas the Constitutional Treaty

---

<sup>31</sup> Andreas Follesdal and Simon Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', in: *Journal of Common Market Studies*, Vol. 44, No. 3 (2006), pp. 534-536.

<sup>32</sup> Giandomenico Majone, 'Europe's "Democratic Deficit": The Question of Standards', in: *European Law Journal*, Vol. 4, No. 1 (1998), pp. 5-28.

<sup>33</sup> Andrew Moravcsik, 'The Myth of Europe's Democratic Deficit', in: *Intereconomics*, November/December (2008), pp. 331-340.

<sup>34</sup> Afke Groen and Thomas Christiansen, 'National Parliaments in the European Union: Conceptual Choices in the European Union's Constitutional Debate', in: *The Palgrave Handbook of National Parliaments and the European Union*, p. 54.

<sup>35</sup> *Ibid.*, p. 53.

rejected in France and the Netherlands only referred to a yellow card and allowed the national legislatures to draft reasoned opinions in a six weeks period.<sup>36</sup>

Despite the rejection of the Constitutional Treaty, COSAC (an interparliamentary body composed of members of national parliaments specialized in European affairs and members of the European Parliament) began a Subsidiarity Monitoring Plot in 2005 on the 3rd Railway Package to get familiar with and to test the subsidiarity system.<sup>37</sup> The scrutiny itself of the various proposals making up the 3rd Railway Package did not happen in the COSAC meeting as the COSAC Secretariat only collected the reports sent by the national parliaments and subsequently presented the results. The problems that occurred in this experiment would also be visible later when after the coming into force of the Lisbon Treaty the Early Warning Mechanism became operative. The fact that national parliaments did not identify the same problems with the legislative proposals meant that national parliaments did not have a similar definition of subsidiarity. Furthermore, national parliamentarians not only controlled the proposals on subsidiarity, but also on proportionality.<sup>38</sup> In 2009, the COSAC also monitored the subsidiarity tests conducted by national parliaments of two legislative proposals namely, the proposal for Directive Standards of Quality and Safety of Human Organs Intended for Transplantation and a proposal for a Council Framework Decision on the Right to Interpretation and Translation in Criminal Proceedings. Experience gained from these subsidiarity monitoring projects and active lobbying on the part of some Member States can explain why in the Lisbon Treaty the six-week period was extended to a eight-week period and why a orange card procedure was added to the yellow card procedure.

As mentioned earlier in this chapter, the Lisbon Treaty has two Protocols that deal with and comment on the role of national parliaments in the institutional framework of the EU. The first Protocol also known as the Protocol on the Role of National Parliaments in the European Union has a general scope and lays down the information rights and mentions subsidiarity monitoring rights of the national parliaments and it emphasizes that national parliaments and the European Parliament should together determine the organisation and promotion of effective and regular interparliamentary cooperation within the EU.<sup>39</sup> As the EU is characterized by a complicated decision-making process, the provisions of this protocol regarding the information rights and interparliamentary cooperation do make it easier for national parliaments to exercise their individual and collective responsibilities. The fact that draft legislative documents are now sent directly to national parliaments by the European authorities enables national parliamentarians to better control their national ministers in the Council and to immediately start the proceedings of the Early Warning System. Moreover, interparliamentary cooperation whether it is between the different national legislatures or between the European Parliament and the national parliaments can be very valuable in the process of trying to influence indirectly or directly the European decision-making process.

The Early Warning Mechanism which consists of a yellow and orange procedure and which is widely regarded as a tool that national parliaments can use to directly impact the Union decision-making process is described in great detail in the second Protocol. Articles 6 and 7 of

---

<sup>36</sup> Afke Groen and Thomas Christiansen, 'National Parliaments in the European Union: Conceptual Choices in the European Union's Constitutional Debate', pp. 54-55.

<sup>37</sup> Adam Cygan, 'National parliaments as guardians of the principle of subsidiarity', in: Steven Blockmans and Adam Lazowski eds., *Research Handbook on EU Institutional Law*, Cheltenham: Elgar, 2016, p. 131.

<sup>38</sup> *Ibid.*, p. 132.

<sup>39</sup> Lock, 'Article 12 TEU', pp. 119 and 122.

this Protocol explain how national parliaments can control legislation emanating from Brussels on the principle of subsidiarity. Article 6 stipulates that any national parliament may, within eight weeks from the date of transmission of a draft legislative act, send a reasoned opinion to the Presidents of the European Parliament, the Council and the Commission in which it makes clear why it thinks that the draft legislative act in question contravenes the subsidiarity principle. Article 7(1) emphasizes that these reasoned opinions will be taken into account by the European Parliament, the Council and the Council. The rest of Article 7 shows how reasoned opinions can be translated into yellow and orange cards. In the EWM procedure, every national legislature has two votes which means that in case of a bicameral parliamentary system, each of the two parliamentary chambers shall have one vote each. In order to reach a yellow card, the reasoned opinions on the non-compliance of a draft legislative act with the subsidiarity principle must represent one third of all the votes given to the national parliaments. This means that at least 19 of the 56 votes have to be attained before one can speak of a yellow card. If a piece of legislation is based on Article 76 of the Treaty on the Functioning of the European Union on the area of freedom, security and justice, then at least 14 votes representing one fourth of the reasoned opinions are needed to reach a yellow card. The threshold for reaching an orange card consists of a simple majority of the votes and an orange card can only be issued for legislation that is governed by the ordinary legislative procedure.<sup>40</sup>

After the issuing of a yellow card, the draft legislative act shall be reviewed and after such a review, the Commission or where appropriate another European institution that has initiated the legislation may decide to maintain, amend or withdraw the legislative proposal. Of course, reasons will have to be provided for why a particular decision has been made. After an orange card, the proposal also has to be reviewed after which the Commission can decide to maintain, amend or withdraw the proposal in question. If it resolves to maintain the draft, then it will have to justify in a reasoned opinion why it considers the draft to be compatible with the principle of subsidiarity. This reasoned opinion together with the reasoned opinions of the national legislatures will be subsequently sent to the two legislators of the Union. Before the conclusion of the first reading, the European Parliament and the Council will make up their mind whether the draft does comply with the subsidiarity principle, thereby taking into account the reasoned opinions of the Commission and the national legislatures. If the Council and the European Parliament by a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament believe that the draft does not comply with the principle of subsidiarity, then the legislative proposal shall be taken off the agenda.<sup>41</sup>

The yellow and orange procedure described in the second Protocol can seem dull and very technical for politicians and outsiders alike but it can in fact be a highly useful tool for national parliamentarians to exert more influence on the EU decision-making process and it is rightly regarded as a major innovation. The academic Ian Cooper has even argued that the introduction of the EWM has turned the national parliaments of the Member States into a virtual third chamber. He has written that the EWM has brought with it a new form of parliamentary involvement which deviates significantly from previous models such as Domestic Oversight, Parliamentary Assembly and Supranational Parliament.<sup>42</sup> According to

---

<sup>40</sup> Lock, 'Article 12 TEU', pp.120-22.

<sup>41</sup> Ibid.

<sup>42</sup> Ian Cooper, 'A 'Virtual Third Chamber' for the European Union? National Parliaments after the Treaty of Lisbon', in: *West European Politics*, Vol. 35, No. 3 (2012), pp. 444-447.

this view, the EWM has through the creation of a virtual third chamber significantly increased the influence of national parliaments in European affairs and has enabled the national legislatures to gain a foothold in the EU that it had lost to the European Parliament (Supranational Parliament) after the Maastricht Treaty. The yellow and orange procedure does give national parliamentarians the opportunity to control European legislation on the subsidiarity principle and it puts them in a position to make a forceful intervention in the EU legislative process. In case of a yellow or orange card, the pre-legislative process will be temporarily halted as the Commission will have an obligation to respectively review the draft legislative act or to justify in a reasoned opinion why it finds the draft act to be compatible with the subsidiarity principle. Of course, this process can also lead to the abandonment of certain legislative acts as evidenced by what happened after the issuing of the first yellow card, thereby proving that national parliaments can directly impact European affairs.

Besides giving national parliaments the opportunity to delay the EU legislative process, the EWM also aims to narrow the democratic deficit in the EU. Even though, it would be too far-fetched to describe national parliaments in the post-Lisbon period as a virtual third chamber, the participation of national chambers through the EWM could however increase the democratic legitimacy of the EU decision-making process. Firstly, the EWM or better said the successful triggering of the yellow and orange card procedure provides national parliamentarians with the opportunity to directly shape European legislation. As mentioned earlier, in case of a yellow or orange card, the European Commission has an obligation to review the draft act and may feel pressure to accommodate certain wishes of national parliaments that they mentioned in their reasoned opinions. Secondly, the participation of national chambers through the EWM makes the pre-legislative process in Brussels more democratic because it creates a new link between the EU and European citizens and it enables national parliamentarians to formulate subsidiarity grievances about European legislation. Moreover, the EWM enhances the democratic legitimacy of the European Parliament as it can emphasize that the legislative proposals enacted were controlled by the national parliaments in the pre-legislative phase on subsidiarity and that they enjoy the support of the national parliaments. Thirdly, recent research by Eric Miklin has showed that the introduction of the EWM has ameliorated the scrutiny systems in weak parliaments as it compelled them to focus more on European affairs.<sup>43</sup> The EWM together with the Euro Crisis has thus led to a process of 're-parliamentarisation' whereby debates about the EU are taking place on a more frequent basis in national parliaments.<sup>44</sup> Although national parliaments have not turned into a virtual third chamber, they are however separately from each other evolving into deliberative chambers where it is increasingly possible to discuss European legislation on substance.

But the EWM also has many deficiencies that have hampered the smooth functioning of the yellow and orange card procedure. Firstly, the eight week period in which national parliamentarians have to write and send their reasoned opinions is very short to expect a lot of yellow and orange cards to materialize. One has to realize that in the eight week timeframe national parliaments not only have to write their individual reasoned opinions but they also have to coordinate with other national chambers to actually issue a yellow or orange card. The fact that to this day only three yellow cards and not one orange card have been issued could

---

<sup>43</sup> Eric 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, No. 3 (2017), pp. 366-385.

<sup>44</sup> See also Frank Wendler, 'Debating Europe in National Parliaments: Public Justification and Political Polarization', Basingstoke: Palgrave Macmillan, 2016.

be attributed to the eight week period which is simply too short to incentivise national parliaments to write reasoned opinions to reach the necessary thresholds. Of course, the eight week period could be extended but that would lead to a further delay in the European legislative process. At the same time, it could also lead to an improved system of subsidiarity monitoring. There are also academics who have argued that the EWM does not function as originally envisioned. Pieter De Wilde has for example written that the EWM has not solved the democratic deficit of the EU. He points to the fact that the EWM obfuscates representative democracy in the EU because it creates uncertainty about the roles and responsibilities of the many institutions that make up representative democracy in the EU. Furthermore, he emphasizes that the EWM invites the wrong kind of involvement from national parliaments. He argues that national parliaments should be focused on controlling their governments and communicating with citizens and that the monitoring of the subsidiarity principle should be left to the judiciary and not to the national parliaments. According to De Wilde, national parliaments should not waste their time, money and manpower on writing reasoned opinions but should rather use these resources to communicate better with the citizens.<sup>45</sup> Given the low number of yellow cards issued and the lack of interest among some national chambers, the EWM has indeed not functioned effectively and has not entirely managed to grab the attention of all national parliaments. It also does not help that the term subsidiarity is not defined very precisely in the European Treaties. As a result, national parliamentarians tend to have different views about the subsidiarity principle. One way of bringing the interpretations of national parliaments of the subsidiarity principle closer to each other would be to give the COSAC the competence to coordinate the subsidiarity tests, but the two Protocols make it very hard to let the COSAC play a bigger role in this process because of the individual nature of the EWM.

---

<sup>45</sup> Pieter de Wilde, 'Why the Early Warning Mechanism does not Alleviate the Democratic Deficit', OPAL Online Paper No. 6/2012, pp. 18-19.

### 1.3 Conclusion

This chapter laid out that the Treaty of Lisbon has considerably strengthened the position of national parliaments and this can be seen in Articles 10 and 12 TEU. Article 10 TEU states clearly that the Member State governments sitting in the Council are democratically accountable to their national parliaments, whereas Article 12 TEU is entirely dedicated to the role of national parliaments in the EU. This Article stipulates that national parliaments contribute to the good functioning of the EU by taking part in the revision procedures of the Treaties according to Article 48 TEU, by being informed of applications for accession to the EU according to Article 49 TEU, by participating in the evaluation mechanisms for the implementation of Union policies in the area of freedom, security and justice according to Article 70 TFEU and by being involved in the supervision of Europol's and Eurojust's activities according to Articles 85 and 88 TFEU. Furthermore, Article 12 TEU expounds that in accordance with the Protocol on the role of national parliaments in the EU –also known as Protocol 1 – national parliaments will be informed by the institutions of the Union, they will be given the draft legislative acts of the EU and they shall partake in inter-parliamentary cooperation between national parliaments and with the European Parliament. But the most important and innovative provision enshrined in Article 12 TEU is the one dealing with subsidiarity monitoring as national parliaments are given the right to control draft legislative acts on the principle of subsidiarity in accordance with the Protocol on the application of the principles of subsidiarity and proportionality also known as Protocol 2. The subsidiarity monitoring system which is better known as the 'Early Warning Mechanism' (EWM) and which consists of a yellow and orange card procedure was introduced to lessen the democratic deficit of the EU and to hinder the process of competence creep. In this chapter, it was pointed out that the EWM has certain virtues and deficiencies. On the one hand, EWM has the potential to increase the democratic legitimacy of the EU decision-making process and to delay the legislative process when national parliaments object to draft legislative acts. On the other hand, the EWM also has serious shortcomings as evidenced by the eight-week period, the difficulties to coordinate with other national parliaments in this short period and the obfuscation of representative democracy in the EU. The next chapter will focus on the nature of the subsidiarity principle in the EU and the exact role of this principle in the EWM. Furthermore, it shall discuss the first two yellow cards.

## 2. The subsidiarity principle and the Early Warning Mechanism

The previous chapter showed that national parliaments are encouraged to contribute actively to the good functioning of the European Union. More precisely, Article 12 TEU enumerates six main areas that reserve an important role for national parliaments in the European composite order. As elaborated in the previous section, national parliaments play a crucial role in the accession and the treaty revision procedures. Moreover, they take part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area and they are involved in the political monitoring of Europol and the evaluation of Eurojust's activities. But the most important innovation of the Lisbon Treaty with regard to the role of national parliaments in the EU is the introduction of the Early Warning Mechanism that enables national chambers to police the draft legislative acts on the principle of subsidiarity.

Whilst the previous chapter provided an introduction to the most significant elements of the Early Warning Mechanism, this second chapter intends to pay close attention to the principle that national parliaments are invited to guard in the Early Warning Mechanism, namely the principle of subsidiarity. Furthermore, this chapter shall take an in-depth look at the first two yellow cards triggered by national parliaments and at how national assemblies have interpreted the subsidiarity principle and whether they have limited themselves to the policing of this principle in their reasoned opinions. The first part of this chapter will deal with the concept of subsidiarity in the EU and the role of this principle in the Early Warning Mechanism, whereas the last two parts of this chapter are devoted to the first two yellow cards that were issued against respectively the right to strike proposal (Monti II proposal) in 2012 and the European Public Prosecutor's Office proposal (EPPO proposal) in 2013.

### 2.1 The origins of subsidiarity

Subsidiarity which is a core constitutional principle of the EU can trace its origins to multiple societal and political traditions. It traces its philosophical underpinnings to the social teaching of the Catholic Church. The papal encyclicals of the 19th and 20th century were characterized by a vision for the society that emphasized the virtue of assigning to a higher and greater association only those tasks that subordinate organizations were not able to carry out. As Fabbrini has showed, this meant that the Catholic Church was against excessive state intervention as this would lead to a weakening of its own position in the society. Subsidiarity functioned for the Catholic Church as a panacea in its fight to jealously guard its own competences that were slowly being eroded by the new state structures.<sup>46</sup>

The subsidiarity principle also can be seen in two German political traditions on the structure of the state: liberalism and federalism.<sup>47</sup> Article 72 of the German Basic Law which was

---

<sup>46</sup> Federico Fabbrini, 'The Principle of Subsidiarity', in: Robert Schütze and Takis Tridimas eds., *Oxford Principles of European Union Law Volume 1: The European Union Legal Order*, Oxford: Oxford University Press, 2018, pp. 228-229.

<sup>47</sup> Katarzyna Granat, 'The Subsidiarity Principle in the EU Treaties', in: Katarzyna Granat ed., *The Principle of Subsidiarity and its Enforcement in the EU Legal Order: The Role of National Parliaments in the Early Warning System*, p.10.

amended in 1994 because it was drafted too broadly stipulates that in the field of concurrent legislative competences, the federal entity should act 'if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.' Vague elements of subsidiarity can also be detected in the liberal tradition of organising a state. The liberal dimension of subsidiarity can be summarized as follows: individuals and private groups ought to be protected from unnecessary state intervention. Due to the fact that the liberal tradition is more concerned about the relationship between the state and its individual citizens than that between the state and its different components, it could also be argued that it is more accurate to classify the liberal concept of subsidiarity as the proportionality principle as the latter deals with the intensity of federal action rather than with the exercise of federal power.<sup>48</sup>

As Nick Barber has correctly explained, there are important differences between the EU and Catholic concepts of subsidiarity. Whereas the former is narrower as it is more concerned with democratic public bodies, the latter takes an expansive view by being attentive to broader collective entities and society as a whole. Secondly, the EU concept of subsidiarity can be regarded independently from the Catholic one.<sup>49</sup> As alluded to in the previous section, the EU principle of subsidiarity is constructed from different political philosophies such as liberalism and federalism and therefore cannot be seen as being concocted solely from the Catholic social doctrine. Many scholars such as Schütze and Fabbrini have written that the EU concept of subsidiarity as a general principle of EU law finds its philosophical origins in the theory of federalism and more specifically in German constitutionalism.<sup>50</sup> They echo what Barber has already written down, namely that the centrality of subsidiarity in the Catholic social doctrine should not blind us from the rich sources that have influenced the EU principle of subsidiarity and the independent trajectory that this EU principle has traveled since its incorporation into the EU constitutional order.

## **2.2 The inauguration and development of the subsidiarity principle in the EU legal order**

The principle of subsidiarity was introduced as a general constitutional principle into the EU legal order with the signing of the Treaty of Maastricht in 1992. Since its introduction, this principle has aimed to govern the exercise of Community/Union competences and to determine whether the Community/Union should exercise a certain competence which is non-exclusive and shared. Prior to Maastricht, subsidiarity was mentioned in a couple of EU documents and was made part of the EC Treaty via the Single European Act (1986) in the area of environmental policy. It was only with the Treaty of Maastricht that this principle became applicable beyond the boundaries of environmental policy.<sup>51</sup> Subsidiarity was hailed

---

<sup>48</sup> Granat, 'The Subsidiarity Principle in the EU Treaties', p. 10 and Robert Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism', in: *The Cambridge Law Journal*, Vol. 68, No. 3 (2009), p. 533.

<sup>49</sup> Nick Barber, 'The Limited Modesty of Subsidiarity', in: *European Law Journal*, Vol. 11, No. 3 (2005), pp. 309-313.

<sup>50</sup> Fabbrini, 'The Principle of Subsidiarity', p. 229 and Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism', pp. 525-526.

<sup>51</sup> Granat, 'The Subsidiarity Principle in the EU Treaties', pp. 18-19.

as the word that saved Maastricht because it convinced hesitant Member States to ratify the Treaty despite the transfer of new competences to the European level.<sup>52</sup> Its clarification during the Edinburgh Council together with new guarantees on issues such as citizenship and defence even managed to convince the eurosceptic Danes to back the Maastricht Treaty.<sup>53</sup> Paul Craig mentions four reasons why subsidiarity was introduced in the early nineties into the EU legal order. Firstly, the subsidiarity rule was seen as an answer to the absence of a clear separation of different categories of competence in the Treaties and to the broad interpretation of Articles 95 and 308 EC (now Articles 114 and 352 TFEU). Secondly, subsidiarity was regarded as a tool that would play an important and mediating role in the conflicts that would erupt between the Member States and the EU on the exercise of certain competences. It was also seen as a way to assuage the fears of Member States about a further federalisation of the EU. Other factors for the inclusion of subsidiarity as a regulatory buffer in the EU treaties related to the aims of preventing excessive centralization and increasing pluralism and the diversity of national values.<sup>54</sup> It is also interesting to note that the incorporation of the subsidiarity principle into the Maastricht Treaty was championed by Germany, Belgium and the United Kingdom for very different reasons. The federal states of Germany and Belgium were adamant on its inclusion with a view to reassure the regional entities that were reluctant to transfer competences to the European level and to make sure that through the subsidiarity mechanism the EU would be held accountable domestically. The United Kingdom, on the other hand, saw the subsidiarity principle as a means to limit the scope of EU action and to maintain its legislative autonomy in areas which it deemed vital such as social, consumer and environmental protection.<sup>55</sup>

Having laid down the differences between the EU and Catholic conceptions of the subsidiarity rule and the reasons for the inclusion of the aforementioned principle in the EU legal order, it is worth looking at the exact wording of the subsidiarity principle inserted in the Treaty of Maastricht and tracking the evolution of this principle with a special focus on its wording in the Treaty text, the two types of subsidiarity found in the respective Articles and Protocols and its operational implementation. The subsidiarity principle was given a fully-fledged formulation for the first time in Article 3B EC of the Maastricht Treaty. This Article read as follows:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Subsidiarity became a general principle which was to apply to all policy fields outside the exclusive competence – a term that remained vague after the ratification of the Maastricht Treaty due to the lack of an explicit treaty scheme and which was clarified with the

---

<sup>52</sup> Deborah Z. Cass, 'The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community', in: *Common Market Law Review*, Vol. 29, No. 6 (1992), pp. 1107-1136.

<sup>53</sup> Morten Kelstrup, 'Denmark's relation to the European Union A history of dualism and pragmatism', in: Lee Miles and Anders Wivel eds., *Denmark and the European Union*, Oxon: Routledge, 2014, pp. 17-19.

<sup>54</sup> Paul Craig, 'Subsidiarity: A Political and Legal Analysis', in: *Journal of Common Market Studies*, Vol. 50, No. 1 (2012), pp. 72-73.

<sup>55</sup> Adam Cygan, 'Subsidiarity as a regulatory principle in EU law', in: Adam Cygan ed., *Accountability, Parliamentarism and Transparency in the EU: The Role of National Parliaments*, Cheltenham: Elgar, 2013, p. 123.

competence catalogue of the Treaty of Lisbon – of the European Community. Furthermore, the Maastricht Treaty provided a democratic perspective of the subsidiarity rule, by stipulating in the preamble and Article A TEU the importance of taking decisions as ‘closely as possible to the citizen’.<sup>56</sup> The formulation used in the Maastricht Treaty of the subsidiarity principle became the foundation for the wording that was put in the Lisbon Treaty. The subsidiarity rule can now be found in Article 5(3) TEU and reads as follows:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, *either at central level or at regional and local level, but can rather*, by reason of the scale or effects of the proposed action, be better achieved at Union level (emphasis added).

The Article now also has a new subparagraph:

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

As discussed in the previous chapter, the Lisbon Treaty, being ‘the Treaty of Parliaments’, gave the national parliaments the opportunity to control the subsidiarity principle when reviewing new draft legislative proposals in areas of **shared competence** emanating from EU institutions and Member States without, however, possessing a veto power. This marked a change in the way subsidiarity was henceforth going monitored as national parliaments became subsidiarity watchdogs whose task would consist of making sure that other EU institutions, and especially the European Commission (the initiator of almost all legislative initiatives) would abide stringently by the subsidiarity rule during the pre-legislative phase. Besides a substantial shift in the manner in which the monitoring of the subsidiarity principle would be organized, article 5(3) TEU of the Lisbon Treaty also contained two changes comparing with Maastricht: a substantive one a textual one.<sup>57</sup> With regard to the substance, the Lisbon subsidiarity calls attention to the sufficiency of national action at ‘central level or at regional and local level’, whereas the Maastricht subsidiarity mentioned the insufficiency at the Member State levels as a criterion to answer the question whether supranational action was needed.<sup>58</sup> The Maastricht subsidiarity formula was clearly blind to the idea that regional and local entities were capable of defining their own priorities and achieving the lofty objectives of actions desired by the European level by themselves. The textual change is a negligible one, as the phrase ‘and can therefore’ at the beginning of the second subsidiarity test found in Article 3B EC has been changed into ‘but can rather’ in Article 5(3) TEU of the Lisbon Treaty.<sup>59</sup> Granat convincingly argues that this textual change does not alter the fact that both parts of the distinct subsidiarity tests are important in deciding whether EU action is necessary and that the difference in words between Maastricht and Lisbon does not therefore herald an adjustment in meaning. Moreover, she posits that the phrase ‘but’ in Article 5(3) TEU can easily be read as ‘and’, thereby emphasizing textual similarity and continuity in meaning between Article 3B EC and Article 5(3) TEU.<sup>60</sup>

---

<sup>56</sup> Granat, ‘The Subsidiarity Principle in the EU Treaties’, p. 19.

<sup>57</sup> Ibid., p. 20.

<sup>58</sup> Ibid., pp. 19-20.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

### 2.3 The material and procedural dimension of the subsidiarity principle

As can be gleaned from the Lisbon Treaty, the principle of subsidiarity has two conceptions: a material and a procedural one.<sup>61</sup> The material dimension of subsidiarity can be found in Article 5 TEU and consists of two tests – the national insufficiency test and the comparative efficiency test – that EU institutions have to conduct to answer the question whether supranational intervention in a given situation is needed.<sup>62</sup> According to the first test, the EU can only act if and in so far the objectives of the proposed action cannot be sufficiently achieved at the national level. The second test will only follow if it has been established that Member States have insufficient resources to achieve a certain policy goal.<sup>63</sup> Lenaerts has argued that one Member State not being able to carry out a specific measure is enough evidence for the insufficiency of national action, paving the way for the second test to kick in.<sup>64</sup> The comparative efficiency test is a ‘federal’ one and asks, having established the insufficiency of national efforts, whether the proposed action can rather, by reason of the scale or effects be better brought about at Union level.<sup>65</sup> It is important to bear in mind that both tests have to be met cumulatively. This means that the EU is only allowed to take action if it proves that it can achieve the goals of the proposed action *better* than the Member States.<sup>66</sup> Procedural subsidiarity refers to procedural steps that the EU institutions (especially the Commission) must enact in order to be able to show that the two tests stipulated in Article 5 TEU have been executed in a satisfactory way so that it will become easier to assess whether Union action is needed.<sup>67</sup> In other words, the thrust of the procedural subsidiarity is to make sure that EU institutions embark on a ‘process’ to make certain that the material dimension of subsidiarity is implemented.

The evolution of the subsidiarity principle in the EU Treaties has shown that material subsidiarity encompassing the “national insufficiency test” and the “comparative efficiency test” has not undergone fundamental alteration. This general framework for interpreting the relatively vague material dimension of subsidiarity has however been joined by several criteria which are meant to help EU institutions to apply this principle in practice. These operative criteria were developed during the nineties with the aim of clarifying the implementation of the subsidiarity principle and to reassure the Member States – which had just agreed with the strengthening of the supranational level – that this rule would not turn into something futile.<sup>68</sup> The new guidelines for the application of the (material) subsidiarity rule were laid down in the ‘Overall Approach’ which was annexed to the European Council’s Conclusions of December 1992 and which described subsidiarity as a ‘dynamic concept’, implying that Community action could be expanded or limited depending on the situation.<sup>69</sup> With regard to answering the question whether the Community should act – taking into

---

<sup>61</sup> Granat, ‘The Subsidiarity Principle in the EU Treaties’, p. 20.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid., pp. 20-21.

<sup>64</sup> Koen Lenaerts, ‘The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism’, in: *Fordham International Law Journal*, Vol. 17, No. 4 (1993), pp. 875-876.

<sup>65</sup> Granat, ‘The Subsidiarity Principle in the EU Treaties’, p. 21.

<sup>66</sup> See Art. 5(3) TEU.

<sup>67</sup> Granat, ‘The Subsidiarity Principle in the EU Treaties’, p.24.

<sup>68</sup> Cygan, ‘Subsidiarity as a regulatory principle in EU law’, pp. 124-128.

<sup>69</sup> Granat, ‘The Subsidiarity Principle in the EU Treaties’, p. 22.

account the national insufficiency and comparative efficiency test – and whether the material dimension of the subsidiarity has been complied with, the Edinburgh recommendations listed the following points:

- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by the Member States; and/or
- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interest; and/or
- the Council must be satisfied that action at Community level would produce clear benefits by reason of its scale or its effects compared with action at the level of the Member States.

Looking at the Edinburgh guidelines, it becomes clear that these build on the Treaty text (Article 3B EC) and emphasize the importance of only initiating Community action if Member State action involves significant costs and if the supranational level brings tremendous benefits. In that sense, the 'Overall Approach' shows how difficult it is to clarify the subsidiarity principle and its application. It is therefore not a surprise that these guidelines were not revised when they were incorporated into the 30th Protocol of the Amsterdam Treaty. Although the Treaty of Amsterdam did not entail a new step in the clarification of the material dimension of subsidiarity, it did however ensure that the Edinburgh guidelines became legally binding (justiciable before the courts) due to their inclusion into a protocol and thus primary law. Moreover, it blurred the line between the subsidiarity and proportionality principle.<sup>70</sup> Regarding the procedural concept of subsidiarity, the Amsterdam protocol took the same approach as with material subsidiarity; it maintained all the steps that the Commission needs to take when proposing legislation. It was now legally codified that the Commission had to conduct wide consultations before initiating legislation, include subsidiarity justification in its proposals, wherever necessary in an explanatory memorandum and to minimise any financial and administrative burdens for the Community and Member States.<sup>71</sup> In contrast to the material dimension of subsidiarity, the procedural side of the subsidiarity principle has evolved a little bit from the nineties as evidenced by the fact that the impact assessment – introduced in 2003 – has emerged as an important part of the overall procedural subsidiarity package.<sup>72</sup> The impact assessment can be added to the list of procedural steps such as road maps, explanatory memoranda and recitals in the proposal's preamble that the Commission as the initiator of most legislative proposals will have to utilize to make a justification for the compatibility of its proposals with material subsidiarity.<sup>73</sup>

With regard to (the clarification of) the principle of subsidiarity, the Lisbon Treaty has not brought about a new era; in fact, it should be noted that Protocol 2 of the Lisbon Treaty – the successor to Protocol 30 of the Amsterdam Treaty – has created a significant amount of confusion. Looking at the text of Protocol 2, it is indeed striking to find that the elucidation of the material aspect of the subsidiarity principle has been removed, whereas the procedural dimension of the subsidiarity principle has been left unchanged.<sup>74</sup> This leads one to raise the

---

<sup>70</sup> Granat, 'The Subsidiarity Principle in the EU Treaties', p. 23.

<sup>71</sup> Ibid., p. 25.

<sup>72</sup> Ibid., p.26.

<sup>73</sup> Ibid.

<sup>74</sup> Ton van den Brink, 'The substance of subsidiarity: the interpretation and meaning of the principle after Lisbon', *The Treaty of Lisbon and the Future of European Law and Policy*, pp. 161-163.

question whether the non-inclusion of the clarifications of the material dimension of the subsidiarity principle in Protocol 2 of the Lisbon Treaty pinpoints to the fact that national and regional parliaments will have considerable freedom in the Lisbon era to define the principle of subsidiarity in a way that would suit and further their aims. As will be shown later in this and the subsequent chapter, a majority of national parliaments has indeed taken a more expansive view of the subsidiarity principle and the lack of guidance regarding the material dimension of the subsidiarity principle in Protocol 2 could partly explain this. Even though, the clarification of the material side of subsidiarity was not made part of the second Protocol of the Lisbon Treaty, the Commission has stipulated that it will continue to follow the substance of the Amsterdam guidelines with respect to both dimensions of the subsidiarity principle.

## **2.4 The subsidiarity principle: A legal and a political principle**

Notwithstanding the incomplete and imperfect nature of Protocol 2 with regard to the interpretation of the subsidiarity principle, this same document did mark the beginning of a new epoch when it came to the way subsidiarity was henceforward going to be monitored. By making national parliaments the new ‘subsidiarity watchdogs’<sup>75</sup>, the Lisbon Treaty sent a strong signal as to the political nature of the subsidiarity principle. Even though subsidiarity has always been a political and a legal principle, the implementation of this principle has predominantly been carried out by political institutions. The principle of subsidiarity is justiciable, but the ECJ has been very reluctant to interpret the material dimension of subsidiarity.<sup>76</sup> It has been a little bit more willing to make a judgement on the procedural aspect of subsidiarity. The political and the legally vague nature of the subsidiarity principle has pushed the ECJ to take a cautious approach to the judicial review of the principle of subsidiarity.<sup>77</sup> Moreover, it is said that the political agenda of the ECJ dictated by a desire to further the cause of supranational integration could be thwarted by the subsidiarity principle – a principle that is often designated as ‘anti-integrationist’ for its tendency to hinder the exercise of shared competences by EU institutions.<sup>78</sup> The difficult justiciability of the subsidiarity principle has prompted certain academic observers to question the role and nature of subsidiarity and its usefulness in preventing ‘competence creep’. Schütze acknowledges the political and judicial nature of subsidiarity, but he sees the political safeguard of federalism laid down in Protocol 2 as a ‘soft constitutional solution’ lacking a hard and fatally efficient core.<sup>79</sup> Therefore, he contends that the judicial safeguard of federalism should be strengthened and that as a consequence, the definition of the subsidiarity principle should also be transformed in a fundamental way. He argues that subsidiarity should be understood as federal proportionality.<sup>80</sup> He differentiates between the liberal and federal dimension of proportionality. Whereas the liberal dimension of proportionality which can be found in

---

<sup>75</sup> Ian Cooper, ‘The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU’, in: *Journal of Common Market Studies*, Vol. 44, No. 2 (2006), pp. 281-304.

<sup>76</sup> Granat, ‘The Subsidiarity Principle in the EU Treaties’, p. 31.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Schütze, ‘Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism’, pp. 531.

<sup>80</sup> Ibid., p. 532.

Article 5(4) TEU stipulates that individuals and their private rights would be protected from excessive public interference, the federal aspect of proportionality located in Article 5(3) TEU could be relied upon to ensure that supranational action does not disproportionately restrict the autonomy of the Member States.<sup>81</sup> In order to enforce the principle of subsidiarity as federal proportionality, the Court according to Schütze should opt for a hard constitutional solution by outlawing disproportionate interferences into national law-making autonomy.<sup>82</sup> The arrival at this particular judicial destination would require the Court to embrace a stricter review of the subsidiarity/federal proportionality principle and thus to jettison its uneasy relationship with Article 5(3) TEU.

Davies reaches the same conclusion as Schütze with regard to the importance of the proportionality principle in the EU legal order. But he is also far more dismissive of the concept of subsidiarity principle which he describes as “the wrong idea, in the wrong place, at the wrong time”.<sup>83</sup> While Schütze subsumes the proportionality principle into the subsidiarity concept and transforms the interpretation of the latter., Davies is sceptical towards all aspects of the subsidiarity principle which he regards as a failed mechanism for balancing supranational and national interests. He argues that the central flaw of the subsidiarity principle is that “instead of providing a method to balance between Member State and Community interests, which is what is needed, it assumes the Community goals, privileges their achievement absolutely, and simply asks who should be the one to do the implementing work”.<sup>84</sup> With a view to preventing a usurpation of powers by EU institutions, Union measures should be examined by the Court with regard to their compatibility with the proportionality principle.<sup>85</sup> The Court should therefore act as a strict arbiter when confronted with cases in which national interests are pitted against supranational interests and should ensure that Member States interests are not encroached too much and are seen as equally important as Union interests. Davies’ plea for the use of the proportionality principle in competence allocation matters and for a decisive role of the European Court of Justice in this process has encountered criticism from the academic community studying EU law. Craig finds the competence-based proportionality review very problematic because it ignores the fact that the existing Treaties already provide a balance between Member State and Union interests.<sup>86</sup> Moreover, it misses the daily reality of EU decision-making in which the formulation of an EU ‘objective’ involves a constant interplay of different political forces. The Commission tends to rely on extensive consultations before writing down an EU ‘objective’ in its legislative proposals.<sup>87</sup> Third, it ascribes a role to the proportionality principle whose legitimacy can not be derived from the Treaties.<sup>88</sup> In other words, a conception of proportionality that emphasizes its independent competence role is incompatible with the Treaty schema. Fourth, a competence-based proportionality judicial review would encounter the same problems of adjudication that the subsidiarity principle has

---

<sup>81</sup> Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism', pp. 533.

<sup>82</sup> *Ibid.*, pp. 534-535.

<sup>83</sup> Gareth Davies, 'Subsidiarity The wrong idea, in the wrong place, at the wrong time', in: *Common Market Law Review*, Vol. 43, No. 1 (2006), pp. 63-84.

<sup>84</sup> *Ibid.*, pp. 67-68.

<sup>85</sup> *Ibid.*, pp. 81-83.

<sup>86</sup> Craig, 'Subsidiarity: A Political and Legal Analysis', p. 82.

<sup>87</sup> *Ibid.*, pp. 82-83.

<sup>88</sup> *Ibid.*, p. 83.

faced.<sup>89</sup> The Court will be very reluctant to strike down a European piece of legislation that was adopted using the qualified majority rule in the Council because a Member State simply believes that a specific measure was disproportionate. In Craig's view, competence-based proportionality review attempts to be a solution to a problem that does not exist for subsidiarity breaching is not a major issue in need of tackling. Lastly, if ever implemented, it will turn out to be ineffective due to a probable fact-specific approach of the ECJ with little precedential impact.<sup>90</sup>

## 2.5 The legal and political interpretation of the Early Warning Mechanism

The introduction of the EWM has underlined that the Masters of the Treaties are not convinced of the fact that 'competence creep' has become an obsolete matter. It has also shown that subsidiarity has de facto become a political principle whose control in the pre-legislative phase has been entrusted to the Commission and national parliaments. The debate on the nature of the EWM is just like the discussion on the characteristics of the subsidiarity principle and its enforcement marked by a strong divide in the literature. This division revolves around the way the EWM should be interpreted. Should the EWM be explained in a legal or political way? To put in another way, should the EWM be interpreted in such a way that national parliaments are only allowed to control the legislative proposals on the subsidiarity principle or should national chambers have the liberty to focus on other elements in their reasoned opinions such as the proportionality principle, the legal basis and the substance of the particular proposal besides the subsidiarity principle?

The case for a strictly legal interpretation of the EWM is made by pointing towards a set of textual, structural and functional arguments. Firstly, it is argued that a textual analysis of Articles 5(3) and 12 TEU, Article 69 TFEU and Articles 6 and 7 of Protocol 2 clearly indicates that national parliaments only have the competence to control draft legislative acts on the principle of subsidiarity.<sup>91</sup> Secondly, a structural line of reasoning is concocted to support the view that the role of national parliaments should be restricted to the scrutiny of the subsidiarity principle.<sup>92</sup> It is put forward that the phase prior to the signing of the Lisbon Treaty and the Constitutional Treaty involved a lot of discussions among national and EU protagonists about the future role of national parliaments in the EU polity. During this period, many propositions were discarded such as establishing a third legislative chamber in the EU structure consisting of national parliamentarians and providing national parliaments with a 'red card' to block EU legislation. Eventually, a compromise was reached that would see national parliaments becoming the new 'subsidiarity watchdogs' in order to democratize EU law-making and to prevent 'competence creep'. However, the report of Working Group I (European Convention) on the Principle of Subsidiarity proposed a tailored EWM which did not mention other principles than the subsidiarity principle that national chambers could use

---

<sup>89</sup> Craig, 'Subsidiarity: A Political and Legal Analysis', p. 83.

<sup>90</sup> Ibid., pp. 83-84.

<sup>91</sup> Jacob Öberg, 'National Parliaments and Political Control of EU Competences: A Sufficient Safeguard of Federalism?', in: *European Public Law*, Vol. 24, No. 4 (2018), pp. 699-700.

<sup>92</sup> Federico Fabbrini and Katarzyna Granat, "'Yellow card, but no foul': The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike", in: *Common Market Law Review*, Vol. 50, No. 1 (2013), pp. 121-122.

to evaluate draft legislative acts. The current design of the EWM is thus a conscious decision of the Treaty drafters with a view to limit the role of national parliaments to the pre-legislative process of the EU. Thirdly, a functional understanding of the EWM, comprising a comparative institutional analysis, is advanced to underpin the claim that the role of national parliaments, when scanning draft legislation, should be strictly confined to the review of subsidiarity.<sup>93</sup> This viewpoint emphasizes that EU institutions should be performing those tasks that they are best suited to carry out in order to facilitate efficiency in EU policy-making. As such, national parliaments are more capable than EU institutions to conduct subsidiarity checks on legislative proposals, whereas other institutions are deemed much better at assessing the content of a legislative proposal, its proportionality and its correct legal basis.<sup>94</sup>

Proponents of a political interpretation of EWM contend that the scope of political control entrusted to national parliaments within the framework of subsidiarity enforcement should be broadened with a view to enhance the democratic legitimacy of the EU and to avoid the transfer of further competences to supranational institutions. According to this viewpoint, national chambers should be allowed to control draft legislative acts on other principles and criteria than the principle of subsidiarity such as the proportionality principle, the principle of conferral, the political merits of legislative proposals and the need to safeguard national constitutional values. Goldoni argues that a political reading of the EWM can be justified when seen in the wider context of the democratization agenda of the Lisbon Treaty and as part of a promise to boost representative democracy in the EU.<sup>95</sup> He points out that Article 4(2) TEU explicitly protects national constitutional identity and that national parliaments should use the instrument of EWM to defend national constitutional essentials.<sup>96</sup> Moreover, he asserts that it is perfectly legitimate to test the compatibility of draft legislative acts with the principle of conferral because the principle of subsidiarity only ever comes into play when it has been established that the Union has the required powers to act and that it shares these with the Member States.<sup>97</sup> This also makes it very difficult to rely upon the subsidiarity principle to object to a draft legislative act that makes use of the internal market or the flexibility clause (resp. Article 114 and 352 TFEU) and that thus veers into the terrain of ‘competence creep’. In Goldoni’s view, the empowerment of national parliaments through the Lisbon Treaty should be thus seen as an encouragement to opt decisively for a broad reading of the EWM that integrates other elements in the reasoned opinions alongside the subsidiarity principle.

Cooper and Jančić are also in favour of a flexible and thus political reading of the EWM. Cooper proclaims that an expansive political reading of subsidiarity could enhance the democratic legitimacy of the EU by giving national parliaments a greater say over EU law-making and transforming them into a “virtual third chamber” in the EU constitutional order.<sup>98</sup> Jančić also posits that the current concept of subsidiarity examination does not hinder ‘competence creep’ and that therefore a broad reconstructed EWM is needed to reduce the

---

<sup>93</sup> Granat, ‘The Scope and Application of the EWS’, p. 74.

<sup>94</sup> Ibid., pp. 74-75.

<sup>95</sup> Marco Goldoni, ‘The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation’, in: *European Constitutional Law Review*, Vol. 10, No. 1 (2014), pp. 101-102.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Ian Cooper, ‘A ‘Virtual Third Chamber’ for the European Union? National Parliaments after the Treaty of Lisbon’, in: *West European Politics*, Vol. 35, No. 3 (2012), pp. 458-462.

democratic deficit and increase the democratic legitimacy of EU lawmaking.<sup>99</sup> He contends that national parliaments, when scrutinizing draft legislative acts, should be allowed to make comments in their reasoned opinions not only on the principle of subsidiarity, but also on the principle of proportionality, the legal basis and the legislative substance.<sup>100</sup> Kiiver sees the role of national parliaments in the EWM as akin to that of Councils of State in Member States which advise national governments on legislative proposals.<sup>101</sup> The fact that Kiiver assigns national chambers a juridical role in the EWM framework does not mean that he is a great advocate for a narrow legal understanding of the EWM. Less equivocal than the abovementioned academics, Kiiver nonetheless argues that national parliaments should have the possibility to refer to other principles such as competence, proportionality and the duty to justify together with the subsidiarity principle in their reasoned opinions.<sup>102</sup> The next section shall focus on the first two yellow cards and it shall show that the reasoned opinions which evolved into the first two yellow cards did not only limit themselves to the control of the subsidiarity principle but that they also dwelled on other principles and criteria.

## 2.6 The first yellow card: Revolt against the Monti II proposal

Before delving into the first yellow card (that was) issued against the Monti II regulation in 2012, it is important to take a step and reflect briefly on the contents of the Monti II regulation and the CJEU jurisprudence (the Viking and Laval judgements) that preceded the Monti II proposal and that prompted the Commission to draft a legislative proposal to balance the economic and social dimension in the EU without however overturning the case law of the Court. A lot has already been written about the seminal cases of Viking and Laval and therefore it suffices to provide the most relevant aspects of these judgements without going into every single detail. In Viking and Laval, two fundamental freedoms – the right to provide services and the right to establishment – were pitted against a fundamental right, namely the right to collective action.<sup>103</sup> The Court for the first time recognized the right to strike as a fundamental right, but at the same time it emphasized (thereby rejecting the Albany approach) that Articles 49 and 56 TFEU had horizontal direct effect and could be invoked against trade unions.<sup>104</sup> Moreover, the Court, using the Säger market access approach, characterized the collective action as a restriction of the two freedoms but also argued that this restriction could be justified for the sake of worker protection.<sup>105</sup> The Court then subjected the right to strike to

---

<sup>99</sup> Davor 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, No. 4 (2015), p. 953.

<sup>100</sup> *Ibid.*, pp. 953-961.

<sup>101</sup> Philipp Kiiver, 'The Early-Warning System for the Principle of Subsidiarity: The National Parliament as a Conseil d'Etat for Europe', in: *European Law Review*, Vol. 36, No. 1 (2011), pp. 98-109.

<sup>102</sup> Philipp Kiiver, 'De subsidiariteitstoets: analyse, ervaringen en aanbevelingen', in: *Regelmaat*, No. 6 (2011), pp. 323-324.

<sup>103</sup> Albertine Veldman, 'The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR', in: *Utrecht Law Review*, Vol. 9, No. 1 (2013), pp. 105-106.

<sup>104</sup> Sybe de Vries, 'Het ex-Monti II-voorstel: 'Paard van Troje' of zege voor sociale grondrechten?', in: *Nederlands tijdschrift voor Europees recht*, No. 4 (2013), p. 124.

<sup>105</sup> Catherine Barnard, 'The calm after the storm: Time to reflect on EU (labour) law scholarship following the decisions in Viking and Laval', in: Alan Bogg, Cathryn Costello and A.C.L. Davies, *Research Handbook on EU Labour Law*, Cheltenham: Elgar, 2016, p. 340.

a proportionality test which in these cases functioned as a market integration mechanism and concluded that the collective action in the Viking case was probably not proportionate, whereas in the Laval case the collection action was considered definitely not be proportionate.<sup>106</sup>

The Viking and Laval decisions ushered in a period of soul-searching involving all the relevant actors (Member States, EU institutions, social partners and academics). This resulted, among other things, in a report from the hand of Mario Monti on the single market which acknowledged that the Viking and Laval judgements ‘revived an old split that had never been healed: the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level’.<sup>107</sup> Monti proposed a number of cosmetic changes to the functioning of the single market such as better implementation and enforcement of the Posted Workers Directive, introducing a provision modelled on Article 2 of Council Regulation (EC) No 2679/98 (Monti I Regulation) that would protect the right to industrial action in the context of the cross-border provision of services and setting up a system that would allow the informal settlement of labour disputes.<sup>108</sup> These recommendations subsequently made their way into a document titled ‘Towards a Single Market Act’ in which the Commission took ownership of these ideas. In proposals 29-30, it stated that it intended to ensure that the rights guaranteed in the Charter, including the right to collective action, will be taken into account and to adopt a legislative proposal with the aim of improving the implementation of the Posted Workers Directive. In addition, it contemplated to clarify the exercise of fundamental social rights within the context of the economic freedoms of the single market.<sup>109</sup>

It was on 21 March 2012 – a year later than planned – that the Commission unveiled its plans to put some flesh on the bones of proposal 30 of the Communication ‘Towards a Single Market Act’.<sup>110</sup> It presented a proposal for a directive on the enforcement of the Posted Workers Directive and it submitted a 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 which is better known as the Monti II Regulation. According to the Commission, meeting the objective of the Regulation – the clarification of the general principles and EU rules applicable to the exercise of the fundamental right to take industrial action within the context of the freedom to provide services and the freedom of establishment, including the need to reconcile them in practice in cross-border situations – needed action at European Union level and could not be achieved by the Member States alone.<sup>111</sup> The Monti II Regulation which had Article 352 TFEU (‘flexibility clause’) as its legal basis was relatively terse and contained only five articles – with Article 5 designating the entry into force of the

---

<sup>106</sup> Barnard, ‘The calm after the storm: Time to reflect on EU (labour) law scholarship following the decisions in Viking and Laval’, p. 340.

<sup>107</sup> Mario Monti, ‘Building a Stronger Single Market’, in: *A New Strategy for the Single Market: At the Service of Europe’s Economy and Society (2010)*, p. 68.

<sup>108</sup> *Ibid.*, p. 72.

<sup>109</sup> Andreas Bücker, Filip Dorssemont and Niklas Bruun, ‘Balancing Fundamental Social Rights and Economic Freedoms: Can the Monti II Initiative Solve the EU Dilemma?’, in: *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 28, No. 3 (2012), pp. 280-281.

<sup>110</sup> *Ibid.*, p. 281.

<sup>111</sup> Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final, p. 10.

Regulation. Article 1 defined the subject matter and stipulated that the Regulation shall not affect in any way the exercise of fundamental rights as recognised in the Member States and that it shall not impinge on the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and practices.<sup>112</sup> Article 2 formed the core of the Regulation as it laid down the principle that the exercise of the freedom of establishment and the freedom to provide services shall respect the fundamental right to take collective action and conversely, that the exercise of the fundamental right to take collective action shall respect these economic freedoms.<sup>113</sup> Article 3 dealt with dispute resolution mechanisms and set forth that Member States which accommodate alternative, non-judicial mechanisms to settle labour disputes shall provide for equal access to these alternative resolution mechanisms in cases where such disagreements flowed from the exercise of the right to take collective action in transnational situations involving the fundamental freedoms mentioned above.<sup>114</sup> Lastly, Article 4 inspired by Articles 4 and 5 of the Monti I Regulation intended to introduce an information exchange system – alert mechanism – whereby a Member State would have the duty to notify the Commission and the other Member States of situations on its territory which imperiled the exercise of the right to establishment and the right to provide services and which had the potential of disturbing the functioning of the single market.<sup>115</sup>

The proposal for the Monti II Regulation is less known for its contents than for the fact that it was the first proposal to attract a yellow card. The issuing of the first yellow card occurred on the last day – 22 May 2012 – of the eighth-week deadline with twelve national parliaments sending reasoned opinions representing in total 19 votes – one more than was necessary to achieve the 1/3 threshold to trigger a yellow card.<sup>116</sup> An analysis of these reasoned opinions shows that national parliaments did not limit their scrutiny activities to the subsidiarity aspects but also incorporated other principles and criteria such as the legal basis, the proportionality principle and the political merits in their assessment.<sup>117</sup> Numerous parliaments criticized the vagueness of the Monti II proposal and remarked that the Commission had breached the procedural dimension of the subsidiarity principle due to its poor justification for the respect of the subsidiarity principle.<sup>118</sup> But the majority of the reasoned opinions did not focus on the principle of subsidiarity but commented on other elements such as those mentioned above.

Many national parliaments opposed the Monti II proposal because of the legal basis chosen by the Commission. They argued that Article 352 TFEU was not the appropriate legal basis and that the proposed regulation did not meet the criteria enshrined in the flexibility clause as the

---

<sup>112</sup> Bücken, Dorssemont and Bruun, 'Balancing Fundamental Social Rights and Economic Freedoms: Can the Monti II Initiative Solve the EU Dilemma?', p. 281.

<sup>113</sup> De Vries, 'Het ex-Monti II-voorstel: 'Paard van Troje' of zege voor sociale grondrechten?', pp. 127-128.

<sup>114</sup> Filip Dorssemont, 'De ontwerp-Verordening Monti II, oude wijn (azijn) in nieuwe zakken? De uitoefening van het recht op collectieve actie in tijden van vrijheid van vestiging en van dienstverrichting', in: *Arbeidsrechtelijke Annotaties*, Vol. 11, No. 2 (2012), pp. 20-23.

<sup>115</sup> *Ibid.*, pp. 29-31.

<sup>116</sup> Ian 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, No. 10 (2015), p. 1417.

<sup>117</sup> Fabbri and Granat, "'Yellow card, but no foul': The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike', pp. 135-139.

<sup>118</sup> Diane Fromage, 'The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member State Parliaments?', in: *Yearbook of European Law*, Vol. 35, No. 1 (2016), pp. 7-8.

regulation did not set out which of the Treaty objectives it wanted achieve.<sup>119</sup> Moreover, national chambers asserted that Article 153(5) TFEU rules out EU action with regard to the right to collective action and that therefore the flexibility clause was not interpreted correctly as Article 352(3) TFEU clearly stipulates that the flexibility clause can not used in cases where harmonization of national laws is explicitly not allowed.<sup>120</sup> Put simply, the Commission was accused of acting in an area – labour law – where it did not have the power to legislate and which was seen as a national question “par excellence”.<sup>121</sup> National parliaments also opined that the Monti II proposal was not in accordance with the proportionality principle. Certain chambers questioned the necessity of the proposal and the suitability of the proposal to achieve the Treaty objectives.<sup>122</sup> Lastly, the reasoned opinions discussed the substance of the Monti II proposal. Especially, Articles 2 and 3 bore the brunt of this critique. According to national parliaments, Article 2 lacked clarity and legal certainty and had the potential to wreck well-functioning national systems in the area of labour law.<sup>123</sup> It also aimed to reconcile economic and social rights which clashed with the constitutional traditions of Member States.<sup>124</sup> Article 3 which dealt with alternative dispute mechanisms was seen as unneeded as existing national mechanisms of dispute settlement were said to be working just excellent.<sup>125</sup>

## **2.7 The second yellow card: The EPPO proposal caught in the crossfire**

The second yellow card followed a year later when on 28 October 2013 fourteen national chambers from 11 Member States sent reasoned opinions – representing in total 18 votes – to the Commission to protest the proposal to establish the European Public Prosecutor’s Office (EPPO).<sup>126</sup> With regard to the EPPO proposal, the threshold to reach a yellow card was a quarter of all the votes allocated to the national parliaments – thus 14 votes out of 56 votes – because it involved a proposal in the area of freedom, security and justice.<sup>127</sup> The Commission based the proposal on Article 86 TFEU which unequivocally mentions the option to inaugurate a European public prosecutor to fight crimes affecting the financial interests of the Union. It argued that the objective of fighting the criminal offences affecting the Union’s financial interests could only be achieved at Union level by reason of its scale and effects.<sup>128</sup>

---

<sup>119</sup> Fabbrini and Granat, “‘Yellow card, but no foul’: The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike”, pp. 136.

<sup>120</sup> Ibid.

<sup>121</sup> Goldoni, 'The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation', p. 98.

<sup>122</sup> Fabbrini and Granat, “‘Yellow card, but no foul’: The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike”, p. 137.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Granat, ‘The Scope and Application of the EWS’, p. 79.

<sup>126</sup> Fromage, ‘The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member State Parliaments?’, pp. 5-6.

<sup>127</sup> Irene Wiczorek, ‘The EPPO Draft Regulation Passes the First Subsidiarity Test: An Analysis and Interpretation of the European Commission’s Hasty Approach to National Parliaments’ Subsidiarity Arguments’, in: *German Law Journal*, Vol. 16, No. 5 (2015), pp. 1252-1253.

<sup>128</sup> Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final, p. 4.

The exclusive prosecution of these abovementioned crimes by national authorities was deemed not to be satisfactory to achieve the goal of protecting the Union's financial interests. The Commission advocated a decentralized structure of the EPPO whereby one European Public Prosecutor (EPP) would be supported by four deputies.<sup>129</sup> Furthermore, the EPPO would have European Delegated Prosecutors (EDPs) in the Member States who would have the competence to conduct the investigations and prosecutions under the direction and supervision of the EPP. The EDPs would wear a 'double-hat': they would be part of the EPPO, but they would also remain members of the national Public Prosecutor's Office.<sup>130</sup> The Commission proposed giving the EPPO two types of competences. The first and substantive (but also exclusive) competence of the EPPO would consist of investigating and prosecuting 'criminal offences affecting the financial interests of the Union'.<sup>131</sup> The second and ancillary competence would enable the EPPO to prosecute crimes 'inextricably linked' with embezzlement of EU money and where 'their joint investigation and prosecution are in the interest of a good administration of justice'.<sup>132</sup>

Just like in the first yellow card, the reasoned opinions that resulted in the second yellow card were not only preoccupied with the subsidiarity principle, but they also remarked negatively on the proportionality, the legal basis and the political merits of the EPPO proposal. But in contrast to the first yellow card, the majority of national parliaments was indeed solely focused on assessing whether the EPPO proposal complied with the subsidiarity principle and eventually concluded that the proposal should be scrapped because it was not in accordance with the principle of subsidiarity. In their reasoned opinions, national chambers alluded to both the material and procedural dimension of the subsidiarity principle. With regard to material subsidiarity, some national parliaments observed that the EPPO proposal failed the 'national insufficiency test' because national efforts making use of national criminal law to combat fraud with EU money were already sufficient and successful.<sup>133</sup> The Commission was criticized for not having examined whether existing EU coordination mechanisms such as Eurojust and OLAF could be strengthened so as to make possible for national authorities to better achieve the objective of guarding the Union's financial interests.<sup>134</sup> It was also argued that the EPPO proposal did not meet the 'comparative efficiency test'. National parliaments asserted that the objectives of the proposal could not be better accomplished at EU level for the insufficiencies in the prosecution of criminal offences against the financial interests of the EU at the national level originated from problems which were intrinsic to the national systems and that as such, the EPPO proposal would not lead to better results regarding the unearthing of misuse of EU funds.<sup>135</sup> Furthermore, national chambers opined that the EPPO proposal was not in conformity with the procedural side of the subsidiarity principle. They pointed out that the Commission did not provide a suitable justification for the proposal and that the impact assessment was not well designed enough for it to argue that national actions would not

---

<sup>129</sup> W. (Pim) Geelhoed, 'Het Europees Openbaar Ministerie tussen soevereiniteit en effectiviteit', in: *Nederlands tijdschrift voor Europees recht*, No. 2/3 (2014), p. 76.

<sup>130</sup> Katalin Ligeti, 'The European Public Prosecutor's Office', in: Maria Bergström, Theodore Konstadinides and Valsamis Mitsilegas eds., *Research Handbook on EU Criminal Law*, Cheltenham: Elgar, 2016, p. 489.

<sup>131</sup> Art. 12 of the Draft EPPO Proposal (2013).

<sup>132</sup> Art. 13 of the Draft EPPO Proposal (2013).

<sup>133</sup> Granat, 'The Scope and Application of the EWS', p. 82.

<sup>134</sup> Öberg, 'National Parliaments and Political Control of EU Competences: A Sufficient Safeguard of Federalism?', pp. 708-709.

<sup>135</sup> Granat, 'The Scope and Application of the EWS', p. 82.

suffice to tackle misappropriation with EU money.<sup>136</sup> In addition, the quantitative indicators in the impact assessment were seen as not reliable as the Commission was chastised for providing a projection of the costs and benefits of the proposal which lacked credibility.<sup>137</sup>

There were also national parliaments that posited that the Union lacked the competence to act in this specific and sensitive area. Devising penal legislation was a matter for the Member States as criminal law was seen primarily as a national competence.<sup>138</sup> National parliaments also criticized the EPPO proposal on proportionality grounds. The Commission was chided for opting for a regulation in preference of a directive as the former was deemed to have a too restrictive effect on national policy space.<sup>139</sup> National chambers also believed that the EPPO proposal disregarded the necessity test as it gave the EPPO the exclusive competence to investigate and prosecute offences affecting the Union's financial interests.<sup>140</sup> They likewise denounced the structure of the future EPPO which they regarded as too centralized and they instead pleaded for a collegial form of authority.<sup>141</sup> Concerns were also raised about the wider substance of the proposal as the concept of 'the Union's financial interest' was found to be vague.<sup>142</sup> Moreover, the proposal was viewed as not affording the suspects the necessary level of protection of rights.<sup>143</sup>

---

<sup>136</sup> Granat, 'The Scope and Application of the EWS', p. 82.

<sup>137</sup> Öberg, 'National Parliaments and Political Control of EU Competences: A Sufficient Safeguard of Federalism?', p. 709.

<sup>138</sup> Fromage, 'The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member State Parliaments?', p. 19.

<sup>139</sup> Öberg, 'National Parliaments and Political Control of EU Competences: A Sufficient Safeguard of Federalism?', p. 707.

<sup>140</sup> Granat, 'The Scope and Application of the EWS', p. 83.

<sup>141</sup> Öberg, 'National Parliaments and Political Control of EU Competences: A Sufficient Safeguard of Federalism?', p. 707.

<sup>142</sup> Granat, 'The Scope and Application of the EWS', p. 83.

<sup>143</sup> Ibid.

## 2.8 Conclusion

This chapter moved to the most important aspect of the EWM, namely the principle of subsidiarity. It showed that the subsidiarity principle was inserted for the first time into the Treaty of Maastricht as a general constitutional rule due to a number of factors such as preventing excessive centralization, increasing pluralism and the diversity of national values and alleviating the fears of Member States about a federal Europe. Besides, subsidiarity was regarded as an answer to the absence of a clear separation of different categories of competence in the Treaties and as a tool that would have a mediating function in the conflicts that would erupt between the Member States and the EU on the exercise of certain competences. This chapter also demonstrated that the principle of subsidiarity in the Lisbon Treaty has two conceptions: a material one and a procedural one. As can be seen in Article 5 TEU, the material dimension comprises two tests – the national insufficiency test and the comparative efficiency test – that EU institutions have to carry out to answer the question whether supranational intervention in a given situation is warranted. According to the national insufficiency test, the EU can only act if and in so far the objectives of the proposed action cannot be sufficiently achieved at the national level, whereas passing the comparative efficiency test requires proof that the objectives of the proposed action can really be accomplished in a better way at Union level than at the national level. And procedural subsidiarity refers to procedural steps that the EU institutions (especially the Commission) must enact in order to be able to prove that the two tests stipulated in Article 5 TEU have been implemented in a satisfactory way so that it will become easier to assess whether Union action is needed. Notwithstanding the two tests, the chapter also pointed out that the subsidiarity principle remains vague and contested and its enforcement suboptimal. And the uncertainties about the nature of subsidiarity can also be discerned in the discussions surrounding the EWM. National parliaments and academics have shown themselves to be divided about whether the EWM should be read in a legal or political way. Put another way, the question is asked whether national chambers should only pay attention to the subsidiarity principle in their analysis of draft legislative acts and whether they are also allowed to incorporate other elements such as the legal basis, the proportionality principle and the substance of the proposal in their reasoned opinions. The first two yellow cards issued against the Monti II and EPPO proposal have showcased that they were characterized by a political interpretation of the EWM on the part of participating parliaments. The next and last chapter will focus on the Posted Workers Directive and the revision proposal of 2016. It will then discuss the third yellow card issued against the amendment proposal and it will answer the question whether the third yellow card was characterized by a legal or a political reading of the EWM.

### 3. The third yellow card and the revision of the Posted Workers Directive

The previous chapter showed that the first two yellow cards regarding respectively the Monti II and the EPPO proposals were characterized by a political reading of the EWM from the side of the national parliaments. It is therefore not surprising that this chapter will demonstrate that the third yellow card issued in 2016 continued this trend as national parliaments did not alter their approach when writing down the reasoned opinions. As in the first two yellow cards, national chambers did not confine their analysis of the amendment proposal of the Posted Workers Directive to the subsidiarity principle. This chapter is structured as follows. It begins by discussing the Posted Workers Directive and the proposal to amend the Posted Workers Directive. The second section will focus on the third yellow card itself as it will delve succinctly into the reasoned opinions that national parliaments wrote to argue that the amendment of the Posted Workers Directive did not comply with the subsidiarity principle.

#### 3.1 The short history and the contents of the Posted Workers Directive

In contrast to the first two yellow cards, the third yellow card was issued against a proposal that amended an existing directive. Whereas the Monti II and the EPPO proposals intended to establish EU coordination and regulation in policy areas sensitive for Member States and which hitherto had been untouched by European rules, the Commission proposal of 2016 to revisit the regulatory framework for posted workers aimed to add new rules to a field that since the 1990s had already been subject to (minimal) EU coordination and harmonisation. It was namely in 1996 that Directive 96/71/EC concerning the posting of workers in the framework of the provision of services was adopted after a long legislative process that took five years.<sup>144</sup> Although the contours of the Posted Workers Directive were already visible in the 1970s, the issue of posted workers did not become pertinent until the enlargement of 1986 when Spain and Portugal joined the European Communities.<sup>145</sup> The Accession Treaties stipulated that Spanish and Portuguese workers could not immediately rely on the provisions on the free movement of workers due to transitional arrangements, but they could be sent to other Member States by companies from Spain and Portugal in the context of the freedom to provide services.<sup>146</sup> It is important to bear in mind that at that time there was no distinction in European law between workers under the Treaties and those that are now regarded as posted workers. This differentiation was established by the European Court of Justice in the seminal case *Rush Portuguesa* in 1990 when it ruled that posted workers could be distinguished from workers who enjoyed rights under the free movement of workers (ex Article 39 TEC and now Article 45 TFEU).<sup>147</sup> It followed from this that posted workers could not be entitled to the

---

<sup>144</sup> The Commission presented its proposal in 1991 and the Posted Workers Directive was eventually adopted in 1996.

<sup>145</sup> Piet van Nuffel and Sofia Afanasjeva, 'The Posting of Workers Directive Revised: Enhancing the Protection of Workers in the Cross-border Provision of Services', in: *European Papers - A Journal on Law and Integration*, Vol. 3, No. 3 (2018), p. 1405.

<sup>146</sup> Daniel Carter, 'Equal Pay for Equal Work in the Same Place? Assessing the Revision to the Posted Workers Directive', in: *Croatian Yearbook of European Law and Policy*, Vol. 14 (2018), p. 35.

<sup>147</sup> *Ibid.*, pp. 35-36.

principle of equal treatment.<sup>148</sup> At the same time, the Court also allowed Member States to impose all national labour legislation on foreign services providers and their workers.<sup>149</sup>

The Court ruling in the Rush case and the effects of enlargement prompted the Commission to come up with a legislative proposal to regulate the question of posted workers. The European legislators subsequently managed to agree on a text which codified the case law of the Court to a great extent. The Posted Workers Directive which has been described as complex and even obscure<sup>150</sup> in parts has two main objectives: facilitating the transnational provision of services within a climate of fair competition and providing protection to posted workers.<sup>151</sup> But as developments in the 2000s have shown, the primary aim of the Directive has turned out to be the cross-border provision of services.<sup>152</sup> The Directive's strong focus on the smooth functioning of the internal market can also be seen in the legal bases that were chosen, namely the freedom of establishment and service provisions.

Even though the Directive has been characterized as complex and obscure, the Directive itself is very short and the most relevant aspects can be found in the first three Articles. The Directive defines a posted worker as 'a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works'.<sup>153</sup> Furthermore, the Directive lists three types of posting: 'normal' posting, whereby companies send workers to another Member State with the objective to provide services in that State, intra-corporate posting and posting through temporary employment undertakings or placement agencies.<sup>154</sup> The core of the Directive can be found in Article 3(1) which lays down a nucleus of minimum protective rights that the host Member States must guarantee to posted workers on their territory. These terms and conditions of employment include working time and annual holidays, minimum rates of pay, conditions of hiring-out of workers, health, safety and hygiene at work, measures which protect pregnant women and young people, and equality of treatment between men and women and these must be laid down by law, regulation or administrative provision<sup>155</sup>, and/or by collective agreements or arbitration awards which have been declared universally applicable and if they concern the construction industry. Article 3(7) allows the Member States to impose more favourable standards than those mentioned in Article 3(1)<sup>156</sup>, whereas Article 3(9) gives national authorities the option to oblige undertakings to guarantee to posted temporary agency workers those terms and conditions which apply to national temporary agency workers.<sup>157</sup> Article 3(10) enables Member States in cases of public policy provisions to apply national terms and conditions on issues other than those referred to in Article 3(1) to national and Member State undertakings.<sup>158</sup> Moreover,

---

<sup>148</sup> Catherine Jacqueson and Frans Pennings, 'Equal Treatment of Mobile Persons in the Context of a Social Market Economy', in: *Utrecht Law Review*, Vol. 15, No. 2 (2019), p. 75.

<sup>149</sup> *Ibid.*

<sup>150</sup> Paul Davies, 'Posted Workers: Single Market Or Protection of National Labour Law Systems?', in: *Common Market Law Review*, Vol. 34, No. 3 (1997), p. 575.

<sup>151</sup> Rebecca Zahn, 'Revision of the Posted Workers Directive: A Europeanisation Perspective', in: *Cambridge Yearbook of European Legal Studies*, Vol. 19 (2017), p. 188.

<sup>152</sup> *Ibid.*, p. 192.

<sup>153</sup> Art. 2 of the Posted Workers Directive.

<sup>154</sup> Zahn, 'Revision of the Posted Workers Directive: A Europeanisation Perspective', p. 198.

<sup>155</sup> Miriam Kullmann, 'Herziening van de Detacheringsrichtlijn: over (on)gelijke beloning en de 'harde kern-plus' bij langdurige detacheringen', in: *Nederlands tijdschrift voor Europees recht*, No. 1/2 (2018), pp. 34-35.

<sup>156</sup> Art. 3(7) of the Posted Workers Directive.

<sup>157</sup> Art. 3(9) of the Posted Workers Directive.

<sup>158</sup> Art. 3(10) of the Posted Workers Directive.

Article 3(10) gives Member States the possibility to apply to national and Member State undertakings terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of Article 3(8) and in areas other than the construction sector.

### **3.2 The revision process of the Posted Workers Directive and the proposed amendments to the Posted Workers Directive**

The decision of the Commission to revise the Posted Workers Directive in 2016 can be attributed to changed circumstances. In 2004, the EU was expanded to the East (and the South) as several East European countries joined the European family. The enlargement from 15 to 25 and subsequently 28 Member States has meant that the Union has become much more diverse with regard to its socio-economic makeup; the EU-15 and EU-10 have indeed very different wage levels and social security coverage.<sup>159</sup> This has created a situation whereby simultaneously fulfilling the twin objectives of the Posted Workers Directive, namely the transnational provision of services within a climate of fair competition and the protection of posted (and national) workers has become considerably difficult in certain sectors. Another factor that led to the initiative to revise the Posted Workers Directive was the Court ruling in the Laval case. In the Laval case, the Court established that Article 3(7) could not be used by Member States to apply higher standards to posted workers and that the Posted Workers Directive was in fact a ceiling with respect to the social protection of workers.<sup>160</sup> What also provided an impetus for the revision of the Posted Workers Directive to reach the top political agenda was the change of power at the presidency of the European Commission. The Barroso Commission was mostly preoccupied with the eurozone crisis and was only interested to improve the implementation of the Posted Workers Directive which it did through the introduction of the Enforcement Directive in early 2014, whereas Jean-Claude Juncker, the first 'Spitzenkandidat' to become Commission President, had explicitly campaigned on social issues and desired to achieve 'Social Triple A Rating' for Europe.<sup>161</sup>

It has become clear that the 'big bang' enlargement of 2004 and the Laval Court ruling have demonstrated the problems associated with posting and have given posting a somewhat negative reputation. At the same time, however, it is important not to overestimate the problems of posting and to correct some misconceptions about posting. Posting remains a limited phenomenon as only 0.6 per cent of the EU working population can be regarded as posted, which comprise 2 million people.<sup>162</sup> Moreover, statistical data have shown that the phenomenon of posting is not dominated by posted workers from low-wage Member States being sent to work in old and high-wage Member States; two third of postings involve

---

<sup>159</sup> Van Nuffel and Afanasjeva, 'The Posting of Workers Directive Revised: Enhancing the Protection of Workers in the Cross-border Provision of Services', p. 1409.

<sup>160</sup> Jacqueson and Pennings, 'Equal Treatment of Mobile Persons in the Context of a Social Market Economy', p. 76.

<sup>161</sup> Sacha Garben, 'The European Pillar of Social Rights: An Assessment of its Meaning and Significance', in: *Cambridge Yearbook of European Legal Studies*, Vol. 21 (2019), p. 109.

<sup>162</sup> Van Nuffel and Afanasjeva, 'The Posting of Workers Directive Revised: Enhancing the Protection of Workers in the Cross-border Provision of Services', p. 1404.

postings between high-wage Member States.<sup>163</sup> Even though, posted workers are highly concentrated in sectors, such as manufacturing and construction which demand medium- and low-skilled workers, posting also occurs in so-called highly-skilled professions, such as in education, health, social work services and business services.<sup>164</sup> Furthermore, posting has the potential to contribute to increasing employment and decreasing unemployment and allowing a worker to develop professionally and enabling a company to grow more through a more diversified workforce.<sup>165</sup> This does not of course negate the fact that in some sectors such as construction and manufacturing, posting can indeed lead to wage competition, social dumping, abuse of workers and loss of jobs.<sup>166</sup> Therefore, the Commission proposal to revise the regulatory framework governing the posting of workers must be seen as an attempt to enhance the legitimacy of posting by making it more social.

It was on 8 March 2016 that as part of a broader mobility package the Commission presented its proposal to revisit the Posted Workers Directive. The proposal had the same aims as the Directive that it was trying to amend and was also based on the internal market legal bases, namely the provisions on free movement of services and establishment (Articles 53(1) and 62 TFEU). Although the Commission did not opt for an additional social policy legal base, it did reserve space for the social objectives of the internal market and the Union in the preamble. As such, recital 4 of the preamble states that after twenty years, it was necessary to assess whether the Posted Worker Directive still struck the right balance between the need to promote the freedom to provide services and the need to protect the rights of posted workers.<sup>167</sup> Furthermore, recital 3 of the preamble stressed that according to Article 3 TEU and Article 9 TFEU, the Union had the task to promote social justice and protection and to encourage a high level of employment, to guarantee an adequate social protection and to combat social exclusion.<sup>168</sup> Recital 11 of the preamble also highlighted that in a competitive single market, service providers should not only compete on labour costs but also on other components such as productivity and efficiency, or the quality and innovation of their goods and services.<sup>169</sup>

The revision proposal showed that the Commission attempted to make a more social use of the internal market legal bases. The Commission wanted to establish a new consensus whereby additional rights for posted workers would not be regarded as obstacles for the freedom to provide cross-border services. The amendments to the Posted Workers Directive solely focused on improving the rights of posted workers. The revision proposal scrapped the obligation of host Member States to impose minimum rates of pay and replaced the phrase 'minimum rates of pay' with the term 'remuneration' in Article 3(1), thereby inaugurating the

---

<sup>163</sup> Van Nuffel and Afanasjeva, 'The Posting of Workers Directive Revised: Enhancing the Protection of Workers in the Cross-border Provision of Services', p. 1404.

<sup>164</sup> Andreia Ghimis and Claire Dhéret, 'The Revision of the Posted Workers Directive: Towards a Sufficient Policy Adjustment?' (European Policy Centre, 20 April 2016) Discussion Paper, p. 6.

<sup>165</sup> Ibid.

<sup>166</sup> Zahn, 'Revision of the Posted Workers Directive: A Europeanisation Perspective', p. 203.

<sup>167</sup> Recital 4 of the Preamble, 'Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services', COM(2016) 128 final, p. 9.

<sup>168</sup> Recital 3 of the Preamble, p. 9.

<sup>169</sup> Recital 11 of the Preamble, p. 10.

principle of ‘equal pay for equal work at the same place’.<sup>170</sup> Member States will be required to publish on a website the constituent elements of remuneration.<sup>171</sup> Rules on remuneration applicable to national workers emanating from legislation and collective agreements would also apply to posted workers. Moreover, provisions from collective agreements declared universally applicable would apply to posted workers in all sectors of the economy, whereas previously this had been the case only in the construction sector.<sup>172</sup> Furthermore, the amendment proposal stipulated that posted and local temporary agency workers would be entitled to the same rights with regard to remuneration and other working conditions.<sup>173</sup> Posted workers would also enjoy additional host Member State labour rights if their term of posting lasted more than 24 months.<sup>174</sup>

The revision of the Posted Workers Directive intended to initiate a process which I would describe as ‘re-nationalization through Europeanization’ by which I mean that legislation at EU level would help contribute to increasing the national policy space concerning the rates of pay. In other words, the revised directive would enable Member States to apply rules of remuneration stemming from legislation and collective agreements instead of minimum wages to posted workers. But not all Member States and their national parliaments were enchanted with the process of amending the framework governing the posted workers. In fact, the issuing of a yellow card against the proposal to revise the Posted Workers Directive was not a surprise and could already be foreshadowed a year before the revision proposal was presented. In 2015, the Commission was sent two letters – the first one delivered on 18 June 2015 by Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden and the second one sent on 31 August 2015 by Bulgaria, the Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Slovakia and Romania – in the consultation phase of the ‘targeted’ revision of the Posted Workers Directive.<sup>175</sup> Whereas the first missive was in favour of a revamp of the Posted Workers Directive, the second letter submitted by Baltic and East European members of the Union found the revision to be premature as the deadline for the transposition of the Enforcement Directive had not passed and its effects could not be thoroughly evaluated.<sup>176</sup>

The letter sent by Member States who had joined the EU after 2004 could not convince the Commission to stop the presentation of the revision proposal in 2016. At the same time, the opposition from the abovementioned Member States did not abate when the Commission revealed its amendment proposal. In May 2016, the third yellow card became a fact when 14 national chambers sent reasoned opinions to the Commission.<sup>177</sup> These reasoned opinions

---

<sup>170</sup> Van Nuffel and Afanasjeva, ‘The Posting of Workers Directive Revised: Enhancing the Protection of Workers in the Cross-border Provision of Services’, p. 1414.

<sup>171</sup> Zahn, ‘Revision of the Posted Workers Directive: A Europeanisation Perspective’, p. 205.

<sup>172</sup> Dhéret and Ghimis, ‘The Revision of the Posted Workers Directive: Towards a Sufficient Policy Adjustment?’, p. 9.

<sup>173</sup> Ilse Janssen, ‘Het voorstel ter herziening van de Detacheringsrichtlijn: een tussenstand’, in: *Tijdschrift Recht en Arbeid*, No. 3 (2018), p. 10.

<sup>174</sup> *Ibid.*

<sup>175</sup> Diane Fromage and Valentin 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, No. 1 (2017), p. 147.

<sup>176</sup> *Ibid.*

<sup>177</sup> Van Nuffel and Afanasjeva, ‘The Posting of Workers Directive Revised: Enhancing the Protection of Workers in the Cross-border Provision of Services’, p. 1415.

originated from 11 Member States<sup>178</sup> whose representatives except for Croatia and Denmark had also sent a letter complaining about the plan of the Commission to revisit the Posted Workers Directive. In contrast to the first two yellow cards, the third yellow card was characterized by a deep division between old and new Member States; 10 out of 11 Member States whose parliaments took part in writing reasoned opinions were Baltic and East European. But the third yellow card was also marked by continuity as the reasoned opinions not only discussed the subsidiarity principle but also zoomed in on other topics such as the legal basis, the proportionality and the content of the revision proposal.

### 3.3 The reasoned opinions of national parliaments

In the reasoned opinions, national parliaments paid attention to both the material and procedural side of the subsidiarity principle. In reference to the material aspect of subsidiarity, national chambers remarked that the Commission did not argue convincingly that the objectives mentioned in the revision proposal could not be achieved sufficiently at the national level.<sup>179</sup> They pointed out that the goals of the provisions inserted in the revision proposal – providing equivalent protection to posted temporary agency workers in relation to national temporary agency workers and enabling Member States to extend universally applicable collective agreements to all economic sectors – could already be achieved by making use of the existing directive.<sup>180</sup> It was argued that the new amended proposal would not add anything new because the Posted Workers Directive and the Enforcement Directive already gave posted workers sufficient social protection.<sup>181</sup> But when it came to subsidiarity-related criticism, the bulk of reasoned opinions castigated the Commission for violating the procedural side of the subsidiarity principle. The revision proposal was criticized for not having a comprehensive subsidiarity justification as the Commission merely mentioned that the existing directive could only be amended by a new directive.<sup>182</sup> Moreover, the impact assessment was deemed by some national parliaments to be badly designed as it did not provide analysis on the impact of the proposal on specific economic sectors, was not based on trustworthy data and did not set out the financial impact of the proposal, thereby making it difficult for national parliamentarians to gauge the real impact of the introduction of remuneration.<sup>183</sup> The impact study was also chastised for not being supported by quantitative and qualitative indicators.<sup>184</sup> Furthermore, the Commission was denounced for having failed to consult the social partners in an extensive manner and it was accused of neglecting the

---

<sup>178</sup> These Member States were Denmark, Bulgaria, Croatia, Czechia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and the Slovak Republic.

<sup>179</sup> Katarzyna Granat, 'The Scope and Application of the EWS', in: Katarzyna Granat ed., *The Principle of Subsidiarity and its Enforcement in the EU Legal Order: The Role of National Parliaments in the Early Warning System*, Oxford: Hart Publishing, 2018, p. 86.

<sup>180</sup> Ibid.

<sup>181</sup> Jacob Öberg, 'National Parliaments and Political Control of EU Competences: A Sufficient Safeguard of Federalism?', in: *European Public Law*, Vol. 24, No. 4 (2018), p. 727.

<sup>182</sup> Granat, 'The Scope and Application of the EWS', p. 86.

<sup>183</sup> Ibid., p. 87

<sup>184</sup> Öberg, 'National Parliaments and Political Control of EU Competences: A Sufficient Safeguard of Federalism?', pp. 724-725.

regional and local elements of the issue at hand.<sup>185</sup> Seen from the perspective of national parliaments, the non-compliance of the Commission with the procedural side of the subsidiarity principle undoubtedly hampered their efforts to assess whether the objectives of revision proposal could really be attained at the European level.

As mentioned earlier, national parliamentarians did not limit their analysis of the revision proposal to the control of subsidiarity, but they also focused on other topics. National chambers complained that the Commission violated the provisions in the Treaty on the free movement of services by introducing the notion of remuneration, thereby restricting opportunities for companies which provide cross-border services and thus leading to more costly services.<sup>186</sup> Moreover, the proposal was disparaged for not respecting Articles 152 and 153 TFEU. It was asserted that the proposal breached Article 152 TFEU by not respecting in an adequate way the autonomy of social partners and their tasks within the collective negotiation.<sup>187</sup> By establishing the concept of remuneration for posted workers, the Commission infringed Article 153(5) TFEU which states that rules relating to pay shall not be legislated by the supranational level.<sup>188</sup> These are all issues which deal with the legal basis and not with the subsidiarity aspects of the revision proposal. National parliaments also argued that the amendment proposal did not comply with the proportionality principle as the revised directive would add additional administrative burdens for undertakings engaged in providing cross-border services.<sup>189</sup> The disproportionate burden would result in a limitation of the free movement of services which would contradict the aim of facilitating the transnational provision of services stipulated in the directive. The Commission was also criticized for designing a legislative text which was too intrusive because it tried to forcefully approximate the wage levels in the EU.<sup>190</sup> Lastly, concerns were put forward about the content of the proposal. National parliaments criticized the concept of remuneration as being too vague<sup>191</sup> and regarded the intention of the Commission to diminish the wage competition to be misguided as other differences that affect fair competitive conditions were not given much attention in the revision proposal.<sup>192</sup>

---

<sup>185</sup> Granat, 'The Scope and Application of the EWS', p. 88.

<sup>186</sup> Diane Fromage and Valentin Kreilinger, 'National Parliaments' Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive', in: *European Journal of Legal Studies*, Vol. 10, No. 1 (2017), p. 149.

<sup>187</sup> Öberg, 'National Parliaments and Political Control of EU Competences: A Sufficient Safeguard of Federalism?', p. 720.

<sup>188</sup> *Ibid.*, pp. 720-721.

<sup>189</sup> *Ibid.*, p. 723.

<sup>190</sup> *Ibid.*

<sup>191</sup> Fromage and Kreilinger, 'National Parliaments' Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive', p. 149.

<sup>192</sup> Opinion issued by the Latvian Parliament on 10 May 2016.

### 3.4 Conclusion

This chapter was entirely dedicated to the third yellow card issued against the proposal to amend the Posted Workers Directive. The first section of the chapter took stock of the Posted Workers Directive adopted in 1996 and the revision proposal of 2016. It laid out that this Directive has two main objectives: facilitating the transnational provision of services within a climate of fair competition and providing protection to posted workers. The centerpiece of this Directive is Article 3 which stipulates that Member States must provide posted workers with a nucleus of minimum protective rights. The impetus to revise the Directive in 2016 had to do with the acknowledgement that a lot (enlargement and the Laval Quartet) had changed in twenty years time and that these events had had a negative influence on the balance struck between the two abovementioned objectives. The amendment proposal introduced the principle of 'equal pay for equal work at the same place', whereby Member States would be required to impose the national level of remuneration on posted workers instead of minimum rates of pay. Moreover, it stated that provisions from collective agreements declared universally applicable would apply to posted workers in all sectors of the economy, whereas previously this had been the case only in the construction sector and it stipulated that posted and local temporary agency workers would be entitled to the same rights with regard to remuneration and other working conditions. Posted workers would also enjoy additional host Member State labour rights if their term of posting lasted more than 24 months. The second part of the chapter delved into the reasoned opinions that constituted the third yellow card. It found that the third yellow card just like the previous two yellow cards was also characterized by a political reading, whereby national parliaments focused not just on the subsidiarity principle but also on the legal basis, the proportionality principle and the content of the revision proposal. In the reasoned opinions, national parliaments paid attention to both the material and procedural side of the subsidiarity principle. In reference to the material aspect of subsidiarity, national chambers remarked that the Commission did not argue convincingly that the objectives mentioned in the revision proposal could not be achieved sufficiently at the national level. However, the bulk of reasoned opinions castigated the Commission for violating the procedural side of the subsidiarity principle. The revision proposal was criticized for not having a comprehensive subsidiarity justification, for having a badly designed impact study and for not initiating extensive consultations with social partners. With regard to the legal basis, national chambers complained that the Commission violated the provisions in the Treaty on the free movement of services and that it did not respect Articles 152 and 153 TFEU. National parliaments also argued that the amended proposal did not comply with the proportionality principle as the revised directive was deemed to be too intrusive because it tried to forcefully approximate the wage levels in the EU. And it would also add additional administrative burdens for undertakings engaged in providing cross-border services. Lastly, concerns were put forward about the content of the proposal. National parliaments criticized the concept of remuneration as being too vague and regarded the intention of the Commission to diminish the wage competition to be misguided as other differences that affect fair competitive conditions were not given much attention in the revision proposal.

## Conclusion

The thesis has had as its aim to answer the question whether the third yellow card was characterized by a strictly legal or a political reading. Put differently, it wanted to figure out whether the reasoned opinions of national parliaments that coalesced into the third yellow card were solely preoccupied with the subsidiarity principle and whether they also focused on other elements such as the legal basis, the proportionality principle and the substance of the proposal. Before answering this central question, it established in the first chapter that the Treaty of Lisbon has considerably strengthened the position of national parliaments and this can be seen in Articles 10 and 12 TEU. Article 10 TEU states clearly that the Member State governments sitting in the Council are democratically accountable to their national parliaments, whereas Article 12 TEU is entirely dedicated to the role of national parliaments in the EU. This Article stipulates that national parliaments contribute to the good functioning of the EU by taking part in the revision procedures of the Treaties according to Article 48 TEU, by being informed of applications for accession to the EU according to Article 49 TEU, by participating in the evaluation mechanisms for the implementation of Union policies in the area of freedom, security and justice according to Article 70 TFEU and by being involved in the supervision of Europol's and Eurojust's activities according to Articles 85 and 88 TFEU. Furthermore, Article 12 TEU expounds that in accordance with the Protocol on the role of national parliaments in the EU – also known as Protocol 1 – national parliaments will be informed by the institutions of the Union, they will be given the draft legislative acts of the EU and they shall partake in inter-parliamentary cooperation between national parliaments and with the European Parliament. But the most important and innovative provision enshrined in Article 12 TEU is the one dealing with subsidiarity monitoring as national parliaments are given the right to control draft legislative acts on the principle of subsidiarity in accordance with the Protocol on the application of the principles of subsidiarity and proportionality also known as Protocol 2. The subsidiarity monitoring system which is better known as the 'Early Warning Mechanism' (EWM) and which consists of a yellow and orange card procedure was introduced to lessen the democratic deficit of the EU and to hinder the process of competence creep. In the first chapter, it was pointed out that the EWM has certain virtues and deficiencies. On the one hand, EWM has the potential to increase the democratic legitimacy of the EU decision-making process and to delay the legislative process when national parliaments object to draft legislative acts. On the other hand, the EWM also has serious shortcomings as evidenced by the eight-week period, the difficulties to coordinate with other national parliaments in this short period and the obfuscation of representative democracy in the EU.

The second chapter moved to the most important aspect of the EWM, namely the principle of subsidiarity. It showed that the subsidiarity principle was inserted for the first time into the Treaty of Maastricht as a general constitutional rule due to a number of factors such as preventing excessive centralization, increasing pluralism and the diversity of national values and alleviating the fears of Member States about a federal Europe. Besides, subsidiarity was regarded as an answer to the absence of a clear separation of different categories of competence in the Treaties and as a tool that would have a mediating function in the conflicts that would erupt between the Member States and the EU on the exercise of certain competences. This chapter also demonstrated that the principle of subsidiarity in the Lisbon Treaty has two conceptions: a material one and a procedural one. As can be seen in Article 5 TEU, the material dimension comprises two tests – the national insufficiency test and the

comparative efficiency test – that EU institutions have to carry out to answer the question whether supranational intervention in a given situation is warranted. According to the national insufficiency test, the EU can only act if and in so far the objectives of the proposed action cannot be sufficiently achieved at the national level, whereas passing the comparative efficiency test requires proof that the objectives of the proposed action can really be accomplished in a better way at Union level than at the national level. And procedural subsidiarity refers to procedural steps that the EU institutions (especially the Commission) must enact in order to be able to prove that the two tests stipulated in Article 5 TEU have been implemented in a satisfactory way so that it will become easier to assess whether Union action is needed. Notwithstanding the two tests, the chapter also pointed out that the subsidiarity principle remains vague and contested and its enforcement suboptimal. And the uncertainties about the nature of subsidiarity can also be discerned in the discussions surrounding the EWM. National parliaments and academics have shown themselves to be divided about whether the EWM should be read in a legal or political way. Put another way, the question is asked whether national chambers should only pay attention to the subsidiarity principle in their analysis of draft legislative acts and whether they are also allowed to incorporate other elements such as the legal basis, the proportionality principle and the substance of the proposal in their reasoned opinions. The first two yellow cards issued against the Monti II and EPPO proposal have showcased that they were characterized by a political interpretation of the EWM from the side of participating parliaments.

The last chapter was entirely dedicated to the third yellow card issued against the proposal to amend the Posted Workers Directive. The first section of the chapter took stock of the Posted Workers Directive adopted in 1996 and the revision proposal of 2016. It laid out that this Directive has two main objectives: facilitating the transnational provision of services within a climate of fair competition and providing protection to posted workers. The centerpiece of this Directive is Article 3 which stipulates that Member States must provide posted workers with a nucleus of minimum protective rights. The impetus to revise the Directive in 2016 had to do with the acknowledgement that a lot (enlargement and the Laval Quartet) had changed in twenty years time and that these events had had a negative influence on the balance struck between the two abovementioned objectives. The amendment proposal introduced the principle of ‘equal pay for equal work at the same place’, whereby Member States would be required to impose the national level of remuneration on posted workers instead of minimum rates of pay. Moreover, it stated that provisions from collective agreements declared universally applicable would apply to posted workers in all sectors of the economy, whereas previously this had been the case only in the construction sector and it stipulated that posted and local temporary agency workers would be entitled to the same rights with regard to remuneration and other working conditions. Posted workers would also enjoy additional host Member State labour rights if their term of posting lasted more than 24 months. The second part of the chapter delved into the reasoned opinions that constituted the third yellow card. It found that the third yellow card just like the previous two yellow cards was also characterized by a political reading, whereby national parliaments focused not just on the subsidiarity principle but also on the legal basis, the proportionality principle and the content of the revision proposal. In the reasoned opinions, national parliaments paid attention to both the material and procedural side of the subsidiarity principle. In reference to the material aspect of subsidiarity, national chambers remarked that the Commission did not argue convincingly that the objectives mentioned in the revision proposal could not be achieved sufficiently at the national level. However, the bulk of reasoned opinions castigated the Commission for

violating the procedural side of the subsidiarity principle. The revision proposal was criticized for not having a comprehensive subsidiarity justification, for having a badly designed impact study and for not initiating extensive consultations with social partners. With regard to the legal basis, national chambers complained that the Commission violated the provisions in the Treaty on the free movement of services and that it did not respect Articles 152 and 153 TFEU. National parliaments also argued that the amended proposal did not comply with the proportionality principle as the revised directive was deemed to be too intrusive because it tried to forcefully approximate the wage levels in the EU. And it would also add additional administrative burdens for undertakings engaged in providing cross-border services. Lastly, concerns were put forward about the content of the proposal. National parliaments criticized the concept of remuneration as being too vague and regarded the intention of the Commission to diminish the wage competition to be misguided as other differences that affect fair competitive conditions were not given much attention in the revision proposal.

This thesis has shown that the third yellow card was characterized by a political reading from the side of national parliaments. In other words, national chambers not only focused on the principle of subsidiarity in their analysis of the revision of the Posted Workers Directive as they also engaged in scrutinizing other elements such the legal basis, the proportionality principle and the substance of the proposal itself. In fact, all the three yellow cards were interpreted in a political manner and they highlighted the differences in opinion between national parliaments and the Commission with regard to the appropriate way to protect the European single market and budget and how to do it in a way that it would not come at the expense of ordinary workers and recipients. It would be interesting to delve deeper into the aftermath of the three yellow cards and the other reasoned opinions issued within the framework of the EWM and which did not lead yellow cards. The reaction of the Commission to the issuing of the yellow cards and the precise influence of the yellow cards on the course of the legislative process deserve to be researched in greater detail. Moreover, it would be important to answer the question whether the political interpretation of the EWM seen in the three yellow cards was an aberration or whether the majority of the reasoned opinions indeed focused on other elements than just the subsidiarity principle. If national parliaments generally use a political interpretation of the EWM when analyzing draft legislative acts, then it would be legitimate to ask whether the Treaties should be changed to reflect the new reality. On the other hand, the fact that the three yellow cards were characterized by a political interpretation of the EWM could also lead one to conclude that national parliaments have not complied with Protocol 2 of the Lisbon Treaty and that therefore the EWM needs to be 're-nationalized' which would entail the removal of it from the Treaty in order to enable the national chambers to scrutinize the draft legislative acts from all angles and to mandate and better control their governments in the Council.

## Bibliography

- Barber, Nick, 'The Limited Modesty of Subsidiarity', in: *European Law Journal*, Vol. 11, No. 3 (2005).
- Barnard, Catherine, 'Social Policy and the Shifting Sands of the Constitutional Order: The Case of Posted Workers', in: Arnall, Anthony, Barnard, Catherine, Dougan, Michael and Spaventa, Eleanor eds., *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, Oxford: Hart Publishing 2011.
- Barnard, Catherine, 'The calm after the storm: Time to reflect on EU (labour) law scholarship following the decisions in Viking and Laval', in: Bogg, Alan, Costello, Cathryn and Davies, A.C.L., *Research Handbook on EU Labour Law*, Cheltenham: Elgar 2016.
- Barrett, Gavin, 'Monti II: The Subsidiarity Review Process Comes of Age... Or Then Again Maybe It Doesn't', in: *Maastricht Journal of European and Comparative Law*, Vol. 19, No. 4 (2012).
- Bartl, Marija, 'The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit', in: *European Law Journal*, Vol. 21, No. 1 (2015).
- Besselink Leonard FM, 'The Place of National Parliaments within the European Constitutional Order', in: Fasone, Cristina and Lupo, Nicola eds., *Interparliamentary Cooperation in the Composite European Constitution*, Oxford: Hart Publishing 2016.
- Bogojevic, Sanja and Groussot, Xavier, 'Subsidiarity as a Procedural Safeguard to Federalism', in: Azoulai, Loïc ed., *The Question of Competence in the European Union*, Oxford: Oxford University Press 2014.
- Bovenschen, Willem, 'Economische Monetaire Unie: schulden crisis leidt tot fundamentele maatregelen', in: *Nederlands tijdschrift voor Europees recht*, No. 5 (2012).
- Brok, Elmar and Selmayr, Martin, 'Der ,Vertrag der Parlamente' als Gefahr für die Demokratie? Zu den offensichtlich unbegründeten Verfassungsklagen gegen den Vertrag von Lissabon', in: *Integration*, 31 (3) 2008.
- Brouwer, Evelien, 'Rechtsgeldigheid van het relocatiebesluit en de betekenis van het solidariteitsbeginsel in het EU-asielbeleid', in: *Nederlands tijdschrift voor Europees recht*, No. 9/10 (2017).
- Bücken, Andreas, Dorssemont, Filip and Bruun, Niklas, 'Balancing Fundamental Social Rights and Economic Freedoms: Can the Monti II Initiative Solve the EU Dilemma?', in: *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 28, No. 3 (2012).

- Carter, Daniel, 'Equal Pay for Equal Work in the Same Place? Assessing the Revision to the Posted Workers Directive', in: *Croatian Yearbook of European Law and Policy*, Vol. 14 (2018).
- Cass Deborah Z., 'The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community', in: *Common Market Law Review*, Vol. 29, No. 6 (1992).
- Chamon, Merijn, 'Eerste toepassingen van de subsidiariteitstoets', in: *SEW, Tijdschrift voor Europees en economisch recht*, No. 6 (2014).
- Cooper, Ian, 'A 'Virtual Third Chamber' for the European Union? National Parliaments after the Treaty of Lisbon', in: *West European Politics*, Vol. 35, No. 3 (2012).
- Cooper, Ian, '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, No. 10 (2015).
- Cooper, Ian, 'National parliaments in the democratic politics of the EU: the subsidiarity early warning mechanism, 2009–2017', in: *Comparative European Politics*, Vol. 17, No. 6 (2019).
- Cooper, Ian, 'The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU', in: *Journal of Common Market Studies*, Vol. 44, No. 2 (2006).
- Countouris, Nicola and Engblom, Samuel, 'Civilising the European Posted Workers Directive', in: Adams-Prassl, Jeremias and Freedland, Mark R eds., *Viking, Laval and Beyond*, Oxford: Hart Publishing 2016.
- Craig, Paul, 'Subsidiarity: A Political and Legal Analysis', in: *Journal of Common Market Studies*, Vol. 50, No. 1 (2012).
- Cygan, Adam, '“Collective’ subsidiarity monitoring by national parliaments after Lisbon: the operation of the early warning mechanism’', in: Rubini, Luca and Trybus, Martin eds., *The Treaty of Lisbon and the Future of European Law and Policy*, Cheltenham: Edward Elgar 2012.
- Cygan, Adam, 'National parliaments as guardians of the principle of subsidiarity', in: Blockmans, Steven and Lazowski, Adam eds., *Research Handbook on EU Institutional Law*, Cheltenham: Elgar 2016.
- Cygan, Adam, 'Subsidiarity as a regulatory principle in EU law', in: Cygan, Adam ed., *Accountability, Parliamentarism and Transparency in the EU: The Role of National Parliaments*, Cheltenham: Elgar 2013.

- Davies, Gareth, 'Subsidiarity The wrong idea, in the wrong place, at the wrong time', in: *Common Market Law Review*, Vol. 43, No. 1 (2006).
- Davies, Paul, 'Posted Workers: Single Market Or Protection of National Labour Law Systems?', in: *Common Market Law Review*, Vol. 34, No. 3 (1997).
- De Vries, Sybe, 'Het ex-Monti II-voorstel: 'Paard van Troje' of zege voor sociale grondrechten?', in: *Nederlands tijdschrift voor Europees recht*, No. 4 (2013).
- De Wilde, Pieter, 'Why the Early Warning Mechanism does not Alleviate the Democratic Deficit', OPAL Online Paper No. 6/2012.
- De Witte, Bruno and Tsourdi, Evangelia (Lilian), 'Confrontation on relocation – The Court of Justice endorses the emergency scheme for compulsory relocation of asylum seekers within the European Union: Slovak Republic and Hungary v. Council', in: *Common Market Law Review*, Vol. 55, No. 5 (2018).
- Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.
- Dorssemont, Filip, 'De ontwerp-Verordening Monti II, oude wijn (azijn) in nieuwe zakken? De uitoefening van het recht op collectieve actie in tijden van vrijheid van vestiging en van dienstverrichting', in: *Arbeidsrechtelijke Annotaties*, Vol. 11, No. 2 (2012).
- Evju, Stein. 'Revisiting the Posted Workers Directive: Conflict of Laws and Laws in Contrast', in: *Cambridge Yearbook of European Legal Studies*, Vol. 12 (2010).
- Fabbrini, Federico, 'The Principle of Subsidiarity', in: Schütze, Robert and Tridimas, Takis eds., *Oxford Principles of European Union Law Volume 1: The European Union Legal Order*, Oxford: Oxford University Press 2018.
- Fabbrini, Federico and Granat, Katarzyna, "'Yellow card, but no foul": The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike', in: *Common Market Law Review*, Vol. 50, No. 1 (2013).
- Fasone, Cristina and Fromage, Diane, '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, No. 2 (2016).
- Follesdal, Andreas and Hix, Simon, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', in: *Journal of Common Market Studies*, Vol. 44, No. 3 (2006).

- Fromage, Diane, 'The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member State Parliaments?', in: *Yearbook of European Law*, Vol. 35, No. 1 (2016).
- Fromage, Diane and Kreilinger, Valentin, 'National Parliaments' Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive', in: *European Journal of Legal Studies*, Vol. 10, No. 1 (2017).
- Garben, Sacha, 'The European Pillar of Social Rights: An Assessment of its Meaning and Significance', in: *Cambridge Yearbook of European Legal Studies*, Vol. 21 (2019).
- Geelhoed, (Pim) W. 'Het Europees Openbaar Ministerie tussen soevereiniteit en effectiviteit', in: *Nederlands tijdschrift voor Europees recht*, No. 2/3 (2014).
- Ghimis, Andreia and Dhéret, Claire, 'The Revision of the Posted Workers Directive: Towards a Sufficient Policy Adjustment?' (European Policy Centre, 20 April 2016) Discussion Paper.
- Goldoni, Marco, 'The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation', in: *European Constitutional Law Review*, Vol. 10, No. 1 (2014).
- Granat, Katarzyna, 'Subsidiarity as a Principle of EU Governance', in: Schütze, Robert ed. *Globalisation and Governance: International Problems, European Solutions*, Cambridge: Cambridge University Press 2018.
- Granat, Katarzyna, *The Principle of Subsidiarity and its Enforcement in the EU Legal Order: The Role of National Parliaments in the Early Warning System*, Oxford: Hart Publishing 2018.
- Groen, Afke and Christiansen, Thomas, 'National Parliaments in the European Union: Conceptual Choices in the European Union's Constitutional Debate', in: Heffler, Claudia, Neuhold, Christine, Rozenberg, Olivier and Smith, Julie eds., *The Palgrave Handbook of National Parliaments and the European Union*, Basingstoke: Palgrave Macmillan 2015.
- Guastaferrero, Barbara, 'Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions', in: *Maastricht Journal of European and Comparative Law*, Vol. 21, No. 2 (2014).
- Heffler, Claudia and Rozenberg, Olivier, 'Introduction', in: Heffler, Claudia, Neuhold, Christine, Rozenberg, Olivier and Smith, Julie eds., *The Palgrave Handbook of National Parliaments and the European Union*, Basingstoke: Palgrave Macmillan 2015.

- Jacqueson, Catherine and Pennings, Frans, 'Equal Treatment of Mobile Persons in the Context of a Social Market Economy', in: *Utrecht Law Review*, Vol. 15, No. 2 (2019).
- Jančić, Davor ed., *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?*, Oxford: Oxford University Press 2017.
- Jančić, Davor, '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, No. 4 (2015).
- Janssen, Ilse, 'Het voorstel ter herziening van de Detacheringsrichtlijn: een tussenstand', in: *Tijdschrift Recht en Arbeid*, No. 3 (2018).
- Kelstrup, Morten, 'Denmark's relation to the European Union A history of dualism and pragmatism', in: Miles, Lee and Wivel, Anders eds., *Denmark and the European Union*, Oxon: Routledge 2014.
- Kiiver, Philipp, 'De subsidiariteitstoets: analyse, ervaringen en aanbevelingen', in: *Regelmaat*, No. 6 (2011).
- Kiiver, Philipp, 'The Early-Warning System for the Principle of Subsidiarity: The National Parliament as a Conseil d'Etat for Europe', in: *European Law Review*, Vol. 36, No. 1 (2011).
- Kleimann, David and Kübek, Gesa, 'The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15', in: *Legal Issues of Economic Integration*, Vol. 45, No. 1 (2018).
- Kullmann, Miriam, 'Herziening van de Detacheringsrichtlijn: over (on)gelijke beloning en de 'harde kern-plus' bij langdurige detacheringen', in: *Nederlands tijdschrift voor Europees recht*, No. 1/2 (2018).
- Lenaerts, Koen, 'The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism', in: *Fordham International Law Journal*, Vol. 17, No. 4 (1993).
- Lhernould, Jean-Philippe, 'Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services: What will change in 2020?', in: *ERA Forum*, Volume 20, No. 2, (2019).
- Ligeti, Katalin, 'The European Public Prosecutor's Office', in: Bergström, Maria, Konstadinides, Theodore and Mitsilegas Valsamis eds., *Research Handbook on EU Criminal Law*, Cheltenham: Elgar 2016.

- Lock, Tobias, ‘Article 12 TEU’, in: Kellerbauer, Manuel, Klamert, Marcus and Tomkin, Jonathan eds., *Commentary on the EU Treaties and the Charter of Fundamental Rights*, Oxford: Oxford University Press 2019.
- Lock, Tobias, ‘Article 48 TEU’, in: Kellerbauer, Manuel, Klamert, Marcus and Tomkin, Jonathan eds., *Commentary on the EU Treaties and the Charter of Fundamental Rights*, Oxford: Oxford University Press 2019.
- MacDowall, Andrew, ‘Voters back Viktor Orbán’s rejection of EU migrant quotas’, in: *Politico Europe*, 2 October 2016.
- Majone, Giandomenico, ‘Europe’s “Democratic Deficit”: The Question of Standards’, in: *European Law Journal*, Vol. 4, No. 1 (1998).
- Maurer, Andreas and Wessels, Wolfgang eds., *National Parliaments on their Ways to Europe: Losers or Latecomers?*, Baden-Baden: Nomos 2001.
- Miklin, Eric, ‘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, No. 3 (2017).
- Monti, Mario, ‘Building a Stronger Single Market’, in: *A New Strategy for the Single Market: At the Service of Europe's Economy and Society (2010)*.
- Moravcsik, Andrew, ‘The Myth of Europe's Democratic Deficit’, in: *Intereconomics*, November/December (2008).
- Neuhold, Christine and Smith, Julie, ‘Conclusion: From ‘Latecomers’ to ‘Policy Shapers’? – The Role of National Parliaments in the ‘Post-Lisbon’ Union’, in: Hefftlar, Claudia, Neuhold, Christine, Rozenberg, Olivier and Smith, Julie eds., *The Palgrave Handbook of National Parliaments and the European Union*, Basingstoke: Palgrave Macmillan 2015.
- Öberg, Jacob, ‘National Parliaments and Political Control of EU Competences: A Sufficient Safeguard of Federalism?’, in: *European Public Law*, Vol. 24, No. 4 (2018).
- O’Brennan, John and Raunio, Tapio, ‘Introduction: Deparliamentarization and European Integration’, in: O’Brennan, John and Raunio, Tapio eds., *National Parliaments within the Enlarged European Union: From ‘Victims’ of Integration to Competitive Actors?*, London: Routledge 2007.
- Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final.
- Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final.

- Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final.
- Rocca, Marco, 'The Proposal for a (So-Called) 'Monti II' 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: Changing without Reversing, Regulating without Affecting', in: *European Labour Law Journal*, Vol. 3, No. 1 (2012).
- Schütze, Robert, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism', in: *The Cambridge Law Journal*, Vol. 68, No. 3 (2009).
- Senden, Linda and Vandamme, Thomas, 'Het Verdrag van Lissabon en het Europese mandaat van nationale parlementen', in: *SEW, Tijdschrift voor Europees en economisch recht*, No. 1 (2009).
- Sprungk, Carina, 'A New Type of Representative Democracy? Reconsidering the Role of National Parliaments in the European Union', in: *Journal of European Integration*, Vol. 35, No. 5 (2013).
- Van den Brink, Ton, 'The substance of subsidiarity: the interpretation and meaning of the principle after Lisbon', in: Rubini, Luca and Trybus, Martin eds., *The Treaty of Lisbon and the Future of European Law and Policy*, Cheltenham: Edward Elgar 2012.
- Van Hoek, Aukje and Houwerzijl, Mijke, "'Posting' and 'Posted Workers': The Need for Clear Definitions of Two Key Concepts of the Posting of Workers Directive", in: *Cambridge Yearbook of European Legal Studies*, Vol. 14 (2012).
- Van Nuffel, Piet and Afanasjeva, Sofia, 'The Posting of Workers Directive Revised: Enhancing the Protection of Workers in the Cross-border Provision of Services', in: *European Papers - A Journal on Law and Integration*, Vol. 3, No. 3 (2018).
- Veldman, Albertine, 'The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR', in: *Utrecht Law Review*, Vol. 9, No. 1 (2013).
- Wendler, Frank, *'Debating Europe in National Parliaments: Public Justification and Political Polarization'*, Basingstoke: Palgrave Macmillan 2016.
- Wieczorek, Irene, 'The EPPO Draft Regulation Passes the First Subsidiarity Test: An Analysis and Interpretation of the European Commission's Hasty Approach to National Parliaments' Subsidiarity Arguments', in: *German Law Journal*, Vol. 16, No. 5 (2015).

- Zahn, Rebecca, 'Revision of the Posted Workers Directive: A Europeanisation Perspective', in: *Cambridge Yearbook of European Legal Studies*, Vol. 19 (2017).