

# FROM VETO PLAYERS TO AGENDA-SETTERS?

## National Parliaments and their ‘Green Card’ to the European Commission

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### ABSTRACT

*National parliaments (NPs) had long been excluded from the European integration process and were in many Member States at best kept informed and rarely involved in daily EU affairs. With the Lisbon Treaty and its introduction of the Early Warning System (EWS), as well as the Political Dialogue initiated by former Commission President Barroso, NPs have now become full actors in the EU. Through the Political Dialogue, they can express their opinion on the Commission Annual Work Programme and influence the Commission’s agenda. Now, through control of the respect of the principle of subsidiarity, and provided that their reasoned opinions attain the defined thresholds, they can potentially strike down an existing proposal. However the EWS leads to NPs still being constrained to a limited, reactive role: as ‘quasi veto-players’ and not one of ‘agenda-setter’. Recent developments in favour of the introduction of a ‘green card’ would change this situation profoundly as NPs would eventually be able to prompt the Commission to make legislative proposals on their behalf. This article sheds light on the evolving role of NPs in EU policymaking from the Lisbon Treaty onwards, from veto players to proactive institutions committed to the good functioning of the EU.*

**Keywords:** Early Warning System; EU agenda-setting; ‘Green card’; National Parliaments; political dialogue

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The authors would like to thank Alfredo De Feo, Costanza Gaeta, Gérard Laprat, Eva-Maria Poptcheva and the two anonymous reviewers for their insightful comments on an earlier version of this article. They are also thankful to the participants of the seminar organized at the Institute for Advanced Studies in Vienna on 9 April 2015. Although the article is the result of a joint work of the authors and the introduction and conclusions have been drafted jointly, Section 2 was written by Cristina Fasone and Section 3 by Diane Fromage.

## §1. INTRODUCTION

National Parliaments (NPs) had long been excluded from ‘European business’, especially after the first direct elections of the European Parliament (EP) in 1979.<sup>1</sup> Not only did most NPs not have any influence on the position defended by their executives in the Community and later European Union (EU) institutions but they long lacked information regarding the supranational negotiation and decision-making process. As a consequence, they were far from being able to be ‘agenda-setters’ in this field, contrary to the role they may assume at national level. Arguably, not all NPs were equally weak: some like the British, the Danish or the German legislatures were guaranteed rights of information and participation but these were either poorly or only partially used.

With the entry into force of the Lisbon Treaty in December 2009, NPs were (finally) guaranteed direct involvement in the European decision-making process by the Lisbon Treaty itself. They ‘contribute actively to the good functioning of the Union’ and have been granted a series of rights and prerogatives to this end (Article 12 of the Treaty of the European Union (TEU)). Furthermore, together with national governments and the EP, they ought to ensure the functioning of the representative democracy on which the EU is founded (Article 10 TEU).

However, it appears that the powers NPs now have are strictly negative or reactive. Some of their functions include a veto over the use of *passerelle* clauses (Article 48(6) TEU and Article 81(3) Treaty of the Functioning of the European Union (TFEU)); or the issuing of reasoned opinions to contest the respect of the principle of subsidiarity by a legislative proposal (the Early Warning System, (EWS)). As a result they are basically designed by the treaties as institutional ‘veto’ or ‘quasi-veto players’ in the EU. Indeed, they are considered to be ‘individual actors who have to agree to the proposed change’,<sup>2</sup> for example in the simplified treaty revision procedures, or as a collective actor that can delay or impose further conditions to EU legislative procedures, as seen with the EWS.<sup>3</sup> Indeed their reasoned opinions that amount to at least one third of the votes cast (18

<sup>1</sup> A. Maurer, ‘National Parliaments in the European Architecture: From Latecomers’ Adaptation Towards Permanent Institutional Change?’, in A. Maurer and W. Wessels (eds.), *National Parliaments on their Ways to Europe: Losers or Latecomers?* (Nomos Verlag, 2001), p. 27–75; P.L. Lindseth, *Power and Legitimacy. Reconciling Europe and the Nation-State* (OUP, 2010), p. 81–188.

<sup>2</sup> See G. Tsebelis, *Veto Players. How Political Institutions Work* (Princeton University Press, 2002), p. 2.

<sup>3</sup> Whether, under the EWS, NPs act as a collective actor or whether the individual dimension of participation prevails is subject to discussion. For example, I. Cooper, ‘A “Virtual Third Chamber” for the European Union? National Parliaments after the Treaty of Lisbon’, 35 *West European Politics* (2012), p. 441–465, sees NPs as a collective actor in a ‘Virtual Third Chamber’; by contrast N. Lupo, ‘Parlamento europeo e parlamenti nazionali nella costituzione ‘composita’ nell’UE: le diverse letture possibili’, 3 *Rivista AIC* (2014), p. 3 et seq., considers that, particularly in the framework of the EWS, NPs play the ‘game’ as individual actors by interpreting the principle of subsidiarity in the light of constitutional identity and national interests, although they can informally coordinate their action. On this point, see D. Jancić, ‘The Game of Cards: National Parliaments in the EU and the Future of

out of 56 votes) obliges the Commission to review the legislative proposal at stake and to decide to withdraw, amend or eventually maintain the proposal as it stands, with reasons.<sup>4</sup>

On the face of it NPs do not currently have any direct and positive influence on EU legislation as ‘agenda-setters’: players who can ‘present take it or leave it proposals’.<sup>5</sup> The Conference of Parliamentary Committees for Union Affairs (COSAC) ‘may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission’.<sup>6</sup> The submission of a contribution by this forum of inter-parliamentary cooperation however does not guarantee that it will be taken into account at a later stage, such as in the actual content of the EU Commission Work Programme or in EU legislative initiatives. Yet, the fact that there is no formal recognition of the agenda-setting power of NPs in the Treaties does not mean that they have not been able to exert such influence, or that they are not willing to attain this possibility.

This article aims to show how the Political Dialogue, launched by President of the Commission Barroso, in 2006, has set the conditions for the direct involvement of NPs on the legislative agenda of the EU – through scrutiny of the Commission’s Annual Work Programme (Section 2.A.). By the same token, the EWS and the Political Dialogue may allow NPs to indirectly influence the EU Commission’s legislative proposals (Section 2.B.).<sup>7</sup> In contrast with this status quo, parliaments have recently begun to advocate the introduction of a ‘green card’. This is the right for national parliaments to ask the Commission to propose or amend European legislation. Such a development would indeed be revolutionary in shifting the role of NPs in the EU from passive to active players – or ‘agenda-setters’ (Section 3).

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the Early Warning Mechanism and the Political Dialogue’, 52 *Common Market Law Review* (2015), p. 939–976.

<sup>4</sup> This procedure, provided by Article 7 of Protocol No. 2, has also been named the ‘yellow card procedure’, with a yellow card issued against the Commission. The number of votes diminishes to one fourth for legislative proposals dealing with cooperation in criminal matters. Nonetheless NPs issue an orange card against the Commission when, in the framework of ordinary legislative procedure, the number of reasoned opinions reaches the simple majority of the votes cast. In these circumstances, if the Commission decides to keep the proposal after the review, the EP by absolute majority, or the Council by a majority of 55% of its members, can stop the procedure, should they agree with the subsidiarity concerns expressed by NPs.

<sup>5</sup> G. Tsebelis, *Veto Players*, p. 2. Indeed, NPs are not formally recognized as EU ‘agenda-setters’ in the most in-depth analyses on the topic either: see, among many, S. Princen, *Agenda-Setting in the European Union* (Palgrave, 2009).

<sup>6</sup> Article 10 of Protocol No. 1. See C. Fasone, ‘Comment on Article 10, Protocol No. 1, on the role of national parliaments in the European Union annexed to the Treaty of Lisbon’, in H.-J. Blanke and S. Mangiameli (eds.), *The Treaty on European Union (TEU)* (Springer, 2013), p. 1607–1621.

<sup>7</sup> On Barroso’s 2006 initiative regarding the Political Dialogue, see Commission Communication on the Citizens’ Agenda – Delivering Results for Europe, COM(2006) 211 final, p. 9. The initiative was immediately endorsed by the European Council at its subsequent meeting: European Council, European Council Presidency Conclusions of 15–16 June 2006 (10633/1/06 REV 1 EN).

## §2. NATIONAL PARLIAMENTS TODAY AS INDIRECT 'AGENDA-SETTERS' FOR THE EU COMMISSION

As mentioned in the introduction, since the launch of the Political Dialogue by former President of the Commission Barroso, NPs are now in direct contact with the European Commission. As Barroso and Vice-President Wallström put it at the moment of the entry into force of the Lisbon Treaty: '[i]n 2006, we set up the mechanism for Political Dialogue to put in place a privileged channel of communication between the Commission and national parliaments'.<sup>8</sup> In the name of this Political Dialogue and now of Article 2 of Protocol 1 annexed to the Lisbon Treaty, NPs receive the EU Commission Annual Work Programme, examine it and send their opinions back to the Commission (Section 2.A.). The Lisbon Treaty also formalizes a second communication channel between NPs and the EU Commission through the creation of the EWS. In this framework NPs are invited to express their opinions on the respect of the principle of subsidiarity in the context of an EU legislative proposal (Section 2.B.).

### A. THE EU COMMISSION'S ANNUAL WORK PROGRAMME AS THE BASIS FOR EXCHANGES BETWEEN THE COMMISSION AND NATIONAL PARLIAMENTS

The EU Commission's Annual Work Programme is the main planning document that describes the fields of EU legislative action for the following year. Usually published in November each year, it is based on the Commission's Annual Policy Strategy Decision.

Since 2006 the Barroso initiative has meant that NPs receive the Annual Work Programme, which is transmitted to them directly by the Commission (alongside any initiative national governments can take with the same purpose). Thus, the Political Dialogue allows for interaction between the Commission and NPs about legislative priorities for the next year's agenda, through the Work Programme. Indeed, in its implementation, this Programme shows a degree of flexibility and is then adapted to the actual needs of the policy-making process and to the economic, political and social developments occurring in the EU context.

Political Dialogue, as is well known, is a two-way flow of information, from the Commission to NPs and from them back to the Commission. As already stated in the first Communication that launched the Political Dialogue, the 'Commission wishes to

<sup>8</sup> Commission President Barroso and Commission Vice President Wallström, Practical Arrangements for the Operation of the Subsidiarity Control Mechanism under Protocol no 2 of the Treaty of Lisbon, 1 December 2009, [http://ec.europa.eu/dgs/secretariat\\_general/rerelations/rerelations\\_other/npo/docs/letter\\_en.pdf](http://ec.europa.eu/dgs/secretariat_general/rerelations/rerelations_other/npo/docs/letter_en.pdf).

transmit directly all new proposals and consultation papers to NPs, *inviting them to react so as to improve the process of policy formulation*.<sup>9</sup>

The Lisbon Treaty has codified in EU primary law only the transmission to NPs of consultation documents, draft legislative acts, the annual legislative programme and any other instrument of legislative planning or policy, explicitly recalled by Article 1 of Protocol 1. In contrast, NPs are formally allowed to send their opinions to the Commission only within the EWS, that is on draft legislative acts falling outside the scope of exclusive EU competence and based on the subsidiarity principle. Hence NPs' opinions on the Annual Work Programme are addressed and delivered to the Commission under the guise of the informal Political Dialogue as they do not enjoy clear recognition in the Treaties. In turn, the Commission does not have a Treaty-based obligation to follow these opinions. Yet, it regularly replies, although often in a very concise way, to NPs. Commission President Barroso had even committed to providing an answer within three months, which, however, the Commission failed to respect, prompting NPs to criticise its behaviour on numerous occasions.<sup>10</sup>

The first dimension of parliamentary review of the Commission Work Programme is individual. Each NP scrutinizes and interacts with the Commission on an individual basis. It has to be highlighted however that in this scrutiny and in the selection of the EU legislative and policy priorities for the coming year, NPs are not alone. First of all, these priorities are usually defined together, or at least in agreement with their national executive, making it a joint exercise given the parliamentary or semi-presidential form of government (with the exception of Cyprus, the only EU Member State where a presidential system is in place).

Secondly, in federal and regional EU Member States, federal or regional entities can also be involved. At least in Austria, Belgium, Italy and Portugal, regional parliaments with legislative powers have a say during the scrutiny of the Commission's Work Programme by the NP.<sup>11</sup> Sometimes the standpoint of these regional legislatures is referred to in the parliamentary resolution or opinion adopted and transmitted to the Commission.<sup>12</sup> The practice of considering regional legislatures is in accordance with

<sup>9</sup> Emphasis added. See Commission Communication on the Citizens' Agenda – Delivering Results for Europe, COM(2006) 211 final, p. 9. However, it remains uncertain whether a real 'dialogue' has been established as, after two years of practice, many NPs noted that they do not examine necessarily the answers provided by the Commission. COSAC, 16<sup>th</sup> Bi-annual Report, October 2011, [www.cosac.eu/documents/bi-annual-reports-of-cosac/d1-16br.pdf](http://www.cosac.eu/documents/bi-annual-reports-of-cosac/d1-16br.pdf), p. 35. Others, such as the French National Assembly, send contributions without asking for any response, in a bottom-up flow only.

<sup>10</sup> For instance, during the LII COSAC meeting in Rome in December 2014. See the minutes of the LII COSAC.

<sup>11</sup> See D. Fromage, 'Regional parliaments and the Early Warning System: An assessment and some suggestions for reform', in M. Goldoni and A. Jonsson Cornell (eds.), *National and Regional Parliaments in the EU Legislative Procedure Post-Lisbon: The Impact of the Early Warning Mechanism* (Hart Publishing, 2016), forthcoming.

<sup>12</sup> See, for instance, the Resolution of the Committee of European Policies of the Italian Senate, on the Commission's Work Programme for 2014, COM(2013) 379, adopted on 30 April 2014 (doc XXIV, n. 29),

EU goals: the review of the Annual Work Programme entails the definition of national priorities in EU affairs and is a strategic exercise which is the result of 'collective work' at domestic level, and led by the executive through all national levels.

There is also a second dimension of review of the Commission's Work Programme on cooperation between NPs, which has developed very rapidly since 2006. Indeed, in the framework of the Political Dialogue, the opinions of NPs on this planning document are also published online on the Inter-parliamentary EU Information Exchange (IPEX) and thus are made available to all the legislatures, together with the replies of the Commission. In this way, NPs know and mutually learn of each others' priorities. It is clear that there are common interests among them. NPs that sent an opinion on the 2014 Annual Work Programme identified as priorities the OLAF reform; and the setting up of the European Public Prosecutor's Office;<sup>13</sup> accession of the EU to the ECHR and the internal rules; the Banking Union and the Single Supervisory and Resolution Mechanisms; and to a lesser extent the TTIP, VAT system and the labour mobility package.<sup>14</sup> These legislative dossiers are identified as either: those on which compliance with the principle of subsidiarity is, at first instance, problematic; those on which content NPs want to exert an actual influence even if they are not subject to the EWS; or those that raise an interest for NPs for both reasons. Indeed, the reasons why a parliamentary scrutiny on the Commission's Work Programme is accomplished (subsidiarity concerns, on the one hand, and the attempt to influence on the merits of the proposal, on the other hand) are strongly intertwined.

In fact, the results of this kind of review on the potential exercise of an 'agenda-setting' power by NPs are fairly limited. On the one hand, NPs often simply identify a list of draft legislative acts and packages they are willing to examine should the Commission table these legislative proposals. In other words, their scrutiny remains very superficial, also because of the lack of background information (unless it is provided by the national executive), and, except for very few NPs, such as the UK Parliament, scrutiny does not involve any consideration of the NPs' viewpoint on the substance of the EU policy options. This could explain why, for instance, the French National Assembly had originally chosen to select the proposals eligible for a tighter subsidiarity scrutiny on the basis of the content of the bi-annual Council presidency programmes rather than on that of the EU Commission Work Programme. On the other hand, the replies by the Commission remain extremely vague and do not add much to NPs in terms of awareness or a more in-depth understanding of the Commission's standpoint. However, a recent development may challenge this situation. The new Juncker Commission expressly

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for what concerns the flexibility of the rules of the Stability and Growth Pact, where resolution n. 3988, of 3 June 2013, of the regional legislative Assembly of Emilia-Romagna is cited.

<sup>13</sup> See the next Section.

<sup>14</sup> Parliaments or chambers thereof that completed the scrutiny of the 2014 Work Programme and sent their opinions were: the Croatian Parliament, the Czech Senate, the German *Bundestag* and *Bundesrat*, the Italian Senate, the Lithuanian *Seimas*, the Polish Senate and *Sejm*, the Portuguese *Assembleia da República*, the Swedish Parliament, the Dutch Senate, the UK House of Lords.

invited NPs to submit their opinions on the 2015 Commission Work Programme<sup>15</sup> and this initiative was remarkably successful as 20 NPs did – either in the form of opinions or by simply indicating their priorities.<sup>16</sup>

Based on the weaknesses experienced in this loose coordination, NPs have tried to exploit another provision of Protocol 1 in combination with provisions on the Political Dialogue, namely the submission of contributions by COSAC on the Commission's Work Programme (Article 10 of Protocol 1). By no means is the Commission bound by these contributions, but this avenue allows NPs to discuss the Work Programme *in concreto* – not just to virtually interact through IPEX – and to define better common priorities. Hence institutional priorities, that is, strategic preferences of all NPs, can supplement national priorities. The added value of COSAC in this pre-selection of NPs' priorities for the year ahead has been expressly recognized by the UK House of Lords, which, through COSAC, has drawn inspiration from the practice developed in the Dutch *Tweede Kamer* for the review of the Work Programme.<sup>17</sup>

COSAC's meetings, especially the meeting of COSAC's Chairpersons at the beginning of the year, have turned into an arena for debate of the Annual Work Programme. In fact, COSAC's rules of procedure ask to draw on the Commission's Work Programme in order to identify one or two subjects as the focus of the annual Conference's activity for the coming year (Article 5 COSAC Rules of procedure). Operational arrangements for the joint scrutiny of the Work Programme have been under discussion on several occasions within COSAC.<sup>18</sup> It was not by chance that this issue was also evoked during the meeting of COSAC's chairpersons on 1–2 February 2015, based on an informal inter-parliamentary session organized on 19 January 2015 by the Dutch *Tweede Kamer*, a leading actor in this field. According to the debrief of this meeting,

fourteen different chambers supported the idea of NPs sharing a list of their priority files in the Commission's Annual Work Programme, and submitting the results to the Commission and the EP before 1 April. For the greatest priority files, a leading ('champion') parliament would be appointed to lead the follow-up.<sup>19</sup>

<sup>15</sup> European Commission, Annual Report 2014 on the relations between the European Commission and national parliaments, COM(2015) 316 final, p. 12.

<sup>16</sup> Austrian Federal Council, Croatian Parliament, Czech Senate, Czech Chamber of deputies, French National Assembly, French Senate, German *Bundesrat*, Hungarian National Assembly, Italian Senate, Polish Senate, Portuguese *Assembleia da República*, Romanian Senate, National Council of the Slovak Republic, Swedish Parliament, Dutch Senate and UK House of Lords. Others, such as the Belgian House of Representatives, the Finnish Parliament, the Polish *Sejm* and UK House of Commons, uploaded the report of their internal debate or added a link to their internal dossier. Information available on ipex.eu. A similar tendency is observable as regards the 2016 Annual Work Programme.

<sup>17</sup> UK House of Lords, European Union Committee, *The Role of National Parliaments in the European Union*, 9<sup>th</sup> Report of Session 2013–14, March 2014, para. 24.

<sup>18</sup> See COSAC, 15<sup>th</sup> Bi-annual Report, May 2011, [www.cosac.eu/documents/bi-annual-reports-of-cosac/](http://www.cosac.eu/documents/bi-annual-reports-of-cosac/), Part 4.

<sup>19</sup> See Summary record of the meeting of the Chairpersons of COSAC, 1 – 2 February 2015 in Riga, [www.parliament.gv.at/PAKT/EU/XXV/EU/05/49/EU\\_54923/imfname\\_10528119.pdf](http://www.parliament.gv.at/PAKT/EU/XXV/EU/05/49/EU_54923/imfname_10528119.pdf), p. 2.

This idea appears to be gaining support among NPs: the working group on the possibility of improving the ‘yellow card’ procedure led by the Polish *Sejm* proposed the introduction of a detailed procedure and a precise schedule to this end as recently as June 2015.<sup>20</sup>

Therefore, a closer cooperation among NPs on the Annual Work Programme, especially via COSAC, where they normally have the opportunity to interact directly with the Commission, is perceived by these legislatures as a key to influence the choice of the dossiers to put on the table in the coming months. This development is particularly relevant as it shows the will of NPs to be involved beyond the (limited) framework offered by the EWS.

## B. THE EARLY WARNING SYSTEM AND POLITICAL DIALOGUE AS MEANS OF INFLUENCE FOR NATIONAL PARLIAMENTS

In the post-Lisbon regime, NPs are entitled to receive, in particular from the Commission, any EU draft legislative act and document translated into their respective official national language. However, according to the wording of Protocols 1 and 2, the procedure defined as the EWS, which gives power to NPs to signal violations of the principle of subsidiarity, applies only to legislative proposals falling outside the remit of the EU’s exclusive competence, that is a very small proportion of legal acts enacted by the EU every year.<sup>21</sup> Furthermore the review is limited in scope to the principle of subsidiarity, and has to take place within eight weeks of the transmission – a very short period of time. In addition to that, NPs can only intervene through the EWS before the legislative procedure formally starts, which has its pros and cons.

On the positive side, the involvement of NPs, immediately after the transmission of a legislative proposal, enables them to exert an influence on EU law-making at a very early stage. Article 4 of Protocol 1 prevents the Council from placing the relevant legislative proposal on the provisional agenda of its meetings before the eight-week period elapses, and ten more days have to elapse before the Council adopts a position on the draft legislative act. This time frame is designed to allow NPs to give political direction and legal input to the legislative process in the form of (reasoned) opinions.

On the negative side the participation of NPs in the EWS is limited only to that precise moment – in their relationship with EU institutions at least – and prevents them from issuing reasoned opinions on amended drafts, although these are transmitted to NPs by the Commission, the EP and the Council alongside the EP’s legislative resolutions and

<sup>20</sup> Letter of the chairwoman of the European Affairs Committee of the Polish *Sejm* to the chairperson of the European Affairs Committee of the Lithuanian *Saeima*, 25 June 2015.

<sup>21</sup> On a number of occasions, NPs have complained for the lack of inclusion of draft delegated acts from the EWS, which can be seen as particularly problematic in the light of the Common Understanding on delegated acts agreed by the Commission, the EP and the Council, according to which a preference is given for the conferral of a delegation of undetermined duration. See European Commission, Reply to the Contribution of the LII COSAC, Rome, 31 November- 2 December 2014, [2015] OJ C 181/1, para. 2.



the Council's positions.<sup>22</sup> In other words, NPs cannot use the EWS to have an impact on the EU legislative process and its outputs, which often develop in a very different way compared to the original draft of the Commission. This gives NPs little or no power as 'agenda-setters' within the legislative process. Nor could such an assessment change because according to Article 8 of Protocol 2 an action for infringement on the grounds of subsidiarity can now be referred to the CJEU by a Member State, also on behalf of its NP or a chamber thereof. It is again a negative parliamentary power, exercised depending on the national legal system, to react against an ultra vires act, which is already in force.

In order to supplement the deficiencies of the EWS, the European Commission maintained the Political Dialogue described above, after the entry into force of the Lisbon Treaty. Indeed, in the framework of this Political Dialogue NPs can express their opinion at any point in time and regarding any aspect of an EU legislative proposal and consultation document. However some NPs, like the Swedish *Riksdag*, send only reasoned opinions to the Commission, that is, no positive opinions, opinions with remarks, or opinions based on grounds other than subsidiarity are submitted. Since 2009 the use of Political Dialogue as a tool to influence the position of the Commission in law-making has grown in importance compared to that of the EWS. This is clearly shown in the statistics provided by the Commission in its yearly reports on the relationship with NPs. In the 2014 Report, dealing with the parliamentary opinions in 2013, the Commission stated that opinions have stabilized at just over 600 per year, of which approximately 14% were reasoned opinions.<sup>23</sup> This figure decreased by 19% in 2014 in comparison with 2013. The Commission explained this more limited participation by the reduction in the number of legislative proposals it submitted.<sup>24</sup> By taking advantage of IPEX, COSAC and other inter-parliamentary meetings, NPs have also become able to coordinate their action and, based on the strategic priorities already identified through the scrutiny of the Commission's Annual Work Programme, most legislatures focus their attention on a dozen legislative proposals per year.

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<sup>22</sup> See Article 4(4) of Protocol 2. As underlined by P. Kiiver, 'The Conduct of Subsidiarity Checks of EU Legislative Proposals by National Parliaments: Analysis, Observations and Practical Recommendations', 12 *ERA Forum* (2012), p. 540, this is particularly problematic if the amendments were introduced following NPs' reasoned opinions.

<sup>23</sup> European Commission, Annual Report 2013 on the relations between the European Commission and national parliaments, COM(2014) 507 final, p. 4. It should be noted, however, that some Chambers have participated less than in the past; the evolution of this tendency should be monitored in the coming years, especially given the fact that the change to the new – and more open – Commission in 2014 may have an influence on parliamentary participation.

<sup>24</sup> European Commission, Annual Report 2014 on the relations between the European Commission and national parliaments, COM(2015) 316 final, p. 2. The overall number of legislative dossiers presented by the Commission in 2013 was 150, whereas (due to the EP elections and the investment of the new Commission in October 2014) from January to September in 2014 only 61 legislative dossiers were proposed. Yearly data is available on the website of the European Commission, under the section 'Work Programme of the Commission – Key documents', [http://ec.europa.eu/atwork/key-documents/index\\_en.htm](http://ec.europa.eu/atwork/key-documents/index_en.htm).

In spite of this, more than six years after the entry into force of the Treaty of Lisbon, NPs remain largely disappointed by the functioning of both mechanisms, the EWS and the Political Dialogue: in particular of the former which in principle grants them the power to force the Commission to review its proposals.

In the 22<sup>nd</sup> COSAC bi-annual Report, citing the comments of many parliaments<sup>25</sup> it was said that:

in general, the European Commission's responses to reasoned opinions and opinions were not deemed satisfactory, in particular because of their brevity, generality and delay in their receipt. NPs and the European Commission should work together to determine appropriate guidelines for the European Commission to respond to reasoned opinions.<sup>26</sup>

In the view of the NPs the impact, if any, they have on EU law-making through their opinions should be explicitly pointed out by the Commission. In this regard, a direction for future developments has been provided by the UK House of Lords. This parliamentary chamber has detected three main avenues to enhance the influence of Member States' legislatures in the EWS and Political Dialogue.<sup>27</sup> The Commission should make the link between parliamentary opinions and EU policy outputs more explicit by:

- (i) identifying national parliament contributions in summary reports on consultation exercises and in subsequent communications on the policy, including how the policy has been shaped or modified in response,
- (ii) responding promptly to national parliament contributions under the general political dialogue, usually within three months,
- (iii) using its annual report on relations with national parliaments to identify the impacts of national parliament engagement.

Interestingly, these suggestions may have (eventually) been heard by the Commission in its latest report on its relations with NPs. It included a section on the impact of NPs' opinion entitled 'Political dialogue and policy outcome'.<sup>28</sup> Arguably, this new section is still characterized by its brevity as it only concerns the proposals that 'attracted most

<sup>25</sup> UK House of Commons and House of Lords, French Senate, Czech Chamber of Deputies, Irish Houses of Parliament, Austrian *Nationalrat* and *Bundesrat*, Czech Senate, Parliament of Cyprus, Luxembourgish Chamber of Deputies.

<sup>26</sup> See COSAC, 22<sup>nd</sup> Bi-annual Report, November 2014, [www.cosac.eu/documents/bi-annual-reports-of-cosac/f4%20COSAC%2022nd%20Bi-annual%20Report\\_EN.pdf](http://www.cosac.eu/documents/bi-annual-reports-of-cosac/f4%20COSAC%2022nd%20Bi-annual%20Report_EN.pdf), p. 24. The need to agree between NPs and the Commission on guidelines to respond on reasoned opinions was particularly emphasized by the UK House of Lords and, in fact, a majority of NPs recently welcomed such an initiative. COSAC, 23<sup>rd</sup> Bi-Annual Report, May 2015, [http://parleu2015.lv/files/cosac\\_plenary/en-23-bi-annual-report-final-2.pdf](http://parleu2015.lv/files/cosac_plenary/en-23-bi-annual-report-final-2.pdf), p. 7.

<sup>27</sup> UK House of Lords, European Union Committee, Report on the Role of the National Parliaments in the European Union, 9<sup>th</sup> Report of session 2013–14, March 2014, para. 40.

<sup>28</sup> European Commission, Annual Report 2014 on the relations between the European Commission and national parliaments, COM(2015) 316 final, p. 6–7.

attention from national Parliaments'.<sup>29</sup> Nonetheless its inclusion is a move in the right direction and hopefully a sign of more openness on the side of the Commission.

So far, NPs have been able to withdraw an item from the legislative agenda of the Commission through the EWS just on one occasion, the 'Monti II draft Regulation' on the right to strike in the field of freedom of establishment and freedom to provide services, the only case showing a direct impact of Member States' legislatures on EU policy-making.<sup>30</sup> For the first time, 12 reasoned opinions (19 votes on the whole) by NPs triggered the threshold for a 'yellow card'. Although the Commission denied that any violation of the principle of subsidiarity had occurred, it finally decided to withdraw the legislative proposal for political reasons, given the widespread opposition against such a measure (also on the part of the executives) and the need for unanimous approval at Council level.

In its letter of reply to national legislatures, the Commission tried to diminish the significance of the reasoned opinions, based on which it had reviewed the proposal. Indeed, it justified the withdrawal by making reference to 'the current state of play of the discussions on the draft Regulation among relevant stakeholders, in particular the EP and Council' and to the fact that the 'proposal [was] unlikely to gather the necessary political support within the European Parliament and Council to enable its adoption'.<sup>31</sup> Nevertheless the parliamentary reasoned opinions, which represented the viewpoint of Member State populations, and the echo of the first 'yellow card', indisputably had weight on the final considerations by the Commission.

By contrast the second yellow card<sup>32</sup> on the setting up of the European Public Prosecutor's Office did not prompt any effect in the Commission's attitude towards the proposal.<sup>33</sup> Once reviewed, together with the reasoned opinions of NPs, the Commission decided to maintain the proposal – whose legislative procedure is still underway – without any revisions as compliance with the principle of subsidiarity was deemed confirmed. Hence, the impact of the second yellow card on EU law-making has been non-existent. What has changed instead has been the acknowledgment by the Commission of the role of NPs. On this occasion it adopted an ad hoc communication explaining more in depth than in the Monti II case the reasons for keeping the draft

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<sup>29</sup> Ibid., p. 6.

<sup>30</sup> See the Commission Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final. M. Goldoni, 'The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation', 10 *European Constitutional Law Review* (2014), p. 90 et seq.; F. Fabbrini and K. Granat, "'Yellow Card, but No Foul": The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike', 50 *CML Rev.* (2013), p. 115 et seq.

<sup>31</sup> European Commission letter to the House of Commons, Ares(2012)1058907.

<sup>32</sup> And so far the last one. No orange card has ever been issued.

<sup>33</sup> See the Commission Proposal for a Council Regulation on the European Public Prosecutor's Office, COM(2013) 534 final.

Regulation unchanged,<sup>34</sup> although not yet satisfactorily according to many NPs.<sup>35</sup> It appears that in this second case NPs have not been able to change the agenda of the Commission but they have strengthened the deliberative nature of the EWS in terms of the dialectic between institutional players and the quality of the justifications provided. In fact ten contributions were submitted to the Commission in 2014 after the proposal was maintained. Some of these opinions were actually second and third contributions transmitted to the Commission. On this occasion, NPs and the Commission were therefore indeed able to enter into a true and lengthy dialogue.<sup>36</sup>

From this viewpoint, the case of the European Citizens' Initiative in the framework of the Political Dialogue represents a more concrete and positive example of parliamentary influence on EU law-making.<sup>37</sup> Rather than withdrawing items from the Commission's agenda, NPs in cooperation with the EP have contributed to shape the content of the final regulation.<sup>38</sup> The process began with the Political Dialogue on the Green Paper,<sup>39</sup> which allowed NPs to express their views on a number of issues such as the setting up of a centralized system of registration, the level of harmonization of procedural requirements among Member States and the time limit on collection of signatures. Further suggestions concerned the replies by the Commission, its powers and its admissibility review.<sup>40</sup> The draft regulation then followed,<sup>41</sup> which became the object of parliamentary opinions contesting the overly-high threshold for Member States where the signatures had to be collected, the *a priori* control on the initiatives accomplished by the Commission, and the absence of a definite deadline for the Commission to take legislative action.<sup>42</sup>

<sup>34</sup> Commission Communication 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 2, COM(2013) 851 final.

<sup>35</sup> See I. Wiczkorek, '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', 16 *German Law Journal* (2015), p. 1247–1270; and D. Fromage, 'The second yellow card on the EPPO proposal: An encouraging development for Member States parliaments?', *Yearbook of European Law* (2016).

<sup>36</sup> European Commission, Annual Report 2013, p. 5.

<sup>37</sup> Indeed the adoption of EU Regulation 211/2011 on the citizens' initiative, [2011] OJ L 65/1, based on Article 11(4) TEU, falls within the exclusive competence of the EU and thus the EWS is automatically excluded.

<sup>38</sup> C. Fasone, 'Competing Concepts of Subsidiarity in the Early Warning Mechanism', in M. Cartabia, N. Lupo and A. Simoncini (eds.), *Democracy and Subsidiarity in the EU. National Parliaments, Regions and Civil Society in the Decision-Making Process* (Il Mulino, 2013), p. 157–196.

<sup>39</sup> European Commission, Green paper on a European Citizens' Initiative, COM(2009) 622 final.

<sup>40</sup> See, in particular, the opinions of the Austrian National Council, the Czech Senate, the Danish Parliament, the German *Bundesrat*, the Irish Parliament, *Seimas* of the Republic of Lithuania, the Luxembourg Chamber of Deputies, the Swedish Parliament, on the Green Paper on a European Citizens' Initiative, COM(2009) 622 final, available on ipex.eu.

<sup>41</sup> Commission Proposal on the citizen's initiative, COM(2010) 119 final.

<sup>42</sup> See, in particular, the opinions on the Draft Regulation issued by the Czech Senate, the Greek Parliament, and the Italian Chambers of Deputies and Senate, available on ipex.eu.

Interestingly many of the concerns expressed by NPs about the uncertainties of the citizens' initiative procedure, designed by the Commission's draft regulation and the overly strict requirements to be fulfilled for an initiative to succeed, were taken up by the Committee on Constitutional Affairs (AFCO) of the EP as amendments to the legislative proposals and were finally endorsed by the plenary.<sup>43</sup> For example, the lowering from one-third to one-quarter of the Member States for the final threshold of countries from where signatures have to be collected derives from a joint attempt of NPs and the EP (with which the Council agreed at the first reading)<sup>44</sup> to reduce as much as possible obstacles for citizens to use this participatory tool.

Hence, there is room for a more active involvement of NPs in EU law-making beyond the rigid rules of the EWS, which primarily attaches a role of veto players to them. However this avenue has still been poorly used so far. It is not by chance but precisely because of the importance given by NPs' scrutiny on EU documents and draft legislative acts to the legal bases, the merits and the principle of proportionality, regardless of the 'straightjacket of subsidiarity', that the proposal to re-focus the parliamentary control on the use of the principle of conferral and on legislative substance has been recently put forward.<sup>45</sup>

### C. ARE NATIONAL PARLIAMENTS ABOUT TO BECOME DIRECTLY INVOLVED IN THE EU COMMISSION'S AGENDA-SETTING?

As already highlighted, the EWS in particular has attracted many negative comments by some NPs who feel they have been given only a 'negative role' or that their role is ineffective<sup>46</sup> and therefore have asked for its reform.<sup>47</sup> By the same token, in an analogy

<sup>43</sup> See the AFCO Committee Report tabled for the plenary, A7-0350/2010, 3 December 2010.

<sup>44</sup> As an agreement was reached between the EP and the Council at first reading, the EP's position corresponds to the final legislative act, Regulation (EU) No 211/2011.

<sup>45</sup> D. Jančić, 52 *Common Market Law Review* (2015), p. 952–961.

<sup>46</sup> This is the case of the French National Assembly that regrets this negative role and believes that it would be more useful for NPs to be able to make improvements or suggest amendments to the legislative proposals or even 'criticize them when they do not go far enough in the added-value one can expect from Europe'. COSAC, Annex to the 22<sup>nd</sup> Bi-Annual Report, November 2014, [www.cosac.eu/documents/bi-annual-reports-of-cosac/f4%20COSAC%2022nd%20Bi-annual%20Report\\_EN.pdf](http://www.cosac.eu/documents/bi-annual-reports-of-cosac/f4%20COSAC%2022nd%20Bi-annual%20Report_EN.pdf), p. 184. Others, like the Finnish parliament, clearly declare that they 'continue to have grave reservations about the effectiveness of the subsidiarity procedure'. Abbreviated translation of the Finnish contribution submitted regarding the Commission proposal for the establishment of a European Public Prosecutor's Office (COM(2013) 534 final). More recently, 'the Italian *Camera dei Deputati* and the Portuguese *Assembleia da República* stressed that it [subsidiarity check] should not be a priority; what really mattered was the influence on the content of the EU policies and decisions'. COSAC, 22<sup>nd</sup> Bi-Annual Report, November 2014, [www.cosac.eu/documents/bi-annual-reports-of-cosac/f4%20COSAC%2022nd%20Bi-annual%20Report\\_EN.pdf](http://www.cosac.eu/documents/bi-annual-reports-of-cosac/f4%20COSAC%2022nd%20Bi-annual%20Report_EN.pdf), p. 24.

<sup>47</sup> There is a growing trend for parliaments to ask for the EWS to be reformed, for instance, in order for the eight week-deadline reserved for scrutiny to be extended to twelve weeks. See also the proposal of the Danish *Folketing* below.

with the ‘yellow’ and ‘orange’ cards existing in the framework of the EWS, NPs are becoming more numerous in their quest for the introduction of a ‘green card’. In their contribution following their meeting in Dublin in June 2013, COSAC members stated that:

COSAC considers that NPs should be more effectively involved in the legislative process of the European Union not just as the guardians of the subsidiarity principle but also as active contributors to that process. This goes beyond the adoption of reasoned opinions on draft legislative acts which may block those acts and would involve a more positive, considered and holistic view under which parliaments could invite the Commission to develop legislative proposals which they believe to be necessary or to review and adapt existing proposals for specific stated reasons.<sup>48</sup>

However, at least to start with, different interpretations of how a ‘green card’ should be conceived have emerged among NPs. In spite of the divergent views, the commitment shown by these legislatures to propose new procedural solutions for the weaknesses of the present EWS is a proof of their willingness to constructively contribute to improve EU decision-making.

The Dutch *Tweede Kamer* started to advocate the reform of the yellow card system and the introduction of a ‘late card’ and a ‘green card’ in line with COSAC’s contribution.<sup>49</sup> According to the *Tweede Kamer* the scope of the EWS has to be broadened to proportionality and to a more careful consideration of the choice of the legal basis. The deadline has to be extended beyond the current eight weeks and the threshold to trigger the yellow card has to be lowered, even if – as acknowledged by the *Tweede Kamer* – reasoned opinions are always issued by the ‘usual suspects’ (the same NPs). The ‘late card’ would give NPs the power to object to a legislative proposal that results from negotiations between the Commission, the Council and the EP; such proposals often change dramatically from the version originally examined by NPs.<sup>50</sup> Finally, in the view of the *Tweede Kamer*, the ‘green card’ would mean the creation of ‘a group of parliaments that is gathered around a theme (cluster of interest) [and that] could propose ideas for new European policies to the European Commission, or could propose the amending or revoking of existing legislation.’<sup>51</sup>

Regarding the ‘green card’, the Danish *Folketing* suggested that ‘National parliaments [should be allowed] to review and comment on the content of a legislative proposal

<sup>48</sup> Contribution of the XLIX COSAC, Dublin, 23–25 June 2013, point 31.

<sup>49</sup> Open Europe Blog Team, ‘Green Card’, ‘Late Card’: Dutch Parliament ups the Ante in EU Democracy Debate’, *Open Europe blog* (2013), <http://openeuropeblog.blogspot.it/2013/11/green-card-late-card-dutch-parliament.html>; and D. Jančić, 52 *Common Market Law Review* (2015), p. 964–965.

<sup>50</sup> NPs receive amended drafts from the Commission and other EU institutions, but a yellow card cannot be issued on the revised documents. The EWS only takes place before the legislative process starts.

<sup>51</sup> Dutch *Tweede Kamer*, ‘Ahead in Europe. On the role of the Dutch House of Representatives and National Parliaments in the European Union’, *Final Report on Democratic Legitimacy*, 9 May 2014, p. 14.

within a ten-week deadline, compared to the current eight weeks of the usual EWS.<sup>52</sup> If one third of NPs agree on a position to change the proposal, the Commission should take their position into account and explain why if it does not. If NPs do not reach a common position on the proposal within the ten-week deadline, there is an automatic green light to proceed with the decision-making.<sup>53</sup>

The Danish *Folketing*'s proposal appears to be strongly inspired by the functioning of the 'yellow card' procedure and suggests that the same number of parliamentary chambers should be in favour of a change in the proposal for the EU Commission to be obliged to take their suggestion on board. A 'green card' according to the Danish *Folketing* seems to be rather different from the one proposed by COSAC and the Dutch *Tweede Kamer*, as it would take effect once a legislative proposal has already been made by the EU Commission and, hence, would still be reactionary rather than an initiative.<sup>54</sup>

This question was also addressed in the UK House of Lords in its Report on the role of the national parliaments in the European Union, published in March 2014. It made its own proposal for a 'green card'.<sup>55</sup> It differs from the Danish proposal as it suggests the possibility for NPs to suggest changes for existing legislation proposals. It also foresees that 'there should be a way for a group of like-minded national parliaments to make constructive suggestions for EU policy initiatives, which may include reviewing existing legislation'<sup>56</sup> – and, in this sense, it is more in the line with the COSAC contribution. At the same time, the Lords

<sup>52</sup> The proposed deadline of ten weeks is, however, rather unexpected as it neither corresponds to the eight-week limit existent in the framework of the EWS – which is unsurprising as it is deemed to be too short by NPs – nor does it match the twelve-week period national parliaments ask for in their claim for a reform of the EWS, based on the traditional deadline set by the Commission for its consultation.

<sup>53</sup> Danish *Folketing*, European Affairs Committee, 'Twenty-Three Recommendations to Strengthen the Role of National Parliaments in a Changing European Governance', January 2014, p. 3.

<sup>54</sup> Such a stance on the part of the Danish *Folketing* also reflects its long-standing position vis-à-vis the EWS and NPs as veto players in the EU. For instance, during the Convention on the future of Europe, Working Group I on the Principle of Subsidiarity, Conclusions CONV 286/02 2002, the Danish delegation proposed, unsuccessfully, the introduction of a 'red card', which would have allowed a majority of NPs to block a Commission's initiative. The idea of a 'red card' has been endorsed more recently – upon the initial proposal put forward by D. Chalmers, 'Democratic self-government in Europe: Domestic solutions to the EU legitimacy crisis', *Policy Network Paper* (2013), [www.policy-network.net/publications\\_download.aspx?ID=8362](http://www.policy-network.net/publications_download.aspx?ID=8362), p. 10, to grant an individual veto power to NPs in the EWS as well as to prompt the unilateral disapplication of EU law – by the House of Commons: see European Scrutiny Committee, 'Reforming the European scrutiny system in the House of Commons', 28 November 2013, HC 109-I 2012–2013, p. 55. Until the latest development in 2015, the UK Government had always rejected both the proposal for a 'red card' by each NP and of disapplication of EU law. See D. Jančić, 52 *Common Market Law Review* (2015), p. 962.

<sup>55</sup> UK House of Lords, European Union Committee, 'The Role of National Parliaments in the European Union', 9<sup>th</sup> Report of Session, 2013–14, March 2014, para. 55–59.

<sup>56</sup> UK House of Lords, European Union Committee, 'The Role of National Parliaments in the European Union', 9<sup>th</sup> Report of Session, 2013–14, March 2014, para. 58.

note the concerns raised about intruding on the Commission's formal right of initiative, and [they] would envisage a 'Green Card' as recognizing a right for a number of NPs working together to make constructive policy or legislative suggestions, including for the review or repeal of existing legislation, not creating a (legally more problematic) formal right for national parliaments to initiate legislation.<sup>57</sup>

Additionally, they underline that a "Green Card" agreement would need to include an undertaking by the Commission that it would consider such suggestions carefully, and either bring forward appropriate legislative or other proposals (or consult on them), or explain why it had decided not to take the requested action.<sup>58</sup> The House of Lords' reading of the 'green card' procedure for NPs mirrors the post-Lisbon arrangement of Article 225 TFEU on the EP's power to submit any appropriate proposal to the Commission, which nonetheless remains free to disregard the submission and, hence, not to take subsequent legislative action by informing the parliament of its reasons.<sup>59</sup> The House of Lords' proposal would then grant both 'pillars' of representative democracy in the EU, the EP and NPs, equal rights to prompt the Commission to present a draft legislative act.

The idea of the introduction of a 'green card' – understood as the possibility for NPs to suggest legislation – is gaining more and more attractiveness among NPs who first met in Brussels in order to discuss this initiative before the COSAC chairs' meeting organized in Riga at the beginning of 2015. Following an invitation from the Dutch *Tweede Kamer*, 14 NPs and the EP discussed this possibility together with the question of NP cooperation in their analysis of the Commission Annual Work Programme and the question of the reform of the EWS.<sup>60</sup> It should be noted that the idea of a 'green card' according to which NPs could make 'constructive suggestions for legislative proposals to the European Commission' was endorsed by nearly half the parliamentary chambers and the EP.<sup>61</sup>

This idea of a 'green card' has recently been examined by all NPs,<sup>62</sup> and is still under discussion after the Luxembourg Presidency of COSAC had set up a working group on

<sup>57</sup> Ibid.

<sup>58</sup> UK House of Lords, European Union Committee, 'The Role of National Parliaments in the European Union', 9<sup>th</sup> Report of Session, 2013–14, March 2014, para. 59.

<sup>59</sup> See N. Lupo, 'Iniziativa legislativa e ruolo dei parlamenti nazionali nel sistema istituzionale dell'Unione europea', in R. Mastroianni and A. Maffeo (eds.), *L'iniziativa dei cittadini europei*, (Editoriale scientifica, 2015), p. 13–48.

<sup>60</sup> Background papers by the Speaker of the Dutch *Tweede Kamer* of 19 January 2015 titled 'Selecting dossiers from the annual work programme' and 'Improving the yellow card procedure' and 'The "Green Card": Discussion Paper' prepared by Lord Boswell of Aynho, Chairperson of the House of Lords EU Select Committee, 19 January 2015.

<sup>61</sup> Letter summarizing the meeting prepared by Lolita Čigāne, Chairperson of the European Affairs Committee of the Latvian Parliament, addressed to Commission Vice-President Timmermans on 28 January 2015. On this occasion, 14 national parliamentary chambers expressed their support for the 'green card'.

<sup>62</sup> COSAC, 23<sup>rd</sup> Bi-annual report, 6 May 2015, [www.cosac.eu/documents/bi-annual-reports-of-cosac/g2%20Twenty-third%20BAR-final-June%202015-rev-CLEAN%20Oct%202015.pdf](http://www.cosac.eu/documents/bi-annual-reports-of-cosac/g2%20Twenty-third%20BAR-final-June%202015-rev-CLEAN%20Oct%202015.pdf), p. 31 et seq.



the reform of the ‘yellow card’ and introduction of the ‘green card’.<sup>63</sup> Therefore, the debate is not yet over. The content of the 23<sup>rd</sup> COSAC bi-annual Report published in June 2015 provides some hints of the developments that can soon be expected. A large majority of the responding chambers/parliaments (23 out of 27) has indeed expressed support for the introduction of a ‘green card’ building on the existing Political Dialogue.<sup>64</sup> On the contrary, three of them (the Finnish Parliament, the Italian Chamber of Deputies and the Bulgarian Parliament) voiced their opposition, whereas others such as the Polish Senate expressed reservations on the compatibility of such an initiative with the Treaties.<sup>65</sup> Interestingly, the EP also considered an enhancement of the Political Dialogue to be a positive development ‘as long as it did not amount to a real right of legislative initiative of national Parliaments, which was not foreseen by the treaties’.<sup>66</sup> This position is not surprising as the EP generally seeks to protect its own prerogatives and, more in general, its relative advantage in comparison to NPs, although it has only made a very limited use of its right of initiative since the entry into force of the Lisbon Treaty (Article 225 TFEU).<sup>67</sup>

Concerning the scope of the ‘green card’ all the NPs that responded agreed that it should allow parliaments to make suggestions for new legislation and suggestions to amend existing legislation. Their opinion regarding the possibility to suggest amendments or to repeal delegated or implementing acts in contrast was not unanimous. Three Parliaments/Chambers were against it (the Slovenian National Assembly, the Hungarian National Assembly and the Belgian Chamber of Representatives). The same applies to their possibility to repeal existing legislation that is not supported by the Slovenian National Assembly, the Hungarian National Assembly and the Latvian Parliament. In addition to these views, the UK House of Lords stated that it would like NPs to be able to suggest a review of existing legislation as well as non-legislative action in a particular field. The French National Assembly also shared its own understanding of the ‘green card’ which considers that NPs should be allowed to ‘propose amendments to a draft legislative act before its adoption by the European Commission as well as to propose new draft legislation not linked to any initiative of the European Commission’.<sup>68</sup> This issue was debated again at the next COSAC plenary meetings (29 November to 1 December

<sup>63</sup> COSAC, Draft Outline of the 24<sup>th</sup> COSAC Bi-Annual Report, p. 1; and the Minutes of the Meeting of the COSAC’s Chairpersons, Luxembourg, 13 July 2015, p. 7–11.

<sup>64</sup> COSAC, 23<sup>rd</sup> Bi-annual report, 6 May 2015, [www.cosac.eu/documents/bi-annual-reports-of-cosac/g2%20Twenty-third%20BAR-final-June%202015-rev-CLEAN%20Oct%202015.pdf](http://www.cosac.eu/documents/bi-annual-reports-of-cosac/g2%20Twenty-third%20BAR-final-June%202015-rev-CLEAN%20Oct%202015.pdf), p. 31.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid., p. 32.

<sup>67</sup> As of October 2013 – that is, in almost four years – there had been 18 legislative initiative reports inviting proposals from the Commission. E.-M. Poptcheva, ‘Parliament’s Legislative Initiative’, *Library of the European Parliament, Policy Briefing* (2013), [www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130619/LDM\\_BRI\(2013\)130619\\_REV2\\_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130619/LDM_BRI(2013)130619_REV2_EN.pdf), p. 5–8.

<sup>68</sup> COSAC, 23<sup>rd</sup> Bi-annual report, 6 May 2015, [www.cosac.eu/documents/bi-annual-reports-of-cosac/g2%20Twenty-third%20BAR-final-June%202015-rev-CLEAN%20Oct%202015.pdf](http://www.cosac.eu/documents/bi-annual-reports-of-cosac/g2%20Twenty-third%20BAR-final-June%202015-rev-CLEAN%20Oct%202015.pdf), p. 33.

2015) – though briefly –<sup>69</sup> and during an Interparliamentary Committee Meeting convened by the AFCO committee of the EP on 19 November 2015.

In any event some NPs have put forward potential proposals<sup>70</sup> for the ‘green card’. They actually already made a first attempt in July 2015 (see below) and have agreed to use the UK House of Lords’ discussion paper as a basis for further discussion.<sup>71</sup> This is all indicative of the future success of this initiative. In particular, they have unanimously agreed to NPs being allowed to issue a ‘green card’. This would be: according to their own internal scrutiny procedures;<sup>72</sup> informal consultations and contact with other NPs and groups of NPs coming together under clusters of interests; with one NP or national parliamentary chamber taking the initiative; preparing a draft letter for its submission to the Commission and sending it to the other NPs inviting them to co-sign this ‘green card’; and, finally, each NPs having two votes as in the framework of the EWS. However other elements of the House of Lords’ discussion paper were rejected by other NPs. The Hungarian National Assembly and the Croatian Parliament refused the proposal that the ‘draft “green card” outlines the substance of the proposal in sufficient details, contains a summary of the reasons behind the proposed action, describes the anticipated benefits, specifies the preferred type of legislation and specifies a possible legal base’.<sup>73</sup>

Nevertheless, the present context – characterized by the new European Commission’s increased openness towards national legislatures since 2014 – seems to be most favourable for the success of a development. Vice-President of the Commission Timmermans has already clearly expressed his opinion in favour of an informal and non-bureaucratic approach however, which does not entail a revision of existing procedures and institutional arrangements.<sup>74</sup>

<sup>69</sup> COSAC, Contribution of the LIV COSAC, 1 December 2015, [www.cosac.eu/54-luxembourg-2015/plenary-meeting-of-the-liv-cosac-29-november-1-december-2015/h1-9%20Contribution%20of%20the%20LIV%20COSAC%20Luxembourg%20EN.PDF](http://www.cosac.eu/54-luxembourg-2015/plenary-meeting-of-the-liv-cosac-29-november-1-december-2015/h1-9%20Contribution%20of%20the%20LIV%20COSAC%20Luxembourg%20EN.PDF), p. 5.

<sup>70</sup> Ideas have included: A proposal on tackling food waste that could provide suggestions for non-legislative action and steps for the Commission to take (e.g. producing a roadmap), which could be incorporated into a new circular economy proposal if the Commission does, indeed, withdraw the existing proposal (UK House of Lords); a proposal establishing a European Business Forum (European Affairs Committee of the Danish Parliament); a proposal for a directive on access to justice in environmental matters (Latvian Parliament); proposals on Energy Union, Digital Agenda and Fight against terrorism (French Senate). Ibid. p. 39.

<sup>71</sup> The Belgian Senate and the Italian Chamber of Deputies however raised objections to this. Ibid. p. 35.

<sup>72</sup> This is not surprising as this is also the case in the framework of the EWS and, most importantly, as EU treaties should not interfere in the autonomy of the Member States.

<sup>73</sup> COSAC, 23<sup>rd</sup> Bi-annual report, 6 May 2015, [www.cosac.eu/documents/bi-annual-reports-of-cosac/g2%20Twenty-third%20BAR-final-June%202015-rev-CLEAN%20Oct%202015.pdf](http://www.cosac.eu/documents/bi-annual-reports-of-cosac/g2%20Twenty-third%20BAR-final-June%202015-rev-CLEAN%20Oct%202015.pdf), p. 35.

<sup>74</sup> Indeed, in his response to Lolita Čigāne, Vice-President Timmermans declared ‘[i]f there are areas where national parliaments feel that the European Union could bring real added value yet has not sufficiently addressed, I would hope these would be raised during our regular discussions at COSAC as well as in direct contacts between Commissioners and national parliaments. If national parliaments identify such issues, it is because they are reflecting the concerns they are hearing from citizens, and I hope you would agree that *rather than entering into a potential lengthy and complex discussion on procedures and new institution arrangements not foreseen by the Treaty, we should try to address this in a*

In the light of this clarification from the Commission, and as recently supported by Lord Boswell, ‘the green card procedure could build on the existing Political Dialogue’,<sup>75</sup> and, in fact, it is now designated as the ‘reinforced Political Dialogue’.<sup>76</sup> If NPs are able to agree on a set of common formal requirements to issue a green card this would also strengthen their political weight. However, first and foremost it will be necessary to clarify what the ‘green card’ is, that is whether:

- according to the British interpretation, NPs can suggest that the Commission adopt legislation in a certain area – which seems to be the predominant conception;
- NPs can modify legislation that has already been proposed, as advocated by the Danish *Folketing*; or
- the ‘green card’ could be used to amend an existing act, or even to repeal or amend implementing and delegated acts, as was envisaged in the latest COSAC questionnaire.

In an attempt to simplify the procedures co-existing in the European institutional system, the first solution should probably prevail and be organized in such a way that it does not further complicate or delay the EU decision-making process. Furthermore, in order for a guarantee that NPs will be heard by the Commission it may be desirable for some thresholds to be defined, and falling below this would mean the Commission is not obliged to consider the proposal. For this a balance needs to be struck between the need for a given proposal to be representative enough and the risk of having thresholds that are too inflexible (as with the EWS) and which formally allow the Commission to disregard NPs’ opinions even if only a few votes are missing. Therefore, one solution to this issue would be for the Commission to commit to always thoroughly examine the proposals made to it with a special obligation in terms of the importance granted to a proposal, and of the justification the Commission has to provide for not taking it on board if a defined number of NPs support it. In this framework, the minimum support outlined for the activation of the ‘yellow card’ procedure could be used, with two votes assigned to each NPs.<sup>77</sup> Current discussions are in favour of NPs having two votes each as already mentioned. The proposed threshold is currently of one quarter of all NPs –not one third as for the ‘yellow card’ – although some NPs (the Bulgarian, the Lithuanian and the Latvian ones) have expressed their preference for a higher threshold

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*very pragmatic and immediate way.* [emphasis added]. See Minutes of the LII COSAC plenary meeting, Italian Senate, Rome, 30 November – 2 December 2014.

<sup>75</sup> See Lord Boswell of Aynho, ‘The “Green Card”: discussion paper, *House of Lords* (2015), [www.parliament.uk/documents/lords-committees/eu-select/COSAC/20150128%20Letter%20to%20Chairpersons.pdf](http://www.parliament.uk/documents/lords-committees/eu-select/COSAC/20150128%20Letter%20to%20Chairpersons.pdf), p. 1.

<sup>76</sup> COSAC, Draft Outline 24<sup>th</sup> COSAC Bi-Annual Report, p. 1.

<sup>77</sup> See also Lord Boswell of Aynho, ‘The “Green Card”: discussion paper, *House of Lords* (2015), [www.parliament.uk/documents/lords-committees/eu-select/COSAC/20150128%20Letter%20to%20Chairpersons.pdf](http://www.parliament.uk/documents/lords-committees/eu-select/COSAC/20150128%20Letter%20to%20Chairpersons.pdf), p. 3: in bicameral systems, each chamber would have one vote, like in the EWS.

of one third.<sup>78</sup> In addition, for the sake of representativeness, but also because it would amount to granting NPs with a right to ‘parliaments’ initiative’, one could also imagine that the minimum threshold required for the European citizens’ initiative – at least one quarter of all Member States<sup>79</sup> – would also be applied here.<sup>80</sup>

Another question to be resolved (and agreed on because so far NPs have not reached a common position) is that of the delay NPs should have to gather the necessary signatures. The latest questionnaire circulated by COSAC asked them what their views on a sixteen-week deadline is, although the Lords finally proposed a deadline of six months. Interestingly, the Polish *Sejm* suggested using the same framework as in the EWS, namely eight weeks. This is all the more surprising as many NPs have repeatedly declared this to be too short.

The EP’s role in the ‘green card’ procedure is not considered in the same way by all NPs and, in fact, only six of the 30 responding Parliaments/Chambers considered it should play any role at all, considering the prerogative it already holds according to Article 225 TFEU. The Maltese Parliament suggested that the flow of information should be bi-directional: the EP should inform NPs when it intends to use its right of initiative and NPs should inform the EP if they consider using the ‘green card’.<sup>81</sup> Several NPs are in favour of informing the EP even if it does not have a formal role in the procedure. It is likely that the choice to include or exclude the EP will have an impact on NPs’ possibilities in this framework. Arguably, a ‘green card’ should remain an instrument reserved to NPs only, although NPs and the EP should of course cooperate and exchange regular information as suggested by the Maltese Parliament.<sup>82</sup>

Finally, for the legitimacy of the whole ‘green card’ procedure, it is desirable that the EU Commission is bound to examine the proposals carefully and justify its position in detail when it does not follow the idea put forward by national legislatures. The Commission can be asked to publish its reply to NPs by a deadline – for example, three months, similarly to the examination of citizens’ initiatives –<sup>83</sup> and/or the relevant Commissioner can be asked to appear before the first signatory parliament of the

<sup>78</sup> COSAC, 23<sup>rd</sup> Bi-annual report, 6 May 2015, [www.cosac.eu/documents/bi-annual-reports-of-cosac/g2%20Twenty-third%20BAR-final-June%202015-rev-CLEAN%20Oct%202015.pdf](http://www.cosac.eu/documents/bi-annual-reports-of-cosac/g2%20Twenty-third%20BAR-final-June%202015-rev-CLEAN%20Oct%202015.pdf), p. 35.

<sup>79</sup> Article 2 of Regulation (EU) 211/2011.

<sup>80</sup> On this point, see in detail, S. Kröger and R. Bellamy, ‘Beyond a Constraining Dissensus: The Role of National Parliaments in Domesticating and Normalising the Politicization of European Integration’, 14 *Comparative European Politics* (2016), p. 16 who also emphasize that a vote by a NP should be activated by a minority of one third.

<sup>81</sup> COSAC, 23<sup>rd</sup> Bi-annual report, 6 May 2015, [www.cosac.eu/documents/bi-annual-reports-of-cosac/g2%20Twenty-third%20BAR-final-June%202015-rev-CLEAN%20Oct%202015.pdf](http://www.cosac.eu/documents/bi-annual-reports-of-cosac/g2%20Twenty-third%20BAR-final-June%202015-rev-CLEAN%20Oct%202015.pdf), p. 38.

<sup>82</sup> Less optimistic on this point is the view expressed by K. Borońska-Hryniewiecka, ‘The “Green Card” Opportunity: Time to Rethink Parliamentary Engagement in EU Affairs’, 41 *PISM Bulletin* (2015), [www.pism.pl/files/?id\\_plik=19620](http://www.pism.pl/files/?id_plik=19620), p. 2, who sees the green card initiative as potentially increasing the ‘rivalry’ between NPs and the EP.

<sup>83</sup> Article 10 of Regulation (EU) 211/2011.

proposal to respond to the green card, ‘with all co-signatories being invited to attend such a meeting’.<sup>84</sup>

The meeting of COSAC’s Chairpersons in July 2015 offered a forum of coordination for issuing the first ‘green card’ ever, irrespective of what the procedural and formal dimension will be. Under the ‘leadership’ of the UK House of Lords and following the format put forward by Lord Boswell on 21 July 2015, 16 Parliaments/Chambers, followed by the Czech Senate and the Danish Parliament, joined the proposal by the Chairman of the European Union Committee to invite the Commission to adopt a strategic approach to the reduction of food waste within the EU, in accordance with a list of recommendations provided in this first ‘green card’.<sup>85</sup>

The number of votes collected (29) based on the EWS is well beyond the threshold of one third and, at least in this case, there was no attempt to deliver a pre-packaged legislative proposal to the Commission. Rather this ‘green card’ offers guidelines and directions from the NPs’ standpoint to the Commission with a view to orient its new long awaited circular economy legislative package. While this first green card does not necessarily say anything about the development of new informal procedures and/or institutional practice, which indeed remain largely dependent on the commitment and the reply of the EU Commission, it confirms however that NPs’ will play a more proactive – agenda-setting oriented – role in EU policymaking.

#### D. CONCLUDING REMARKS

This article aims to bring light to the ongoing discussion about the development of the role of NPs in the EU, and their growing importance in constructively influencing the decision-making process. An evolution can be seen from the role of NPs as passive actors to veto players (based on post-Lisbon Treaty provisions) to ‘agenda-setters’, though their power to shape EU legislation is still very limited at present.

Whether it is desirable for the EU and Member States to acknowledge an agenda-setting role for NPs is outside the scope of this article, in spite of the effects a ‘green card’ might have on the relationship between NPs and governments on the one hand,

<sup>84</sup> Lord Boswell of Aynho, The “Green Card”: discussion paper, *House of Lords* (2015), [www.parliament.uk/documents/lords-committees/eu-select/COSAC/20150128%20Letter%20to%20Chairpersons.pdf](http://www.parliament.uk/documents/lords-committees/eu-select/COSAC/20150128%20Letter%20to%20Chairpersons.pdf), p. 4.

<sup>85</sup> See UK House of Lords, European Union Committee, and co-signatories, Letter to the European Commission, Food waste: a proposal by national parliaments to the European Commission, 22 July 2015, [www.parliament.uk/documents/lords-committees/eu-select/green-card/green-card-on-food-waste.pdf](http://www.parliament.uk/documents/lords-committees/eu-select/green-card/green-card-on-food-waste.pdf). The other 17 co-signatory NPs/Chambers are the Bulgarian National Assembly, the Croatian Parliament, the Cypriot House of Representatives, the Czech Chamber of Deputies and Senate, the Danish Parliament, the French National Assembly and Senate, the Hungarian National Assembly, the Italian Senate, the Latvian *Saeima*, Lithuanian *Seimas*, Luxembourgish Chamber of Deputies, the Maltese House of Representatives, the Dutch *Tweede Kamer*, the Portuguese *Assembleia da República*, Slovakian National Council. Furthermore, other chambers could not participate because they lack the necessary institutional capacity although they would have potentially been interested in supporting this initiative.

and between the EU and its Member States on the other, in terms of increased autonomy of legislatures and as a further injection of national interests at the beginning of the legislative process.

It is the Treaty of Lisbon and in particular the Political Dialogue launched by the European Commission in 2006 that has prompted this more active and constructive role for NPs. Through individual and collaborative reviews (especially within COSAC) of the Commission's Annual Work Programme, they have tried to influence the selection of the key legislative dossiers for the year ahead. By the same token the EWS and the Political Dialogue on EU draft legislative acts have provided NPs with an avenue to influence EU legislation in the making and more precisely the development of the legislative process and the amendments. These innovations also raised their awareness and interest in EU matters in general, even fostering in some cases such as in Italy and Spain, the beginning of a systematic scrutiny of the European legislative proposals.

National Parliaments have expressed disappointment about the replies provided by the Commission to their opinions, the feeling that they only have a slight impact on the content of EU legislation, and the understanding of their role as mere veto players in the EU. This has triggered a recent significant reaction: the prospective creation of a 'green card' to be issued by NPs, according to the most recent informal inter-parliamentary and COSAC meetings. The national parliamentary chambers that supported the 'green card' originally have been very careful not to emphasize it as a tool that could lead to a revolution. It has been argued, indeed, that the power (monopoly) of legislative initiative of the Commission is by no means affected, nor is the role of the EP as co-legislator. In other words, a significant group of NPs or chambers, each of them on the basis of their national procedures, can submit a proposal for a legislative initiative to the Commission. In turn the Commission will have an obligation to respond to NPs either by adopting a legislative initiative or by justifying its decision not to take action, similarly to what Article 225 TFEU provides for the EP.

In any event a weighted balance between the representation of NPs and the efficiency of EU decision-making has to be struck. To avoid a slowing of the EU legislative process but also to favour considered and detailed replies from the Commission unhindered by an uncontrolled flow of 'green cards' by NPs, specific requirements in terms of thresholds and timing should be agreed between NPs and the Commission.

The extent to which the 'green card' is admissible under the existing treaty provisions, a condition for its workability, remains to be seen and largely depends on the prospective duties of the Commission. Should the idea of a 'green card' be endorsed by the Commission itself, as it appears from its first holding reply to the NPs' proposal on food waste management, it could be regulated in the EU via (enhanced) Political Dialogue through institutional practice and the unilateral commitment of the Commission to a follow up of NPs' proposals. Otherwise, a treaty revision will remain the only viable, although at present highly impracticable, option.

Regardless of the implementation of a ‘green card’ and the formal recognition of NPs as ‘agenda-setters’, it is the new attitude towards the EU shown by these legislatures that is particularly important in the current context of growing anti-European sentiments across Europe.<sup>86</sup> This could counter proposals like that of British Prime Minister David Cameron for a ‘red card’, whereby ‘groups of national parliaments, acting together, can stop unwanted legislative proposals’.<sup>87</sup> By contrast, NPs want to ‘contribute actively to the good functioning of the Union’ by bringing the inputs of national public opinions into the EU decision-making process. They are not satisfied having a role as mere guardians of the competence boundaries between Member States and the EU, and by the role – primarily of censorship – that the Lisbon Treaty granted to them.

In other words, the active contribution of NPs to the effective functioning of the EU should be based on a balanced relationship between their role as ‘agenda-setters’. This can be done by means of ‘green cards’ and (enhanced) Political Dialogue, interparliamentary cooperation and the evaluation of EU policies in the area of freedom, security and justice, and their negative role vis-à-vis EU institutions as veto or quasi-veto players (through the *passerelle* clauses and the EWS respectively) in selected cases also enshrined in Article 12 TEU. So far, however, this relationship has remained imbalanced. It is tipped towards an exclusively censorship role to constrain, delay or block the EU policy-making process. This appears to be a myopic move compared to the potential that NPs may bring to EU policy-making: they can represent the view of both national political majorities and minorities.

The extent to which the effective functioning of the EU will more generally be ensured by NPs through the ‘green card’ initiatives and, on the other hand, not leave them disappointed by this new device shall depend on the degree of coordination that NPs will be able to orchestrate in terms of selection of salient and topical issues to bring to the attention of the Commission in due time. Such a success will further depend on the commitment of the Commission to take NPs’ suggestions into account in its prospective legislative proposals. An assessment will only be possible once NPs have issued a real ‘green card’ for the first time because that has not really happened yet: as underlined, the first ‘green card’ issued in July 2015 relied on an initiative the Commission had already planned itself anyway.<sup>88</sup>

<sup>86</sup> S. Kröger and R. Bellamy, 14 *Comparative European Politics* (2016).

<sup>87</sup> See D. Cameron, Letter addressed to the President of the European Council, Donald Tusk: A New Settlement for the United Kingdom in a Reformed European Union, London, 10 November 2015, p. 4. This proposal was included in the ‘UK deal’ under discussion. Conclusion of the European Council meeting (18 and 19 February 2016), p. 17–18.

<sup>88</sup> See D. Fromage, ‘National parliaments in the Juncker Commission era: the ‘green card’ initiative and beyond’, 4 *Quaderni costituzionali* (2015), p. 1024–1026.