

National Parliaments and the EU Commission's Agenda: Limits and Recent Developments of a Difficult Partnership

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1. Introduction¹

National parliaments (NPs) were long excluded from 'European business', especially after the first direct elections of the European Parliament (EP) in 1979 (Maurer 2001; Lindseth 2010: 81-188). Not only did most NPs not have any influence on the position defended by their executives in the Community – and later European Union (EU) – instances 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 of 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 a 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 (art. 12 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 (art. 10 TEU).

However, it appears that the powers NPs now have are strictly negative or reactive: they can, among other things, veto the use of passerelle clauses (art. 48-6 TEU and art. 81-3 TFEU) or issue reasoned opinions to contest the respect of the principle of subsidiarity by a legislative proposal (this procedure is referred to as the Early Warning System, (EWS)). Hence they are basically designed by the treaties as institutional 'veto' or 'quasi-veto players' in the EU, since they are considered to be 'individual actors who have to agree to the proposed change' (Tsebelis 2002: 2), e.g. in the simplified treaty revision procedures, or as a collective actor who can delay or impose further conditions to the carrying out of the EU legislative procedures, like in the EWS.² Indeed, a number of reasoned opinions issued by NPs at least equal to one third of the votes cast (eighteen out of fifty-six 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 due reasons.³

Prima facie NPs do not currently have any direct and positive influence on EU legislation as 'agenda-setters', i.e. as players who can 'present take it or leave it proposals' (Tsebelis 2002: 2). The

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² Whether, under the EWS, NPs act as a collective actor or whether the individual dimension of participation prevails is subject to discussion. For example, Cooper (2006) sees NPs as a collective actor in a 'Virtual Third Chamber'; by contrast, Lupo (2014) 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.

³ This procedure, provided by art. 7, protocol 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.

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’.⁴ 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, for example 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 parliaments have not been able to exert such an influence, or that they are not willing to attain this possibility.

This contribution aims at showing how the Political Dialogue, launched by Commission President Barroso in 2006, has provided the conditions for a direct involvement of NPs on the legislative agenda of the EU through the scrutiny of the Commission’s Annual Work Programme (2.1.). By the same token, the EWS and the Political Dialogue may allow NPs to indirectly influence the EU Commission’s legislative proposals (2.2.).⁵ In contrast with this *status quo*, parliaments have recently begun to advocate the introduction of a ‘green card’, that is the right for national parliaments to propose 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’ (3).

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 the then Commission president, Barroso, NPs are now in direct contact with this European institution or, as Commission President Barroso and Vice-President Wallström put it, at the moment of the entry into force of the Lisbon Treaty, ‘In 2006, we set up the mechanism for Political Dialogue to put in place a privileged channel of communication between the Commission and national parliaments’ (European Commission 2009). 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 (a). The Lisbon Treaty also formalizes a second communication channel between NPs and the EU Commission through the creation of the EWS in whose framework NPs are invited to express their opinions regarding the respect of the principle of subsidiarity of an EU legislative proposal (b).

2.1. 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 describing 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, because of the Barroso initiative, NPs have been receiving the Annual Work Programme, which is transmitted directly by the Commission (alongside any initiative national governments can take with the same purpose). Thus the Political Dialogue allows for the interplay between the Commission and NPs about the legislative priorities to be put in the following year’s agenda as the content of the Work Programme. Indeed, in its implementation, this Programme shows a degree of flexibility and is then adapted to the actual needs of the policymaking process and to the economic, political and social developments occurring in the EU context.

The 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 launching the Political Dialogue, ‘The Commission wishes to transmit directly all

⁴ Art. 10, protocol 1 annexed to the Treaty of Lisbon. See Fasone (2013a: 1607-1621).

⁵ On the Barroso’s 2006 initiative regarding the Political Dialogue, see European Commission (2006: 9). The initiative was immediately endorsed by the European Council on the occasion of its subsequent meeting: European Council’s Conclusions of 15-16 June 2006.

new proposals and consultation papers to NPs, *inviting them to react so as to improve the process of policy formulation*. [emphasis added] (European Commission 2006: 9).⁶

The Lisbon Treaty has codified in EU primary law only the transmission of consultation documents, draft legislative acts, the annual legislative programme as well as any other instrument of legislative planning or policy, explicitly recalled by art. 1 of protocol 1, to NPs. In contrast, these legislatures are formally allowed to send their opinions to the Commission only within the EWS, that is on draft legislative acts falling outside EU exclusive competence on the grounds of the subsidiarity principle. Hence NPs' opinions on the Annual Work Programme are addressed and delivered to the Commission in the name of the practice unilaterally established by this EU institution through the Political Dialogue and do not enjoy a 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 criticize its behaviour on numerous occasions.⁷

A first dimension of parliamentary review of the Commission Work Programme is individual. Each parliament carries out its scrutiny and interacts with the Commission on an individual basis. It has to be highlighted, however, that in this scrutiny exercise and in the selection of the EU legislative and policy priorities for the coming year, parliaments are not alone. First of all, these priorities are usually defined together, or at least in agreement with their national executive, so that this is a joint exercise, given the parliamentary or semi-presidential form of government (except for Cyprus). Secondly, in federal and regional EU Member States federal or regional entities can also be involved and, 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 national parliament. Sometimes the standpoint of these regional legislatures is referred to in the parliamentary resolution or opinion adopted and transmitted to the Commission.⁸ It could not be different, after all, since the review of the Annual Work Programme entails the definition of the national priorities in EU affairs and thus is a strategic exercise which is the result of 'collective work' at domestic level and led by the executives.

There is also a second dimension of review of the Commission's Work Programme which regards the horizontal cooperation among NPs, and that 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: for example, those parliaments that sent opinions on the 2014 Annual Work Programme detected as priorities the OLAF reform and the setting up of the European Public Prosecutor's Office (see section 2.2.), the 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, the VAT system and the labour mobility package.⁹ These legislative dossiers are identified as either those on which the control of compliance with the principle of subsidiarity is accomplished on a first instance or those on which content parliaments want to exert an actual influence, even if they are not subject to the EWS, or those that raise an interest by parliaments for both reasons. Indeed, the reasons why a parliamentary scrutiny

⁶ 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 2011b: 35). Others, such as the French National Assembly, send contributions without asking for any response, in a bottom-up flow only.

⁷ For instance during the LII COSAC meeting in Rome in December 2014.

⁸ See, for instance, Italian Senate (2014), for what concerns the flexibilisation 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.

⁹ 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.

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.

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, parliaments often identify just 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 parliaments, like the UK Parliament, does not involve any consideration of the parliaments' viewpoint on the substance of the EU policy options. This could explain why, for instance, the French National Assembly has 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 and more in depth understanding of the Commission's standpoint.

Based on the weaknesses experienced in this loose coordination, NPs have tried to exploit another provision of protocol 1 in combination with those on the Political Dialogue, namely the submission of contributions by COSAC on the Commission's Work Programme (art. 10). By no means is the Commission bound by these contributions, but this avenue allows NPs to discuss the Work Programme *in concreto* – and not just to virtually interact through IPEX – and to define better common priorities. Hence institutional priorities, i.e. strategic preferences of all NPs, can supplement national priorities. The added value of COSAC in this pre-selection of parliaments' priorities for the year ahead has been expressly recognised 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 (UK House of Lords 2014: § 24).

COSAC's meetings, especially the meeting of COSAC's Chairpersons taking place 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 (rule 5). Operational arrangements for the joint scrutiny of the Work Programme have been under discussions on several occasions within COSAC (COSAC 2011a: Part 4). Not by chance was this issue also evoked during the meeting of COSAC's chairpersons on 1-2 February 2015, based on the result of an informal inter-parliamentary session organized on 19 January 2015 by the *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.'¹⁰

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.

2.2. 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 exclusive competence, that is a very small proportion of legal acts enacted

¹⁰ See the Summary record of the meeting of the Chairpersons of COSAC, 1 – 2 February 2015 in Riga, p. 2, available at http://www.parlament.gv.at/PAKT/EU/XXV/EU/05/49/EU_54923/imfname_10528119.pdf.

by the EU every year.¹¹ Furthermore, the review is limited, in its scope, only 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 national legislatures, immediately after the transmission of a legislative proposal, enables them to exert an influence on EU law-making at a very early stage. Art. 4, protocol 1 prevents the Council from placing the relevant legislative proposal on its provisional agenda of the 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. Hence this time frame is designed to allow parliaments to give political directions and legal inputs to the legislative process in the form of (reasoned) opinions.

On the negative side, instead, 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 legislatures by the Commission, the EP and the Council alongside the EP's legislative resolutions and Council's positions.¹² In other words, NPs cannot use the EWS to have an impact of the EU legislative process and outputs, which often develop in a very different way compared to the original draft of the Commission. This gives parliaments little or no power as 'agenda-setters' within the legislative process. Nor could such an assessment change because, according to art. 8, protocol 2, an action for infringement on the grounds of subsidiarity can now be notified to the Court of Justice 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 – which is not codified by the Treaties although it finds its legal basis there (protocols 1 and 2) –, 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. Although some NPs, like the Swedish *Riksdag*, send only reasoned opinions to the Commission, i.e. no positive opinions, opinions with remarks, or opinions based on grounds other than subsidiarity are submitted, and 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 parliamentary opinions in 2013, the Commission stated that opinions have stabilised at just over six hundred per year, of which approximately 14% were reasoned opinions' (European Commission 2014a: 4).¹³ 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 of legislative proposals per year.

In spite of this, five 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, and in particular of the former, which in principle grants them the power to force the Commission to review its proposals.

¹¹ 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 (2014b: § 2).

¹² See art. 4, protocol 2 annexed to the Treaty of Lisbon. As underlined by Philipp Kiiver (2012: 540), this is particularly problematic if the amendments were introduced following NPs' reasoned opinions.

¹³ 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.

For example, in the 22nd COSAC bi-annual Report, by citing the comments of many parliaments,¹⁴ it is 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’ (COSAC 2014b: 24).¹⁵ In the view of legislatures the impact, if any, of NPs 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 (UK House of Lords 2014: §40). 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.

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 the EU policymaking (Fabbrini and Granat 2013; Goldoni 2014).¹⁶ For the first time, twelve reasoned opinions (nineteen votes on the whole) by NPs triggered the threshold for a ‘yellow card’ and, 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 required 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 is unlikely to gather the necessary political support within the European Parliament and Council to enable its adoption.’ Nevertheless the parliamentary reasoned opinions, which represented the viewpoint of Member States’ peoples, and the echo of the first ‘yellow card’ reached, indisputably had a weight on the final considerations by the Commission.

By contrast, the second yellow card,¹⁷ on the setting up of the European Public Prosecutor’s Office did not prompt any effect in the Commission’s attitude towards the proposal.¹⁸ 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, since the compliance with the principle of subsidiarity was deemed confirmed. Hence the impact of the second yellow card on EU law-making

¹⁴ The UK House of Commons and House of Lords, French *Sénat*, Czech *Poslanecká sněmovna*, Irish Houses of the *Oireachtas*, Austrian *Nationalrat* and *Bundesrat*, Czech *Senát*, Cyprus *Vouli ton Antiprosopon*, Luxembourg *Chambre des Députés*.

¹⁵ The need to agree between NPs and the Commission on guidelines to respond on reasoned opinions was particularly emphasised by the UK House of Lords and, in fact, this question is included in the COSAC questionnaire which is currently circulating among NPs.

¹⁶ See 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 final, 21 March 2012.

¹⁷ And so far the last one. No orange card has ever been issued.

¹⁸ See the Proposal for a Council Regulation on the European Public Prosecutor's Office, COM(2013) 534 final, 17 July 2013.

has been non-existent. What has changed, instead, has been the acknowledgment by the Commission of the role of parliaments; 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 Regulation unchanged (European Commission 2013), although not yet satisfactorily according to many legislatures (Fromage 2015). It appears that in this second case NPs have been unable to change the agenda of the Commission, but rather they have strengthened the deliberative nature of the EWS in terms of the dialectic between institutional players and the quality of the justifications provided.

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.¹⁹ 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 (Fasone 2013b). The process begun already by the Political Dialogue on the Green Paper, which allowed NPs to express their views on a number of issues, like the setting up of a centralized system of registration, the level of harmonization of procedural requirements among Member States and the time limit of the collection of the signatures. Further suggestions regarded the replies by the Commission, its powers and its admissibility review.²⁰ The Draft Regulation then followed²¹, which became the object of parliamentary opinions contesting the too high threshold of 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.²² 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 too 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 finally endorsed by the plenary.²³ For example, the lowering from one third to one fourth 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 reading²⁴ – to reduce as much as possible the 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 designs primarily a role of veto players for them, but this avenue has still been poorly used so far.

3. 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 ineffective²⁵ and therefore

¹⁹ Indeed the adoption of EU Regulation 211/2011 of the EP and Council of 16, February 2011, on the citizens' initiative, based on art. 11.4 TEU, falls within the exclusive competence of the EU and thus the EWS is automatically excluded.

²⁰ 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, 11 November 2009, available on ipex.eu.

²¹ Proposal for a Regulation of the European Parliament and of the Council on the citizens' initiative, COM (2010) 119 final, Brussels, 31 March 2010.

²² 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.

²³ See the AFCO Committee Report tabled for the plenary, A7-0350/2010, 3 December 2010.

²⁴ As an agreement was reached between the EP and Council at first reading, the EP's position corresponds to the final legislative act, Regulation (EU) No 211/2011.

²⁵ 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 2014a: 184). Others, like the Finnish parliament, clearly declare that they 'continue to have grave reservations about the effectiveness of the

have asked for its reform.²⁶ By the same token, in an analogy with the ‘yellow’ and ‘orange’ cards existing in the framework of the EWS, parliaments 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’ (COSAC 2013: point 31). However, at least to start with, different understandings 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 (Open Europe 2013). 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’ (e.g. by the same parliaments). The ‘late card’, instead, would give NPs the power to object to a legislative proposal that results from negotiations between the Commission, the Council and the EP; proposals are often heavily changed with reference to the version originally examined by NPs.²⁷ 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’ (Dutch *Tweede Kamer* 2014: 14).

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 within a ten-week deadline, compared to the current eight weeks of the usual EWS.’²⁸ If one third of national parliaments agree on a position to change the proposal, the Commission should take into account the position of the parliaments and explain if it does not. If NPs do not reach a common position on the proposal within the ten-week deadline, a green light to proceed with the decision-making procedure is automatically given’ (Danish *Folketing* 2014: 3). As it appears, the Danish Parliament’s proposal is 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. In any event, the understanding of a ‘green card’ supported by the Danish *Folketing* seems to be rather different from the one proposed by COSAC and

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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 2014b: 24).

²⁶ There is a growing trend for parliaments to ask for the EWS to be reformed in order, for instance, for the eight week-deadline reserved for scrutiny to be extended to twelve weeks. See also the proposal of the Danish *Folketing* below.

²⁷ 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.

²⁸ 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.

the Dutch *Tweede Kamer*, as it would intervene once a legislative proposal has already been made by the EU Commission and, hence, would still be reactive rather than proactive.²⁹

The UK House of Lords in its Report on the role of the national parliaments in the European Union published in March 2014 also addressed this question and made its own proposal of what a 'green card' procedure should look like (UK House of Lords 2014: § 55-59). Its proposal is different from the Danish one in the sense that it not only suggests the possibility for NPs to make proposals to change already proposed legislation but 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' – and, in this sense, it is more in the line with the COSAC contribution. At the same time, the Lords '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'. 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'. The House of Lords' reading of the 'green card' procedure for NPs mirrors the post-Lisbon arrangement of art. 225 TFEU on the EP's power to submit any appropriate proposal to the Commission, which nonetheless remains free to disregard this submission and, hence, not to take subsequent legislative action by informing the parliament of its reasons.³⁰ The House of Lords' proposal would then grant both 'pillars' of representative democracy in the EU, the EP and NPs, equal rights to submit a proposal for a legislative initiative.

The idea of the introduction of a 'green card' – understood as the possibility for NPs to suggest legislation – seems to be gaining more and more attractiveness among NPs who, as a matter of fact, met in Brussels in order to discuss this initiative before the COSAC Chairs' meeting organized in Riga at the beginning of 2015.³¹ Following an invitation of the Dutch *Tweede Kamer*, fourteen parliaments and the EP discussed this possibility together with the question of the cooperation of national parliaments in their analysis of the Commission Annual Work Programme and the question of the reform of the EWS (Dutch *Tweede Kamer* 2015a and b; UK House of Lords 2015). 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 plus the EP (Latvian Parliament 2015). This idea has been examined by all NPs in preparation for the 23rd bi-annual COSAC report in the first semester of 2015 and it has to be seen whether the proposal for a 'green card' is going to convince a larger number, if not all, of them. In any case, the present context characterized by more openness of the new European Commission (2014-) towards national legislatures seems to be most favourable for the success of such a development, although Commission Vice-President Timmermans has already clearly expressed his opinion in favour

²⁹ 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 (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 questionnaire submitted to NPs in preparation for the LII COSAC plenary meeting of 31 May – 2 June 2015 has taken four interpretations of the 'green card' on board: Suggestions for new legislation, suggestions to amend existing legislation, suggestions to repeal existing legislation and suggestions to amend or repeal delegated or implementing acts. It remains to be seen which interpretation(s) of the 'green card' NPs will favour or whether they will suggest yet again a new approach.

³⁰ Poptcheva (2013: 5-8), shows that since the entry into force of the Treaty of Lisbon the EP's initiative rights have not been extensively used, being the EP more focused in influencing ongoing legislative procedures rather than to initiate new ones. Nevertheless when the EP has exercised its power under art. 225 TFEU the Commission has almost always taken consistent legislative actions afterwards.

³¹ This question received the support of several parliaments, among which the French chambers for example. See also COSAC (2015).

of an informal and non-bureaucratic approach, which does not entail a revision of existing procedures and institutional arrangements.³²

In the light of this clarification by the Commission, and as recently supported by Lord Boswell, ‘the green card procedure could build on the existing Political Dialogue’ (UK House of Lords 2015: 1). Should parliaments be 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, it is a possibility for NPs to suggest the Commission to adopt legislation in a certain area – which seems to be the predominant conception; whether it is a right for NPs to modify already proposed legislation as advocated by the Danish *Folketing*; or whether the ‘green card’ could be a possibility to amend an existing act, or even to repeal or amend implementing and delegated acts, as envisaged by COSAC’s 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 NPs to be guaranteed that they will be heard by the Commission, it may be desirable for some thresholds to be defined below which the EU Commission is not obliged to consider the proposal. In this matter, a balance needs to be struck between the need for a given proposal to be representative enough and the risk of having too inflexible thresholds – as is the case in the EWS – that formally allow the EU Commission to disregard parliamentary opinions even if only a few votes are missing. Therefore, one solution to this issue would be for the EU Commission to commit to always examine thoroughly the proposals made to it with, however, a special obligation in terms of the importance granted to a proposal, and of the justification the EU Commission has to provide for not taking it on board, if a defined number of NPs supports 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 parliament (UK House of Lords 2015: 3).³³ In addition, for the sake of representativeness, but also because it would amount to granting NPs with a right to ‘parliaments’ initiative’, one could imagine too that the minimum threshold required for the European citizens’ initiative – at least one quarter of all Member States –³⁴ would also be applied here (Kröger and Bellamy 2016).

Furthermore, 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 – e.g. three months, similarly to the examination of citizens’ initiatives –³⁵ and/or the relevant Commissioner can be asked to appear before the first signatory parliament of the proposal to respond to the green card, ‘with all co-signatories being invited to attend such a meeting’ (UK House of Lords 2015: 4).

Although lacking any formal acknowledgment of this new tool, on 22 July 2015 sixteen parliamentary chambers, led by the UK House of Lords and, in particular the Chairman of its European Union Committee, Lord Boswell, issued what they have named as the first ‘green card’

³² Indeed, in his response to Lolita Čigāne, Vice-President Timmermans declared ‘If 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 very pragmatic and immediate way* [emphasis added]’ (European Commission 2014b). See Minutes of the LII COSAC plenary meeting, Italian Senate, Rome, 30 November-2 December 2014.

³³ In bicameral systems each chamber would have one vote, like in the EWS.

³⁴ Art. 2, Regulation (EU) 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens’ initiative, OJEU L 65/1, 11 March 2011.

³⁵ Art. 10, Regulation (EU) 211/2011.

ever.³⁶ The proposal by national parliaments invites the Commission, 'when tabling a new circular economy package, to adopt a strategic approach to the reduction of food waste within the EU', according to a list of recommendations provided in the letter.³⁷ While waiting for the follow up by the Commission and despite the many uncertainties surrounding the procedure,³⁸ it can be highlighted that the 'green card' very much resembles as for its purpose and content the initial UK House of Lords' proposal of January 2015 and, significantly, has been supported by a number of chambers very close to the threshold of votes set by protocol 2 for triggering the orange card.³⁹

4. Concluding remarks

This paper aims to highlight an ongoing development about the role of NPs in the EU, that is the growing importance they give to constructively influence the decision-making process. An excursus can be traced in the position of NPs from passive actors, to veto players – based on some post-Lisbon Treaty provisions – to 'agenda-setters', although 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 remains outside the scope of this paper. It goes without saying, however, that, should parliaments be given a direct power of legislative initiative, or rather just the power to submit a proposal for a subsequent Commission's legislative initiative, the effects on the balance of powers between the EU and Member States, on the one hand, and between national executives and parliaments, on the other, would be far more problematic in the first case. Indeed, the autonomy of NPs vis-à-vis their executives would increase substantially alongside the power of the Member States, through their parliaments, to define the general political directions for the EU action.

It is the Treaty of Lisbon, and in particular the Political Dialogue, which had already been launched by the European Commission in 2006, that has prompted this more active and constructive role for NPs. By reviewing individually and in cooperation, in particular within COSAC, 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, like in Spain, the beginning of a systematic scrutiny of the European legislative proposals.

However, the disappointment expressed by most NPs about the replies provided by the Commission to their opinions, the perception of a scarce impact on the content of EU legislation, and the understanding of their role as mere negative-veto players in the EU has triggered a recent significant reaction: the prospective creation of a 'green card' to be issued by NPs, according to the most recent COSAC meetings and inter-parliamentary cooperation, under the UK House of Lords' leadership, in July 2015. The national parliamentary chambers that appear to support the 'green card' so far 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

³⁶ The co-signatories of the 'green card' are: the Bulgarian National Assembly, the Croatian Parliament, the Cypriot House of Representatives, the Czech Chamber of Deputies, 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, the UK House of Lords.

³⁷ See UK House of Lords, European Union Committee, and co-signatories (2015), 'Letter to the European Commission', *Food waste: a proposal by national parliaments to the European Commission*, 22 July 2015, available at <http://www.parliament.uk/documents/lords-committees/eu-select/green-card/green-card-on-food-waste.pdf>

³⁸ For example, the proposal for a 'green card' has been co-signed by the chairmen of the parliamentary committees on European affairs whereas the sectoral committees have not been involved although in several NPs they directly participate in the EWS.

³⁹ 26 votes vis-à-vis 29 needed for issuing the orange card with 28 NPs.

chambers, each of them based on national procedures, can submit a proposal for a legislative initiative to the Commission, which in turn 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 art. 225 TFEU provides for the EP. Here there has to be struck a weighted balance between the representation of NPs and the efficiency of EU decision making.

The extent to which the ‘green card’ is admissible under the existing treaty provisions, which is also a condition for its feasibility today, 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, it can be regulated in the EU via Political Dialogue through institutional practice and the unilateral commitment of the Commission to a follow up of NP’s proposals. Otherwise the 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 a role of ‘agenda-setters’ to NPs, 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 (Kröger and Bellamy 2016). 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 by the role of 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.

References

- Convention on the future of Europe (2002), Working Group I on the Principle of Subsidiarity, *Conclusions*, CONV 286/02 2002.
- Cooper, I. (2012), ‘A “Virtual Third Chamber” for the European Union? National Parliaments after the Treaty of Lisbon’, *West European Politics* 35(3): 441-465.
- COSAC (2011a), *15th Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny*, Brussels, May 2011.
- COSAC (2011b), *16th Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny*, Brussels, October 2011.
- COSAC (2013), ‘Contribution of the XLIX COSAC’, Dublin, 23-25 June 2013.
- COSAC (2014a), *Annex to the 22nd Bi-Annual Report of COSAC on EU Practices and Procedures*, Brussels, November 2014.
- COSAC (2014b), *22nd Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny*, Brussels, November 2014.
- COSAC (2015), Draft Outline of the *23rd Bi-Annual Report of COSAC*, presented at the Meeting of the LIII COSAC Chairpersons, Riga, 1-2 February 2015.
- Danish *Folketing* (2014), European Affairs Committee, *Twenty-Three Recommendations to Strengthen the Role of National Parliaments in a Changing European Governance*, January 2014.
- Dutch *Tweede Kamer* (2014), ‘Ahead in Europe. On the role of the Dutch House of Representatives and National Parliaments in the European Union’, *Final Report on Democratic Legitimacy*, May 2014.
- Dutch *Tweede Kamer* (2015a), Background paper by the Speaker on *Improving the Yellow Card Procedure*, 19 January 2015.
- Dutch *Tweede Kamer* (2015b), Background paper by the Speaker on *Selecting Dossiers from the Annual Work Programme*, 19 January 2015.
- European Commission (2006), Communication ‘Citizens’ Agenda – Delivering Results for Europe’, COM (2006) 211 final, Brussels, 10 May 2006.
- European Commission (2009), President Barroso and Commission Vice President Wallström (2009-2014), ‘Practical Arrangements for the Operation of the Subsidiarity Control Mechanism under Protocol no 2 of the Treaty of Lisbon’, Letter of President Barroso and Vice-president Wallström of 1 December 2009, available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/np/docs/letter_en.pdf.

- European Commission (2013), Communication to the European Parliament, the Council and the national parliaments '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, Brussels, 27 November 2013.
- European Commission (2014a), 'Annual Report 2013 on the relations between the European Commission and national parliaments', COM (2014) 507 final, Brussels, 5 August 2014.
- European Commission (2014b), 'Reply to the Contribution of the LII COSAC', Rome, 31 November-2 December 2014.
- Fabbrini, F., Granat, K. (2013), "'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', *Common Market Law Review* 50(1): 115-143.
- Fasone, C. (2013a), '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)*, Vienna-New York, Springer: 1607-1621.
- Fasone, C. (2013b), '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*, Bologna, Il Mulino: 157-196.
- Fromage, D. (2015), 'The Second Yellow Card and its Implication for the Participation of the National Parliaments in the EU: Analysis and Prospects', *Yearbook of European Law*, (forthcoming).
- Goldoni, M. (2014), 'The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation', *European Constitutional Law Review* 10(1): 90-108.
- Italian Senate (2014), Resolution of the Committee of European Policies on 'the European Commission's Annual Work Programme for 2014', (COM (2013) 379), 30 April 2014, doc. XXIV, no. 29.
- Kiiver, P. (2012), 'The Conduct of Subsidiarity Checks of EU Legislative Proposals by National Parliaments: Analysis, Observations and Practical Recommendations', *ERA Forum* 12(1): 535-547.
- Kröger, S., Bellamy, R. (2016), 'Beyond a Constraining Dissensus: The Role of National Parliaments in Domesticating and Normalising the Politicization of European Integration', *Comparative European Politics*, 14(1) (forthcoming)
- Latvian Parliament (2015), 'Letter from Chairperson of the European Affairs Committee, Lolita Čigāne, to the European Commission Vice-President Timmermans', 28 January 2015.
- Lindseth, P. L. (2010), *Power and Legitimacy. Reconciling Europe and the Nation-State*, Oxford, Oxford University Press.
- Lupo, N. (2014), 'Parlamento Europeo e Parlamenti Nazionali nella Costituzione "composita" nell'UE: le Diverse Letture Possibili', *Rivista AIC* 3, 12 September 2014.
- Maurer, A. (2001), 'National Parliaments in the European Architecture: From Latecomers' Adaptation Towards Permanent Institutional Change?', in A. Maurer, W. Wessels (eds.), *National Parliaments on their Ways to Europe: Losers or Latecomers?*, Baden Baden, Nomos Verlag: 27-75.
- Open Europe (2013), "'Green card", "Late card": Dutch Parliament Ups the Ante in EU Democracy Debate', *Open Europe blog*, 1 November 2013, available at <http://openeuropeblog.blogspot.it/2013/11/green-card-late-card-dutch-parliament.html>
- Poptcheva, E.-M. (2013), 'Parliament's Legislative Initiative', *Library of the European Parliament - Policy Briefing*, Brussels, 24 October 2013.
- Tsebelis, G. (2002), *Veto Players. How Political Institutions Work*, Princeton, Princeton University Press.
- UK House of Lords (2014), European Union Committee, 'The Role of National Parliaments in the European Union', March 2014.
- UK House of Lords (2015), European Union Committee, Lord Boswell of Aynho, 'The "Green Card": discussion paper', 19 January 2015.