

## ARTICLES

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# The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member State Parliaments?

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## I. Introduction: The second yellow card triggered since 2009

On 28 October 2013, the second yellow card ever was activated.<sup>1</sup> On this occasion, 14 national parliaments<sup>2</sup> transmitted reasoned opinions to the EU

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<sup>1</sup> The European Commission acknowledged this activation on 6 November 2013. Communication from the Commission to the European Parliament, the Council, and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2 of 27 November 2013 [COM(2013) 851 final], 3.

<sup>2</sup> Cypriot House of representatives, Czech Senate, French Senate, Hungarian National assembly, both Chambers of Irish House of Oireachtas, Maltese House of representatives, Romanian Chamber of deputies, Slovenian National assembly, Swedish parliament, Dutch Senate, Dutch House of representatives, and UK House of Lords and House of Commons.

The participation of the British and the Irish Parliaments should be underlined since both Member States have an opt-out in the Area of Freedom, Security and Justice contained in Protocol 21 annexed to the Treaties. Contrary to Denmark, which has a permanent opt-out, Ireland and the UK may decide to opt in which they have not done on this occasion. The UK has repeatedly expressed its strong opposition to this initiative. In its Coalition agreement, the then UK government declared: 'We will approach forthcoming legislation in the area of criminal justice on a case-by-case basis, with a view to maximising our country's security, protecting Britain's civil liberties and preserving the integrity of our criminal justice system. *Britain will not participate in the establishment of any European Public Prosecutor*' [emphasis added]. 'The Coalition: our programme', 20 May 2010, Chapter 13, 'Europe', 19. This position was confirmed in the Written statement to Parliament submitted by the UK Government on 2 December 2013 which repeated that 'As confirmed in the coalition agreement, the government will not participate in the establishment of any EPPO [and that] We [the Government] will remain a full and active participant in both the Eurojust and EPPO negotiations to defend our national interests'. Written statement to Parliament on the European Commission's proposals on Eurojust and the European Public Prosecutor's Office by the Home Office published on 2 December 2013. See, on opt-ins in the UK and especially on the relationship between Parliament and Government in such cases: House of Commons European Scrutiny Committee: European Public Prosecutor's Office: Reasoned Opinion. Reform of Eurojust European Anti-Fraud Office. Fifteenth Report of Session 2013–2014, 7.

Commission—representing a total of 18 votes<sup>3</sup>—regarding the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office (COM (2013) 534).

In almost six years, the Early Warning Mechanism—which allows national parliaments to express concerns regarding the respect of the principle of subsidiarity of new EU legislative proposals affecting non-exclusive competences—has only been activated twice. Criticisms of its efficiency and usefulness have been sharp and numerous.<sup>4</sup> The first yellow card was triggered on 22 May 2012;

In any case, the European Union Act 2011 makes such an opt-in subject to an agreement: this decision needs to be approved by an Act of Parliament and by referendum according to article 6(3) that states 'A Minister of the Crown may not give a notification under Article 4 of Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice annexed to TEU [Treaty on European Union] and TFEU [Treaty on the Functioning of the European Union] which relates to participation by the United Kingdom in a European Public Prosecutor's Office or an extension of the powers of that Office unless—(a) the notification has been approved by Act of Parliament, and (b) the referendum condition is met'.

Further, the relevance of a British or an Irish participation in the Early Warning System if they have not opted in could be questioned: why should non-participating Member States be able to raise concerns about the respect of the principle of subsidiarity of a proposal? Such participation can be justified by the fact that even if the UK is not part of the initiative, it will be affected by it as the House of Lords argues. The House of Lords in fact launched an enquiry regarding the role of the new proposed EPPO in January 2014. Following this enquiry, it published a report on the EPPO's impact on non-participating Member States. 'Lords probe EU Public Prosecutor proposal following a 'yellow card' from national parliaments' 22 January 2014 <http://www.parliament.uk/business/lords/media-centre/house-of-lords-media-notice/2014/january-2014/eu-public-prosecutor/>, accessed 7 October 2015) and House of Lords European Union Committee: The impact of the European Public Prosecutor's Office on the United Kingdom, 2014. The House of Commons European scrutiny committee members also clearly underlined in their reasoned opinion that '[they] include, in [their] scrutiny, whether the interests of non-participating Member States are met by the proposal'. House of Commons European Scrutiny Committee: European Public Prosecutor's Office: Reasoned Opinion. Reform of Eurojust European Anti-Fraud Office. Fifteenth Report of Session 2013–2014, 5.

<sup>3</sup> A threshold of 14 votes out of 56 (1/4) must be reached in order to activate the Early Warning System when a proposal affects the Area of freedom, security and justice (art. 76 TFEU); in all other cases, 1/3 (18) of the total number of votes is required. This lower threshold in the Area of freedom, security and justice is due to its sensitivity for Member States, sensitivity visible in the large use of mutual recognition and references to the traditions and judicial systems of the Member States (art. 67 TFEU and Chapter 4). H Labayle, 'Parquet européen et contrôle de subsidiarité: premier carton jaune pour l'Espace de liberté'. Réseau universitaire européen. Droit de l'Espace de liberté, sécurité et justice. 8 January 2014. <http://www.gdr-elsj.eu/2014/01/08/cooperation-judiciaire-penale/parquet-europeen-et-contrôle-de-subsidiarité-premier-carton-jaune-pour-l'espace-de-liberté/>.

Unfortunately, the lack of direct information currently available cannot allow a detailed analysis of how national parliaments cooperated—or not—in order to reach the number of reasoned opinions necessary to trigger a yellow card, similar to the one made by Ian Cooper regarding the first yellow card. I Cooper, 'A Yellow Card for the Striker: national parliaments and the defeat of EU legislation on the right to strike' (2015) 22 *Journal of European Public Policy*, 1406. However, from the information available on the Platform for EU Interparliamentary Exchange (IPEX) database, on that occasion the yellow card was also triggered *in extremis*: 5 Chambers (French Senate, Maltese Parliament, Romanian House of Deputies, British House of Lords and House of Commons) adopted their reasoned opinions equivalent to 6 votes—on 28 October 2013, that is on the last day allocated for the control of the respect of the principle of subsidiarity.

<sup>4</sup> For instance, Tapio Raunio concluded his assessment of the procedure as follows: 'What lessons can we draw from the introduction and early record of the subsidiarity control mechanism?

it concerned the Proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services [COM(2012)130]. On that occasion, 12 national parliaments submitted a reasoned opinion. As 7 votes had been expressed by unicameral parliaments, this took the total number of votes to 19. The EU Commission withdrew its proposal on 12 September 2012, although it affirmed further that ‘The Commission has not found based on this assessment [of the arguments put forward by national parliaments in their reasoned opinions] that the principle of subsidiarity has been breached’.<sup>5</sup> However, this proposal raised an issue of competence in the first place. It was made on the basis of the flexibility clause enshrined in Article 352 TFEU, which specifically prohibits the harmonization of Member State laws or regulations in cases where the Treaties exclude such harmonization (para. 3).<sup>6</sup> Given the fact that Article 153–5 TFEU excludes the right to strike from the domain of harmonization, some national parliaments (Dutch House of representatives, Portuguese assembly, Luxembourgish Chamber of deputies, Latvian parliament, French Senate, German Bundesrat, Belgian House of representatives) have—legitimately in my view—argued that the Commission lacked the competence to make the proposal in the first place, or that Article 352 TFEU was not the appropriate legal basis. Therefore, there might be no question of subsidiarity at all since for there to be subsidiarity issues, the Union must have a (non-exclusive) competence. In the proposal’s justification, the Commission reaffirmed that the exclusion contained in Article 153–5 TFEU was not to be interpreted as being absolute as has been shown by the case law of the Court of Justice.<sup>7</sup> Furthermore, numerous

Essentially it appears that the arguments put forward about its [the EWS] rather modest impact are valid. National parliaments will probably use it with varying degrees of interest, depending on the salience of Europe and of the individual legislative initiatives. *It is also unlikely that national parliaments could muster the sufficient number of votes to show the ‘yellow’ or ‘orange’ cards to the Commission, at least not without the support of a large number of national governments. Hence it will probably remain a rather harmless procedure, with only a marginal impact on the EU’s legislative process* [emphasis added]. T Raunio, ‘Destined for irrelevance? Subsidiarity control by National parliaments’, Real Instituto Elcano, Working Paper 36, 2010, 1, 13. Six years later, it remains unclear whether this prevision has been verified. Indeed, when the first yellow card was triggered, three governments of Member States whose parliaments issued a reasoned opinion had declared the proposal conform to the principle of subsidiarity. Element mentioned by Ian Cooper during the OPAL National Parliaments and Europe conference celebrated in London on 31 March 2014. However, this could simply be the result of an internal dysfunction in the relationship between Parliament and Government.

<sup>5</sup> European Commission, Commission decision to withdraw the Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services—COM(2012) 130. Letter sent to the House of Lords, 1.

<sup>6</sup> See, on the issue of competence: F Fabbrini and K Granat, “Yellow card, but not foul”: The role of the National parliaments under the subsidiarity Protocol and the Commission proposal for an EU Regulation on the right to strike’ (2013) 50 *Common Market Law Review*, 115, 132 f.

<sup>7</sup> In the assessment of the subsidiarity and proportionality principles, the Commission declares indeed that ‘Given the lack of explicit provision in the Treaty for the necessary powers, the present Regulation is based on Article 352 TFEU. Article 153(5) TFEU excludes the right to strike from the range of matters that can be regulated across the EU by way of minimum standards through

parliaments criticized the vagueness of this proposal, and the poor justification given by the Commission for the respect of the principle of subsidiarity. As a matter of fact, the Commission simply declared that ‘The objective of the Regulation, to clarify 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, *requires action at European Union level and cannot be achieved by the Member States alone*’ [emphasis added]. The Commission did not demonstrate that it took into account the two constitutive elements of the principle of subsidiarity, that is, that a defined goal cannot be sufficiently achieved at Member State level and can at the same time be better achieved, by reason of its scale or effects, at Union level. Furthermore, the Commission seems to refer to arguments linked to proportionality when trying to demonstrate that the principle of subsidiarity is respected since it further adds that ‘As regards the contents of the proposal, respect for the subsidiarity principle is further ensured by recognition of the role of national courts in establishing the facts and ascertaining whether actions pursue objectives that constitute a legitimate interest, *are suitable for attaining these objectives, and do not go beyond what is necessary to attain them*’ [emphasis added].

All these elements show that this first yellow card was reached in such peculiar circumstances that its meaning as a proof of the functioning of the Early Warning System has to be interpreted carefully. Indeed, the reaction of the EU Commission on that first occasion could be considered to be disappointing to some extent—or at least be criticized—since it simply withdrew its proposal, considering that there were no subsidiarity issues, and it neither gave a clear sign to national parliaments<sup>8</sup> nor did it allow for the drawing of general conclusions regarding the efficiency of the Early Warning System.<sup>9</sup> A standardized

Directives. *However, the Court rulings have clearly shown that the fact that Article 153 does not apply to the right to strike does not as such exclude collective action from the scope of EU law*’ [emphasis added]. The Commission is referring here to the *Viking-Line*, *Laval*, and *Ruffert* cases (Cases C-438/05, C-341/05, and C-346/06 respectively).

<sup>8</sup> The interpretation made by national parliamentary chambers of the Commission’s reaction differs among them: according to the survey conducted in the framework of COSAC in May 2013, ‘In the specific case of “Monti II” the majority of Parliaments/Chambers believed that the European Commission actions in responding to the “yellow card” were in line with the Lisbon Treaty and that it applied correctly the practical arrangements for the operation of the subsidiarity mechanism. However, 12 Parliaments/Chambers did not believe that the reply from the Commission to the reasoned opinion (dated 12 September 2012) was an adequate response’. COSAC, 19th bi-annual report Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, 3.

<sup>9</sup> See, on the first yellow card and the interpretation of the Commission’s attitude: G Barrett, ‘Monti II: The subsidiarity review process comes of age . . . or then again maybe it doesn’t’ (2012) 19 *Maastricht Journal of European and Comparative Law*, 595; F Fabbrini and K Granat, “‘Yellow card, but not foul’: The role of the National parliaments under the subsidiarity Protocol and the Commission proposal for an EU Regulation on the right to strike’ (n 6) M Goldoni, ‘The Early

clarification note was sent by the EU Commission to national parliaments in March 2013, ten months after the yellow card was triggered.<sup>10</sup>

Conversely, in the case of the second yellow card, I contend that although the Commission decided to maintain its proposal in spite of the numerous reasoned opinions, the sign it gave to national parliaments may have been more encouraging this time. The particularity of the legal basis chosen—Article 86 TFEU—which provides for the possibility to establish enhanced cooperation if unanimity cannot be reached in the Council—without any previous authorization as we will see—may, however, have played a determining role in the definition of the Commission's reaction. This also raises the question of whether yellow cards are generally going to be triggered mostly under exceptional circumstances, as proved to be the case with both of the yellow cards that have been triggered.

I will first highlight the content of the proposal for the establishment of the EPPO and the context in which it was issued (Section II) before I analyse the Commission's justification of its proposal (Section III). Then, I look at the objections made by national parliaments (Section IV) and the answer given by the Commission (Section V). Finally, an assessment of the meaning of this second yellow card for the participation of national parliaments in the subsidiarity check in general will be made (Section VI).

## **II. A proposal for the establishment of a European Public Prosecutor's Office as the outcome of a long-lasting process**

As French former minister of Justice, Robert Badinter, underlined soon after the second yellow card was triggered, 'The project for a European prosecutor goes back a decade'<sup>11</sup> and, in fact, some have attributed the initiative to former French President Valéry Giscard d'Estaing who raised this idea as early as 1977.<sup>12</sup> Although the question of the establishment of a European Public Prosecutor's Office had already been subject to attention,<sup>13</sup> the Commission's first consultation dates back to the year 2000 when it issued its Green paper on

Warning System and the Monti II Regulation: The Case for a Political Interpretation' (2013) 10 *European Constitutional Law Review*, 90.

<sup>10</sup> Reply from the European Commission, 14 March 2013, ARES (2013) 338244.

<sup>11</sup> 'French ex-minister backs calls for European public prosecutor', Euractiv, 14 February 2014. In reality, the need to protect the Community's financial interest has been present from the very moment the Community started to have its own resources in 1976. Green paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor presented by the Commission. COM (2001) 715 final, 5.

<sup>12</sup> French Senate, EU Affairs Committee, Session held on 10 March 2015. Transcription available at <http://www.senat.fr/compte-rendu-commissions/20150309/europ.html>, accessed 4 October 2015.

<sup>13</sup> An academic report, the *Corpus juris*, prepared by a group of academic lawyers from different Member States was published in 1997: M Delmas-Marty, *Corpus Juris: Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union* (Economica 1997).

criminal-law protection for the financial interests of the Community and the establishment of a European Prosecutor [COM (2001) 715] and its follow up report issued on 19 March 2003 [COM (2003)128 final]. Following this Green paper—and the entry into force of the Lisbon Treaty that gave further competences to the EU in this field—the Commission presented a package of legislative measures to improve the EU-wide prosecution of criminals who defraud EU taxpayers on 17 July 2013. These three proposals aimed to a reform of the EU Judicial cooperation Unit (Eurojust), a reform of the European anti-fraud Office (OLAF), and the establishment of a European Public Prosecutor's Office (EPPO).<sup>14</sup> As concerns particularly the last proposal—which is the one that triggered the yellow card—Article 86 TFEU provides the basis for the creation of an EPPO at EU level since the entry into force of the Lisbon Treaty by establishing that 'In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust'. It further states that 'The Council shall act unanimously after obtaining the consent of the European Parliament'.<sup>15</sup>

The draft regulation presented by the Commission first defines the Prosecutor's competences and the conditions under which they may be exercised. It develops the conditions of the implementation of the competences granted to the EPPO by Article 86–2 TFEU, that is 'The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests among others'. This provision further determines that the EPPO 'shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences'. In its Second Chapter, the proposal sets out the status, the organization and the structure of the EPPO. The EU Commission advocated a decentralized structure consisting of one European Public Prosecutor and four Deputies who assist him, all of them appointed by the Council with the consent of the European Parliament for a term of eight years, non-renewable (Arts 8–1 and 9–1 of the proposal). On this basis, a new Union body with legal personality shall be created, and the conditions of accountability and independence of

<sup>14</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions. Improving OLAF's governance and reinforcing procedural safeguards in investigations: A step-by-step approach to accompany the establishment of the European Public Prosecutor's Office [COM(2013) 533 final], Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust) [COM(2013) 535 final].

<sup>15</sup> Some have argued that, in reality, the ultimate goal of the authors of the Treaty was the coordination of prosecutions in general within the EU since art. 86–4 TFEU foresees a greater possibility of action 'The European Council may, at the same time or subsequently, adopt a decision . . . in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension'. Labayle: 'Parquet européen et contrôle de subsidiarité' (n 3).



the Prosecutor and its deputies are also defined. Additionally, each Member State shall have at least one Delegated European Public Prosecutor from a list of three candidates for a renewable period of five years (Art. 10–1). This decision to name one European Public Prosecutor at the head of an office with a decentralized structure instead of a European Public Prosecutor's Office headed by a collegial structure—as foreseen in the wording of Article 86 TFEU according to some national parliaments<sup>16</sup>—is one of the elements that national parliaments strongly criticized, as we will see in Section IV. Section 4 of the Second Chapter further sets out the basic principles governing the EPPO's activities. Among the most discussed features of the EPPO is the fact that the proposal grants it an exclusive competence with respect to the criminal offences affecting the financial interests of the Union (Art. 12), although the proposal distinguishes between the offences that fall directly within its competence and those for which it is necessary to establish a link to the offences of the first category (ancillary competence). The definition of the ancillary competence, contained in Article 13, was criticized by numerous national parliaments. Indeed, this article reads as follows: 'Where the offences referred to in Article 12 are inextricably linked with criminal offences other than those referred to in Article 12 and their joint investigation and prosecution are in the interest of a good administration of justice the European Public Prosecutor's Office shall also be competent for those other criminal offences, under the conditions that the offences referred to in Article 12 are preponderant and the other criminal offences are based on identical facts'. The vagueness of the conditions defined (whenever the 'joint investigation and prosecution are in the *interest of a good administration of justice*' [emphasis added]) seems to leave a wide margin for frequent interpretation to the detriment of the national level. Chapter III contains the rules of procedure on investigations, prosecutions, and trial proceedings, and Chapter IV the procedural safeguards, in particular those derived from the obligation of the EU in the light of its Charter of Fundamental Rights. The following chapters address the issues of judicial review: an obligation for national courts to refer questions for preliminary rulings to the CJEU regarding the acts of the EPPO (Chapter V); data protection (Chapter VI); financial and staff provision (Chapter VII); and the relations of the EPPO with Union bodies and third countries institutions (Chapter VIII). Regarding the financial and staff provisions, the proposal 'seeks to be cost-efficient for the EU budget: [and envisages that] part of OLAF's current resources will be used for setting up the central headquarters of the European Public Prosecutor's Office, which in turn will rely on the administrative support of Eurojust'. The content of these provisions is, however, somewhat appealing since the proposal does not even

<sup>16</sup> Art. 86–1 TFEU 'In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust.'

clearly define where the EPPO's headquarters are to be implemented! This is one example, among others—concerning for instance the minimum requirements to become a Delegated European Prosecutor as well<sup>17</sup>—showing that this proposal lacks absolute clarity.

### III. The Commission's—too short?—justification

A similar remark can be made concerning the Commission's justification in terms of the respect of subsidiarity and proportionality in the proposal itself: while the impact assessment is, on this occasion, particularly detailed, the proposal itself contains a somewhat superficial justification.

In this respect, the Commission affirms that 'There is a need for the Union to act because the foreseen action has an intrinsic Union dimension'<sup>18</sup> and that 'this objective can only be achieved at Union level by reason of its scale and effects [given that . . .] the present situation, in which the prosecution of offences against the Union's financial interests is exclusively in the hands of the authorities of the Member States is not satisfactory and does not sufficiently achieve the objective of fighting effectively against offences affecting the Union budget'. This justification appears to be formalistic and does not fully comply with the obligation of the Commission to justify thoroughly why a proposal respects the principle of subsidiarity.<sup>19</sup> Indeed, according to Article 5 of Protocol 2:

Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators.

The Commission also does not justify why the reinforcement of the existing structures—mainly OLAF and Eurojust—would not be sufficient; in fact, it does not consider any possibility other than the creation of the EPPO in the proposal itself.<sup>20</sup> It simply stresses further the fact that 'The Union's competence to counter fraud and other offences affecting its financial interests is

<sup>17</sup> However, it remains unclear whether it was actually for the Commission to define the criteria for the nomination of the Delegated European Prosecutor. This option, by very much limiting the autonomy of the Member States, may have been perceived as too intrusive by them.

<sup>18</sup> Point 3.2. on subsidiarity and proportionality, Explanatory memorandum.

<sup>19</sup> As will be highlighted below, the Commission defends its brevity arguing that in the Impact assessment it did thoroughly justify its action.

<sup>20</sup> In the Impact assessment, though, the Commission does provide the relevant information.

unambiguously stipulated by Articles 86 and 325 of the Treaty. As this Union competence is not accessory to that of Member States and exercising it has become necessary to achieve a more effective protection of the Union's financial interests, the proposed package complies with the requirement of subsidiarity'. The justification provided in this part of the Explanatory memorandum is therefore rather formal and one-sided and does not comply with the obligation contained in Article 5 Protocol 2. The justification contained in the Recitals is possibly clearer. There, the Commission declares:

In accordance with the principle of subsidiarity, combating crimes affecting the financial interests of the Union can be better achieved at Union level by reason of its scale and effects. The present situation, in which the prosecution of offences against the Union's financial interests is exclusively in the hands of the authorities of the Member States does not sufficiently achieve that objective. Since the objectives of this Regulation, namely the setting up of the European Public Prosecutor's Office, cannot be achieved by the Member States given the fragmentation of national prosecutions in the area of offences committed against the Union's financial interests and can therefore, by reason of the fact that the European Public Prosecutor's Office is to have exclusive competence to prosecute such offences, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union.

However, this justification is also formalistic.

It could be argued that the establishment of a European Public Prosecutor Office, *per se*, relies on the assumption that an action at EU level is necessary. Still, if the final goal of such establishment is indeed to 'protect the Union's financial interests against criminal offences, which generate significant financial damages every year' and to give remedy to the fact that 'these offences are currently not sufficiently investigated and prosecuted by the relevant national authorities' (1, Recitals), then the Commission had the duty to better justify simultaneously why an action at EU level was necessary (EU added-value) and why an action by the Member States could not permit the achievement of the defined goal—this is the double conditionality set up by the principle of subsidiarity. Otherwise, as some parliamentary Chambers have remarked, other solutions designed to reach the same goal could be deemed to be more respectful of the principle of subsidiarity.

#### **IV. The objections raised by national parliaments**

Having considered the Commission's justification, and before taking a close look at the comments submitted by the national parliamentary chambers, note first that, although national parliaments issued 14 reasoned opinions, this proposal attracted wide attention, since 27 of the 41 Chambers reported some type of activity in relation to it during the eight-week period allocated to

them to check it with respect of the principle of subsidiarity.<sup>21</sup> Furthermore, 11 Chambers submitted comments or positive assessments regarding the principle of subsidiarity in the framework of the Political Dialogue with the European Commission.<sup>22</sup>

As to the content of the objections made by national parliaments, an analysis of the reasoned opinions transmitted to the Commission shows that while some national parliaments are against the creation of a European Public Prosecutor

<sup>21</sup> Information extracted from the IPEX platform: [www.ipex.eu](http://www.ipex.eu), accessed 5 October 2015.

<sup>22</sup> It is noteworthy that some Chambers submitted their opinions after the deadline (Croatia, Italian Senate) or even after the Commission answered to the yellow card (Finland, French National Assembly, and German Bundestag). Whereas the French National Assembly approved a rather positive resolution in which it repeats its support to the initiative and makes some suggestions of change, the Finnish parliament adopted a more reserved opinion. It recalls that 'the decision on whether or not to participate in this enhanced cooperation has to be taken when the proposal has been clarified and when the views of the other member states are known' and that 'its decision not to submit a reasoned opinion does not permit the inference that Finland is ready to take part in enhanced cooperation on EPPO'. It also expresses its scepticism regarding the efficiency of the Early Warning System in general: 'The Grand Committee took particular note of the fact that the Lisbon treaty's subsidiarity mechanism in its current form is a singularly ineffective way to affect European legislation. The Grand Committee continues to have grave reservations about the effectiveness of the subsidiarity procedure. In the committee's experience, the Commission regularly responds to national parliaments' reasoned opinions with many months' delay, and in very general terms that in practice make no attempt to address the substantive remarks of parliaments. In the committee's assessment national parliaments' inputs have had little if any effect on legislative outcomes, unless the corresponding national government has raised the parliament's observations in the Council of its own accord, either because it is constitutionally obliged to do so, or for other reasons'. The German Bundestag on the other hand only adopted its (very detailed) resolution in June 2014 in which it made particularly precise recommendations directed both to the federal government and to the EU institutions (Commission and European Parliament). It stresses for instance the importance of the link between EPPO and European and national legislatures, raises issues deriving from the dual, ie national and European, belonging of the European Delegated Prosecutors and is particularly critical of the category of ancillary competences. Other national parliaments (Croatian Parliament, Dutch Senate, Dutch House of Representatives, and Romanian Chamber of Deputies) transmitted a second opinion to the European Commission in the framework of the Political Dialogue in reaction to the justification given by the Commission for maintaining its proposal, and to its answers of March 2014. Unfortunately, the Dutch answer is not available nor is the Romanian one since no translation to English was provided. However, the Croatian reply is of particular interest since it assesses critically the justification of the Commission's decision to maintain its proposal together with the decision itself. Furthermore, the Swedish parliament also informed on the IPEX platform of a debate between its Committee of Justice and its Government on this matter on 25 March 2014 and the Dutch Senate sent a third letter with comments and questions regarding the yellow card procedure in June 2014. This might be the sign of the establishment of the dialogue the Commission has been longing for: the 16th bi-annual report of COSAC highlighted that 'None of the 40 national Parliaments/Chambers state that they have continued dialogue with the Commission after receiving the Commission's replies to their reasoned opinions' in October 2011. Therefore, the establishment of a dialogue on this occasion can be interpreted as the beginning of a change in the relationship between national parliaments and the Commission which has now evolved into the possibility, by the means of a 'green card', to make suggestions for legislative proposals national parliaments are now demanding.

After the Monti II proposal was withdrawn, no national parliamentary Chamber published any answer on the IPEX database. However, some parliaments perceived this decision of the Commission as a personal success. Such an interpretation should be viewed positively since national parliaments' interest in EU affairs is increased accordingly. Barrett, 'Monti II' (n 9), 600.

Office as such (House of Lords, Irish Oireachtas, Dutch Chambers), others have expressed their discontent not with the initiative itself, but rather with the proposed structure or prerogatives (French Senate, Polish Senate, Maltese House of Representatives).<sup>23</sup> By contrast, the Spanish Joint Committee for the European Union and the Lithuanian Seimas fully supported the initiative in its entirety. Others, such as the Portuguese Assembly of the Republic and the Austrian National Council, were in favour of the initiative but added some comments to their positive assessment.

Regarding subsidiarity as such, it is appealing that apart from the French Senate, which focused on the proportionality element—highlighted later in this section—and the Irish House of Oireachtas, all other reasoned opinions based their arguments strictly on elements of subsidiarity. None of them appeared to use the Early Warning System to express their discontent in relation to the proposal itself or with any other aspect alien to the principle of subsidiarity. Some other aspects—also detailed in this section—may have been mentioned but there was always an argument against the respect of the principle of subsidiarity in the first place. This, in fact, contradicts Jean Paul Jacqu  s assessment that ‘the invocation of subsidiarity is used as an instrument to fight a legislative proposal that is deemed inappropriate whatever the real reason is’.<sup>24</sup>

National parliaments underline a lack of suitable justification for the proposal, either due to the wording of the justification or due to the fact that the proposal was made too soon and without the Commission having drawn together all the elements required to decide that only the establishment of the EPPO could tackle the problems detected. In accordance with Article 5 Protocol 2, as mentioned in Section III, the Commission has a duty to justify all its proposals thoroughly with regard to the principle of subsidiarity. Regarding the proposal at stake, some national parliaments (British House of Lords, both Dutch Chambers, Hungarian National assembly, Cypriot parliament, Swedish parliament, Romanian Chamber of deputies, Czech Senate, and Slovenian House of

<sup>23</sup> Interestingly enough, although the French National assembly is against the proposed form of EPPO, it did not approve any reasoned opinion and submitted an opinion in the framework of the Political Dialogue after the deadline for the subsidiarity check whereas the French Senate, while being also in favour of the establishment of the EPPO, did submit a reasoned opinion. In France, the perspective of the establishment of a European public prosecutor has roused interest and a generally favourable position for a long time: for instance, the *Conseil d’Etat* produced a study at the request of the French Government after an initiative of the National assembly—which was fully supported by the Senate—in 2011. *Conseil d’Etat, R  flexions sur l’institution d’un parquet europ  en* (La Documentation fran  aise 2011). Moreover, the National Assembly adopted resolutions on 22 May 2003 and 14 August 2011 and organized, after the yellow card was triggered, a dedicated interparliamentary conference on 17 September 2014 in order to bring together like minded parliamentary chambers and, more generally, to convey the idea that the creation of an EPPO would be a positive development.

<sup>24</sup> Jean Paul Jacqu  , Editorial: National parliaments: a review of the implementation of the protocol on subsidiarity and proportionality. TEP  SA Newsletter 28 August 2013 <http://www.tepsa.eu/editorial-national-parliaments-a-review-of-the-implementation-of-the-protocol-on-subsidiarity-and-proportionality/>, accessed 6 April 2014

representatives) considered that the justification of the Commission was not sufficient. They remark that the Commission simply declares the existence of a transnational dimension and the impossibility for individual Member States to achieve the proposed goal whereas—as the House of Lords, the Swedish parliament, the Romanian Chamber of deputies, the Czech Senate, and the Slovenian House of representatives have argued—such a definitive conclusion cannot possibly be drawn as the PIF directive (PIF is the French acronym for protection of financial interests [COM(2012) 363]) had not been approved by the time the proposal was issued and when there exists no assessment of the latest OLAF and Eurojust reforms performed as late as 2008 and 2013.<sup>25</sup> As Philipp Kiiver affirms, it is absolutely legitimate to consider an insufficient justification with respect to the principle of subsidiarity to be a violation of it,<sup>26</sup> hence national parliaments were right in drawing such a conclusion.

The reasoned opinions transmitted by the national parliamentary chambers also show that the link existing between the principles of subsidiarity and of proportionality remains unclear,<sup>27</sup> although Article 6 of Protocol 2 annexed to the Lisbon Treaty clearly defines that ‘Any national Parliament or any chamber of a national Parliament may... send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the *principle of subsidiarity*’ [emphasis added]. As a consequence, even if this Protocol concerns the principle of subsidiarity and the principle of proportionality, there is—formally at least—no doubt about the fact that the reasoned opinions expressed in the framework of the Early Warning System may only concern the respect of the principle of subsidiarity. It appears, however, that in practice this distinction is not so clear: for instance, the Swedish Parliament writes in its opinion that ‘the Riksdag considers that the proposal does not fulfil the proportionality criterion that is *included in the subsidiarity check*’ [emphasis added]. Similarly, the French Senate *de facto* uses arguments linked to proportionality rather than to subsidiarity. It argues that given the wording of Article 5 TEU, which foresees that the Union should only intervene ‘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

<sup>25</sup> Eurojust was strengthened in 2008 by the Council Decision 2009/406 on the strengthening of Eurojust and amending Decision 2002/187 setting up Eurojust with a view to reinforcing the fight against serious crime. An evaluation of its implementation was programmed by June 2014. A regulation that strengthens OLAF was also adopted in September 2013. Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 and (EURATOM) No 1074/1999.

<sup>26</sup> P Kiiver, ‘The Conduct of Subsidiarity Checks of EU Legislative Proposals by National Parliaments: Analysis, Observations and Practical Recommendations’ (2012) 12 *ERA Forum*, 535.

<sup>27</sup> See, on possible reasons for this confusion linked to the origin of the principle at EU level: C Jeffery and J Ziller, *The Role of the Committee of the Regions in Implementing and Monitoring the Subsidiarity and Proportionality Principles in the Light of the Constitution for Europe* (Office for Official Publications of the European Communities 2006), 60 f.



or effects of the proposed action, be better achieved at Union level', it is necessary to examine whether the aim of the proposed action can best be achieved at Community level, but also whether the intensity of the action does not go beyond what is necessary to achieve the proposed action.<sup>28</sup> However, this aspect of intensity is rather one of proportionality, as defined in Article 5–4 TEU.<sup>29</sup> Similarly, the Cypriot House of Representatives, when affirming that the proposal does not comply with the principle of subsidiarity due to the fact that 'the proposal goes beyond what is necessary in order to achieve the objectives of the Union'<sup>30</sup> also appears to take the proportionality element into account at the time of assessing the respect of the principle of subsidiarity. The broad scope of this analysis is nevertheless not surprising: 15 out of 39 parliamentary Chambers opined, in a survey organized in the framework of COSAC, that 'the principle of proportionality should be considered an inextricable component of the principle of subsidiarity'.<sup>31</sup> It could therefore be said that there may be some element of proportionality in the principle of subsidiarity itself, and, in fact, the Commission shows its awareness of this issue in the answer it provided to national parliaments in which it said that it 'is... well aware that the limits of the principle of subsidiarity are not easy to trace and has therefore adopted an open attitude towards the reasoned opinions, interpreting their arguments, insofar as possible, in the light of the principle of subsidiarity'.<sup>32</sup> This difference in the interpretation made by national parliaments of the principle of subsidiarity was, however, later used by the Commission as an explanation of why it would not review its proposal whereas, as the Dutch Senate has shown beyond any doubt, the Commission had always claimed its openness to different justifications of a subsidiarity breach.<sup>33</sup>

<sup>28</sup> Senate's opinion, 2.

<sup>29</sup> Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary in order to achieve the objectives of the Treaties.

<sup>30</sup> Cypriot House of Representatives' reasoned opinion, 2.

<sup>31</sup> COSAC, 18th bi-annual report Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, 4. In fact, national parliaments discussed the possibility of scrutinizing the principle of proportionality on an equal footing with the principle of subsidiarity within the framework of the Working group on the possibility of improving the 'yellow card' procedure which met in May 2015. Its members agreed that 'National parliaments/chambers should also include in their reasoned opinions relating to non-compliance with the principle of subsidiarity information on the possible non-compliance of the draft legislative act with the principle of proportionality'. This proposal even foresaw the possibility for the responsible Commissioner to meet with the parliaments to give them a better knowledge and a deeper explanation if at least nine parliaments observed subsidiarity issues. Letter by the Chairwoman of the EU affairs committee of the Polish Sejm to the Chairperson of the EU affairs committee of the Latvian parliament, 25 June 2015.

<sup>32</sup> Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2 of 27 November 2013 [COM(2013) 851 final], 4.

<sup>33</sup> Letter of the Dutch Senate to the European Commission, Comments and questions concerning the yellow card procedure, 3 June 2014, 2.

Beyond this question regarding the importance of the principle of proportionality within the principle of subsidiarity itself, this inclusion could be justified by several factual elements, such as for example the fact that Protocol 2 and Article 5 TEU address both principles together,<sup>34</sup> and also by the fact that if a yellow card is triggered, the Commission has to review its proposal whereas there are no automatic effects when national parliaments share their views in the framework of the Political Dialogue.<sup>35</sup> In any event, the subsidiarity assessment is necessarily politically loaded and there is no straight forward definition of this principle. Referring only to the most obvious, how can national deputies strictly and objectively assess that a proposal's aim can be better achieved at EU level and cannot be sufficiently achieved by Member States? The result of such an assessment will necessarily differ from one Member State to another. This is all the more true as the Commission itself highlights in its proposal that the efficiency of the prosecution by Member States currently varies widely from one Member State to the other.<sup>36</sup>

Furthermore, some parliaments are actually assuming that the establishment of the EPPO contravenes *per se* the principle of subsidiarity (British House of Lords, Dutch Chambers, Irish House of Oireachteas, Swedish Parliament, Romanian Chamber of Deputies, and Czech Senate). In their opinions, they consider that the cooperation mechanisms existing in the framework of OLAF and Eurojust could be reinforced, and if they were, the EPPO would be superfluous. On the contrary, the Committee on EU Affairs of the Slovenian National Assembly highlighted that 'the establishment of the European Public Prosecutor's Office *per se* does not constitute a violation of the principle of

<sup>34</sup> Jacques Ziller justifies the exclusion of the principle of proportionality from the scope of the Early Warning System as follows: 'The main interest in the apparent dissociation between subsidiarity and proportionality in the text of Article I-11 [art. 5 TEU] is that it hints at greater substance for the principle of subsidiarity. Whereas the principle of proportionality is set out in detail and is backed by complex and abundant case law from the Court of Justice, case law on the principle of subsidiarity is quite meagre. A separation between the two could add more weight to arguments centring on the principle of subsidiarity, including those arising in a legal context.' Jeffery and Ziller, *The role of the Committee of the Regions in implementing and monitoring the subsidiarity and proportionality principles in the light of the Constitution for Europe*, 57 f.

<sup>35</sup> The Political Dialogue is an informal initiative launched by President Commission Barroso in 2006. In the framework of this dialogue between the EU Commission and national parliaments, the latter may send their opinion or remarks of any kind to the former (ie regarding subsidiarity or not) at any time (ie without being bound to the eight week-period awarded to them in the framework of the Early Warning System). This initiative has been very successful indeed and the participation of national parliaments to it very frequent (484 contributions in 2014). For more information, see the Annual reports on relations between the European Commission and national parliaments presented by the Commission.

<sup>36</sup> The percentage of actions with judicial decision compared to the total number of transferred cases varies from 100% (Finland) to 9.3% (Spain) with an average of 45.7%. Of these actions of conviction with judicial decision, the percentage of convictions varies from 100% (Austria, Estonia, Luxembourg, and Sweden) to 0% (Hungary and Slovakia). Annex to the European Commission's Press Release 'Protecting taxpayers' money against fraud: Commission proposes European Public Prosecutor's Office and reinforces OLAF procedural guarantees.' 17 July 2013. [http://europa.eu/rapid/press-release\\_IP-13-709\\_en.htm](http://europa.eu/rapid/press-release_IP-13-709_en.htm), accessed 7 October 2015.



subsidiarity, since the possibility of its establishment is provided by Article 86 of TFEU'. By providing that 'the Council... *may* establish a European Public Prosecutor's Office from Eurojust' [emphasis added], Article 86 TFEU opens up the possibility of taking such an initiative without obliging the Council to act. From that perspective, there is no reason to believe that a proposal for the establishment of an EPPO breaches *per se* the principle of subsidiarity, but it will, of course, be necessary for the Commission to justify the necessity of such establishment in any case.

In addition to those comments made concerning subsidiarity, numerous parliamentary Chambers also included other critical elements which addressed very diverse issues, the main points of which will be reflected here. Five parliamentary Chambers have insisted on the fact that criminal law is primarily a national competence (British House of Lords, both Dutch Chambers, Irish parliament, and Maltese parliament). Given the fact that the first four Chambers have also considered that the reinforcement of the existing structures (OLAF and Eurojust for example) would be sufficient, this argument shows that they would most probably be reluctant to see the creation of an EPPO independently of the content of the proposal. In addition to this general criticism, national parliaments have also expressed their disagreement concerning the content of the proposal.

The issue of the statute of the EPPO's members in broad terms has attracted some concerns (Italian Senate, Romanian Senate). Additionally, as remarked above, the competences of the EPPO as they are defined in the proposal have provoked all sorts of comments: the Dutch Chambers considered that the EPPO's powers are too far reaching, the Hungarian assembly even affirmed that the exclusive competence granted to the EPPO whenever 'criminal offences [affect] the financial interests of the Union' (Art. 12 of the proposal) goes beyond the content of Article 86 TFEU that does not foresee such exclusiveness.

In addition, the structure of the EPPO has been sharply criticized: the French Chambers, the Polish Senate, the Lithuanian Parliament, the Maltese parliament, and the Romanian House of Deputies defend a collegiate management structure with a rotation among Member States instead of the establishment of a European Public Prosecutor as proposed by the Commission. Given the fact that the initiative for the establishment of the EPPO has been strongly supported by France and Germany—which called again for a swift agreement in this field on 4 March 2014<sup>37</sup>—and that these Member States are clearly in favour of a collegiate management structure, it is actually surprising that the Commission maintained its proposal unchanged in that respect.

<sup>37</sup> European Public Prosecutor's Office: Commission proposal gains momentum. European Commission Memo, 4 March 2014. [http://europa.eu/rapid/press-release\\_MEMO-14-154\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-154_en.htm), accessed 7 October 2015.

## V. The Commission's reaction

In spite of the opposition from the national parliamentary chambers, the EU Commission informed them in a relatively timely reaction of its will to maintain the proposal:<sup>38</sup> this answer was given only three weeks after the yellow card was officially triggered whereas the Commission had taken more than two months to give its decision regarding the first yellow card.<sup>39</sup> The outcome of this review was also different: as mentioned, the Commission previously withdrew the Monti II proposal. This time, it decided to move on with the establishment of the EPPO, and what could appear more surprising is the fact that even if it generated numerous critiques and it had the possibility to modify the proposal,<sup>40</sup> it retained the original text unchanged.

In its answer, the Commission took due account of the objections raised by national parliaments. It clearly separated the arguments into two categories, divided again into thematic subcategories: those it considered to be relating to the principle of subsidiarity, and those falling outside the scope of the subsidiarity control mechanism in its view. It only examined the former, although acknowledging that it would take the latter into consideration in the process of negotiating the proposal. In fact, the Commission sent each chamber who submitted a reasoned opinion a personalized answer to the points raised outside of the scope of the subsidiarity check in mid-March 2014 which has led national parliaments to debate on this proposal again and submit a second opinion in some cases.<sup>41</sup> In doing so, the Commission clearly did not respect the timescale it had imposed on itself to respond to all opinions or comments received within three months, but it is indeed a positive sign.

Regarding the lack of justification, it considered that the proposal was sufficiently substantiated since the Court of Justice 'accepted an implicit and rather limited reasoning as sufficient to justify compliance with the principle of subsidiarity' in a previous case (Case C-233/94, *Germany v Parliament and Council*) and since the impact assessment does present sufficient explanation as to why both criteria for the respect of subsidiarity are met here.<sup>42</sup> It further emphasizes

<sup>38</sup> Communication from the Commission to the European Parliament, the Council, and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2 of 27 November 2013 [COM(2013) 851 final].

<sup>39</sup> The first yellow card was triggered on 22 May 2012 and the Commission sent its answer to the national parliaments on 12 September 2012; given the fact that the month of August is not considered to be part of the working period, the Commission still took more than two months to deliver its answer.

<sup>40</sup> Art. 7–2, Protocol 2.

<sup>41</sup> See footnote 22.

<sup>42</sup> Communication from the Commission to the European Parliament, the Council, and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2 of 27 November 2013 [COM(2013) 851 final], 6.

the value of the impact assessment: ‘The Commission recalls that in the Vodafone case the Court of Justice referred to an impact assessment of the Commission to justify respect for the principle of proportionality’ and continues by affirming that, as a consequence, ‘The Commission considers that the impact assessment report is also relevant in the context of respect for the principle of subsidiarity, supplementing the reasons given in the explanatory memorandum and in the legislative financial statement’. Although this argument is formally valid and in line with the CJEU’s careful attitude in the interpretation of the principle of subsidiarity,<sup>43</sup> it might at the same time have the effect of transferring the burden onto the national parliaments that already receive numerous proposals every year, have to filter them in order to discriminate which of them require a subsidiarity check, and perform such checks within a short period of eight weeks, as defined in Protocol 2. It may be desirable instead for the Commission to extend the length of its justification in the proposal given these practical constraints inherent to the subsidiarity check procedure and its own extended knowledge of the topic.

On the other hand, the arguments raised by the Commission in defending the view that Member State actions and the existing coordination and investigation mechanisms are insufficient are more convincing. It recalls that ‘the subsidiarity principle requires a comparison between the efficiency of action at the Union level and action at the Member State level [and that] [t]he situation in particular Member States is therefore not decisive in itself, as long as it can be shown that action at the level of the Member States is generally insufficient, and that Union action would generally better achieve the policy objective’.<sup>44</sup> The Commission further underlines the limitations inherent in Eurojust, and in OLAF—administrative investigation and no automatic initiation of criminal proceedings on the basis of its findings that are mere recommendation—and it shows that an EPPO would pursue complementary activities.

Concerning the value added from the creation of an EPPO, the Commission possibly does not fully demonstrate why, for example, a common Union-level

See, further, on the value of the impact assessments in the judicial review: A Alemanno, ‘A Meeting of Minds on Impact Assessment’, (2001) 17 *European Public Law*, 485. This author highlights the risk of using the impact assessment prepared by the Commission in relation to draft legislative proposals at the time of performing the judicial review of the adopted proposal since both the European Parliament and the Council do not always perform impact assessments on their amendments. Alemanno, ‘A Meeting of Minds on Impact Assessment’, 503.

<sup>43</sup> The Court of Justice has, so far, applied formal criteria of control and mostly checked that the Commission has formally respected its obligation without assessing the substance of the principle. See, on the Court’s attitude and its evolution over time: B Bertrand, ‘Un principe politique saisi par le droit. La justiciabilité du principe de subsidiarité en droit de l’Union européenne’, (2012) 48 *Revue Trimestrielle de Droit Européen*, 329.

<sup>44</sup> Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office with regard to the principle of subsidiarity, in accordance with Protocol No 2 of 27 November 2013 [COM(2013) 851 final], 6–7.

prosecution policy can only be achieved with the creation of an EPPO. It stresses the fact that ‘the proposal tackles a number of important practical and legal issues’ and that ‘it would be possible to discover cross-border links which might not be noticed in purely national investigations... [and] to more effectively direct and coordinate investigations’ but it is rather a circular argumentation since the Commission does not give any new evidence of this.

As a next step, the Commission looks at the comments submitted regarding the structure of the EPPO and declares that ‘the arguments included in the reasoned opinions in favour of a collegial structure and against the organisational model set out in the proposal are more related to the principle of proportionality than to that of subsidiarity’.<sup>45</sup> Its answer to this criticism is irrefutable: ‘according to the Commission a collegial structure is not necessarily less centralised than that of the proposal: it is merely a different way of organising the European Public Prosecutor’s Office, which would in any event remain an office of the Union. Hence the comparison between the decentralised model of the proposal and the *collegial structure preferred by a number of national Parliaments is not a comparison between action at the Union level and action at the Member State level, but a comparison between two possible modes of action at the Union level*. In the Commission’s view, that is not a question concerning the principle of subsidiarity’ [emphasis added]. It indicates that the structure could indeed have an influence on the question of the respect of the principle of subsidiarity since it may influence the outcome of the value added test: a collegial structure may be less efficient and, therefore, render an action at EU level less attractive and compliant with the principle of subsidiarity.<sup>46</sup>

Finally, the Commission also considers the question of the nature and the scope of the competence of the EPPO as a final element of the objections related to subsidiarity. It recalls that Article 86 TFEU does not set any limit to these competences and that a reduction might limit the value added of the creation of an EPPO and therefore calls into question the Union’s competence in this matter. It also recalls that national authorities would not be excluded and that, concerning the ancillary competence when certain conditions are met, safeguards have been put in place. This answer is convincing since it is in line with the establishment of the EPPO itself: if an EPPO is to be established, it should have the competence necessary to perform its task efficiently.

Even if all these arguments do not convince the national parliamentary Chambers, there is no doubt that the Commission has, this time, shown that it took due consideration of the comments transmitted to it. By doing so, it has—at least—complied with its formal obligation to justify thoroughly its

<sup>45</sup> Interestingly, in so doing, the Commission claims that the opinion submitted by the French Senate does not address subsidiarity as has been shown above. Commission’s answer, 10.

<sup>46</sup> It follows from this that national Parliaments should in fact be consulted at a later stage as the amendments approved during the legislative procedure can potentially affect the outcome of the subsidiarity test.

action. Whether an EPPO will finally be established at EU level or not now seems to be rather a political matter.

On the other hand, with respect to the Commission's decision to make this proposal at this particular point in time and to maintain it and its original text, several explanations may be considered.

First of all, the establishment of the EPPO defined in Article 86 TFEU is ruled by a special legislative procedure: 'The Council shall act unanimously after obtaining the consent of the European Parliament'. A few months before the elections of the European Parliament, it was risky to make this proposal, although a positive resolution could still be adopted.<sup>47</sup> In fact, the decision to launch such a conflictive and important proposal at the end of the Commission's mandate is striking if it really intended to succeed in its approval. The Commission has had the capacity to make such a proposal since the entry into force of the Lisbon Treaty; this question has been subject to debate and consultations for the last decade, President Barroso announced its intention to make a proposal in the State of the Union 2012 Address in September 2012,<sup>48</sup> and, yet, the proposal was finally launched in July 2013. Additionally, as some Member States have remarked, the PIF Directive proposal had not been approved in July 2013 whereas it contains definitions of the crimes that the EPPO is supposed to fight. Also, the reforms of Eurojust and OLAF conducted in 2008 and 2013 have neither been fully put into place yet nor assessed. For all these reasons, the Commission's decision is striking. These circumstances, combined with the formalistic and poor justification provided by the Commission in terms of subsidiarity—at least in the proposal itself—and with the fact that the proposal was maintained in spite of national parliamentary opposition, could be a sign that the Commission wanted to put this issue at the top of the agenda and encourage Member States to act in this field—potentially through enhanced cooperation—while being aware that the creation of an EPPO—which requires unanimity—was unlikely to be achieved with the participation of all Member States.

Furthermore, Jean Paul Jacqué's comment expressed after the first yellow card according to which 'precedent shows that, in the future it will be difficult to act against the objections represented by one third of national parliaments' votes because it will be unlikely to get a majority in Council and possibly in Parliament'<sup>49</sup> has not yet been proven to be true, but at least such a perspective

<sup>47</sup> European Parliament, Texts Adopted Part III at the sitting of Wednesday 12 March 2014, provisional edition, P7\_TA-PROV(2014)03–12, 313 f. In its comments, the European Parliament seems to have echoed some of the objections raised by the national parliaments, for instance regarding the ancillary competence for which it suggests the definition of three cumulative conditions (point 5, iii) or regarding the current lack of definition of the offences the EPPO is called to investigate (point 5, iv).

<sup>48</sup> Commission President State of the Union 2012 Address, 12 September 2012. [http://europa.eu/rapid/press-release\\_SPEECH-12-596\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm?locale=en), accessed 7 October 2015.

<sup>49</sup> Jean Paul Jacqué, Editorial: National parliaments: a review of the implementation of the protocol on subsidiarity and proportionality. TEPSA Newsletter 28 August 2013 <http://www.tepsa.eu/>

has not discouraged the Commission. As mentioned, the Commission has not only maintained its proposal but it has retained the original text as well. Several explanations can be found for this decision: most importantly, Article 86 TFEU foresees the possibility of at least nine Member States agreeing on the establishment of an enhanced cooperation mechanism if no agreement is reached in the Council.<sup>50</sup> In such a case, the authorization to proceed with enhanced cooperation is 'deemed to be granted' so that, unlike in the case of enhanced cooperation following the procedure laid down in Article 329 TFEU, 'the authorisation to proceed with the enhanced cooperation... shall [not] be granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament' (Art. 329–1 TFEU). As the French National Assembly EU affairs Committee remarked in the report it prepared in December 2013, it remains unclear whether, in the event of such an initiative of enhanced cooperation, the participating Member States would have to proceed on the basis of the original proposal made by the Commission.<sup>51</sup> In any event, even if this were the case, the opportunity for Member States to make an alternative proposal, as defined in Article 76 TFEU, remains.<sup>52</sup> The existence of these alternatives might explain why the Commission did not hesitate to maintain its proposal even if Article 86 TFEU requires the approval of all participating Member States acting unanimously. Even if the British and Irish parliamentary opinions should not necessarily be taken into account since these Member States have not opted in, 11 other parliamentary Chambers considered that the proposal does not respect the principle of subsidiarity as it is and, therefore, it is reasonable to express doubt that unanimity would be achieved in the Council. In fact, two years after the yellow card was activated, no proposal creating an EPPO has yet been adopted. As mentioned, the European Parliament approved a resolution during the precedent legislature and it has

editorial-national-parliaments-a-review-of-the-implementation-of-the-protocol-on-subsidiarity-and-proportionality/, accessed 6 April 2014

<sup>50</sup> Art. 86–1, paras 1 and 2: 'In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.'

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council, and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.'

<sup>51</sup> Report no. 1658 on the proposal of a Council regulation on the creation of a European Public Prosecutor Office (COM[2013] 534 final), 32.

<sup>52</sup> Art. 76 TFEU: 'The acts referred to in Chapters 4 and 5 [of the TFEU], together with the measures referred to in Article 74 which ensure administrative cooperation in the areas covered by these Chapters, shall be adopted:

(a) on a proposal from the Commission, or (b) on the initiative of a quarter of the Member States.'

now adopted a second resolution in April 2015.<sup>53</sup> The proposal has been discussed numerous times in the Council which has yet to reach agreement. In parallel, 13 national parliaments/chambers subscribed to a common declaration in Paris in September 2014 in which they advocated a collegial structure, shared competences between the EPPO and national authorities, and the need to guarantee the independence, the efficiency, and the value added of the EPPO.<sup>54</sup> In spite of these intensive debates, given, among others, the strong opposition to the establishment of the EPPO shown by Sweden, it seems likely that enhanced cooperation will be privileged. The existence of this ‘rescue way’—and the high probability of its use—probably also explains why the Commission decided to retain the original text untouched.

## VI. Conclusion: Which is the message addressed to national parliaments?

As a last step, I would like to propose the following hypotheses regarding what can be deduced from the Commission’s attitude for the relations between the Commission and national parliaments in general.<sup>55</sup>

This second yellow card finally and undoubtedly proves the efficiency of the Early Warning Mechanism, in spite of the fact that it is only the second card ever triggered.<sup>56</sup> This is not just because, as some have claimed, the efficiency of this new Mechanism should not necessarily be assessed on the frequency of its activation. It is also considered that, on the contrary, the lack of frequent activation can be interpreted as a proof of the Mechanism’s efficiency<sup>57</sup> because it acts as a kind of Damocles’ sword: knowing that national parliaments now have

<sup>53</sup> European Parliament resolution of 29 April 2015 on the proposal for a Council regulation on the establishment of the European Public Prosecutor’s Office (COM(2013)0534–2013/0255(APP)) P8\_TA-PROV(2015)0173.

<sup>54</sup> The common declaration is available at: [http://www.assemblee-nationale.fr/14/europe/position-scom/Declaration\\_commune\\_parquet\\_europeen\\_17%20–09–2014\\_AN.pdf](http://www.assemblee-nationale.fr/14/europe/position-scom/Declaration_commune_parquet_europeen_17%20–09–2014_AN.pdf), accessed 10 December 2014.

<sup>55</sup> Although these comments are made in relation to the Barroso Commission, since no yellow cards have been triggered under the presidency of Jean-Claude Juncker, it is still the most recent precedent and serves as a reference. It should, however, be noted that Commission President Juncker has shown more sympathy for national parliaments than Commission President Barroso had in creating a first vice-president in charge of, among other things, overseeing the European Commission’s relations with the other European institutions and promoting a new partnership with national Parliaments. Nevertheless, first vice-President Timmermans has only shown limited enthusiasm for the ‘green card’ initiative. On the recent evolution of the relationship between the Commission and national parliaments see: C Fasone and D Fromage, ‘National parliaments and the EU Commission’s agenda: limits and recent developments of a difficult partnership’, Special issue on Parliaments, public opinion and parliamentary elections in Europe, *Max Weber Programme-EUI Working papers*, 2015, 31–44.

<sup>56</sup> This, of course, does not mean that no reforms of the Early Warning System, as they are advocated by national and regional legislatures at the time of writing, are not desirable.

<sup>57</sup> Gavin Barrett defends this view, which I share. G Barrett, ‘Monti II’ (n 9), 600.



a say and that any yellow card will not remain unremarked or free of consequences in political terms, the EU Commission should be tempted to avoid national parliaments' disapproval and thus strictly respect subsidiarity. In any event, even if the activation of the Early Warning Mechanism is to be the criterion to assess its efficiency, this second yellow card concerning a proposal whose justification in terms of subsidiarity was less objectionable than the first—due to the nature of the proposed action, whose redaction was less vague (although some criticisms can still be made) and, most importantly, whose legal basis was much clearer than that of the Monti II proposal—clears all the remaining doubts about the efficiency of this system. This is especially important given the fact that for the first time in 2012 (and every year since),<sup>58</sup> several national parliaments have participated less enthusiastically in the Political Dialogue with the Commission than in the previous year. Although this decrease might be related to internal or artificial factors, such as elections or a reduced number of legislative proposals put forward by the Commission, it is a tendency that should be monitored thoroughly since it could also be a sign of general dissatisfaction among the national parliamentary chambers with the answers or the attention given to their opinions by the Commission. They have, indeed, repeatedly considered the answers received to be generally too slow and not specific enough, and have several times demanded improvements in this field.<sup>59</sup>

It should further be noted that the answer provided by the Commission to this second yellow card was indeed much more detailed and better justified than that given to national parliaments on the occasion of the first yellow card. Arguably, since the Commission fulfilled national parliaments' wish by withdrawing the proposal on the first occasion, it possibly did not have to provide them with such a detailed justification on the occasion of the second yellow card when it went against their will. However, in 2012 as well, a better justified and personalized answer would have been welcome, especially given the fact that the Mechanism was activated for the first time. Some further clarifications did come, but much later, in March 2013. By contrast, in the case of the EPPO, although the Commission informed of its decision regarding the second yellow card in a timely manner—three weeks—its answer was precise and took account of the objections raised by national parliaments, although the Commission later

<sup>58</sup> European Commission, Annual reports 2012, 2013, and 2014 on relations between the European Commission and national parliaments.

<sup>59</sup> Collectively, in May 2013. COSAC, 19th bi-annual report Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, 30. Before that, also in the framework of COSAC, in October 2011. COSAC, 15th bi-annual report Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, 33. The Finnish parliament has also expressed its discontent in the opinion it submitted to the EU Commission in the framework of the Political Dialogue (see footnote 22). This question is still of great concern for national parliaments who addressed the issue in the framework of the Working group on the possibility of improving the 'yellow card' procedure. Letter by the Chairwoman of the EU affairs committee of the Polish Sejm to the Chairperson of the EU affairs committee of the Latvian parliament, 25 June 2015.



made use of their variety to retain its proposal unchanged. As mentioned, in March 2014, the Commission also provided individual answers to the arguments raised outside the scope of the subsidiarity assessment. In this sense, even if the proposal is maintained, national parliaments appear to have been heard—eventually.

And this is well deserved: not only have national parliaments been actively participating in the Political Dialogue since 2006 and in the Early Warning Mechanism since 2009, but in this occasion—the EPPO proposal—they have shown genuine interest by submitting comments in reaction to the Commission’s decision and individual answers and this is a sign that—finally—a real dialogue has been established.<sup>60</sup> Therefore, the decrease in some Chambers’ participation in the Political Dialogue should possibly not be interpreted as a sign of tiredness or reduced interest in EU Affairs in general; together with the second yellow card, it hopefully proves that national parliaments are still able to react when necessary and are simply concentrating their efforts to avoid unnecessarily spoiling too many resources.

<sup>60</sup> See footnote 22.