National Parliaments and the EU-legislative Procedure post-Lisbon: A Comparative Analysis of the Early Warning Mechanism

Abstracts and Bios

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Reconstructing the Early Warning System (EWS)
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The Early Warning System (EWS) has been understood as a device for two functions: enhancing the democratic quality of EU lawmaking and improving subsidiarity review. After having criticized the two most common interpretations of the EWS as a deliberative exercise or as an advisory mechanism, the article proposes to look at the function of the EWS from the perspective of European integration. In this way, a different light is shed on the role of national parliaments. It is suggested that in light of three grounds (legal, practical and political), national parliaments ought to apply the EWS in a political rather than strictly formal way and they should use the EWS for protecting the constitutional essentials of their domestic orders.

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True Nature and Future Use of the EWM
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Through the Early Warning Mechanism (EWM), the subsidiarity review has received renewed interest in recent years and the willingness to use it in order to modernize the European Union (EU) appears stronger than ever before. Political initiatives are raised to further strengthening the EWM in the EU. One reason for this is probably that the principle of subsidiarity has now been interpreted and applied by the national parliaments for some years, and it is obvious that the application of the principle in this context has been broader than the narrow legal interpretation elaborated by the Court of Justice. However, in the wake of this development, voices are heard that the nature of the present subsidiarity review should change. In that respect, the Dutch Foreign Minister stated in Financial Times (November 2013) that:

"…we would encourage national parliaments to bring Europe back home where it belongs and strengthen their cooperation with each other and the European Parliament. They should have the right to summon commissioners to capitals. And if one-third of national parliaments raise subsidiarity objections to a legislative proposal (the yellow card procedure), the commission should not just reconsider, it should use its discretion to take the disputed proposal off the table, turning the yellow card into a red."

The Dutch Foreign Minister is not alone in advocating such a development. Similar proposals are presented inter alia in a report by the British think tank Centre for European Reform (CER), entitled "How to build a modern European Union" (October 2013). However, there are reasons to consider the new interest for the EWM with some caution. A development in which national parliaments are given more power as actors in the policy-making process at EU level can alter the present constitutional balance in the Union. It is therefore important to discuss what the true nature of the EWM is; e.g. political, legal, constitutional? And against this background, what is the optimal use of the EWM and should the mechanism be equally important in all areas?

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What Kind of Political Procedure is the EWM?

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There is genuine ambiguity in the design of the Early Warning Mechanism (EWM), so that there are (at least) two reasonable interpretations of its nature and purpose, which may broadly be referred to as political and legal. However, this dichotomy covers a number of disagreements, including:

1. Whether subsidiarity and the EWM is best studied by political scientists or legal scholars,
2. Whether subsidiarity questions should be decided by political or legal institutions (e.g. parliaments vs. courts),
3. Whether subsidiarity should be interpreted according to political reasoning or legal reasoning, and
4. Whether subsidiarity is a substantively broad or narrow principle (integrated with or separable from e.g. proportionality and policy concerns).

A closer examination of these questions reveals (it is argued here) that a purely legal reading should be rejected, and that the EWM should be understood in political terms, as a virtual third chamber for the EU.

This however, does not resolve the fundamental question of what kind of political procedure is the EWM? Specifically, is it a instance of legislative bargaining, in which national parliaments make instrumental use of the subsidiarity principle in order to advance their interests? Or is it a process of argumentation, in which national parliaments and EU institutions (especially the Commission) advance competing interpretations of the subsidiarity principle in the course of reviewing whether EU legislative action is warranted in a given case? To put it another way, even if we can agree that national parliaments comprise a virtual third chamber for the EU, this does not resolve the question of what kind of political dynamics will prevail within this chamber.

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The limits of the EWM from an access to information point of view

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The European Commission made quite an effort in the early 2000’s to improve the European legislative process, mainly in response to the critique it received against its earlier standards. In effect, the Commission’s subsidiarity and proportionality evaluations have been subject to review by the Impact Assessment Board for more than ten years. The Board’s reviews are attached to the legislative proposals presented by the European Commission and are therefore accessible to the national parliaments. The Impact Assessment Board has expressed concern regarding the Commission’s consideration of the principles of subsidiarity (and proportionality) claiming that the reviews made by the Commission are often unsatisfactory in nature.

Wetter’s presentation will focus on the quality of the legislative documents which are forwarded to the national parliaments, aiming to identify weaknesses in these documents. Questions to be discussed include whether it would be possible for a national parliament wishing to conduct a strict review of the subsidiarity principle to do this based on the information presented in the documents forwarded to it. An associated question reads whether or not it is appropriate for national parliaments to receive more information on the subsidiarity assessments made by the Commission, including those of the Commission’s legal service, than what is currently the case. Such a proposal would however quite radically change the inter-institutional balance between the European organs and the national parliaments which emphasizes the necessity to discuss the role of the EWM from a broader constitutional perspective.

Anna Wetter is a doctor of law and guest lecturer at the faculty of law at Uppsala University. Her research interests lie in the fields of European law (including European criminal law) and international law with emphasis on EC Regulation 1334/2000 setting up a Community regime for the control of exports of dual-use goods and technology. Export control in this area serves to contribute to the non-proliferation of weapons of mass destruction.

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Similar but different: Comparing the scrutiny of the principle of subsidiarity in Sweden, Denmark and Finland
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As this paper will illustrate Sweden, Denmark and Finland have chosen different ways to implement protocol no. 2 into their national constitutional orders. In general these three states are perceived as similar regarding their parliamentary systems. However, as this paper will show there are significant differences as to the implementation of protocol no. 2. The different implementation strategies chosen will be systematically analyzed focusing on institutional, legislative and political factors. Conclusions will be drawn as to the effect of the different implementation strategies on the national constitutional order, transnational parliamentary cooperation, and finally the potential impact on the EU-legislative procedure.

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The scrutiny of the principle of subsidiarity in the procedures and in the reasoned opinions of the Italian Chamber of Deputies and Senate

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The presentation starts with a short review of the features of Italian bicameralism and the occurrences of the principle of subsidiarity in the Italian Constitution. Then, it examines the different ways in which the Chamber of Deputies and the Senate have implemented the EWM. The parliamentary rules of procedures – adopted in a provisional and experimental way – for the approval of reasoned opinions, in fact, differ significantly regarding: a) the source of law in which they are contained; b) the role assigned to the different parliamentary bodies involved in the procedure; c) the relationships with the political dialogue, as well as with the powers of scrutiny and direction of the Government in EU affairs.

The second part of the presentation deals with the actual content of the reasoned opinions approved by the Chamber of deputies and by the Senate. The bicameral and polycentric nature of the Italian Parliament is reflected also in the content and in the style of the reasoned opinions approved, which vary considerably mainly according to the concept of subsidiarity adopted in each assessment. Finally, it will be argued, also in the light of the institutional practice, that the procedure of the Senate is more efficient and more coherent with the predominantly political nature of the EWM in its practical application.

Nicola Lupo is a professor of Law of the elective assemblies and the director of the Master Program in Parliament and Public Policies at LUISS Guido Carli University in Rome. He was throughout 1997-2005 counsellor of the Italian Chamber of Deputies. His research interest lie in the fields of constitutional law, national parliaments and sources of law.

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“Asymmetrical bicameralism”: a differentiated use of the Early Warning Mechanism in the two chambers of the French Parliament
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French parliamentary involvement in EU affairs continues to be weak both in terms of ‘control’ of the government and in terms of use of formal instruments granted by a major constitutional revision and the implementation of the new Lisbon procedures in 2008. Through the study of the constitutional provisions and of the actual use of the reasoned opinions in the Assemblée Nationale and the Sénat, this communication aims at understanding the perspective of the French parliament on the Early Warning Mechanism (EWM).

Parliamentary scrutiny of EU affairs in France is defined by the cooperative relationship between a mostly cohesive parliamentary majority and the government in the parlementarisme rationalisé of the French Fifth Republic and by the incongruent and asymmetrical French bicameralism. If both chambers consider the use of reasoned opinions as an instrument for those who are ‘against Europe’, the specificities of the French institutional setting generate a differentiated use of the Early Warning Mechanism in the Assemblée Nationale and the Sénat. While the Sénat actively used the EWM, by early 2014 the Assemblée had done so only four times since its introduction. Moreover, while the former chairman of the Sénat put in place a working group on subsidiarity, the Assemblée nationale has not seen any procedural adaptations of this kind for the subsidiarity check.

The low use of reasoned opinions under EWM by the Assemblée nationale can be explained by the fact that the chamber will usually send a reasoned opinion if this supports the position of the government. The Sénat might see in the EWM the opportunity to enhance its own role in French ‘asymmetrical bicameralism’ and become in the long run, if not a ‘real’ government watchdog in EU affairs, at least something of a European player.

Angela Tacea is a Research Associate and PhD candidate at the Centre d’études europééenne, Sciences Po Paris. Her research interests lie in the field of comparative politics, public policy and legislative studies, europeanization of national policies, especially policies linked to national identities, both within the European member states and within countries in the European Neighbourhood Policy.

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Subsidiarity Monitoring from the Perspective of the United Kingdom Parliament: Securing Influence over Ministers and Improving Democratic Legitimacy

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As the title suggests the process, in the UK Parliament, of scrutiny of draft EU legislation encompasses both the individual parliamentary function of securing ministerial accountability and engaging with the practice of reasoned opinions under Protocol 2. In two recent Reports the EU affairs committees in both Houses of Parliament concluded that influence must be focused on the UK Government.¹ Both reports highlighted that this is the key purpose of scrutiny and reflects a parliamentary sovereignty interpretation in which the primacy of the UK Parliament is considered as paramount. Furthermore, this would seek to ensure that UK Parliament’s position would be represented in the government’s negotiating stance in the Council.

There is no doubt that the UK Parliament maintains the position it has held since accession in 1972 that it is national parliaments, which are, and will remain, the source of real democratic legitimacy and accountability in the EU. However, the collective influence of national parliaments, which arises from Protocol 2 of the Lisbon Treaty through the Reasoned Opinion process, must now also be considered to be not only an integral part of the scrutiny process, but also contributes to improved legislative legitimacy.

This paper examines how the UK Parliament has sought to balance the pursuit of ministerial accountability with the production of reasoned opinions. The focus will fall on the terms of reference of the EU affairs Committees and how these enable the Committees to fulfil the obligations to the Parliament as well as the procedures under Protocol 2. In particular, close consideration will be paid to the use of scrutiny reserves as a mechanism for ‘controlling’ the minister and how these could be developed to address concerns when legislation changes within the legislative process.

Adam Cygan is a Professor at the school of Law, university of Leicester, visiting Professor at the Faculty of Law at the University of Brescia. His research interests lie in the field of EU Public law and governance with a focus on the relationship between national parliaments and the EU Institutions within the context of the decision-making process.

¹ HC 109 (2013-14) & HL Paper 151 (2013-14)

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In Declaration No 51 to the Lisbon Treaty, Belgium stated that, the parliamentary assemblies of the regional entities within their field of competences act as chambers of the national Parliament. This way, Belgium wanted to emphasize that regional and federal assemblies are to be considered on equal footing. This can be explained by the dual nature of Belgian federalism, marked by exclusive competences and the absence of hierarchy. The implementation of this principle, however, is somewhat deficient. First, there is no legal basis for an internal mechanism to translate subsidiarity opinions into the European EWS. Second, regional parliaments in particular show little interest in the EWS. Although the federal House of Representatives, supported by an administrative unit, is more active in conducting subsidiarity analyses, all legislative assemblies mix subsidiarity analysis with political dialogue and consider the latter more relevant. Several reasons explain this, but it seems that in particular small regional assemblies are ill equipped to engage in subsidiarity checks. This is one argument for the organization of regional participation through the Senate, which was recently reformed to function as a Chamber of the federated entities but lacks this function hitherto. Another argument is that the Belgian system, which merely gathers subsidiarity opinions without dialogue, misses opportunities to fully weigh in the EWS. Nonetheless, the reformed Senate has lost all powers to intervene in international or European affairs. This brings a two-sided problem to the fore. On the one hand, it shows that the Protocol, by imposing the distribution of the bicameral member states’ votes, interferes in domestic institutional design. On the other hand, it makes clear that domestic institutional reform should take a holistic approach and take into account European implications.

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Italian Regional Councils in the Early Warning Mechanism. The Positive Externalities of a ‘European’ Procedure on National Constitutional Law
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Italian Regional Councils as regional elected assemblies provided with legislative powers have experienced significant transformations in the Italian constitutional history since when most of them – 15 - have been established in the 1970s. Being initially so autonomous to become a source of political instability at regional level, the role of regional Councils has been decisively constrained towards regional executives by the constitutional reform of 1999 while their legislative powers have been widened in 2001. Moreover, in spite of the strong decentralization of the Italian State, regional Councils have never been represented in the Second Chamber, the Senate, nor they take part in any national decision-making procedure, legislative or constitutional, with definitely minor exceptions.

The Treaty of Lisbon and the early warning mechanism have probably disclosed a new scenario for regional Councils. While the ratification process of the Treaty reform was still ongoing and immediately after its entry into force, regional Councils passed new regional laws that allow them to participate in the early warning mechanism and to strengthen their scrutiny over regional executives while controlling the compliance with the principle of subsidiarity. Also the internal rules of procedure of most regional Councils have been revised to this end following the benchmark provided by the most active Councils (in Abruzzo, Emilia-Romagna, Marche).

In comparison the Italian Parliament has been slower in adjusting State legislation to the early warning mechanism. When finally State law n. 234/2012 was approved, in December 2012, it also introduced important novelties for regional Councils. They have been associated to the two national Chamber in the early warning mechanism as well as – with a provision that is unique in comparative perspective – in the political dialogue. The enforcement of law n. 234/2012 poses nonetheless doubts as for the effects of the opinions delivered by regional Councils on the national parliament’s opinions and for the approach of regional Councils to the early warning mechanism, in particular whether they should coordinate their positions at national level through the Conference of their Presidents or they should act individually.

This contribution argues that the early warning mechanism has provoked positive externalities for regional Councils at constitutional level, even though no constitutional amendment has been adopted. The new ‘European’ procedure has usually reinforced the role of regional Councils towards regional executives on EU affairs, although to a different extent depending on the region, and has contributed to create a link with the national parliament that was not existent before.

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EU-oriented strategies of inter-parliamentary cooperation between regional parliaments and other institutional actors depend on several variables. The most important of them is the institutional context in which parliaments operate. But there are also other factors such as availability of resources, attitude of individual members of parliament or the exposure to Europeanization. In this regard, the empirical findings reveal considerable variations in the patterns and scope of inter-parliamentary relations in EU policy-control pointing to diverse modes of adaptation to Europeanization. This contribution offers a comparative overview of these various models and attempts to account for the differences revealed. It also discusses the main challenges facing regional parliaments and provides suggestions for improvements.

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