

**The Early-Warning System for the Principle of
Subsidiarity: The National Parliament as a *Conseil
d'Etat* for Europe**

By

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***Reprinted from* European Law Review
Issue 1, 2011**

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(*Law Publishers*)

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Analysis and Reflections

The Early-Warning System for the Principle of Subsidiarity: The National Parliament as a *Conseil d'Etat* for Europe

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☞ Competence; EU law; EU legislative process; Legislatures; Subsidiarity

Abstract

In this article, the author examines the Lisbon Treaty's early-warning system (EWS) for the principle of subsidiarity and the way national parliaments use it in practice to respond to EU legislative proposals. The author argues that the European role of national parliaments under the EWS may be compared to the domestic role of a council of state, an advisory body which exists in several Member States. Like EWS opinions of national parliaments, the advice of a council of state on bills is not binding but, in both cases, the procedure is an institutionalised part of the legislative process; like the EWS, advice by a council of state typically includes legal considerations on whether the adoption of a bill would be lawful, e.g. in compliance with the constitution, rather than whether it would be politically desirable. The empirical analysis of recent EWS practice reveals that a host of national parliaments are prepared to adhere to such a relatively narrow role, which makes a council of state a realistic and recognisable role model for those national parliaments that still struggle to define their proper role in the European Union.

Introduction

In a 1999 essay, Joseph Weiler suggested the setting up of an EU institution that would check draft EU legislation to make sure that the European Union had competence to legislate as intended, and to verify that the legislation in question complies with the principle of subsidiarity. Such a French-style *Conseil Constitutionnel* would be meant to help with “restoring faith in the inviolability of the boundaries between Community and Member State competences”.¹ In the present article, I shall argue that while the EU Constitutional Treaty and the Treaty of Lisbon did not establish a *Conseil Constitutionnel* for the European Union, the early-warning system for the principle of subsidiarity² that they introduced did bring about the emergence of a sort of *Conseil d'Etat* in the form of national parliaments exercising an advisory role in the EU legislative process. Several EU Member States have such a council of state that checks domestic bills before they are introduced in parliament, and this could well become a recognisable role model for national parliaments that are still struggling to define their proper role in the European Union. Of course,

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¹ J.H.H. Weiler, *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999), p.354.

² Protocol No.2 TEU; see also Protocol No.2 to the Treaty establishing a Constitution for Europe.

national parliamentarians may not particularly like the idea that they, as democratic law-makers, should be reduced to issuing non-binding advice on rather formal aspects of bills in the fashion of a council of state. However, both the procedural set-up and the empirical reality of the use of the early-warning system thus far do merit such an analogy. For a host of national parliaments in the European Union, the alternative to playing *Conseil d'Etat* in this way is that they are sidelined altogether, the European legislative game simply being played without them. In such a case, being a diligent watchdog sifting EU bills could in fact be quite an attractive scenario.

The early-warning system

The involvement of national parliaments in the EU legislative process had been one of the most prominent features of the Treaty establishing a Constitution for Europe and its successor, the Treaty of Lisbon. These were in fact the first two European treaties to mention the term “the national parliaments” in their text proper. Traditionally, national parliamentary involvement is rather marginal and indirect. The most obvious and, according to empirical findings, the most commonly used mechanism is the calling to account of ministers and, possibly, the consultation with them before they attend the Council of Ministers in Brussels.³ The Treaty of Amsterdam sought to accommodate national parliaments somewhat: a Protocol, for instance, granted them a six-week period before Commission proposals would be put on the Council agenda so that a minimum time window for scrutiny could be observed.⁴ The Constitutional Treaty affirmed the Amsterdam Protocol and added, as far as the legislative process is concerned, a subsidiarity control mechanism called the early-warning system (EWS), which the Treaty of Lisbon took over, and at least notionally strengthened.

According to the Lisbon regime in force, European legislative proposals are sent directly by the Commission to the national parliaments in all official languages.⁵ As soon as all language versions have been sent, national parliaments have eight weeks—up from the six weeks under the Constitutional Treaty and the earlier Amsterdam Protocol—to check these proposals. Upon the request of parliaments, the Commission does not count the weeks in August to make sure that parliaments are not precluded from participating in the EWS owing to the summer recess.⁶ When a parliament or chamber thereof considers a proposal to be incompatible with the principle of subsidiarity, it may send a “reasoned opinion” to the Commission, the European Parliament and the Council.⁷

Subsidiarity is defined as a rule 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.”⁸

³O. Tans et al. (eds), *National Parliaments and European Democracy: A Bottom-up Approach to European Constitutionalism* (Groningen: Europa Law Publishing, 2007); see also K. Auel and A. Benz (eds), *The Europeanisation of Parliamentary Democracy* (London: Routledge, 2006) and the still-influential volume A. Maurer and W. Wessels (eds), *National Parliaments on their Ways to Europe: Losers or Latecomers?* (Baden-Baden: Nomos, 2001).

⁴Article 3 of the Protocol (eventually numbered No.9) on the role of national parliaments in the European Union (1997), replaced by Protocol No.1 to the Treaty of Lisbon.

⁵Articles 3 and 4 of Protocol No.2 TEU. The Protocol uses the term “draft legislative acts” which includes not only Commission proposals but also initiatives from a group of Member States or from the European Parliament, requests from the Court of Justice or the European Investment Bank and recommendations from the European Central Bank for the adoption of a legislative act.

⁶Conclusions of the XLII COSAC, an inter-parliamentary conference on EU affairs, Stockholm, October 4–6, 2009, item 2.1.

⁷Article 6 Protocol No.2 TEU.

⁸Article 5(3) TEU.

Already in the 1990s, it had been noted that subsidiarity might be an interesting subject for national parliaments to address,⁹ assuming that domestic legislatures should have an interest in retaining competences at the domestic level and might thereby act as a decentralising corrective vis-à-vis Brussels. The Laeken Declaration of December 15, 2001, the original mandate for the Convention that went on to draft the Constitutional Treaty, also explicitly referred to subsidiarity review as a possible task for national parliaments.

According to the system in force, reasoned opinions under the EWS are counted and weighed. Each parliament wields two votes; unicameral parliaments cast both votes on their own, otherwise votes are shared out.¹⁰ Each reasoned opinion is therefore worth either one or two votes against a proposal. If one-third of the total votes constitute objections, the Commission may withdraw, amend or keep in force its proposal but must in that case justify its decision anew. In the area of freedom, security and justice, the threshold is one-quarter. This part of the EWS is usually referred to as the “yellow card procedure”. If more than half of all votes constitute objections but the Commission leaves the proposal unchanged and the European Parliament or the Council are also of the opinion that the proposal violates the subsidiarity principle, they may stop the consideration of the proposal before the first reading.¹¹ This “orange card” has been added by the Treaty of Lisbon. One may argue whether the card is truly orange since the Council and the European Parliament have the right to reject legislation in any event and retain the initiative to decide what to do with incoming objections, but that is the established term. The EWS is never a “red card”: at no stage does it amount to a veto.

It is relatively easy to dismiss the EWS on a number of practical and theoretical grounds. Critical questions had in fact already been voiced when the EWS was inserted into the Constitutional Treaty.¹² Most practical criticism revolves around the prediction that the EWS is not only non-binding, it will never be triggered: partly because thresholds are unattainably high and co-ordination between national parliaments insufficient, partly because the time periods are prohibitively short, and partly because breaches of subsidiarity do not seem to be a problem in real life. Indeed, the Finnish Parliament reported already in 2004 that it had reviewed all its EU dossiers since Finland’s EU accession in 1995 and that it had not discovered a single case where it might have established a breach of subsidiarity, although possibly of proportionality.¹³ And it truly is odd that EU legislative proposals must be justified in the light of subsidiarity and proportionality, but reasoned opinions may only concern subsidiarity.¹⁴

A cynic might thus indeed dismiss the EWS as window-dressing. Yet there are at least two reasons why it should still be worth the effort to consider and implement the EWS. The first reason is that the relatively

⁹The Amsterdam Protocol referred to subsidiarity, the area of freedom, security and justice, and fundamental rights as possibly interesting topics for contributions from COSAC as an inter-parliamentary forum.

¹⁰This usually means that, in bicameral systems, each chamber receives one vote. The exception is Belgium, where, next to the two chambers of the federal parliament, the parliaments of the regions and communities are considered to form part of a composite multi-cameral legislature which would also have the right to cast Belgian EWS votes; see Declaration 51 in the Final Act of the IGC of December 13, 2007.

¹¹Article 7 Protocol No.2 TEU.

¹²See T. Raunio, “National Legislatures in the EU Constitutional Treaty” in J. O’ Brennan and T. Raunio (eds), *National Parliaments within the Enlarged European Union: From “Victims” of Integration to Competitive Actors?* (London: Routledge, 2007); W. Sleath, “The Role of National Parliaments in European Affairs” in G. Amato, H. Bribosia and B. De Witte (eds), *Genèse et destinée de la Constitution européenne* (Brussels: Bruylant, 2007); see also S. Hölscheidt, “Formale Aufwertung — geringe Schubkraft: die Rolle der nationalen Parlamente gemäß dem Lissabonner Vertrag” (2008) 31 *integration* 254.

¹³P. Kiiwer, *The National Parliaments in the European Union — A Critical View on EU Constitution-Building* (Den Haag: Kluwer Law International, 2006), p.161.

¹⁴See also the second part of art.5(3) TEU: “The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.”

narrow task of checking proposals for their compliance with the principle of subsidiarity might trigger interest and raise European awareness among national parliamentarians, which might translate into greater attention to the political aspects of proposed EU legislation and the government's opinion on it. The EWS might thus, without conferring any significant powers on national parliaments, in fact become a catalyst for the exercise of those powers that national parliaments have already.¹⁵ The second reason is that it is sensible to appreciate the value of the EWS in its own right, not just as a catalyst. Some parliaments or chambers are already so active and indeed pro-active in European affairs that subsidiarity control would be more of a limitation than a boost. The Swedish and Danish parliaments, for instance, do not even bother to react to legislative proposals at a point when it is arguably too late to make a difference as a national parliament, and instead respond to consultation documents: Green Papers, White Papers and Commission communications; regarding finalised proposals, they rely on briefing and debriefing their own ministers before and after the relevant Council votes.¹⁶ But there are a number of parliaments and chambers which are still struggling to define their proper role in the EU decision-making process. To them, the EWS, coupled with a solid conceptualisation thereof as I propose here, could bring added value, as a catalyst but also as a new minimum standard of EU involvement. It is on that basis that we shall also revisit some of the critical remarks about the EWS further below.

A final argument in favour of considering the EWS on its merits is that it has already been used since late 2004, when COSAC, an inter-parliamentary conference, decided to launch a pilot project whereby all participating parliaments and chambers would check an agreed set of proposals simultaneously.¹⁷ The Commission considers 2006 to be the beginning of the process as it then announced its commitment to a "political dialogue" with national parliaments,¹⁸ which was the forerunner to the EWS pending its formal entry into force and which the Commission now sees as a parallel track of communication with national parliaments alongside the EWS. Either way, while some things still have to crystallise, it is already possible to draw some empirical conclusions from the correspondence between national parliaments and the European Commission thus far, and to embed them in a conceptual framework that would define the role of national parliaments as councils of state.

National parliaments as councils of state

The main argument of the present article is that both the procedural setup of the early-warning system and its empirical use justify an analogy to be drawn with consultation on bills in Member States that feature a council of state. What is meant by council of state here is not a monarchical privy council, cabinet or presidential advisory body, but specifically the French-style *Conseil d'Etat* as a consultative body to which the government submits its bills before it submits them to parliament. The capacity of councils of state as supreme courts of administrative jurisdiction is not relevant here either, only their advisory function. Apart from France,¹⁹ consultative councils of state also exist in a roughly comparable form in Belgium,²⁰ the Netherlands,²¹ Luxembourg,²² Italy²³ and Spain.²⁴

¹⁵ P. Kiiver, "The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity" (2008) 15 *Maastricht Journal of European and Comparative Law* 77.

¹⁶ Annual Report 2009 on relations between the European Commission and national parliaments, Brussels, June 2, 2010, COM(2010) 291 final, p.3.

¹⁷ See the Conclusions of the XXXII COSAC, The Hague, November 22–23, 2004, item 5.

¹⁸ "A citizens' agenda — Delivering results for Europe", COM(2006) 211 final, p.9.

¹⁹ Article 39 of the French Constitution.

²⁰ Article 160 of the Belgian Constitution.

²¹ Article 73 of the Dutch Constitution.

²² Article 83bis of the Luxembourg Constitution.

²³ Article 100 of the Italian Constitution.

²⁴ Article 107 of the Spanish Constitution.

The argument is based on the following analogies: (1) the EWS can be seen as an institutionalised advice procedure; and (2) the empirical use of the EWS by a number of national parliaments to issue opinions on the *lawfulness*, rather than the political desirability, of legislation is comparable to a typical consultative task of a council of state. In other words, the EWS is designed as a relatively narrow advice procedure, similar to the advice procedure applicable to councils of state regarding bills, and empirical analysis reveals that several national parliaments in fact do use the EWS in such a manner.

The EWS as an advice procedure

In principle, the involvement of national parliaments under the EWS is simply a step in the ordinary legislative procedure, between the publication of a Commission proposal and its filing on the agenda of the Council and the European Parliament. This would call for a qualification of the EWS as a part of co-decision. The Commission is in fact intending to include its correspondence with national parliaments in its Pre-Lex database of legislative dossiers. At the same time, we should note that the EWS is not laid down in art.294 of the Treaty on the Functioning of the European Union (TFEU), where it would logically belong, but in a Protocol (No.2) on subsidiarity and proportionality. The Protocol has the same rank and binding effect as the Treaties proper; still, national parliaments are optically uncoupled from co-decision. Their function under the Protocol is referred to in art.5(3) TEU (subsidiarity) and art.12 TEU (the role of national parliaments), the latter being placed in the chapter on democratic principles. The TFEU provisions regulating the actual ordinary legislative procedure do not mention national parliaments anywhere.

Not just optically, also substantively it would be an exaggeration to speak of the EWS as a form of co-legislation. First, as noted, national parliamentary reasoned opinions are not binding, even though art.7 of Protocol No.2 sounds impressive. The Commission may have the right to withdraw proposals, and the Council and the European Parliament may have the right to reject them, but it is up to the European institutions whether to make use of that right. The Commission is never forced to amend or withdraw proposals, and the Council and the European Parliament can *always* reject legislation, even without a yellow card. The Commission in fact notes that:

“Relations with national parliaments have been intensified whilst fully respecting the respective prerogatives of the EU institutions and, more generally, ensuring the balance of the ‘institutional triangle’.”²⁵

Secondly, the Treaty of Lisbon is actually the first European integration treaty to introduce the term “Union legislator” to describe the Council and the European Parliament together, even though the term is somewhat hidden.²⁶ With such a dogmatically clear definition, there is little space left for other European co-legislators, such as national parliaments.

And yet the EWS is beyond any doubt more than a loose consultation. It is, in spite of the earlier qualifications, highly formalised. The most crucial elements are:

- the obligation to send proposals to national parliaments²⁷;
- the obligation to wait for a certain period for reasoned opinions to arrive²⁸;
- the counting and weighing of reasoned opinions²⁹; and

²⁵ Annual Report 2008 on relations between the European Commission and national parliaments, Brussels, July 7, 2009, COM(2009) 343 final, p.3.

²⁶ Protocol No.2 TEU art.4, first sentence, and art.7(3), fourth sentence and subparas (a) and (b).

²⁷ Article 2 of Protocol No.1 TEU and art.4 of Protocol No.2 TEU.

²⁸ Article 4 of Protocol No.1 TEU and art.6 of Protocol No.2 TEU.

²⁹ Article 7(1) of Protocol No.2 TEU.

- the obligation to re-justify when enough negative opinions are issued.³⁰

This goes beyond the mere listening to informal input from random stakeholders. It resembles, as I argue, formalised advice procedures as they exist for national legislation with respect to councils of state. For, typically, the consultation of a council of state on domestic bills, at least on government bills as opposed to private member's bills, is not optional but mandatory as well. In fact, the EWS is in one sense even a bit weightier than the typical consultation of a council of state since, in the national legislative process, governments are usually under no obligation to justify their deviation from an opinion of the council of state whereas the European Commission, if the EWS is triggered, is obliged to review its proposal and to justify the proposal's retention.

Another parallel between the EWS and domestic consultations of councils of state is that the EWS is worded negatively. Parliaments may issue objections but are not expected to give their positive approval: silence means tacit consent, a reasoned opinion under art.6 of Protocol No.2 is an objection, "stating why it considers that the draft in question does *not* comply with the principle of subsidiarity" (emphasis added). Similarly, the Dutch Council of State, for instance, is expected to either have an objection or to have no objections to a bill's transmission to parliament. It is not expected, for example, actively to endorse the government's political priorities or urge it to boldly go further. Even the most positive advice formula reads that the Council of State sees "no reason to make any substantive comments".³¹ While such restraint may not be found in all councils of state, the review of whether a bill is in compliance with the national constitution and the state's international obligations—a typical consultative task for councils of state, as we shall see below—is also, by definition, a closed question to which the answer is either "negative" or "not negative".

The negative formulation of the EWS has, incidentally, not prevented several national parliaments from actually submitting positive reasoned opinions to the Commission. Such positive opinions confirm that the parliament in question has no objections, or agrees with the Commission that the relevant principles have been observed. An example of a proposal triggering positive opinions (one from the Dutch Parliament and one from each chamber of the Italian Parliament) was the reduced VAT directive.³² When national parliaments participate in subsidiarity checks coordinated by COSAC, many parliaments also confirm that they detect no breach of law, which again boils down to positive advice in the sense of a motion of no-objection.

Focus on legality, not desirability

The Dutch Council of State has formulated a task for itself routinely to review bills in the light of their compliance with, among other things, higher norms: the constitution, general principles of law, European Union law and other international obligations of the state.³³ The same applies to its Luxembourg counterpart,³⁴ while the Belgian Council of State even stresses the technical and apolitical nature of its opinions on bills, and of its consideration of the bills' compatibility with the constitution and international treaties.³⁵

³⁰ Article 7(2) and (3) of Protocol No.2 TEU.

³¹ G.J. Veerman, *Over wetgeving: principes, paradoxen en praktische beschouwingen* (Den Haag: Sdu, 2007), p.75.

³² See COM(2008) 428. The Commission is uploading incoming letters and its own replies to national parliaments at http://ec.europa.eu/dgs/secretariat_general/reasons/reasons_other/npo/index_en.htm [Accessed December 13, 2010].

³³ This the councils of state indicate themselves in their presentations; see, for the Netherlands, at <http://www.raadvanstate.nl/adviezen> [Accessed December 13, 2010].

³⁴ At <http://www.conseil-etat.public.lu/fr/attributions/index.html> [Accessed December 13, 2010].

³⁵ At http://www.raadvst-consetat.be/?page=proc_consult_page4&lang=en [Accessed December 13, 2010].

The review of the constitutionality of bills, for instance, is a review of their legality: an assessment based on legal criteria. Meanwhile, activities such as policy analysis of the necessity or effectiveness of law are much more closely related to the *desirability* of legislation. After all, legislation that is superfluous or hard to enforce is not immediately unlawful, it is first and foremost undesirable. Legality review, by contrast, implies an assessment of the *admissibility* of legislation and its compliance with certain norms, irrespective of whether the law's adoption is opportune or not. And also as regards the EWS, we should note that compliance with the principle of subsidiarity is not merely a question of how desirable a certain piece of EU legislation is or would be. What is at stake is the question whether the European Union may (lawfully) legislate at all. This is a question that arises even before the proportionality question can be addressed, which concerns the form and extent of action assuming that action is lawful (at that level of government) in the first place.

The above observations are not merely academically intriguing, they are empirically realistic. It is true that both Working Groups of the European Convention which originally drafted the EWS for the Constitutional Treaty had envisaged it to be a “political” dialogue.³⁶ Nevertheless, in several national parliaments, it may be observed that a distinction is actually made between (political) desirability review and (legal) admissibility review of Commission proposals, and that there is a readiness to remain faithful to the prescribed EWS standards and procedures. The most compelling *prima facie* evidence of such readiness is the structuring of parliamentary opinions under the headings of subsidiarity assessment and other principles, such as legality proper (i.e. presence of a sufficient legal basis) and proportionality. Chambers thereby distinguish, at least seek to distinguish, the various review criteria and to phrase their arguments accordingly.

Based on the letters published by the Commission regarding proposals launched in 2009 (letters on proposals launched earlier are being added but the archive is not yet complete),³⁷ the following picture emerges. Several parliaments or chambers explicitly include subsidiarity as a heading in the structure of their opinions and formulate (part of) their opinion under that heading. This includes those parliaments or chambers that only issued reasoned opinions on legislative proposals in the context of a COSAC-coordinated subsidiarity check, but not of their own motion, namely the Belgian House of Representatives and Senate, the German Bundestag, the French National Assembly, the Czech Chamber of Deputies, the two chambers of the Irish Parliament jointly, the lower chamber of the Parliament of Slovenia and the unicameral parliaments of Bulgaria, Latvia, Hungary and Malta. These chambers, in other words, over the observed period, do not reply to EU legislative proposals unless triggered by COSAC, but they stick to subsidiarity considerations when they do. Some of these chambers also reply to other items such as consultation documents, however that is not covered by the EWS and would rather fall, properly, under “political dialogue”.

Furthermore, there are parliaments or chambers that also issued reasoned opinions on legislative proposals outside the context of COSAC-coordinated subsidiarity checks, and that even then adhere, at least partly, to subsidiarity-based reasoning. This group includes the two chambers of the Italian Parliament, the two chambers of the Dutch Parliament acting separately or jointly, the French Senate, the Greek Parliament and the Austrian Bundesrat. The Portuguese Parliament phrases its opinions in EWS terms some of the times—it had been mentioned in a 2008 report by the Commission alongside the Dutch Parliament and

³⁶ See the Final Report of Convention WG I (Subsidiarity), CONV 286/02, p.2; and of WG IV (National Parliaments), CONV 353/02, p.10, respectively.

³⁷ The archive is available online at http://www.ec.europa.eu/dgs/secretariat_general/relation/relation_other/np/index_en.htm [Accessed December 13, 2010].

the French Senate as a parliament that did stick to subsidiarity considerations instead of political issues³⁸—but that is not always the case in the examined period.

To draw a stark contrast, the German Bundesrat has the habit of providing highly detailed amendments to virtually each article of a draft directive or regulation to which it replies, in the style of a co-legislative chamber, while the UK House of Lords keeps producing its usual in-depth reports on selected legislative projects. Both chambers seem to draw up their opinions or reports for their own purposes—of communicating with their own government or the public—and not for the primary purpose of the EWS. The Commission is merely put in “cc”, as it were. Over the examined period, the Luxembourg Parliament responded to COSAC-selected proposals only, but discussed subsidiarity only marginally and did not even attempt to phrase its opinion in such terms. The Lithuanian Parliament responded to just one non-COSAC item, namely a proposal concerning the security of gas supply, and voiced purely political opinions rather than views on subsidiarity. In its opinion on the COSAC-selected items, it did observe the EWS review criteria, however. The Czech Senate, meanwhile, did not refer to subsidiarity even when participating in COSAC subsidiarity checks, let alone when responding to other proposals, and instead discussed the political desirability of the proposed measures.

Nevertheless, it is fair to say that while some parliaments or chambers choose to carry out autonomous and openly, one might say unabashedly, political scrutiny in communicating with the Commission, most parliaments or chambers that do participate in the EWS are willing to adapt their reasoning to the review criteria stipulated in Protocol No.2.

Four Dutch examples may illustrate the point. In a joint opinion of the two chambers of the Dutch Parliament on the proposed framework decision on the fight against terrorism,³⁹ the States-General argued that subsidiarity and proportionality had been complied with only in a “strict sense” whereas they had further questions on which they wished the Commission to elaborate. In other words, legally, the adoption of the proposal would not lead to a breach of EU law, but other than that there is room for debate: the definition of “public provocation” of terrorist offences, for instance, seemed rather broad. Regarding the proposal on cross-border healthcare,⁴⁰ the Dutch Parliament raised the question whether it was compatible with art.152(5) EC (now art.168 TFEU), which stipulates that:

“Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care.”

The Dutch Parliament argued that the scope of the proposed measure was not entirely clear and that therefore no clearance under the EWS could be given. The proposed Equal Treatment Directive⁴¹ was also criticised as, again, it was not clear what the impact on domestic law would be, so a positive reply under the EWS could not be given either. Perhaps the finest empirical example of the Dutch Parliament’s distinguishing between legal and political review was its response to the proposal on minimum standards for the protection of stateless persons in the field of asylum law⁴²: the two chambers jointly sent a positive letter, stating that together they had no objections under the EWS, but the senatorial First Chamber sent a separate letter—a sort of concurring opinion—asking more general critical questions on EU asylum policy. Evidently, the Parliament did not wish to mix up political considerations with the EWS and opted for separate replies.

³⁸ Annual Report 2008 on relations between the European Commission and national parliaments, Brussels, July 7, 2009, COM(2009) 343 final, p.5.

³⁹ See COM(2007) 650.

⁴⁰ See COM(2008) 414.

⁴¹ See COM(2008) 426.

⁴² See COM(2009) 554.

Implications for the EWS

The drawing of an analogy between national parliaments in the EWS and councils of state in domestic lawmaking has a number of practical consequences. One such consequence is that national parliaments that are willing to embrace such an analogy may actually be performing a function that is more consistent with their domestic role. In the debate on the role of national parliaments in the European Union, one frequently gets the impression that parliamentarians are expected to play a role in a European context that they do not even play in the domestic context. A realistic assessment of what we can expect of national parliaments would have to take into account, among other things, that, domestically, parliamentarians are typically not there to *develop* policies but to ask critical questions to the government (the opposition more so than coalition parties), to demand proper justification of policies and, finally, to *legitimise* these policies through majority consent.⁴³ Bringing European activity under the EWS in line with traditional domestic patterns of parliamentary behaviour might generate expectations that are realistic.

The second consequence is that the diligence with which EWS activity is carried out becomes more relevant than the question whether democratic legitimacy is conveyed in the process. After all, an unelected council of state is not respected for its democratic credentials but rather for its intellectual rigour. One probable reason why the Dutch Parliament sticks so relatively faithfully to the letter and spirit of the EWS is that its participation in the EWS was, at least originally, a joint project between the Second (lower) Chamber and the senatorial First Chamber. In the domestic lawmaking process, the First Chamber, even though it has an absolute veto on all bills, is used to limiting its review of bills to the consideration of their constitutionality, leaving the political assessment to the directly elected parliamentarians in the lower chamber. This habit coincides with the First Chamber's more general willingness to invest time into European affairs: as senators are indirectly elected, they have less need to cater to the more immediate preoccupations of voters and have more time to consider policy issues that do not promise electoral reward. Both phenomena may have left an imprint on Dutch EWS practice.

We can also observe disproportionate participation by upper chambers in other systems: all 11 British letters on EU proposals launched in 2009 originated in the House of Lords, not a single one from the Commons; seven out of eight French letters came from the Senate; the Czech Senate was the one to respond to 22 out of the 23 EU proposals that triggered a Czech parliamentary response; six out of ten Austrian letters came from the federal-senatorial Bundesrat; and even though the German Bundesrat is a federal inter-executive chamber rather than a proper senate, let alone a parliament in the strict sense, one should also point out that this German Bundesrat authored 15 out of 17 German letters over the examined period.

While senates are usually subordinate to lower chambers—their veto can in most systems be overruled, the government normally relies on the confidence of the lower chamber and not the senate—one should readily agree that, in the EWS, reasoned opinions from senates are not necessarily of an inferior value to opinions from lower chambers. Formally, the two votes are equally weighty. Substantively, senates seem to have more energy to invest in the process. In fact, as senates are typically more independent from the executive of the day, their opinion should even have a greater *added* value than opinions approved by a majority in the lower chamber, which is usually the same majority that keeps the government in office. The senates themselves seem to embrace a stronger European role and welcome in particular that the EWS accords them co-equal status with the lower chambers.⁴⁴

⁴³ See K. Auel, "Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs" (2007) 13 *European Law Journal* 487.

⁴⁴ See the Joint Statement of the 6th meeting of the Association of European Senates, Warsaw, May 25, 2004, available at <http://www.senateurope.org> [Accessed December 13, 2010].

Of course we should not forget that the democratic legitimacy of senates, if they are indirectly elected, partially elected or, like the Lords, entirely unelected, is weaker than that of lower chambers.⁴⁵ In that light, it would appear misguided to place art.12(b) TEU, which refers to the EWS in which senates are co-equal to lower chambers, in the “Democratic Principles” chapter of the EU Treaty. Again, logically, the EWS belongs in the chapter on the ordinary EU legislative process.

The relative formality, perhaps even formalism, of EWS review standards could furthermore solve a frequently cited concern that there does not seem to be a uniform definition of the term “subsidiarity”.⁴⁶ Perhaps it truly is difficult to separate it from proportionality and sheer desirability. However, we should recall that Protocol No.2 TEU places an obligation on the Commission to justify its proposals in the light of subsidiarity (and proportionality). If this justification is found wanting, Protocol No.2 is breached by default. The case can even be made that the EWS is thereby an accountability mechanism vis-à-vis the Commission, in that national parliaments as forums ask questions to the Commission as an actor and the Commission has to justify; and, since the dialogue is designed to revolve around the legality not political desirability of proposals, one could even speak of legal rather than political accountability.⁴⁷ The limitation here is that the object of these questions concerns (mere) proposals, not final action on the part of the actor; that the EWS does not itself provide for a rejoinder from parliaments after the Commission’s rebuttal to reasoned opinions (even though some parliaments do send supplementary letters); and that national parliaments do not have a direct sanction for dissatisfactory answers from the Commission (objections from national lower chambers may of course herald objections from the corresponding government in the Council of Ministers as well as possible resistance at the implementation stage). In this sense, the scope for sanctions or counterproposals is limited; but again, it is not at all necessary for national parliaments to respond to Commission proposals with an economic analysis or regulatory impact assessment of their own. It is enough that they check whether the Commission’s *reasoning* is lazy (such as that a particular instrument or legal basis has been chosen because previous measures had taken the same form or been based on the same basis) or whether it is thorough and convincing. The empirical record suggests that the Commission is at times very cautious when formulating its replies to national parliamentary reasoned opinions,⁴⁸ and it acknowledges itself that reasoned opinions from several national chambers challenge the justification rather than the merit of subsidiarity compliance.⁴⁹ And since Commission proposals are often amended by the Council and the European Parliament in a way on which the Commission had not prepared an impact assessment, it might anyway be more sensible under the EWS to check the justification rather than the content of proposals.

The final practical consequence of the present analysis is that COSAC should by all means continue to select potentially controversial proposals for collective scrutiny under the EWS. Without co-ordination between national parliaments, Commission proposals trigger usually a maximum of three to four opinions each; proposals subjected to co-ordinated review are processed by around 30 parliaments or chambers.⁵⁰

⁴⁵ See for a comparative overview: S. Patterson and A. Mughan (eds), *Senates: Bicameralism in the Contemporary World* (Columbus: Ohio State University Press, 1999).

⁴⁶ COSAC, *Report on the Results of the Subsidiarity Check on the Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation* (November 2008), p.12.

⁴⁷ This would in some sense comply with the definition of an accountability relationship as formulated by Bovens; see M. Bovens, “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13 *European Law Journal* 447.

⁴⁸ See, e.g. the Commission’s replies to national parliamentary reactions to the proposed Equal Treatment Directive COM(2008) 426.

⁴⁹ Annual Report 2009 on relations between the European Commission and national parliaments, Brussels, 2 June 2010, COM(2010) 291 final, p.4.

⁵⁰ Reports on the COSAC subsidiarity checks are available at <http://www.cosac.eu/en/info/earlywarning> [Accessed December 13, 2010].

For parliaments that are still seeking to define their role, such co-ordination would seem crucial. Unfortunately, rotating COSAC presidencies have lately omitted to select proposals for collective review, as more and more chambers seem to argue that the EWS is established enough, that scrutiny should cover broadly political issues and that subsidiarity control, now that the pilot projects have been completed, should be an autonomous task for parliaments without interference from COSAC.⁵¹ This is a shame, considering that COSAC co-ordination has triggered EWS activity where otherwise, in all likelihood, there would have been none and that EWS review may, as said, act as a concrete catalyst for further political scrutiny.

Conclusion

One should hope that, even though COSAC is scaling back its co-ordination activities, a coalition of active national parliaments or chambers will nevertheless emerge to take the EWS seriously. It is quite possible, in fact probable and absolutely legitimate, that national senates, as opposed to lower chambers, will be well represented in such a coalition of active chambers. In the context of the EWS, a realistic model to adopt would then be the scrutiny of EU legislative proposals in the fashion of a council of state as it is, in several Member States, consulted on domestic bills before they are submitted to the domestic legislature. Such council of state-type activity is advisory, not co-legislative, but that does not mean it is irrelevant. Scrutiny under the EWS should then focus on the lawfulness, on the admissibility, of legislation, rather than its political desirability. Political considerations may still be triggered in the wake of EWS review, although it is probably too late at the EWS stage to make much of a substantive difference. Instead, EWS review may well focus on the quality of the justification of proposals in the light of subsidiarity (and other principles), which should keep the Commission on its toes. Perhaps the yellow or orange cards of the EWS will never be triggered, but that should not automatically be considered a sign of the system's weakness. If the Commission stays within the limits of conferred competences and of the principles of the exercise of these competences, and if national parliaments or chambers call the Commission to account for its choices and reasoning in proposing new EU measures, then there will simply be no need for any yellow or orange cards to be raised.

⁵¹The possibility of such a turn of events had in fact already been anticipated even at a time when COSAC envisaged making collective subsidiarity checks a regular feature of its work; see M. Knudsen and Y. Carl, "COSAC — Its Role to Date and its Potential in the Future" in G. Barrett (ed.), *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures* (Dublin: Clarus, 2008).