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Making Sense of Subsidiarity and the Early Warning Mechanism – A Constitutional Dialogue?

Abstract

The new European Commission took office on 1 November 2014, with a number of structural changes including the creation of a First Vice-President, a responsibility given to the former Dutch Foreign Minister Frans Timmermans. The First Vice-President will ensure that every Commission proposal respects the principles of subsidiarity and proportionality. If the Commission pays more attention to the principle of subsidiarity and treats it more as a political commitment than a constitutional barrier, it is possible that the demand for strengthening the control of national parliaments in the Early Warning Mechanism (EWM) will dissipate. The new Commission's high level of interest in the principle of subsidiarity also means that this is an excellent moment to evaluate the present mechanism and to present some ideas on how subsidiarity can better be observed in a more comprehensive system in which the *ex ante* control is considered in a broader political perspective and is seen as a more independent way of promoting the democratic legitimacy of Union legislation.

1 Introduction

The principle of subsidiarity was introduced as a tool to keep under control the distribution of powers in the EU, where the competences are shared between the Union and the Member States. The principle should ensure that the EU uses its powers and resources for the right things. The preservation of domestic regulatory power and only limited supranational involvement, in a supplementary or complementary capacity, can also be seen as a manifestation of the spirit of subsidiarity.[1] However, it is obvious that one can have different views on what the EU should do and what should be left to domestic regulatory power. In a Union composed of 28 governments and a directly elected European Parliament, there will always be different preferences for what the Union should achieve. The needs of European integration will, furthermore, vary over time, as was demonstrated in the aftermath of the financial crisis,[2] when the Union developed an agenda for economic governance, which was unimaginable before the crisis. With this diversity of opinions and the dynamic character of the integration process, it is clear that a vague and non-binding principle of subsidiarity does not have much effect. The principle must have concrete content and be binding. This is already the case as a result of the Maastricht Treaty, through which subsidiarity as a general principle was inserted in the basic Treaties. The principle will, it is thought, point to the most efficient decision level (national or European) in situations in which the competence of the Union is not exclusive.

However, the outcome of the subsidiarity test depends heavily on how the objectives are expressed in the

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1 See Dashwood, A. et al., Wyatt and Dashwood's European Union Law, 6th ed., Hart Publishing 2011, p. 115.

2 Ibid, p. 116.

proposed legislative acts. Since EU cooperation is designed to find common solutions to transnational problems, legal review as a constitutional barrier has often been considered to be fairly weak. The case law from the Court of Justice of the European Union (the Court of Justice) indicates that if an action complies with the Treaties and is linked to their aims, that action can it seems, under hardly any circumstances, be contrary to the principle of subsidiarity, i.e. it will not be rendered unconstitutional by the legal *ex post* control.[3] Professor Derrick Wyatt has explained this development by arguing that the interpretation and application of the principle of subsidiarity includes a large element of policy assessment and political judgment and allows 'the EU institutions to present almost any proposal for EU wide action as having an objective which can be better achieved at EU level than at national or sub national level, and that is precisely what they do'.[4]

Against this background, the Lisbon Treaty sharpened the political *ex ante* control and made national parliaments the primary supervisors in the pre-legislative stage.[5] From a democratic legitimacy perspective, no institutions can of course be more appropriate to carry out the subsidiarity review than the national parliaments, as the powers used by the Union come from them. Thus, the Lisbon Treaty introduced the EWM that gave national parliaments, collectively, a right to challenge the legislative initiatives of the EU in the light of the principle of subsidiarity. The idea of enhancing the political *ex ante* control is sound, but the present construction is, in my view, based on two incompatible objectives. On the one hand, the parliamentary control is supposed to be political and, therefore, broader than the judicial review carried out by the Court of Justice. On the other hand, the control is framed in the same way as the control exercised by the Court of Justice, and the Court also has the last say when it comes to the ultimate meaning of subsidiarity. This implies that the national parliaments, if they respect the limits of their mandate, are forced to take a position on relatively complex legal questions, which to a large extent inhibits their ability to consider the broader political and constitutional issue, namely whether a proposal is something to which the EU should give priority within its limited powers and resources. The strict legal barriers that frame the EWM, and the non-binding nature of the reasoned opinions resulting from it, have, in general, not been appreciated. Several national parliaments have now presented proposals that aim to strengthen the subsidiarity review and make it more binding,[6] but they do not seem to take full account of the present institutional balance in the EU and the principal differences between the *ex ante* political review and the *ex post* judicial review. This brings us to the complex nature of the principle of subsidiarity, which will be discussed next.

2 The nature of the present system

Even when the principle of subsidiarity was first introduced through the Maastricht Treaty, the principle was cut into two parts: the first as a broader political objective, and the second as a binding provision working as a legal barrier against the misuse of Union competences. The current system suffers from this inherent conflict of objectives. The scrutiny by national parliaments is based on the legal definition of subsidiarity in Article 5.3 TEU. At the same time, the national parliaments are expected to consider the principle of subsidiarity in a broader political perspective. In the protocol on proportionality and subsidiarity[7] (the Protocol) it is stated that all decisions should be made as closely as possible to the citizens. The Swedish Committee on the Constitution believes that this means that the EWM is a commitment that follows from

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3 See, for example, case C-377/98, Netherlands v European Parliament and Council, EU:C:2001:523, case C-491/01, ex parte British American Tobacco, EU:C:2002:741, joined cases C-154 and 155/04, Alliance for Natural Health and Nutri-Link, EU:C:2005:449 and case C-58/08, Vodafone, EU:C:2010:321. For a discussion of the case law, see, for instance, Biondi, A., *Subsidiarity in the Courtroom*, in Biondi, A., Eeckhout, P. & Ripley, S. (eds), EU Law after Lisbon, Oxford University Press 2012, pp. 213 ff.

4 Professor Derrick Wyatt QC, Brick Court Chambers, *submission of evidence* to the Report from the UK Government: Review of the Balance of Competences between the United Kingdom and the European Union; Subsidiarity and Proportionality (December 2014), see p. 54. Available at www.gov.uk/review-of-the-balance-of-competences.

5 See Dashwood, A. et al., Wyatt and Dashwood's European Union Law, 6th ed., Hart Publishing 2011, p. 119.

6 See, for instance, the Dutch Parliament, Ahead in Europe: On the Role of the Dutch House of Representatives and National Parliaments in the European Union Final Report, Rapporteurship (2014), the abovementioned report from the UK Government: Review of the Balance of Competences between the United Kingdom and the European Union; Subsidiarity and Proportionality (2014) and the report from the Danish Folketinget: Twenty-three Recommendations – to strengthen the role of national parliaments in a changing European governance (European Affairs Committee 2014).

7 Treaty on European Union, Protocol No. 2.

the Treaty and is intended to enhance the democratic legitimacy of the decision making process in the Union.[8] This inherent conflict of objectives has created both an uncertainty and a debate on what should be encompassed in subsidiarity reviews of the national parliaments. Several parliaments, including the Swedish Parliament, have, for example, emphasized that it is unreasonable that the review outlined in the Protocol should distinguish between subsidiarity and proportionality and that the Protocol only allows for a limited review on issues regarding subsidiarity *stricto sensu*. With the support of parts of the doctrine,[9] the Swedish Parliament has argued that a proportionality test is included in the subsidiarity review, and that national parliaments therefore have reason to rule on proportionality concerns in their opinions with regard to the principle of subsidiarity. This question came into the spotlight when the Commission, in a Communication, rejected certain arguments from national parliaments because they did not correspond to the Commission's interpretation of what is covered by the term 'subsidiarity'.[10] Some national parliaments have reacted strongly to this attitude, because they believe that a reasoned opinion on subsidiarity from a national parliament cannot be ignored by the Commission on such formal grounds. The Commission should not be entitled to dismiss arguments from a national parliament for the sole reason that, according to the Commission, those arguments do not have their origin in Article 5.3 TEU. Thus, the EU Committee of the House of Lords stated in its 2013-14 report on the role of national parliaments in the European Union that 'the Commission should make an undertaking that, when a "yellow card" is issued, it will either drop the proposal in question, or substantially amend it in order to meet the concerns expressed'. It suggested that the aim should be to focus the procedure not on whether the concerns were consistent with the Commission's own interpretation of subsidiarity but on what should be altered to address the concerns expressed by a large number of national chambers.[11] The Swedish Committee on the Constitution recalls, in this context, with some emphasis, that it follows from Article 6 of the Protocol that each national parliament, within eight weeks, may send a reasoned opinion to the presidents of the European Parliament, the Council and the Commission stating 'why it considers that the draft in question does not comply with the principle of subsidiarity'. According to the Swedish Committee, the Protocol does not give any room for the body proposing the draft unilaterally to disregard some of the reasons that the national parliaments have put forward as the basis for their opinions. Thus, the Commission should not have any superior right to determine which arguments fall within the scope of the principle of subsidiarity but should, as follows from Article 7 in the Protocol, take account of the reasoned opinions issued by the national parliaments.[12]

One might think that this discussion is about legal details, but it underlines the inherent conflict of objectives that characterize the present system. This conflict needs to be resolved if the legitimate aim of strengthening democracy in the EU decision making process is to be achieved.

The current mechanism can therefore be described as political control of a constitutional nature within a very narrow legal framework. In the following, I will discuss what can be done about this, both within the current regulatory framework and through changes to this framework. First, however, something must be said about the EWM and the institutional balance in the EU, as it is important to take due account of this in any reform of the subsidiarity review mechanism.

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8 Konstitutionsutskottets utlåtande 2013/14:KU45, Granskning av kommissionsrapporter om subsidiaritet och proportionalitet m.m., p. 26 (Opinion from the Committee on the Constitution on reports from the Commission concerning subsidiarity and proportionality).

9 See, *inter alia*, Kiiver, P., The early warning system for the principle of subsidiarity: constitutional theory and empirical reality, Routledge 2012, pp. 99 f., Lenaerts, K. & Van Nuffel, P., European Union Law, 3rd ed., Sweet & Maxwell 2011, pp. 144 f., Tridimas, T., The general principles of EU Law, 2nd ed., Oxford University Press 2006, p. 176 and Hettne, J., Subsidiaritetsprincipen: Politisk granskning eller juridisk kontroll?, SIEPS 2003:4, pp. 20 f (The principle of subsidiarity: Political scrutiny or legal review).

10 COM (2013) 851 on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2.

11 House of Lords European Union Committee, The Role of National Parliaments in the European Union, 9th Report of the Session 2013-14 (2014). Available at: www.publications.parliament.uk/pa/ld201314/ldselect/ldeucom/151/151.pdf.

12 Konstitutionsutskottets utlåtande 2013/14:KU45, Granskning av kommissionsrapporter om subsidiaritet och proportionalitet m.m., p. 27.

3 The EWM

The EWM is, in short, constructed to operate as follows. The national parliaments receive a draft legislative act. It is then possible for them, within eight weeks, to lodge a reasoned opinion of why they consider that the draft in question does not comply with the principle of subsidiarity. If the opinions that are submitted represent at least one third of all the votes allocated to the national parliaments (a total of 56 votes), then the draft must be reviewed (the yellow card). The threshold here is one quarter in the case of a draft legislative act submitted on the basis of Article 76 TFEU in the area of freedom, security and justice. After such review, the Commission or as the case may be another institution may decide to maintain, amend or withdraw the proposal. If it chooses to maintain the proposal, the Commission or the other institution shall, in a reasoned opinion, justify why it considers that the proposal complies with the principle of subsidiarity.

Furthermore, under the ordinary legislative procedure, where the reasoned opinions that a proposal for a legislative act does not comply with the principle of subsidiarity represent at least a simple majority of the votes allocated to the national parliaments, the proposal must, of course, also be reviewed. However, in this case, if the Commission chooses to maintain the proposal, the issue of subsidiarity will also be considered by the Union legislator (the Council and European Parliament). If, by a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal will not be given further consideration (the orange card).

Finally, Article 8 of the Protocol expressly confers upon the Court of Justice the jurisdiction to hear actions based on the principle of subsidiarity for the annulment of legislative acts of the Union that are brought by Member States or notified by them 'in accordance with their legal order' on behalf of their national parliaments or a chamber thereof. This constitutes a link between the *ex ante* political control and the *ex post* judicial review.

4 The institutional balance in the EU and the power of national parliaments

The institutional system of the EU is complex, and it is, of course, not possible to give a complete description of it in this context. Some key features can, however, be highlighted, as these are of great importance for understanding the function that the subsidiarity review of the national parliaments currently has in the EU. The Commission has, in principle, the exclusive right of initiative to put forward proposals for binding legislative acts. This so-called right of initiative follows from Article 17.2 TEU. Legislative acts may only be adopted on the basis of a proposal from the Commission, unless otherwise provided for in the Treaties. This is connected with the Commission's role as an authority that is completely independent of the Member States and should work in the interests of the Union as a whole.[13] Although it is the European Parliament and the Council that constitute the 'legislator' within the EU, the acts they adopt are therefore always, in principle, based on proposals coming from this 'independent' authority.[14] The Council and the European Parliament have no proper right of initiative, but the Commission is of course highly sensitive to the will of these two institutions, as their approval is a prerequisite for what will ultimately be decided. Furthermore, one cannot ignore the indirect influence of the European Council. Without being a party to the legislative process, the European Council, in its conclusions regarding important political questions, may influence the legislative process. The conclusions from the European Council can sometimes be very specific, as was clearly demonstrated during the financial crisis.[15]

The link between the EU legislator and the democratic systems in the Member States is expressed in Article 10 TEU. This Article provides that citizens are directly represented in the European Parliament, but also that Member States are represented in the European Council and that they are accountable to their national parliaments or their citizens.

This form of democratic legitimacy is reflected in the ordinary legislative procedure in which the Commission,

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13 See Articles 17.1 and 17.3 TEU. See, for instance, Dashwood, A. et al., Wyatt and Dashwood's European Union Law, 6th ed., Hart Publishing 2011, p. 51 and Horspool, M. & Humphreys, M., EU Law, 7th ed., Oxford University Press 2012, p. 72.

14 This model has been relaxed in the context of the EU's recent development. As a remnant of the old three pillar construction the Member States can still on their own initiative propose legislative acts in the area of police cooperation and criminal justice. One quarter of the Member States can submit a proposal for a legislative act (see Article 76 TFEU).

15 Dashwood, A. et al., Wyatt and Dashwood's European Union Law, 6th ed., Hart Publishing 2011, p. 72. See also Horspool, M. & Humphreys, M., EU Law, 7th ed., Oxford University Press 2012, p. 53.

the Council and the European Parliament have clearly defined roles. The Commission is, in this context, not only the principle initiator of proposals, but also continues to have influence over its initial proposals and is therefore actively involved when its proposals are discussed and amended. The Council can accept amendments from the Parliament during the procedure, by qualified majority, but if such amendments are not accepted by the Commission then unanimity in the Council is required (see Article 293 TFEU).

Against this background it is understandable that national parliaments were not given a stronger influence over the EU legislative process than the influence described above (yellow card and orange card).[16] National parliaments have a right to highlight the fact that there are serious doubts as to whether a proposal from the Commission (or exceptionally from another institution) complies with the principle of subsidiarity. The ultimate decision on the legislative act must, however, be adopted by the political institutions of the Union. If the national parliaments were to be given greater influence in the form of a veto right, the present institutional balance would change. The European Parliament and the Council would then have no opportunity to take a position on subsidiarity, and the independent role of the Commission in safeguarding the long-term goals of the Union would be affected. Such a development would naturally also affect the position of the European Parliament, which is supposed to exercise political supervision over the performance by the Commission of its tasks under the Treaties (see Article 14 TEU). It is illustrative in this regard that in an early resolution, the European Parliament expressed concern that subsidiarity might be used as a pretext to call into question all that had been achieved at the Union level, stressing that the application of subsidiarity should not under any circumstances result in a weakening of EU law.[17]

5 Could the political control be more legal?

It has already been submitted that a more binding EWM would influence the division of powers in the Union and the position of the political institutions. A further question of importance is whether the national parliaments, when taking part in the EWM, are suitable as veto holders. In my view, that is not the case. The reason for my view is that the issue at stake, subsidiarity in accordance with Article 5.3 TEU, is a legal or even a constitutional question, and parliaments will always be political bodies, and should, in my opinion, not act as anything else. If it was a constitutional veto process that was intended by the EWM, a council of national constitutional courts or supreme courts would have been a better option. It has been argued by Kiiver that such a role for national parliaments is not impossible.[18] However, even if I were to agree with Kiiver that the mechanism set up is, on its surface, similar to the function carried out by the national council of a state, like the French Conseil d'Etat or the Swedish lagrådet, I believe that it is a mistake to attribute such a legal or constitutional function to an international council composed of all the national parliaments in the Union. Even if some national parliaments have developed the competences and skills to carry out this function, usually through an increased involvement of civil servants, it does not appear to be the desired way forward. One should also add that the institution that has the last say on questions regarding subsidiarity is the Court of Justice. A council of states would possibly try to compete with the Court of Justice as regards the final meaning of subsidiarity, but that would be a peculiar and unreasonable situation, especially if the council was composed of national parliaments, and it would in any case be incompatible with the role given to the Court of Justice in the EU Treaties.

A counter argument could be that it is not necessary or convenient to have only one definition of subsidiarity.

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16 It should be noted that the European Convention's working group that was tasked with reviewing subsidiarity monitoring discussed the introduction of a 'red card' that would allow a sufficient majority of national parliaments to block a Commission initiative. The aim was to ensure that any new monitoring mechanism would have real teeth. However, in their final report the group agreed that any improvements to subsidiarity monitoring should not block decision making, nor make the process more lengthy or cumbersome, and as such the 'red card' idea was not taken forward (Working Group I on the Principle of Subsidiarity, Conclusions CONV 286/02 2002).

17 European Parliament Resolution on the Commission reports to the European Council on the application of the subsidiarity principle in 1994. See Biondi, A., Eeckhout, P. & Ripley, S. (eds), EU Law after Lisbon, Oxford University Press 2012, p. 220.

18 Kiiver, P., The early warning system for the principle of subsidiarity: constitutional theory and empirical reality, Routledge 2012, pp. 126 ff. Kiiver does however not suggest that the opinion should be binding.

For some crucial questions there is simply not just one answer. It is true that the interpretation of the principle of subsidiarity could change over time and will always be dependent on the actual function of the Union. It is therefore possible to argue that some kind of constitutional pluralism is acceptable when it comes to the application and interpretation of the principle of subsidiarity. However, I would not subscribe to such reasoning , if it would mean that national parliaments are given a more constitutional function. Political bodies like parliaments are generally not designed to give authoritative rulings on constitutional issues, and it does not help that the EWM is based on the collective actions of a number of parliaments. A development in which the position of a certain group of parliaments or chambers, usually from a minority of the states in the Union, can issue a legal opinion that in practical terms has a similar legal value as a judgment of the Court of Justice seems hazardous. This is an additional reason why I consider that the yellow card should not be turned into a red veto card.

I also think that we have already seen an example of the principal problems in letting the reasoned opinions of parliaments have a greater impact on the legislative process of the Union. I am referring to the matter of the European Public Prosecutor's Office (EPPO), where a group of national parliaments considered the Commission proposal to be in conflict with the principle of subsidiarity.[19] At the same time, the Treaty clearly foresees the creation of this office. Article 86 TFEU provides that in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council is to act unanimously after obtaining the consent of the European Parliament.

Hence, there is a clear legal basis for this development, but a unanimous decision from the Council is required. Moreover, the treaty clearly foresees the possible lack of support from some Member States for such a development and underlines the possibility of enhanced cooperation. Article 86 continues by stating that, in the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council is to be suspended. After discussion, and if a consensus is obtained, the European Council, within four months of this suspension, is to refer the draft back to the Council for adoption.

Within the same timeframe, if there is no consensus, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they are to notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) TFEU and Article 329(1) of this Treaty shall be deemed to be granted, and the provisions on enhanced cooperation shall apply.

It is not difficult to guess that the Commission had the option of enhanced cooperation in mind when it initiated the process of creating the EPPO, a process that led to the negative reaction from several national parliaments.[20] Other decisions regarding enhanced cooperation that have been adopted recently have, incidentally, been contested before the Court of Justice (EU Patent and financial transaction tax).[21] If the objection against the EPPO had to be respected, this would not only remove the power of the Council and the European Council to decide on the issue, but it would also eliminate the possibility of the Court of Justice having a say on the validity of any decision on the creation of the EPPO, also as an enhanced cooperation.

6 The limited scope of the subsidiarity review

It is noticeable that the scrutiny of national parliaments under the EWM is limited in several respects.

Firstly, it is only a draft *legislative act* that can be scrutinized by the national parliaments, not a '*non-legislative act*' (an act under the TFEU that is not derived from a legislative process, such as a delegated act or an implementing act adopted by the Commission). It is thus important to verify which pieces of legislation constitute 'legislative acts'. It follows, for example, from the TFEU

[19] See proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, COM/2013/0534 final. A total of 19 votes from parliaments in 11 Member States objected on subsidiarity grounds.

[20] See Commission Communication: COM (2013) 851 on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2.

[21] See joined cases C-274/11 and C-295/11, Spain and Italy v Council, EU:C:2013:240, and case C-209/13 United Kingdom v Council, C:2014:283.

that a request to amend the Statute of the Court of Justice is a 'draft legislative act',[22] but some important acts adopted under the chapters on competition policy and social policy are not legislative acts.[23]

Second, as has been mentioned earlier, a national parliament can only comment on why it considers that a draft is inconsistent with the principle of subsidiarity. National parliaments are not invited to comment on whether a proposal appears to be incompatible with the principle of conferral or the principle of proportionality, even though these two principles obviously have the same context (the distribution of powers between the EU and the Member States), as illustrated by Article 5 TEU, where these three principles are expressed together. Furthermore, there is no explicit provision for national parliaments to object if they believe that national identity has been violated, within the meaning of Article 4.2 TEU. It is therefore understandable that the subsidiarity review is considered, by several national parliaments, to be a blunt instrument of control, because the principle of subsidiarity is isolated from these other related principles. Indeed, in many cases subsidiarity completely misses the point. The judgment to be made under the principle of subsidiarity is not about the objective pursued but about whether the pursuit of that objective requires Union action.[24] Thus, the principle of subsidiarity does not (on its own) provide a method of balancing the interests of the Member States and the Union. Instead it asks who should implement objectives that are already agreed.[25] In fact, it has proved virtually impossible to challenge a harmonization measure in the light of the subsidiarity principle. In these cases, the Court has pointed out that when the objective pursued by the measure is harmonization, which is necessary in order to prevent differences between national laws causing obstacles to movement or distortions of competition, it is manifestly the case that Member States alone cannot act.[26] Accordingly, subsidiarity in its strict sense has no relevance to those measures whose aim is to create the uniformity necessary for the Single Market. Nevertheless, this is the area where the principle has been claimed to have its biggest impact (shared competences). Where uniformity is necessary, only the Union will be able to act.

Against this backdrop, it is not surprising that several parliaments have argued that an element of proportionality is part of the principle of subsidiarity (see section 2 above). Moreover, subsidiarity and proportionality have frequently been conflated in impact assessments, and many national parliaments have considered subsidiarity checks ineffective if proportionality is not included.[27] The two concepts are clearly closely related, and explicitly extending the procedure to include proportionality would avoid sterile disputes about whether a particular concern about a proposal fell under one heading or the other.[28] It has been argued that the fact that previous reasoned opinions and yellow cards covered other matters such as proportionality and competence show that national parliaments have incentives, and the ability, to protect those matters too, and/or that it is impractical to split these off from subsidiarity in political if not in legal terms.[29] Hence, the Dutch Parliament has suggested that it should be possible for reasoned opinions to cover proportionality and the choice of legal basis.[30]

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22 According to Article 3 of the Protocol: 'For the purposes of this Protocol, "draft legislative acts" shall mean proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank, for the adoption of a legislative act.'

23 See Dashwood, A. et al., Wyatt and Dashwood's European Union Law, 6th ed., Hart Publishing 2011, p. 85.

24 See opinion of Advocate General Maduro in Case C-58/08, Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform, EU:C:2009:596, para 30.

25 See Davies, G, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, CML Rev 43, 2006, pp. 63, 69.

26 See e.g. Case C-491/01, The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd, EU:C:2002:741, para 182.

27 See, for instance, Dutch Parliament, Ahead in Europe: On the Role of the Dutch House of Representatives and National Parliaments in the European Union Final Report, Rapporteurship (2014), the report from the UK Government: Review of the Balance of Competences between the United Kingdom and the European Union; Subsidiarity and Proportionality (2014), the report from the Danish Folketinget: Twenty-three Recommendations – to strengthen the role of national parliaments in a changing European governance (European Affairs Committee 2014) and the Swedish Parliament:Konstitutionsutskottets utlåtande 2013/14:KU45, Granskning av kommissionsrapporter om subsidiaritet och proportionalitet m.m., p. 26.

28 House of Lords European Union Committee Report HL 151 of Session 2013-14 The Role of National Parliaments in the European Union, available at: http://www.parliament.uk/documents/Role-of-National-Parliaments.pdf, para. 77.

29 Senior European Experts Group, *submission of evidence* in report from the UK Government: Review of the Balance of Competences between the United Kingdom and the European Union; Subsidiarity and Proportionality (2014).

30 See Tweede Kamer, available at: www.tweedekamer.nl/images/Position_paper_Dutch_House_of_Representatives_on_democratic_legitimacy_in_the_EU_final_181-236782.pdf.

7 Constitutional dialogue

If we accept that the national parliaments, regardless of the names they give to their subsidiarity reviews, are engaged in politics, there is no reason to restrict the control to the principle of subsidiarity in the strict sense. The EWM should be seen as a political dialogue regarding constitutional issues (a constitutional dialogue), and not as a veto system. This dialogue should, like the present subsidiarity review, be focused on questions relating to the distribution of competences between the EU and the Member States, but it should not be limited to subsidiarity in the strict sense. National parliaments should also be able to consider the principles of conferral (legal basis), proportionality and the respect for national identity, which are issues that are closely linked to the principle of subsidiarity.[31] National parliaments should therefore be engaged in a wider constitutional review without any unnecessary and troublesome legal barriers framing their control at the outset.

It appears to me that the national parliaments can only be expected to carry out political control. Even if the present reviews of some parliaments can be described as 'technical' or 'legal', this cannot hide the fact that the argument put forward will always be politically motivated. So even if reasoned opinions from some parliaments are strikingly similar to advisory opinions of councils of states (see section 5 above), this is not a development that effectively achieves the objectives of the EWM in enhancing democratic legitimacy, because it forces the parliaments to hide their real concerns under a pretended legal scrutiny on the issue of subsidiarity. These objectives are better achieved by a broader constitutional control by the parliaments, with less emphasis on the label 'subsidiarity' and legal boundaries.

Accordingly, it is submitted that the subsidiarity review through the EWM should be seen as a special form of political dialogue that, in contrast to the broader political dialogue,[32] focuses on issues relating to the division of competence between the Union and its Member States. Against that background, the choice of a yellow card and not a red veto card was reasonable (see section 4 above). Similarly, the addition of an orange card did not change the logic by disturbing the institutional balance in the EU (see section 3 above). Neither the yellow card nor the orange card makes the national parliaments veto players, and both leave the legislative triangle between the Commission and the Council/European Parliament intact. If the reasoned opinions of a certain number of parliaments are followed by these institutions, the constitutional balance in the Union is not shifted. On the other hand, there would be a dramatic shift if national parliaments could actually stop a proposal at the EWM stage.

8 Accepting the difference and bringing the Court in earlier

If the proposed distinction between political and legal control is accepted, the subsidiarity review becomes more efficient. National parliaments become involved at a deeper level. At the same time, the EU constitutional order is preserved, with the European Parliament and the Council as legislator and the Court of Justice as the ultimate arbitrator.

If such an arrangement meets resistance from the national parliaments because of its non-binding nature, there is still one option available that would not upset the institutional balance of the Union.

What might be possible, as an alternative to a red card, is to create an opportunity for the Court of Justice to have a role earlier in the process. It seems that it would be possible to construct an *ex ante* legal review whose effect would be similar to the control exercised by national constitutional courts in many Member States. If a certain number of parliaments have serious doubts about the compatibility of a proposal with the constitutional principles of the Union, they could collectively be able to initiate such a preliminary examination before the Court of Justice, in the same way as is possible when the Court examines international agreements that the Union is intending to conclude with third countries or international organizations. According to Article 218.11 TFEU, a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether a proposed agreement is compatible with the Treaties. When the opinion of the Court is

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[31] For national identity, see Article 4.2 TEU. The Union shall respect the Member States's national identities inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It is important to note that the respect for national identities means different considerations for different states.

[32] The former President of the European Commission, José Manuel Barroso, initiated a political dialogue with national parliaments in 2006, which provides national parliaments with the opportunity to submit opinions or contributions on proposals and consultation documents without a time limit, the Commission guaranteeing a reply.

adverse, the proposed agreement may not enter into force unless it is amended or the Treaties are revised. That provision has the aim of forestalling the complications that would result from legal disputes concerning the compatibility of the Treaties and international agreements binding upon the EU.[33] A similar provision regarding whether a proposed legislative act is compatible with the principle of subsidiarity, and possibly with other related constitutional principles, could be added to the Protocol. It can be used in case a certain number of chambers is dissatisfied with the Commission´s reaction to a yellow card. This proposal obviously needs to be considered further, both in practical terms and as regards its effects. For instance, it must be decided how many parliaments or chambers that are needed to support a request for an opinion (same as for a yellow card?) and when this should be possible (after the Commission's reasoned opinion regarding a yellow card?). There is also a risk that such an option would make the political *ex ante* control more legal. It is however probable that the presence of such an instrument would put further pressure on the Commission to take subsidiarity seriously during the EWM.

9 Conclusions

To make the subsidiarity review by national parliaments the instrument that it was intended to be – a necessary counterweight to the increased competences of the EU – it should be wider and should include the main constitutional principles of the Union: the principles of conferral, subsidiarity and proportionality as well as respect for national identity (a constitutional dialogue). The problem with the present EWM is not its lack of binding effect, but rather that the present dialogue is drafted in unnecessarily narrow legal terms. I have therefore argued for a broadening of the control and, at the same time, an acceptance of its non-binding effects.

A wider control or dialogue could also be combined with a new role for the Court of Justice, giving the Court power to rule on constitutional issues beforehand if a certain number of parliaments so requested. This would mean a strengthening of the current controls that respect the institutional balance in the Union, as the Court of Justice is clearly the final arbiter when it comes to these issues. The objective is to give a more effective voice to the national parliaments without unduly distorting the Union's own institutional balance. The desire for a broader political control on grounds related to subsidiarity would then be balanced with a respect for the legal meaning of subsidiarity in accordance with Article 5.3 TEU. This should contribute to the aim of strengthening democracy in the EU decision making process.

A wider control can probably be possible without Treaty changes, at least as a preliminary solution. It is possible to argue that all the principles mentioned can be seen as components of a broad subsidiarity review.[34] It is therefore something that could be agreed on through an inter-institutional agreement between the Commission, the Council and the European Parliament. There is already an inter-institutional agreement between these three institutions regarding better law making, which covers how these institutions should support the application of the principle of subsidiarity.[35] The additional constitutional objections that a national parliament may raise in a reasoned opinion are already accepted as part of the political dialogue. What is requested therefore seems to be that the Commission undertakes to accept objections on constitutional issues related to subsidiarity and to treat these as objections on subsidiarity in a broad sense or at least not to disregard such constitutional arguments presented under the heading of subsidiarity in reasoned opinions from national parliaments.

To bring in the Court earlier in the process and engage it in the *ex ante* control would, however, need Treaty changes, probably in both the Protocol and the Treaty (TFEU) itself. It would, however, not change the Union's own institutional balance and would therefore not go as far as creating a red veto card. It will also be less intrusive than creating a new competence court, which would raise difficult questions about the division of competence between the new body and the Court of Justice.[36]

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[33] See Opinions 2/94, EU:C:1996:140, paragraph 3; 1/08, EU:C:2009:739, paragraph 107; and 1/09, EU:C:2011:123, paragraph 47.

[34] See for a similar reasoning Kiiver, P., The early warning system for the principle of subsidiarity: constitutional theory and empirical reality, Routledge 2012, pp. 147 ff.

[35] European Council, European Parliament and European Commission, Inter-Institutional Agreement on Better Law-Making, OJ C 321, 31.12.2003, pp. 1-5.

[36] Cf. the report from the UK Government: Review of the Balance of Competences between the United Kingdom and the European Union Subsidiarity and Proportionality (2014), p. 97. See also Opinion 2/13 of 18 December 2014 where the Court of Justice concluded that the agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU.

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