

## Beyond Legislative Veto Power: The Transformative Effects of the Early Warning System for Subsidiarity Control Ten Years Down the Line

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**Abstract.** The majority of European Union (EU) studies tend to be critical of the Early Warning System (EWS) for subsidiarity control, deeming it as ineffective in blocking unwanted EU legislation. Against this background, the aim of this paper is to identify and discuss several transformative effects of the EWS connected with the quality and democratic character of the EU governance, beyond the tool's legislative veto power. A critical review of the EWS' interpretations as an accountability mechanism, Europeanization engine, parliamentary autonomy enhancing tool, platform of politicization of Europe, as well as an instrument improving the Commission's regulatory culture reveals that –although flawed by design– the modus operandi of the EWS has in fact contributed to reinforcing the input legitimacy of the EU. The argument is also made that the EWS should be viewed as a sort of 'reality-check' for the EU's legislative moderation, thus enhancing the 'perceived output legitimacy' of the EU policy-making. The paper, however, concludes that although the positive effects of the EWS ought to be recognized and valued, the mechanism in its current form has exhausted its democratic potential and needs to be complemented with new forms of representative politics in EU affairs.

**Keywords:** Early warning system; European Union; input legitimacy; output legitimacy; Europeanization; politicization.

### [en] Más allá del poder de veto legislativo: los efectos transformadores del mecanismo de alerta temprana para el control de subsidiariedad diez años después

**Resumen.** Los estudios de la Unión Europea (UE) tienden mayoritariamente a ser críticos con el mecanismo de alerta temprana para el control de subsidiariedad, desechándolo por su ineficacia para bloquear la legislación de la UE indeseada. Teniendo en cuenta estos antecedentes, el objetivo de este artículo es identificar y discutir varios efectos transformadores de este mecanismo conectados con la calidad democrática de la gobernanza de la UE, más allá del poder de veto legislativo de la herramienta. Una revisión crítica de las interpretaciones de la alerta temprana como instrumento de rendición de cuentas, motor de europeización, herramienta para el fortalecimiento de la autonomía parlamentaria, plataforma de politicización de Europa, así como instrumento de mejora de la cultura regulativa de la Comisión revela que, aunque con defectos en su diseño, su funcionamiento ha contribuido en la práctica a reforzar la legitimidad de origen de la UE. También se argumenta que el sistema de alerta temprana debe ser visto como una especie de prueba de realidad para la moderación legislativa de la UE, que como tal fortalece la legitimidad de origen percibida de la elaboración de políticas de la UE. El artículo concluye, sin embargo, que, aunque los efectos positivos de la alerta temprana deben ser reconocidos y valorados, el mecanismo en su forma actual ha agotado su potencial democrático y precisa ser complementado con nuevas modalidades de política representativa en asuntos de la UE.

**Palabras clave:** Sistema de alerta temprana; Unión Europea; legitimidad de origen; legitimidad de resultados; europeización; politicización.

**Summary.** 1. Introduction. 2. EWS: treaty provisions and their political effects. 3. Input legitimacy related effects of the EWS. 4. Output legitimacy-related effect: EU's legislative moderation. 5. Conclusion and a way forward. 6. Bibliography.

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## 1. Introduction

The Lisbon Treaty (Treaty on European Union<sup>2</sup>, hereafter TEU) –sometimes enthusiastically referred to as the “treaty of parliaments”<sup>3</sup>– was undoubtedly a landmark document in terms of formally strengthening the role of national legislators in the EU political architecture. The innovative character of the TEU consisted in several aspects. First, the treaty made first, direct reference to national parliaments (hereafter NPs) in its main text, providing that their task was to “contribute actively to the good functioning of the Union” (article 12 TEU). Second, TEU granted NPs with a broad catalogue of rights regarding access to information including EU draft legislative and non-legislative acts (art. 12.a TEU). Third, it involved NPs in simplified treaty revision procedures by allowing them to participate in the use of the general *passerelle clause* (Art. 48.7 TEU). Finally, and most importantly, it granted them a direct and crucial role in the EU legislative process as the guardians of the principle of subsidiarity (art. 5.3 TEU). The procedural format of that role was set out in the Protocol No. 2 on the application of the principles of subsidiarity and proportionality, through the mechanism called the Early Warning System (hereafter EWS).

The introduction of the EWS has been certainly the most spectacular institutional innovation to date related to strengthening NPs in the EU. It was established, in large part, due to a widely shared perception amongst political élites that the continuous transfer of sovereignty to the European level had undermined parliamentary control and caused a democratic deficit, which cannot be tackled by empowering the European Parliament (EP) alone, but also demands a stronger involvement of NPs (Raunio, 2005; Rittberger, 2005). To some extent, the new procedure was supposed to restore their representative function in EU affairs. However, since the beginning of its functioning, the EWS met with mixed feelings and criticism in the academic literature. It was predicted that the mechanism would remain a mere “window dressing” largely unexploited by NPs (Raunio, 2010) since breaches of subsidiarity principle by EU legislators are not a real problem in EU life. In the same vein, Benz (2011) wondered whether the new rules of the EWS would be of anything more than a symbolic significance. Other scholars were even harsher, claiming that the mechanism would not only fail to alleviate the democratic deficit, but also obfuscate the existing channels of delegation and accountability in the EU (De Wilde, 2012). Finally, there were voices that the EWS would administratively overburden NPs and distract their attention and resources away from the two core parliamentary functions, i.e. controlling governments and connecting to citizens.

Ten years after its introduction, the nature, purpose and effects of the EWS still remain contested. On the one hand, the tool is deemed ineffective as a legislative veto mechanism with only three so-called “yellow cards” triggered by NPs so far, and only one case in which the procedure resulted in the EU legislative proposal being withdrawn (Rozenberg, 2017; Fromage and Kreilinger, 2017 *inter alia*). It is also criticized for its narrow scope, excluding important aspects of EU policy proposals as proportionality and legal basis (Kiiver, 2012; Jancic, 2015 *inter alia*). On the other hand, studies show that in some cases, beyond the yellow cards, parliamentary concerns expressed in the so called “reasoned opinions” have had tangible impact on the contents of the final EU legislation (Cooper, 2019). Yet, the extent to which the EWS should be evaluated as a success or a failure is not self-evident, even for NPs themselves. Responding to a question of whether they find the process established by Protocol No 2 of the TEU effective and efficient, 16 out of 39 parliamentary chambers had no opinion (COSAC, 2018a). The large number of “no opinion” responses might have been due to the fact that the issue is too complex to provide a simple yes/no answer.

Against this background, the aim of this article is to contribute to the process of EWS’ evaluation by identifying and analysing a number of transformative effects of the mechanism connected with the quality and democratic character of EU governance. The underlying assumption of this research is that, notwithstanding the rightful criticism of the EWS’ relative incapacity to block unwanted EU legislation, ten years down the line the mechanism merits a more comprehensive assessment. To this end, the paper identifies and discusses several transformative effects of the EWS connected with the EU input legitimacy, as well as one important, yet overlooked, outcome of the procedure related to the output legitimacy dimension. In the former case, the analysis focuses on EWS interpretations as an accountability mechanism, Europeanization engine, parliamentary autonomy enhancing tool, platform of politicization of Europe, as well as an instrument improving the Commission’s regulatory culture. In the latter case, the EWS is hypothesized to acts as a sort of “reality-check” for the EU’s legislative moderation. The paper concludes that although majority of the analyzed EWS effects have contributed to increasing the quality and democratic legitimacy of the EU multilevel polity, the mechanism in its current form has exhausted its democratic potential and should be complemented with new forms of representative politics in EU affairs. The context of the COVID-19 pandemics adds additional angle to the undertaken analysis as the new forms of crisis-related coordination and governance pose challenge to the effective engagement of national parliaments in EU decision-making processes (ECPRD, 2020).

<sup>2</sup> Consolidated version after the changes introduced by the Lisbon Treaty

<sup>3</sup> See, for example, the speech of Maroš Šefčovič, former vice-president of the European Commission: [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_10\\_116](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_10_116), accessed 25.03.2020

The following analysis draws from several kinds of data sources. The first one includes insights from the existing literature and EU institutional documents. The second consists of rich empirical data extracted from COSAC bi-annual reports, especially their annexes. The third portion of data stems from the author's own empirical research and the feedback obtained from NPs. It includes the findings from a questionnaire conducted between June and July 2019 among 39 parliamentary chambers (excluding the British Houses of Parliaments), addressed by higher level clerks working at EU affairs commissions. While the general purpose of the survey was to address a question of whether NPs are "multi-arena players" in the EU, its section dedicated to the EWS inquired about NP' motivations to participate in the procedure as well as about evaluation of its effectiveness. Additional information was obtained through interviews conducted with the heads of European affairs commissions (EAC) secretariats at the Polish and French parliaments over the period of March to May 2019.

The remainder of this article is structured as follows. The next section presents formal aspects of the EWS as enshrined in the Treaty of Lisbon, followed by a general overview of their political effects so far. The next one identifies and discusses a number of input-legitimacy oriented transformative effects of the EWS. The following section introduces and elaborates on the output-legitimacy related aspect of the mechanism, which to date have been overlooked in the literature. The paper finishes with conclusions and a discussion of the future prospects for the EWS as well as parliamentary EU-oriented activity in general.

## 2. EWS: treaty provisions and their political effects

As provided by Protocol 2 attached to TEU, within the framework of the EWS, NPs were given eight weeks –from the date of the European Commission's transmission of an EU draft legislative act translated to the national language– to scrutinize it and issue the so-called "reasoned opinion" (RO) if they consider that the draft in question does not comply with the principle of subsidiarity. In line with Article 5(3) TEU, the principle of subsidiarity states that "in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level". Although words "sufficiently" or "better" are to some extent contestable and can be interpreted using different rationales and criteria, it is commonly admitted that the objective which constitutes and gives sense to the subsidiarity principle is the maximum relative efficacy of the level of governance which acts within the legal framework of the attribution of competences (for more about the legal and political aspects of subsidiarity see Kiiver 2012).<sup>4</sup> The tasks of observing the principle of subsidiarity by the Commission, and controlling it by national parliaments, refer to the category of competences shared between the EU and Member States and constitutes a broad range of areas including, *inter alia*, environmental protection, internal market regulations, energy policy or the controversial migration and asylum policy (art. 4 TFEU<sup>5</sup>).

In line with Protocol no. 2, two potential outcomes can emerge from the EWS: parliaments can raise a "yellow card" when at least one third of them (19 votes)<sup>6</sup> oppose the draft legislative act on the basis of its non-compliance with the subsidiarity principle. In such case, Art. 7 of Protocol no. 2 provides that the initiator of the contested draft (usually the Commission) must review the proposal and decide whether to maintain, amend or withdraw it, giving reasons for each decision. Parliaments can also raise an "orange card" when more than half of them (29 votes) oppose a draft legislative act on grounds of subsidiarity breach. If the Commission, after reviewing the draft, decides to maintain it, the European legislators (by a majority of 55 per cent of the members of the Council or a simple majority in the European Parliament) shall decide whether or not to block the Commission's proposal. If either of them shares the opinion of NPs with respect to the breach of subsidiarity, the legislative proposal will not proceed. In addition, Article 8 of Protocol no.2 granted NPs the right to bring legal action before the Court of Justice of the EU on the basis of a subsidiarity breach, provided that they had previously issued a RO within the EWS.

During the ten years of the EWS' operation –since December 2009 until December 2019– NPs have raised collectively only three yellow cards. There have been no orange cards raised so far and no parliament has referred to the CJEU on the basis of subsidiarity breach. The first yellow card was triggered in May 2012 concerning the Commission's proposal for a 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" (the so-called "Monti II").<sup>7</sup> Its aim was to develop a legislative framework for transnational industrial action (the right to strike) in

<sup>4</sup> In line with this definition, two conditions should be fulfilled for the EU action to be justified: 1) insufficiency of Member States in performing the action at the national level (insufficiency test) and 2) added value of the same action performed at EU level (added value test).

<sup>5</sup> Consolidated version of the Treaty on the Functioning of the European Union.

<sup>6</sup> Each NP was allotted two votes under the EWS, one vote per chamber in bicameral systems, which gives a total of 56 possible votes cast by 28 Member States of the European Union (before Brexit). Each RO counts as one vote if issued by a single chamber in a bicameral parliament and two votes if issued by a unicameral parliament. There were 15 unicameral parliaments and 13 bicameral parliaments in the EU before Brexit.

<sup>7</sup> ROs were delivered by 12 national chambers representing 19 votes under the EWS.

the context of EU internal market. As a result of the EWS, in September 2012 the Commission announced its intention to withdraw the proposal. Paradoxically, however, this decision was not dictated by ROs' verdicts related to subsidiarity breach, but by the Commission's concerns of insufficient support for the proposal within the European Parliament and the Council (cf. Fabbrini and Granat 2013).<sup>8</sup> The second yellow card was raised in October 2013, challenging the Commission's proposal to create a European Public Prosecutor Office (EPPO).<sup>9</sup> In that case, the Commission dismissed subsidiarity breach<sup>10</sup> and decided to maintain the proposal. Although the yellow card did not stop the legislative process, it surely generated a further debate on the proposal at the level of the Council. Eventually, only 20 of 28 Member States took part in the creation of EPPO in the framework of the so-called enhanced cooperation. The third yellow card was raised by NPs in May 2016 with regard to an (amendment) proposal for a Directive concerning the posting of workers in the framework of the provision of services (the so-called Posted Workers Directive, PWD).<sup>11</sup> The new aspect of the third card was its geographical scope as it led to the emergence of a regional block of ROs from NPs of Central and Eastern Europe (plus Denmark). In its response, the Commission justified its proposal, rejected the subsidiarity concerns raised by NPs, and decided to continue the legislative process. In spite of opposition coming from many NPs and a consequent political split between "old" and "new" Member States, the proposal has finally obtained the necessary majority in the Council and passed as legislation.

While a deeper analysis of the issued yellow cards would extend the scope of this paper (for such purpose see e.g.: Cooper, 2015; Jancic, 2015; Fromage and Kreilinger, 2017), their consequences merit some brief words of summary. First, the three cases have demonstrated that both –NPs as well as the Commission– treat EWS quite instrumentally. NPs are using it for political reasons, claiming subsidiarity breach even if there isn't one, in order to express their opposition to the proposed EU policy solutions.<sup>12</sup> While such state of affairs have been explained by scholars as a natural consequence of NPs being political institutions operating with political arguments in their evaluations of policy contents (Kiiver, 2012), it stays in a conflict with the formal scope of the narrow remit of subsidiarity analysis. The Commission, on the other hand, tends to act rather discretionally, withdrawing proposals with little chances of final approval in the Council while disregarding NPs reservations expressed in the ROs when it knows the proposal will gain ultimate majority support in the Council. As the third yellow card has shown, it does so even if some aspects of subsidiarity require further clarifications.<sup>13</sup>

However, notwithstanding the relative ineffectiveness of the yellow cards, we can observe a positive evolution in terms of the Commission's responsiveness to parliamentary feedback within the EWS. While in case of the first yellow card, the Commission did not properly address the concerns of NPs expressed in their ROs nor engaged in any form of a dialogue with them, its response to the second yellow card on EPPO amounted to a 13-page argumentation and was much more comprehensive. Moreover, apart from issuing a general communication to all NPs, as in case of Monti II, the Commission also issued individual replies to each chamber who had submitted a RO. In some cases, it resulted in a sort of inter-institutional dialogue as some parliamentary chambers submitted a second, and even a third contribution (Fromage and Kreilinger, 2017). The format of individual replies to each ROs was maintained in case of the third yellow card on PWD. This improvement of the Commission's replies to ROs has been acknowledged by NPs (COSAC 2016; 23). In its response to the Report of the Task Force on Subsidiarity, Proportionality and "Doing Less more Efficiently" published in July 2018 under the chairmanship of the former First Vice-President Frans Timmermans, the Commission obliged to produce aggregate responses where four or more NPs issue ROs on EU legislative proposal but where their number falls short of the threshold required to trigger a "yellow card". The replies will be made available to the public and the co-legislators (Commission, 2018).

### 3. Input legitimacy related effects of the EWS

While the assessment of the EWS by the outcome of the hitherto yellow cards is rather disappointing, this research claims that the tool's veto capacity should not be the only sign of the system's effectiveness or lack of it. The principle of subsidiarity links the *input* and *output* dimensions of legitimacy (Scharpf 1999) inasmuch as it regulates the allocation of policy-making competence within the EU multi-level system according to democracy and efficiency related arguments. With regard to the former, it encourages decision-making to take place closer to citizens, or problem at hand. In this context, the institutional design of the EWS enhances the

<sup>8</sup> The analysis of ROs show that NPs have expressed reservations to the choice of a wrong legal basis and the breach of the principle of proportionality as main weaknesses of the proposal. In its response to NPs, the Commission observed that the subsidiarity principle was in fact not breached.

<sup>9</sup> ROs were issued by 11 parliaments and amounted to 18 subsidiarity votes.

<sup>10</sup> There was no doubt that the Commission had the competence to make such a proposal since Article 86(1) TFEU reads: "In order to combat crimes affecting the financial interests of the Union, the Council [...] may establish a European Public Prosecutor's Office from Eurojust".

<sup>11</sup> ROs were issued by 14 parliamentary chambers giving a total of 22 votes under the EWS.

<sup>12</sup> The fact of misusing the EWS has been brought up even by some NPs such as, for example, the French Assemble Nationale in 29<sup>th</sup> COSAC Bi-annual Report (see annex).

<sup>13</sup> Scholars admit that in case of the PWD subsidiarity was breached but solely on the basis of procedural grounds, i.e. in the sense that the Commission failed its obligation contained in Article 5 Protocol No. 2 to justify its action and especially its added value.

“democratic” element of subsidiarity by strengthening the control of NPs –as representatives of citizens– over the EU policy-making process. Literature to date allows to extract several other aspects of the EWS potentially increasing the representative dimension of EU legitimacy.

### 3.1. Accountability – enhancing tool

Philipp Kiiver, probably as one of the first scholars, made the case for conceptualizing the EWS as an accountability mechanism (2012). Thus, in his view, the main added value of this system is not to veto Brussels, but to make it justify and explain new legislation. It goes without a doubt, that the EWS provided the first and only, unmediated channel of parliamentary control over EU legislation involving potential sanctions. The accountability role of the EWS does not only lie in the NPs right to issue reservations to the Commission’s proposals, but also in the latter one being obliged to address them. In this way, the Commission –as the EU executive and policy-initiator already horizontally accountable to the European Parliament (EP) and the Council– has become additionally, vertically accountable to the collective of NPs under the threat of consequences (yellow or orange card). Contrary to what De Wilde’s suggested, this increase in domestic parliamentary control over EU policy-making does not obfuscate the existing channels of delegation and accountability by duplicating the oversight function of the EP. In fact, the latter one receives and processes all ROs coming from NPs, whereas EP committees directly engage in cooperation with national chambers, either at the pre-legislative, or post-legislative stage of the EU policy-making. Moreover, the EP supports NPs in their scrutinizing task and even calls for their facilitation and extension under the EWS (COSAC, 2018: 347). In this sense, the EWS adds strength to the concept of “positive-sum legitimacy” (Bardleben and Hurrelmann, 2007: 21) which implies that the different levels of governance reinforce each other’s lawfulness through a relationship of mutual support.

### 3.2. Parliamentary Europeanization engine

The studies have also shown that introducing the EWS has generated a process of Europeanization of parliamentary administrations and, albeit to a lesser extent, parliamentary elites (Cooper, 2012). It resulted not only in institutional reorganization, introduction of new procedures, or mobilization of additional human resources in virtually all chambers (COSAC, 2010; Borońska-Hryniewiecka, 2013a) but also in establishing new forms of inter-parliamentary cooperation and networking in EU affairs (Goldoni, 2016). Yet, instead of driving resources away from crucial parliamentary functions (as feared by de Wilde), the establishment of the EWS triggered policy-learning, and thus motivated NPs to intervene in EU decision-making sooner and more actively, also beyond subsidiarity. The study of post-Lisbon changes in the Austrian *Nationalrat* and the Dutch *Tweede Kamer* conducted by Miklin (2016) illustrate these processes. His research found that the impact of the EWS on NPs scrutiny in EU affairs may have been larger than commonly expected, increasing parliamentary activity in influencing their governments’ position on EU dossiers more generally. Last but not least, the introduction of the EWS has also raised institutional awareness of the necessity to discuss EU policies with regional (sub-national) parliaments with legislative powers and generated transforming dynamics in parliamentary *modus operandi* in EU decentralized Member States (Borońska-Hryniewiecka, 2017a & b).

### 3.3. Leverage for parliamentary autonomy?

In their conceptual article published in *Journal of European Public Policy*, Auel and Neuhold treat the EWS as a one of the elements of a “multi-arena playing field” where NPs act as collective players “formally independent of their governments who no longer hold a hierarchical gate-keeper position” (2017, 1550). This poses an empirical question of whether operationalization of the EWS has indeed increased parliamentary autonomy in EU affairs vis-à-vis their governments? While being theoretically plausible (i.e. parliamentary participation in the EWS is formally regulated by the EU treaty, independently of domestic prerogatives, and legitimizes NPs to act as direct interlocutors vis-a-vis the Commission), there is little actual evidence that the tool has *de facto* boosted NPs’ position as autonomous players. As much as the EWS has strengthened the domestic accountability link between NPs and national governments by obliging the executives, who hitherto dominated the EU legislative process, to pay greater attention to their parliamentary principals, the logical motivation of parliamentary majorities remains to support their governments in EU affairs. Empirical studies confirm that the EWS is usually used for the same purpose. The three cases of yellow cards have shown, that NPs action under EWS is very much government-linked and that ROs are an emanation of government’s positions on EU policy (cf. Bellamy, 2014; Fromage and Kreilinger, 2017). In a similar way, questionnaires conducted by the author in the period June–July 2019 among higher-level clerks of the European Affairs Committees of NPs revealed that although many acknowledge that in formal terms ROs can be decided independently, informal political coordination between parliamentary majority and the government takes place. Out of 25 chambers who responded to the survey, only five stated that their ROs are conducted and adopted independently of the executive (Danish *Folketing*, Portuguese *Assembleia* and the French *Senát* both houses of the Dutch parliament). A closer anal-

ysis of the Polish and French lower chambers' participation in the EWS in the period of Juncker Commission confirmed the inter-institutional arrangement whereby subsidiarity scrutiny is done in compatibility with the executive and the positions are usually accorded. While 75% of ROs issued by the Polish *Sejm* in the analyzed period explicitly supported the government's position, clerks at the *Assemblée nationale* admitted that ROs hardly ever constitute a "political problem" for the executive (Borońska-Hryniewiecka, 2020). In some cases (e.g. Czech Senate) the position of the government is one of the sources based on which the rapporteur decides whether to propose a RO to the EAC. Cooper has also pointed to cases when the government might steer the chamber not to adopt a RO (Cooper, 2015)<sup>14</sup>.

### 3.4. Platform for domestic politicization of Europe

Since parliamentary feedback to the Commission under the EWS depends in large measure on the domestic political deliberations and contestations that inform it, the procedure can be also interpreted as a way of politicization of EU policies which indirectly enhances the EU democratic legitimacy (Hix and Follesdal, 2006). The literature confirms this aspect to some extent. For example, Gatterman and Heffler (2015) showed that parliamentary activity in the EWS largely depends on MPs' political motivation. They found that, at the national level, the number of ROs was dependent on party political contestation over EU integration as well as on the salience and urgency of draft legislative acts. In a similar way, Williams and Bevan (2016) showed that greater public Euroskepticism is associated with the issuance of more ROs. Political discourses and debates about the content, instruments and objectives of EU policies, as well as about the future of the EU polity, are fundamental to democracies and contribute to the building of legitimacy as well as identity. Thereby parliamentary engagement in the EWS can be understood as providing political linkage between EU policy-making and those represented in the domestic context, thus bridging the gap between EU realm and domestic politics.

### 3.5. Disciplining tool in the Commission's regulatory approach

Protocol no. 2 attached to the Treaty of Lisbon puts an obligation on the Commission to provide in its draft legislative proposals the so-called impact assessment (IA) in which –next to subsidiarity-related analysis– the potential economic, social and environmental consequences of the proposed legislation are taken into account (art. 5). The reasons for concluding that the Union's objective can be "better achieved at the EU level" (i.e. the second subsidiarity condition)<sup>15</sup> should be substantiated by qualitative and, when necessary, quantitative indicators. The proposal should also take into account any financial or administrative burdens for public or private sectors in relation to implementation of a proposed policy. Robustness of such IAs is being systematically evaluated by the Regulatory Scrutiny Board's (RSB); a semi-independent expert body established within the EU Better Regulation Agenda. The analysis of the RSB's reports from the years 2012–2018 shows that the quality of the Commission's IAs has improved during the past years. Whereas in 2012, the Board considered 47% of the conducted IAs unsatisfactory in terms of arguments related to subsidiarity and proportionality, in 2018 it called for improvements in only 28% of the analyzed cases (RSB Annual Reports, 2012-2018). It is assumed here that parliamentary feedback produced as a result of participation in the EWS has, at least to some extent, contributed to this improvement by exerting certain disciplining effect on the Commission's drafting of EU legislation.

Although RSB cannot access ROs before it sees the Commission's IAs (as they are done before the publication of draft legislative proposals), the chairwoman of the RSB, Veronica Gaffey, admitted in an email exchange<sup>16</sup> that the Board looks closely at the feedback received from MS, including their national parliaments. This feedback includes various parliamentary observations and concerns related to the quality of EU policy proposals generated in the process of domestic monitoring of EU affairs. While majority of NPs begin their scrutiny activities from assessing subsidiarity aspects, once the decision is taken whether to activate the EWS or not, many chambers also decide to express other sorts of comments related to the analyzed dossiers. If subsidiarity checks are not followed by a RO, they often result in a submission of an opinion within the broader framework of "political dialogue" (PD)<sup>17</sup>, where the chamber is able to communicate its political views more generally, raising issues of the proposed policies' potential policy impact, aspects of proportionality<sup>18</sup> and legal basis. In fact, the number of PD opinions has increased after the introduction of the EWS (Rozenberg, 2017).<sup>19</sup> Yet, as mentioned before, empirical data reveal that in spite of the narrow scope of the EWS, many NPs use

<sup>14</sup> Spanish government may have influenced the decision not to pass an RO in case of Monti II.

<sup>15</sup> The first one being insufficiency of Member States-level action.

<sup>16</sup> The email consultation with Veronica Gaffey, Chair of the RSB, took place on 23 March 2020.

<sup>17</sup> The procedure also known as "Barroso initiative" was established by the Commission in 2006. Its scope includes also non-legislative documents such as communications, policy strategies or annual work programs.

<sup>18</sup> According to which "the content and form of EU action shall not exceed what is necessary to achieve the objectives of the Treaties".

<sup>19</sup> The proportion of ROs compared to the overall number of opinions issued within the political dialogue has been quite low (at around 10%) and declining over the last years to 6.5 % in 2018 (European Commission, 2019).

the system to express their non-subsidiarity related concerns (cf. Borońska-Hryniewiecka, 2013a).<sup>20</sup> In fact, as revealed in several COSAC bi-annual reports (e.g. 18<sup>th</sup> and 29<sup>th</sup>), almost all national chambers consider the principle of proportionality when scrutinizing draft legislative acts. In fact, majority of them do not believe that subsidiarity checks would be effective otherwise. More importantly, as shown in the case of the second and third yellow card, although NPs comments surpassed subsidiarity, and referred both to conferral and proportionality, the Commission replied to them. In this sense, subsidiarity scrutiny becomes a starting point which –although itself does not bring tangible legislative effects– stimulates a broader communication between NPs and the Commission. The latter one admits that opinions of NPs constitute an invaluable source of insight and analysis for the Commission’s interactions with the other institutions’ (European Commission, 2017: 7).

Yet, while the improvement of the Commission’s IAs is statistically observable, it is not yet fully satisfactory. Empirical evidence reveals that ten years down the line, NPs still complain about insufficient justifications of the principle of subsidiarity and the proposed actions’ added value in the Commission’s legislative proposals (29<sup>th</sup> COSAC bi-annual report). The particularly brief and tautological justification of the need to amend the existing legislation with regard to the posted workers’ directive (an object of the 3<sup>rd</sup> yellow card) is a case in point (cf. Fromage and Kreiling, 2017). That is why the critical parliamentary feedback based on the EWS experience in form of a contribution to the 2018 Subsidiarity Task Force Report should play an important role in the further improvement of the Commission’s regulatory approach. In its response to the Task Force’s recommendations to better highlight the concept of European added value, the Commission obliged to raise this issue in its guidance to staff and present more clearly its assessments of subsidiarity and proportionality in the forthcoming IAs (Commission, 2018).

#### 4. Output legitimacy-related effect: EU’s legislative moderation

As mentioned above, one common denominator of a negative assessment of the EWS is that it does not deliver the expected results as legislation-blocking tool, until today NPs have managed to issue only three collective warnings (yellow cards) to the Commission. Yet, this in itself should not be a sign of the system’s effectiveness or lack of it. In fact, what is surprisingly neglected in the literature and public debates, rarity of yellow cards can testify that, contrary to what Eurosceptics say, the Commission does not systematically break the principle of subsidiarity by unlawfully and unreasonably “enforcing” policy solutions upon Member States.

The underlying purpose of the EWS was, precisely, to give NPs the possibility to actively scrutinize the allocation and use of competences between the Member States and the EU. Although the conferral review (i.e. allocation of competences) falls outside the ambit of the EWS, the Commission is nevertheless obliged to specify the legal basis of the proposed measures in its legislative drafts, which is later verified by NPs and, ultimately, by the Court of Justice of the EU. With regard to the actual use of these competences, the control of subsidiarity through the EWS encompasses the requirement of rationality and certain moderation in the exercise of shared legislative powers, entailing a twofold logic of conduct: i.e. negative, expressed by the right to say “no” to the unjustified (inefficient, irrational) EU intervention leading to unnecessary centralization of policy-making; and positive, according to which the EU should act to help the Member States when these are not capable to achieve the desired results by the intervention at the national level (this situation can take place due to the transnational character of identified problems and the fact that the existing legal framework at national level proves to be insufficient to address them). In light of the above, only three yellow cards issued during ten years might mean that the second logic prevails in the EU policy-making.

But let’s look at the bigger picture, i.e. statistics beyond the three yellow cards. During the same time –since December 2009 until December 2019– NPs issued 469 ROs in the framework of EWS.<sup>21</sup> It is not a large number taking into account that it refers to a total of 785 legislative proposals being subject to EWM scrutiny<sup>22</sup> which gives an average of less than one RO per proposal. Moreover, most ROs have been concentrated on a relatively small number of legislative drafts out of which only 16 attracted more than six ROs and received at least 50% of the votes necessary to trigger a yellow card (cf. Cooper, 2018).<sup>23</sup> Taking into account that NPs conduct systematic, subsidiarity-oriented scrutiny of EU proposal, the relative rarity of ROs confirms that the overwhelming majority of draft EU legislation is perceived by domestic legislators as lawful, fairly reasonable and ultimately necessary.

As a counter argument, it is sometimes posited that low number of ROs is caused by an insufficient period of time available for issuing opinions and coordinating positions among NPs (8 weeks). In other words, had the scrutiny time been longer, NP would have found more cases of subsidiarity breach. While scrutiny timing

<sup>20</sup> Depending on parliamentary approach to EU scrutiny, some NPs channel these wider concerns either in their ROs; under the PD; or in both ways.

<sup>21</sup> This number refers to the total number of opinions issued by parliamentary chambers under Protocol No 2 to the Treaties according to the European Commission Annual Reports for the years 2010-2018 and cross-checked the IPEX database.

<sup>22</sup> This total is compiled on the basis of data obtained from IPEX database and cross-checked with EP connect database.

<sup>23</sup> The statistics for the years 2010-2017 are taken from the study of Cooper (2019). For the years 2018-2019 they were compiled by the author. In 2018-2019 there were no EU proposals that attracted more than 4 ROs.

might indeed pose a challenge to inter-parliamentary cooperation (COSAC, 2018a), presenting it as the main obstacle seems rather unconvincing. Apart from the fact that not all NPs see the timing as a major problem<sup>24</sup>, the practice reveals that NPs can mobilize quite effectively within available eight weeks period when they have adequate political motivation. Already the first yellow card showed that NPs as a group have logistical tools with which to co-ordinate their efforts to achieve a collective result (Cooper, 2012). It was also well illustrated in case of the 3<sup>rd</sup> yellow card on the posted workers directive. Some of the chambers who became active in that early warning round had only adopted very few ROs since 2010, while others –prompted by their counterparts in other MS– managed to adopt their ROs within only seven final days before the deadline (Fromage and Kreilinger, 2017).<sup>25</sup>

Such conclusion inevitably brings us back the above-quoted prediction of Raunio (2010) that the EWS would remain a mere “window dressing” since breach of the subsidiarity principle by EU legislators is not a real problem. While the latter has been indeed proven true, the former otherwise. It is precisely thanks to the functioning of the EWS that the then “expert knowledge” has become widely shared by NPs and their MPs as representatives of the people. In other words, the parliamentary capacity to keep track of EU policy-making through the involvement in the EWS resulting in only three yellow cards, has created a democratic transformative effect which –ideally– should translate into improving the perception of EU regulations (i.e. output legitimacy) as desirable, necessary and reasonable. In this sense, the EWS should be viewed as a tool carrying some sort of normative appeal to citizens as representing the rule of “optimal” and “rational” governance. The problem is that this outcome of the EWS is not effectively communicated to the public either by domestic MPs or EU institutions. Instead, we can still hear about Brussels “imposing policy solutions on Member States” or encroaching upon their competences, as in case of the controversial refugee relocation scheme.<sup>26</sup> In fact, EU elites, let alone national politicians, have done little in recent years to produce a narrative, or at least stimulate a discourse, serving to legitimize the Union’s policies in the eyes of its citizens. This could be done through building a subsidiarity-conscious social identity by –for example– pointing to the transformative effects of the EWS.

Interpreting the EWS as a meaningful tool for the verification of the EU’s legislative exercise resonates to some extent with the feedback obtained from NPs in the 29<sup>th</sup> COSAC bi-annual report.<sup>27</sup> Asked whether there are any policy areas where, over time, decision-making and implementation could be relegated in whole or in part, or definitely returned to the national level, only six (out of 39) chambers representing five Member States replied “yes”.<sup>28</sup> Out of those, only the German *Bundesrat* indicated concrete policy areas in which adjustments should be made through a “decrease in regulatory density” –such as domestic security policy, labor, social welfare and the area of education, research and culture– (COSAC, 2018a; report and annex). It is however unclear to which particular EU initiatives the German chamber was referring as the quoted policy areas, except of research, do not belong to the sphere of shared competences. At the same time, three of the abovementioned chambers are among the most favorable of the EWS itself (COSAC, 2018a; report and annex).<sup>29</sup> More interestingly, as revealed in the responses to my questionnaire, the Swedish *Riksdag* –as a chamber which has issued by far the highest number of ROs to date (around 80)– considers its own subsidiarity checks as meaningful, while considering that systematic participation in the EWS by NPs “probably contributes to the democratic legitimacy of EU legislation and to an active assessment by the EU institutions of subsidiarity aspects” (cf. *Riksdag*, 2018).

## 5. Conclusion and a way forward

The aim of this article was to contribute a voice in a discussion about the relative effectiveness of the EWS for subsidiarity control ten years after its introduction in the Lisbon Treaty. The starting point was a premise that while the mechanism is rightly criticized for its too narrow formal scope and incapacity to block unwanted

<sup>24</sup> I.e. Polish *Sejm* or German *Bundestag*. Moreover, since the counting of the 8-week deadline starts when the NP receives the legislative proposal in its national language, in fact the actual time-span becomes longer for all non-English NPs who might use of the English language versions of the draft act.

<sup>25</sup> With regard to the EWS scrutiny deadline, is important to highlight that, in a response to the long-term parliamentary pressure, EU institutions decided to help NPs to execute their scrutiny role under the EWS more effectively and on 11 October 2019, agreed that the Commission would exclude the period between 20 December and 10 January from the eight-week scrutiny period, in the same manner as with the month of August, effective from 20 December 2019.

<sup>26</sup> There is still a mistaken view among the broader public that migration and asylum policies belong to exclusive competence of Member States. In fact, they belong to the category of “shared competences” between the EU and MS.

<sup>27</sup> This assessment also goes in line with the conclusions of the Report of the Task Force on Subsidiarity, Proportionality and “Doing Less more Efficiently” published on 15 July 2018 under the chairmanship of the First Vice-President Frans Timmermans and co-authored by members of NPs (Austria, Bulgaria and Estonia) and the European Committee of the Regions. According to the Report, the EU value added is present in all existing areas of activity.

<sup>28</sup> Belgian and French *Senát*, German *Bundesrat*, Latvian *Saeima* and both chambers of the Slovenian parliament.

<sup>29</sup> German *Bundesrat* as well as French and Belgian *Senát* find the procedure established by Protocol 2 TUE effective and efficient.



EU legislation, its functioning merits a more comprehensive analysis with regard to a range of transformative effects related to, both, the input and output legitimacy of the EU.

Conducted literature review and gathered empirical evidence reveal that, with regard to input legitimacy, the EWS has enhanced the representative dimension of the EU governance in several ways. Most importantly, it has provided direct and only accountability relationship between the Commission and NPs through which the former one is obliged to justify and explain new legislation under the threat of consequences. Indirectly, this provision has also strengthened the domestic accountability link between legislatures and executives. The research, however, does not confirm that the EWS has increased parliamentary autonomy vis-à-vis domestic executives to the extent that NPs can be deemed independent players in the realm of EU affairs. Second, the EWS has triggered a multi-level process of Europeanization of parliamentary administrations and elites, stimulating new forms of inter-parliamentary cooperation. Third, the mechanism has facilitated more systematic politicization of EU policies in domestic contexts. Finally, it provided an additional element to the EU's Better Regulation agenda by exerting indirect, positive influence on the regulatory discipline of the Commission and the quality of its impact assessments. Therefore, it can be stated that the actual parliamentary feedback produced under the EWS has become more meaningful *in actum* than the limited scope of the legal framework which shapes it.

With regard to output legitimacy, the analysis has provided arguments for viewing the EWS as a positive verification tool of the EU's legislative moderation. This obvious, yet largely overlooked aspect of subsidiarity scrutiny, should not be discredited as it carries important implications for the EU democratic legitimacy. The fact that yellow cards and –more generally– ROs have been employed relatively infrequently does not mean that the system is ineffective. Its effectiveness is manifested precisely in communicating that the EU's exercise of its competences is largely lawful, necessary and brings added value. In this sense, operation of the EWS is thought to contribute to enhancing a good perception of the EU output legitimacy. The problem is that this outcome has not been adequately publicized to become the common knowledge among European citizens.

Yet, while the above-discussed legitimacy-enhancing aspects of the EWS should be appreciated, their attractiveness has to a large extent lost its appeal for NPs. It is worrying to observe that 2019 was the first year after the introduction of the EWS in which no new ROs were issued by NPs. Whether this can be explained by absolute lack of parliamentary concerns regarding EU draft legislative proposals is very unlikely. To some extent, this could be justified by the electoral cycle before 2019 EP elections combined with the end of Juncker Commission's term of office. Yet, the following year –2020– yielded only 12 ROs, the second lowest record after 2015. The question therefore becomes whether such state of affairs is a sign of NPs disillusionment with the EWS's legislative influence and their awareness that the tool's democratic potential has been already exhausted?

In this light, a more critical and forward-looking perspective has to be taken in order to ensure that the transformative effects of the Lisbon Treaty will be preserved and that the role of NPs in the EU will be further strengthened. First, there is an evident need to revive the EWS as a meaningful parliamentary scrutiny procedure. While some minor improvements in line with NPs postulates have been already announced by the Commission in the aftermath of the Subsidiarity Task Force Report (see earlier in this paper), more significant changes requiring treaty reform are also indispensable. The most criticised element of the EWS, i.e. its narrow scope, limited to assessment of subsidiarity should be broadened. The European Commission's readiness to include proportionality and legal basis into the EWS scrutiny procedure is a good sign.<sup>30</sup> Another adjustment is the extension of the scrutiny deadline to 12 weeks, which was also endorsed by the Task Force.

Second, it is becoming clear for EU institutions as well as for Member States that the principle of subsidiarity cannot remain the main vector of parliamentary influence in the European legislative process. Not only because it is ineffective, but most of all because it is not satisfactory for an increasing number of NPs (COSAC, 2018a). First, the EWS allows NPs to control EU policy-making only when the draft legislation act is first presented. Second, it confines NPs in a defensive attitude towards national competences *vis-à-vis* the EU and attributes them a negative role of legislative veto-players and gate keepers of EU integration. For this reason, while the reformed EWS should be preserved, it needs to be complemented with another, more constructive arena of democratic politics in the EU.

Such initiative was already, informally undertaken in 2015 by a group of NPs, including the Danish *Folketing*, the British *House of Lords* and the Dutch *Tweede Kamer*, in form of the so-called "green card". It was conceived as a form of enhanced political dialogue through which NPs could collectively make suggestions for EU policy initiatives, or for reviewing and repealing existing EU legislation. The authors of the initiative envisaged that in order to qualify as a green card, a proposal would have to gain support of 1/4 of the votes allocated to NPs under the EWS and be delivered to the Commission within six months from the date of the proposing chamber circulating the draft. The Commission was expected to formally respond by stating whether it intends to take the proposed action or not, and state why.<sup>31</sup> Most importantly, in spite of the varying opinions as to the

<sup>30</sup> The Report of the Task Force on Subsidiarity published under the chairmanship of Frans Timmermans recommended that Protocol No. 2 TEU should be revised to allow NPs express their views about proportionality and the legal basis (conferral) of the proposed legislation.

<sup>31</sup> See the "Green Card" Discussion Paper <http://www.tweedekamer.nl/kamerstukken/detail?id=2015D00583&did=2015D00583>

scope and form of the procedure, the overall idea met with enthusiasm of a majority of legislative chambers in two subsequent COSAC reports (23<sup>rd</sup> and 24<sup>th</sup>). Although the instrument has never been formalized at the EU level, in 2015 NPs issued three green cards on topics such as food waste, corporate social responsibility and audiovisual services (for more see Borońska-Hryniewiecka, 2017c). While we do not observe more green cards being issued these days, this option stays on the parliamentary menu of potential institutional developments in the EU including future treaty changes. At the same time, an increasing number of NPs voice their appetite for more positive involvement in the EU governance, with the possibility to genuinely influence the development of EU policies at the various stages of the decision-making process (COSAC, 2018 a&b). While still several years ago, such form of parliamentary involvement met with skepticism in Brussels (Borońska-Hryniewiecka, 2017c), the situation has evolved and currently the green card enjoys backing of both the European Commission<sup>32</sup> and the EP<sup>33</sup>. It remains in the hands of NPs, how they will use this opportune institutional context to their advantage. In the author's view, they should not wait for the next treaty change but act now. While the shift to emergency decision-making in the EU resulting from the COVID-19 pandemics might pose a challenge to national parliaments, or simply side-line them in the process of consultation and control, national legislators should definitely fight back by adopting a pro-active stance to the EU agenda. The current crisis presents a historical opportunity for NPs –as direct representatives of the citizens– to re-engage in joint efforts (also in cooperation with the EP) of bringing forward constructive legislative proposals of pan-European character to address the burning social and economic problems of the European peoples.

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<sup>32</sup> The Task Force on Subsidiarity, Proportionality and “Doing Less More Efficiently” led by Frans Timmermans –in its final report– encouraged NPs to pursue with the green card initiatives and the Commission to respond to them (see page 12).

<sup>33</sup> The green card has the support of the JURI and AFCC committees of the EP (see annex to 29<sup>th</sup> Bi-annual COSAC, p. 347).

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