

DELIBERATIVE DEMOCRACY IN THE EU

Countering Populism with Participation
and Debate



EDITED BY
STEVEN BLOCKMANS
AND SOPHIA RUSSACK

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10. REVISING THE EARLY WARNING SYSTEM TO REINFORCE THE 'THIRD CHAMBER' OF EU MULTI-LEVEL LAW-MAKING

FILIPPA CHATZISTAVROU AND
KONSTANTINOS PAPANIKOLAOU

This chapter explores a potentially effective improvement of the role of national parliaments as the 'third chamber' in the EU's multi-level governance system. The latter is characterised by a de facto transfer of competences within a new generation of EU policies, which requires a rethink of how to improve the lines of delegation and accountability.

The generalisation of the Early Warning System (EWS) – through the establishment of new 'blue' and 'green' card procedures – would make it possible to extend multi-level parliamentary scrutiny in a more flexible way while rendering this control mechanism legally binding for the Commission, the Council and the European Parliament, not only on subsidiarity issues but throughout the whole policy cycle. In this way, conferral-focused scrutiny within a new mechanism could first assuage national anxieties that generate Euroscepticism; and second, it could transform the reactive and negative EWS involvement into an active and constructive one.

10.1 Introduction: A confusing creep of competence?

EU institutions exercise their functions under the fundamental principle of voluntary conferral of powers by member states. The loose and incomplete horizontal separation of powers has been based on this principle ensuring the proper functioning of the EU's traditional institutional triangle. The Lisbon Treaty changes set out in

Art. 12 TEU, Art. 5(3) TEU, the Protocol (No. 1) on the role of national parliaments (NPs) in the European Union and the Protocol (No. 2) on the application of the principles of subsidiarity and proportionality placed emphasis on reshaping and strengthening the European supportive role of national assemblies.

NPs' first duty is to control national governments, thus ensuring (indirect) democratic legitimacy for one of the two representative bodies of European bicameralism. The subsidiarity control mechanism, the Early Warning System (EWS) established in 2009, confuses this principal-agent relationship between NPs and governments, by also making NPs 'agents' at the EU level (Raunio, 2007). Since then, NPs have been described, quite rightly, as a civil society actor of the third sector (Cooper, 2013); it has even been argued that the introduction of the EWS suggested a 'tricameral' system of representative democracy in the EU by empowering NPs' collective and formal intervention (Cooper, 2013).

Assessing the ten years of experience with the EWS, this paper challenges the status quo of political and institutional power within the EU and outlines a means of effective improvement in NPs' role as the 'third chamber' in a multi-level governance system fit for the 21st century. By putting the accent on the problem of competence creep, it underlines the need to establish a real balance between preserving domestic socio-economic and politico-legal idiosyncrasies, and developing European public policies for convergence and inclusion.

Need to establish a real balance between preserving domestic socio-economic and politico-legal idiosyncrasies, and developing European public policies for convergence and inclusion.

10.2 What policy capacity for national parliaments within the EU?

Subsidiarity is a regulation and legitimation principle on the vertical distribution of competences according to which the EU must not intervene in any area of shared competence unless such an action is deemed necessary and presents a clear added value. The EWS, in the sense of monitoring the compliance of EU legislation, only comes into play when competence in a certain policy field is shared with the member states. In principle, national competences (such as national

security, the maintenance of law and order), or exclusive EU competences (such as competition law, common commercial policy and monetary policy) or non-legislative documents such as communications or green papers are excluded.

However, successive crises created a great deal of pressure for action at the EU level leading to the widening of policy initiatives beyond old-fashioned classifications and subsequently the erosion of individual national competences. For example, the question of oversight powers of NPs over the ECB,¹ the Banking Union and the OMT programme, as well as the controversial question of 'technical assistance' provided on the basis of structural reform support programmes² are issues that go well beyond scrutinising the Commission's subsidiarity compliance. The phenomenon of 'de-parliamentarisation' of European integration refers to the transfer of policymaking (mainly regulatory) powers to the European level; it is illustrated in two ways. First, the increased use of co-decision and qualified majority voting in the Council and the bargaining in the Council and the European Council make it difficult for national parliaments. They find themselves in a situation of informational asymmetry making it effective scrutiny of their governments' activities difficult and are thus losing direct influence and becoming unable to force governments to make detailed *ex ante* commitments before taking decisions at the European level (Raunio, 2009). New powers for the European Parliament cannot fully compensate for the NPs' loss of authority; the only way to address the democratic deficit is to better (re-)involve NPs directly at the EU level (Cooper, 2013).

Successive crises created a great deal of pressure for action at the EU level leading to the widening of policy initiatives beyond old-fashioned classifications and subsequently the erosion of individual national competences.

¹ This does not refer to the latter's monetary policy but merely its supervisory tasks.

² The opinion of the Committee of Regions of 2018 on the structural reform support programme for the period 2017 to 2020 concluded that the proposal complied "with the principle of subsidiarity if technical assistance is provided in areas of shared competence between the Union and the Member States" adding that "as the proposal is based on a voluntary mechanism, the question of proportionality does not arise". In fact, in principle these programmes are not voluntary and technical assistance also covers areas of national competence.

Second, policy developments in the early 21st century clearly show that there is a *de facto* transfer of new competences to the intergovernmental institutions and *de novo* bodies of the EU. This transfer 'breaks' the bicameral logic of the system, since the European Parliament cannot carry out its (direct) scrutiny role of the newly Europeanised core state policy areas (i.e. budgetary and economic policy, migration, asylum and borders policy, defence policy, etc.). Added to this, the long-term empowering of executives as the main policy shapers, which further undermines – depending on the national political systems – the scrutiny role of NPs within the domestic arena of public policy.

Co-decision and forced Europeanisation of 'new' EU policies are taking place while only a handful of MPs involved with European Affairs Committees keep track of the Brussels agenda, the remainder appear to live on another planet called 'domestic', unaffected by the constant stream of new EU legislation (Borońska-Hryniewiecka, 2015).

These developments show that the traditional categorisations of competences do not correspond to the political and legal post-crisis realities. The need for impact assessments of each proposal before publication will increase. With the new generation of EU policies, we need to think how to redesign the lines of delegation and accountability.

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The EWS as it currently operates does not assess the transfer of powers to the EU, but whether those that have already been transferred are correctly classified according to the distinction between exclusive, shared and supporting EU competences. However, recurrent serious transgressions of the competence boundaries might raise questions as to whether the EU should continue to exercise powers in a given field (Jančić, 2015). So, the crucial question today is how to achieve a successful distribution of competences in a system of multi-level governance and multi-layer as well as multi-tier architecture by taking decisions at the most appropriate level.

10.3 The Early Warning System: an assessment

According to the EWS (post-Brexit), each of the 15 unicameral parliaments is allotted two votes, while each of the 12 bicameral chambers counts as a single vote. With 27 EU member states and 39 national parliamentary chambers, there are 54 votes in all; in the yellow card procedure one-third (one-quarter in the AFSJ) are needed to raise objections, while a simple majority is needed in the orange card procedure. *Regional parliaments with legislative powers can also be consulted.* The orange card procedure, that has never been used, gives the right to force the Commission or other EU legislative initiators (European Parliament, Council, a (group of) member state(s), etc.) to take NPs' opinion directly into account and deal with their concerns.

The *acquis* of this 'game of cards' is that NPs protested in their reasoned opinions on matters well beyond the issue of subsidiarity, for instance on the political choices made in Commission documents or policy areas in a draft legislative act, i.e. the legislative substance and the added value of the proposal, its legal basis, or on the compliance with the principle of proportionality and policy efficiency (Jančić, 2015). These submissions that are not raising concerns related to compliance with subsidiarity are referred to as 'contributions'.

No doubt, the fact that the yellow card procedure has been triggered three times (see Table 10.1) proves that NPs are quite willing to influence and participate in policy shaping in the pre-legislative phase of EU decision-making, rather than merely being policy commentators expressing their views on EU law-making.

In the policy debate one of the main questions is what triggers NPs to be proactive at the European level. The binding nature of the national parliamentary scrutiny procedure as far as it concerns governments' negotiating mandates in the Council differs significantly from one member state to another; this also applies regarding the heterogeneity of national parliamentary traditions and perceptions of parliamentary roles in EU governance.³

³ Two forms of representation may be distinguished from one another: in 'dyadic representation', the individual MP represents his or her constituency; in 'collective representation', the entire parliamentary chamber represents the electorate as a whole, and individual parliamentarians may represent interests or persons outside their own constituency.

Table 10.1 *The three yellow cards*

May 2016	14 parliamentary chambers from 11 member states totalling 22 votes → Proposal for a Directive concerning the posting of workers in the framework of the provision of services. ⁴	Romanian Chamber of Deputies (1), Romanian Senate (1), Czech Chamber of Deputies (1), Czech Senate (1), Polish Sejm (1), Polish Senate (1), Seimas of Republic of Lithuania (2), Danish Parliament (2), Croatian Parliament (2), Latvian Saeima (2), Bulgarian National Assembly (2), Hungarian National Assembly (2), Estonian Parliament (2) and the National Council of the Slovak Republic (2).
October 2013	13 parliamentary chambers from 11 member states totalling 19 votes → Proposal for European Public Prosecutor's Office (EPPO). ⁵	Cypriot Parliament (2), Czech Senate (1), House of Commons (1), House of Lords (1), Swedish Parliament (2), Slovenian National Assembly (2), Romanian Chamber of Deputies (1), Maltese Parliament (2), Irish Parliament (2), Hungarian National Assembly (2), French Senate (1), Dutch Parliament (1), Dutch Senate (1).
May 2012	12 parliamentary chambers from 12 member states totalling 19 votes → "Monti II" Proposal Regulation in order to ensure the free movement of goods in the EU, while acknowledging	Dutch House of Representatives (1), Portuguese Assembly (2), Latvian Parliament (2), French Senate (1), Belgian House of Representatives (1), Luxembourgian Chamber of Deputies (2), House of Commons (1), Swedish Parliament (2), Polish Parliament (1), Maltese Parliament (2), Finish Parliament (2), Danish

⁴ The opinion of the Committee of Regions on the Revision of the Posting of Workers Directive did not raise any issue and agreed with the Commission proposal.

⁵ The task of prosecuting crimes affecting the EU budget had been within the exclusive competences of the member states. However, the Commission considered that they are not adequately equipped and motivated to counteract such offences (Brady, 2013).

	<p>the right and freedom to take strike action.⁶</p>	<p>Parliament (2). The Danish Folketing played the role of 'initiator', acting rapidly to adopt the first reasoned opinion.</p>
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Scholars often conclude that there is no blanket weakening of legislatures due to the intergovernmental nature of crisis management, but rather the exacerbation of existing strengths and weaknesses. Nevertheless, they admit that NPs encounter many common obstacles related to the lack of resources (Paskalev, 2009), the central role of the European Affairs Committee vis-à-vis sectoral committees (Winzen, 2012), but also the short time period of eight weeks and the difficult while indispensable coordination between parliaments in order to meet the threshold of a yellow card (Cooper, 2012). Furthermore, the lack of compatibility and coordination in the field of European affairs between the houses in many member states naturally weakens national parliaments' ability to exert influence on the EU.

Scholars have explained that MPs are more likely to vote for a reasoned opinion under certain conditions, i.e. when there are high levels of contestation between parties over EU integration, presence of a minority government, strong public Euroscepticism, institutionally strong (upper) chambers, economic growth or an adverse macro-economic context, or new, urgent or salient legislation debated in the Council and voted in the European Parliament before the scrutiny period (Gattermann and Heffler, 2015; Williams, 2016). Yet, disappointing experiences may also be a reason for the partly reluctant use. Strong parliaments are not invariably the most active. Beyond formal power and institutional capacity, motivational factors are significant in

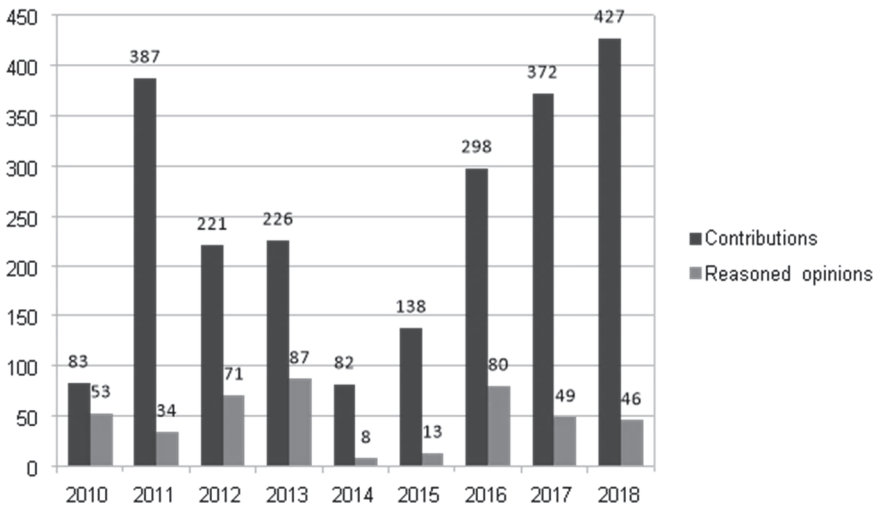
The lack of compatibility and coordination in the field of European affairs between the houses in many member states naturally weakens national parliaments' ability to exert influence on the EU.

⁶ Subsequent to several decisions by the CJEU, concerns were raised that in the internal market, economic freedoms might prevail over fundamental freedoms, such as the right to strike. Hence, the Commission decided to draft a proposal addressing these concerns and clarifying the relationship between these freedoms (European Commission, 2013, 7).

explaining parliamentary involvement in the EWS (Auel, Rozenberg and Tacea, 2015).

The EWS does not seem to live up to the expectation of establishing of a constructive and meaningful exchange of arguments between NPs and the Commission. A large number of parliaments have repeatedly criticised the fairly late, vague and generally inconsequential replies by the European Commission to both reasoned and Political Dialogue opinions⁷ (Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union [COSAC], 2012, 2014, 2015). Whether and to what extent this also explains fluctuations in the number of submitted opinions is difficult to gauge, given that the number of new legislative initiatives by the Commission has also decreased (see Figure 10.1).

Figure 10.1 Total of submissions by NPs under Protocol N° 2, 2010-2018

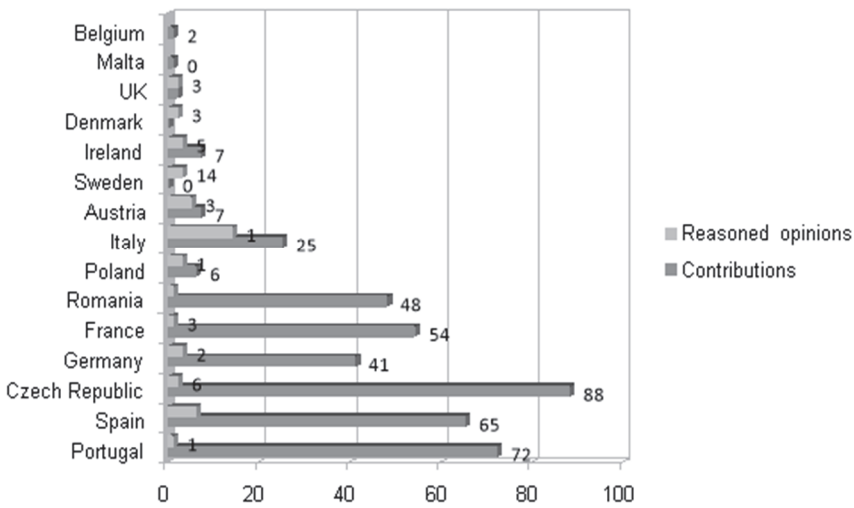


Source: Annual Reports 2010-2018, Relations between European Parliament & EU National Parliaments under the Treaty of Lisbon, European Parliament.

⁷ National parliaments can also submit opinions, contributions or statements in the framework of the Informal political dialogue, which is an individual procedure, non-binding in its entirety, and wholly dependent on the Commission both for its existence and for its impact.

Each parliament has different procedures for adopting a reasoned opinion, with its own combination of competent bodies – European Affairs Committee, sectoral committee and/or plenary session – involved in the process. Some NPs take a more active part in the EWS procedure than others, having made very frequent use of the instrument, but overall participation varies (Williams, 2016) (see Figure 10. 2).

Figure 10.2 Submissions by NPs under Protocol N° 2, 2018⁸



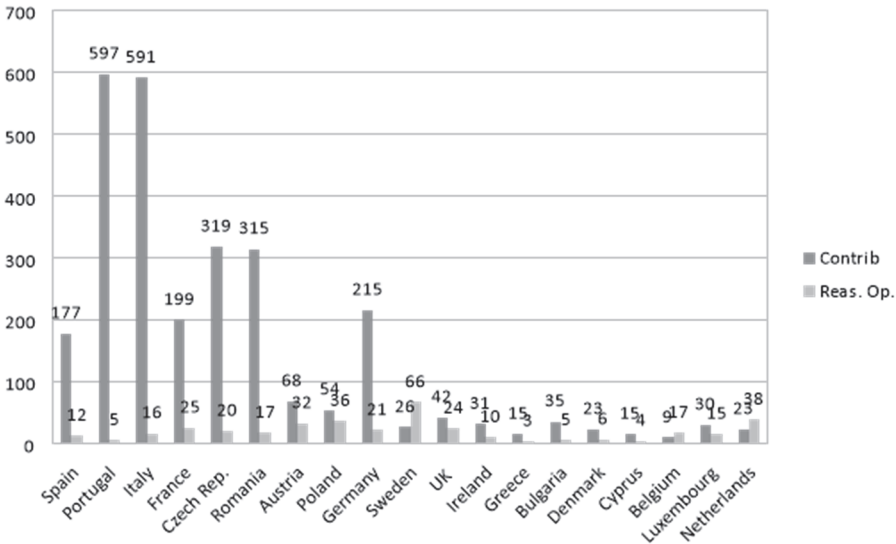
Source: Annual Report 2018, Relations between European Parliament & EU National Parliaments under the Treaty of Lisbon, European Parliament.

In a long-term perspective, the absolute frontrunner in the EWS is the Swedish Riksdag, followed by the Polish and Austrian parliaments (see Figure 10.3). Other parliaments, however, have been more reluctant in their use of the instrument. While the Dutch Tweede Kamer seeks to be an active player in the EU, there is consensus between the Swedish, Finnish and German chambers that the EWS should remain a complementary tool since parliaments should not be granted a more independent role at the EU level. The Portuguese parliament is, along with the Italian parliament, by far the

⁸ Bulgaria, Cyprus, Slovakia, Slovenia, Luxembourg, Latvia, Greece, Hungary, Estonia, Finland and Lithuania made no submissions in 2018.

most prolific parliament in submitting contributions. The former has a similar performance in informal political dialogue, since it has sent literally hundreds of letters to the Commission, but it is relatively reticent in using the EWS (See Figure 10.3).

Figure 10.3 Total of submissions by NPs under Protocol N° 2, country by country, 2010-2018⁹



Source: Annual Reports 2010-2018, Relations between European Parliament & EU National Parliaments under the Treaty of Lisbon, European Parliament.

A parliament is not a homogeneous bloc, but a *lieu* of political antagonism where big or small majorities have the last say on formulating parliamentary positions. In fact, some studies show that the common majority-opposition divide represents a problem for the EWS (Cooper, 2012; Raunio, 2009). Further, the EWS has also been accused of having the potential to put powers into the hands of a ‘minority’, while it is far from being a system allowing minority rule.

⁹ The Parliaments of Malta, Hungary, Latvia, Lithuania, Croatia, Slovenia, Estonia, Finland and Slovakia have made less than 10 submissions per country for the whole period 2010-2018.

National parliaments are the weakest link in the EU policy game for two reasons. First, the EWS is in effect a very demanding system requiring supermajority approval (Cooper, 2013). Second, other players, much more internally cohesive, dominate the policy agenda. For these two reasons, the 'veto players' (Tsebelis, 2004), i.e. the Commission, the Council and the European Parliament, provide 'high policy stability', thus preventing a shift from the legislative status quo, since the number of individual and collective national parliamentary actors that have to agree to a proposed change is very high. In this sense, it is rightly observed that there is a lack of a unified parliamentary approach to EU affairs and strained relations with the European Parliament, preventing NPs from becoming 'multi-arena players' (Auel and Neuhold, 2017).

Individual national legislators are institutional and partisan players, which together are a collective actor but with no pre-defined preferences. They act as individual players exercising traditional scrutiny within the domestic arena and participating within the EU arena where possible (e.g., Political Dialogue, CJEU action, treaty revisions); they also act as collective parliamentary players together with other NPs submitting opinions (EWS, formal IPC) or as being formal members of future Conventions.¹⁰ National parliaments operate more and more at both levels, oscillating between the two poles of internal antagonism and external cooperation. Unless we consider that the yellow card is at most advisory and the orange card is not a veto, the experience of the three yellow cards could constitute a good counter-argument, bringing us to consider ways to reconfigure the EWS.

National parliaments operate more and more at both levels, oscillating between the two poles of internal antagonism and external cooperation.

¹⁰ In the framework of the formalisation of the Convention method as part of the ordinary Treaty revision procedure (Art. 48 TEU).

10.4 New policy options

As noted above, national parliaments view subsidiarity as a broad political principle rather than as a narrow legal or technical principle. The generalisation of the use of the EWS would allow politics to infuse EU policymaking. Under an ‘enlarged’ EWS, a parliament could become a mere tool of its government, who will instruct it to pass reasoned opinions against draft legislative proposals that the government opposes (Cooper, 2015).¹¹ The generalisation of the EWS would mean that this mechanism is not only the first phase of what happens later in the Council. It would make it possible to extend multi-level parliamentary scrutiny in a more flexible way while

The generalisation of the EWS would make it possible to extend multi-level parliamentary scrutiny while rendering this control mechanism legally binding for the Commission, the Council and the European Parliament, throughout the whole policy cycle.

rendering this control mechanism legally binding for the Commission, the Council and the European Parliament, not only on subsidiarity issues but throughout the whole policy cycle.¹² In that perspective, it would be judicious to refocus NP’s European scrutiny on the question of the existence of

EU competence and the principle of (a dynamic) conferral, also amenable to the repatriation of powers from the EU, and thereby endow parliaments with a more positive role as regards the substance of EU legislation (Jančić, 2015). NPs’ role has already been extended to two further types of Treaty change, the simplified Treaty revision procedure as well as two ‘passerelles’ (Art. 48 para. 7 TEU and 81 TFEU). While the former also requires ratification within each member state, NPs have been given a direct and individual veto right

¹¹ Art. 8 of the Protocol 2 stipulates that member states may bring actions for annulment before the Court against a legislative act on grounds of infringement of the principle of subsidiarity on behalf of their national parliament or a chamber thereof, in accordance with their legal system. The Committee of the Regions may also bring such actions against legislative acts if the TFEU provides that it must be consulted.

¹² In the conceptual phase when policies and legislation are being designed, as well as in the implementation and evaluation phases after the measures have entered into force.

regarding the two ‘passerelles’ that can be exercised within six months of the notification of the change. It could be interesting to duplicate the right to veto (by adopting some elements from the red card proposal)¹³ on policy grounds in the application of a new multi-level law-making mechanism while initiating reasonable voting rules for the essentially ‘positive’ cast of the EWS. In this framework, the logic of the system should be changed. The yellow card should not anymore be ‘advisory’, leaving it up to the Commission to decide whether to maintain, amend or withdraw the proposal, while, in the case of the orange card, if the Commission maintains the proposal, then the final decision is in the hands of the European Parliament and the Council. The merging of the yellow and orange card could make a single ‘blue card’ procedure possible, where NPs work in tandem with the European Parliament by reviewing legislative proposals (mixed parliamentary scrutiny, following the example of Europol) where the Commission and the Council would be obliged to take into account (see Table 10.2).¹⁴ Another step could be to re-frame the green card allowing ‘positive voting’ to make it a proposal to be issued together with the European Parliament (Borońska-Hryniewiecka, 2015).

The merging of the yellow and orange card could make a single ‘blue card’ procedure possible, where NPs work in tandem with the European Parliament.

Table 10.2 Towards a multi-level law-making mechanism

Current system	Deadlines for submission and rules for triggering	Proposed system	New deadlines for submission and rules for triggering	
Yellow card	Eight weeks / one-third of total votes	Blue card (a multi-criteria	15 weeks / 35% of total votes of NPs	The Commission (or other institution-legislative initiator)

¹³ Initially, the red card veto was a democratic reform contained within the 2016 EU-UK renegotiated settlement according to which if in the first 12 weeks 55% of national parliaments raise objections to a new EU legislative proposal (on the grounds of non-compliance with the principle of subsidiarity), then it must be either amended or discarded, and will be ‘comprehensively discussed’ in the Council.

¹⁴ The review of the proposal means withdraw or substantially amend the proposal.

Orange card	Over half of total votes	scrutiny procedure)	and one-third of EP total votes (with MEPs from at least 3 political groups)	<p>along with the Council must review the proposal in any policy area & votes of 55% of member states in the European Council.</p> <p>A national parliament or/and one-third of EP with MEPs from at least 3 political groups may bring a complaint before the European Ombudsman and a case before the ECJ in case of non-compliance with the procedure.</p>
		Green card	36 weeks / 40 % of total votes of NPs and one-third of EP total votes (with MEPs from at least 3 political groups)	<p>NPs and EP right to initiate legislation in all policy areas except in areas of exclusive competence.</p> <p>The Commission along with the Council must examine the proposal & votes of 55% of member states in the European Council.</p> <p>A national parliament or/and one-third of EP with MEPs from at least 3 political groups may bring a complaint before the European Ombudsman and a case before the ECJ in case of non-compliance with the procedure.</p>

This could be facilitated through a gentleman’s agreement with the purpose of initiating, repealing legislation or proposing amendments to existing legislation or non-legislative initiatives, thus transforming the reactive and negative EWS involvement into an

active and constructive one (see Table 10.2). The assessment of a multi-level law-making mechanism should be undertaken not by the Commission, but by the European Ombudsman – whose role needs to be strongly reinforced. The Mediator would be competent to submit an informed assessment of the overall functioning of the system and the degree of compliance.

It will no doubt not be easy for member states acting together in the Council, in cooperation with the European Commission, to agree this package of improvements. There is a real challenge to overcome governments' fears that they will no longer hold a hierarchical gatekeeper position, in addition to the reluctance of the Commission and European Parliament, which already stipulated that any reform in that direction raises concerns about treaty incompatibility while cultivating legislative and parliamentary competition by confronting one level with the other.

For that reason, there is a need for preliminary work with NPs to equip them domestically with specific institutional competences. Reinforcing the presence of NPs in Brussels is also important, since NPs' Representatives (NPRs) are quite weak in comparison to those employed by national governments, who have representatives meeting on a continuous and permanent basis in the Council and the COREPER (Cooper, 2015).

In order to strengthen the follow-up of legislative activity within the new mechanism and also include regional parliaments and assemblies, new initiatives should be promoted, i.e. the regularisation of monthly meetings of NPRs in cooperation with the European Parliament, the establishment of a rotation system with a NPs' leader for six months, along the lines of the presidency trio logic, and the development of sector-oriented joint parliamentary sessions under the auspices of a COSAC reinforced with real decision-making power (cf. Chapter 11).

Up to now, competences conferred on the Union are moulded by ECJ case law and by the Commission's extensive legislative reach. NPs could be the new actor to do so, endeavouring to strengthen, not to compete with the European Parliament's legislative function. Conferral-focused scrutiny within a

Conferral-focused scrutiny within a new mechanism could assuage national anxieties that generate Euroscepticism, and restore a sense of control over transfer of competence to the EU.

new mechanism could assuage national anxieties that generate Euroscepticism, and restore a sense of control over transfer of competence to the EU. Effective national parliamentary oversight of the quality of EU legislative output and the distribution of competences (Jančić, 2015) is an excellent way to alleviate the (national and European) democratic deficit and boost EU legitimacy. It should also be an integral part of national parliamentarians' role in EU affairs.

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