

EU Law's Grand Scheme on National Parliaments

The Third Yellow Card on Posted Workers and the Way Forward

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1. One's Resilience is Another's Resignation

This volume has sought to unearth how the Lisbon Treaty and the euro crisis have influenced the development of the European role of national parliaments (NPs). This was viewed from the lens of a dichotomous inquiry of whether these domestic sources of EU democratic legitimacy exhibit resilience or resignation given the economic and financial challenges facing European integration.

The verdict presented by the contributors is split. The prevalent general diagnosis is that NPs have encountered new obstacles for participation in EU decision-making due to constraints imposed to ensure the stability and sustainability of the Member States' fiscal policies, but that they nonetheless remain salient actors within the Union's constitutional construct.

When it comes to the concepts of *European constitutionalism and democratic legitimacy* examined in Part I, NPs are expected to contribute to the good functioning of the EU and to the accountability of EU institutions in order to strengthen the notion of limited government in the Union. Yet with rising popular scepticism and ineffective communication between EU policy-makers and domestic electorates, the locus of politics has partly turned to a more direct involvement of the citizens. This is evident from calls for referenda to be organized on European matters and the spread and influence of social media on the shaping of political attitudes and preferences. While referenda are rightly judged as an inadequate legitimating tool because they do not guarantee an ongoing scrutiny of EU business (Besselink), they may—as the UK's 'Brexit' referendum of 23 June 2016 has shown—incentivize parliamentary engagement in a broader discussion of the benefits of European integration (Smith).

In a similar fashion, the fragmentation of the political sphere caused by what can be seen as the digitalization of politics through social media also offers additional avenues for democratic participation, insofar as many parliamentary chambers, parliamentarians, political parties, and their regional and local branches, committees, and political groups, maintain a strong online presence. This can be illustrated by the fact that the House of Lords EU Committee, one of the most revered and most influential chambers in EU affairs, has recently positively evaluated the effectiveness of its Twitter account.¹ Such strategies have proven to engender new liaisons between public officials

¹ House of Lords, EU Committee, HL Paper 35 'Report on 2015–16', 3rd Report of Session 2016–17 of 28 July 2016, paras 105–109, pp. 26–28.

and the electorate, thereby providing supplementary platforms for an exchange of views on EU matters.

The crisis has furthermore led to the situation in which the Union must ‘persuade or coerce’ the Member States to achieve its policies. However, the fact that EU institutions remain reliant on the legitimacy supplied by NPs accentuates their ‘continued resilience ... as repositories of democratic and constitutional legitimacy’ (Lindseth). However, whether and how this materializes is neither only a matter of EU law nor only a matter of domestic legislative enactment, but also of constitutional adjudication. Both national courts and the European Court of Justice (ECJ) influence the level of protection of parliamentary prerogatives in EU affairs to a considerable, albeit variable, extent given that both judicial levels are constitutionally designed to provide a check against *ultra vires* action of EU institutions (Fasone and Lupo). It is indeed the question of conferred powers that should drive the future development of national parliamentary involvement in EU affairs.² This would address the democratically problematic fact that the EU’s competence has been shaped and interpreted as one seeking to achieve a pre-determined, unquestionably desirable ultimate goal.³ This goal needs to be opened up for contestation and NPs must be made part of that if they are to contribute to the good functioning of the EU. The nascent but still very limited capacity of NPs to scrutinize non-legislative areas of EU decision-making, such as comitology and open methods of cooperation, further confirms the need for stronger ‘institutional incentives for action’ (Barrett). While challenged, the constitutional and legitimating roles of NPs have therefore proven resilient.

Concerning the *impact of the financial and sovereign debt crises* on domestic and EU democracy analysed in Part II, the evolution has gone in the direction of extending the Union’s executive federalism at the expense of the budgetary autonomy of NPs, which has provoked vocal opposition by the German Federal Constitutional Court (Pernice). The leading role of the European Central Bank in containing the crisis, through conditional loans and unconventional monetary policy, has prompted a self-imposed commitment of its President to account to NPs for its decisions (Jančić). Domestically, the crisis has also benefited legislatures.⁴ This took the form of enhanced procedures for the accountability of the government for decisions taken in the European Council and the Council.⁵ But although this resulted in ‘better information, more frequent hearings and increased parliamentary influence’, the overarching problem remains that parliamentarians’ main tool for sanctioning the executive is not more than ‘political blame’ (Fromage). Although a degree of secrecy in the European Council and the Council remains necessary to enable a frank government–parliament dialogue, the limited scope for national parliamentarians to leave a concrete imprint on EU policy-making warrants a bolder reform of the EU settlement to rectify this.

² Davor Jančić, ‘The Game of Cards: National Parliaments in the EU and the Future of the Early Warning Mechanism and the Political Dialogue’ (2015) 52 CML Rev 939, 953.

³ Gareth Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ (2015) 21 ELJ 2.

⁴ Davor Jančić, ‘National Parliaments and EU Fiscal Integration’ (2016) 22 ELJ 225.

⁵ See the role of these two EU institutions in this context in Sergio Fabbrini and Uwe Puetter, ‘Integration without Supranationalisation: Studying the Lead Roles of the European Council and the Council in Post-Lisbon EU Politics’ (2016) 38 J Eur Integration 481; Andrew Glencross, ‘The European Council and the Legitimacy Paradox of New Intergovernmentalism: Constitutional Agency Meets Politicisation’ (2016) 38 J Eur Integration 497.

Redistributive effects of the euro crisis management have also generated higher levels of politicization than before.⁶ Thanks to the salience of parliamentary debates on the approval of EU decisions to establish and utilize financial rescue funds, parliaments' communicative activity has become more pronounced and, rather than concentrating merely on executive control,⁷ it has begun focusing more emphatically on upholding the interests of the citizens and of the respective constituencies (Wendler). At the same time, the European Semester process of economic policy coordination constitutes another avenue requiring parliamentary adaptation. The empirics of party politics of compliance with European Semester requirements, which demand domestic pursuit of budgetary and fiscal targets prescribed by the EU, has shown how essential the existence of formal parliamentary powers is for successful political contestation of EU economic governance (Maatsch).

These insights expose the resilience of NPs in adjusting their role to the post-crisis context of reduced fiscal autonomy, while concomitantly suggesting the underlying resignation of both EU and national actors in safeguarding domestic legislative institutions through 'harder' mechanisms. Sensitive Union-wide issues of wealth redistribution, which are the bread-and-butter of electoral bargaining in domestic politics, have been catapulted to the very centre of parliamentary affairs in many a Member State. This requires parliaments to view and understand their national interest in light of the overarching European interest. However, the disparities between the national interests of the Member States are both an advantage and a disadvantage. The advantage is that domestic sensitivities are better articulated and represented, while the disadvantage is that they might be difficult to reconcile, thus stymieing EU progress and fostering a fall-back to populism if strict national blueprints are not followed at the EU level. To avoid this risk, a further Europeanization of NPs is requisite in a more binding fashion than hitherto. The crisis-induced domestication of European politics must hence be counterbalanced by the Europeanization of domestic politics.

Interparliamentary dynamics, studied in Part III, paint a picture of an emerging collective awareness of parliaments of the added value of cooperation in the process of evaluating EU policy and overseeing executive action. In internal EU affairs, both the Lisbon Treaty and the euro crisis have been 'instrumental' to what can be seen as a stratification of parliamentary forums at the EU level (Cooper). This has evolved according to different policy fields (foreign and security policy, economic and financial governance, and justice and home affairs) and according to the level of authority that the various forums enjoy (the Speakers Conference and the Parliamentary Dimension of the EU Presidency). In this respect, the 'green card' initiative—seeking to enable NPs to take part in proposing, amending, or repealing EU legislation—demonstrates that any antagonisms between the European Parliament (EP) and NPs can be harmful for their respective functions and that their shared commitment to the betterment of the lives of EU citizens requires their relations to be transformed into a more overt partnership towards 'power sharing and synergy building' (Borońska-Hryniewiecka).

In external EU affairs, too, the elimination of conflict between the EP and NPs is a lesson that the EU could learn from the manner in which the US and Switzerland

⁶ See also on this Katrin Auel and Oliver Höing, 'National Parliaments and the Eurozone Crisis: Taking Ownership in Difficult Times?' (2015) 38 WEP 375.

⁷ See, however, that government membership plays an important role in the processes of parliamentary approval of international fiscal aid measures in Hanno Degner and Dirk Leuffen, 'Keynes, Friedman, or Monnet? Explaining Parliamentary Voting Behaviour on Fiscal Aid for Euro Area Member States' (2016) 39 WEP 1139.

have organized their parliamentary safeguards of federalism at their respective State and cantonal levels (Granat). Finally, although asymmetries and variations persist, parliaments mainly exhibit convergence in terms of increased resources and ability to scrutinize the EU's foreign, security, and defence policies, trade policy, and human rights protection (Raube and Wouters). These endeavours, however, continue to take the shape of informal networking, characterized by the absence of entitlement to issue binding pronouncements. These assessments highlight a palpable measure of resilience in interinstitutional relations of parliamentary participation at the EU level.

Put together, the findings of this book point to the conclusion that, while the idea of NPs as carriers of a portion of democratic legitimacy of the EU has been resilient, the means to achieve this were resigned to 'old-style' parliamentary involvement through gradual, evolutionary, and predominantly domestically driven attempts to exact unofficial increments to their existing Treaty portfolio of competences. If this has been the model on which national parliamentary involvement could be built before the crisis, the latter's compelling inroads into national sovereignty makes it obsolete.

A viable answer to a 'revolution' cannot be an 'evolution'; tough times require tough measures. What is required is not only an inward-looking importation and nationalization of 'Europe', but also, and crucially so, the exportation and Europeanization of 'the Member State'. This means that the EU's input legitimacy cannot rest on NPs in a constitutionally significant way if their powers, which are tangibly affected by the crisis, do not acquire a more binding nature. Parliaments' function of identity building and contestation need to be made constitutionally relevant not only at the national level but also at the EU level, lest their resilience be overcome by integrative forces of European integration. These forces need to be politically challenged and appraised in a fundamental manner, which, as the following section outlines, subsidiarity policing does not afford.

2. Grand Schemes With Little Bite: The Third Yellow Card and the False Promise of Subsidiarity

2.1 Reasons for EU Action: Social Dumping Riddance

The principle of subsidiarity,⁸ policed through an early warning mechanism, is the key EU-level instrument for NPs to have a say in EU law-making.⁹ Parliaments, it transpires, have seriously taken their role to issue reasoned opinions opposing draft EU legislation in non-exclusive areas of competence where this is deemed better achievable at the national level. Following the first yellow card on the proposal for a Council regulation on the right to collective action¹⁰ and the second yellow card on the creation of the European Public Prosecutor's Office,¹¹ the NPs' last concerted objection

⁸ This section builds on the author's presentation given at the European Institute, Leiden Law School on 25 May 2016.

⁹ Anna J Cornell and Marco Goldoni (eds), *National and Regional Parliaments in the EU-Legislative Procedure Post-Lisbon: The Impact of the Early Warning Mechanism* (Hart Publishing 2017).

¹⁰ Federico Fabbrini and Katarzyna Granat, "Yellow Card, but No Foul": The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike' (2013) 50 CML Rev 115; Ian Cooper, 'A Yellow Card for the Striker: National Parliaments and the Defeat of EU Legislation on the Right to Strike' (2015) 22 JEPP 1406.

¹¹ Diane Fromage, 'The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member State Parliaments?' (2016) 35 YEL 5; Irene Wiczorek, 'The EPPO Draft Regulation

was directed at the Commission's proposal to amend the Directive on the Posting of Workers.¹²

Observing the rise in the number of posted workers of close to 45 per cent in the 2010–2014 period in an otherwise small market accounting for no more than 0.7 per cent of total EU employment, the Commission sought to improve the conditions of work for posted workers in the host Member States.¹³ The goal is to avoid distortion of the single market and ensure a level playing field, which is jeopardized by growing wage differences between the Member States. This is to be accomplished primarily by imposing the applicability of the same remuneration rules (thus not only the minimum wage but also other types of compensation that may make up a worker's pay such as bonuses) to both posted and local workers and by extending to posted workers and to all economic sectors the rights laid down in universally applicable collective agreements (thus not only in the construction sector). This is aimed at preventing social dumping, whereby posted workers may be 'cheaper' and subject to laxer employment rules, thus causing a downward pressure in the host Member State to lower social and labour law standards.¹⁴ This in turn favours the posting service provider by making it more competitive than the local one, which leads to unfair competition prohibited under EU law. However, the *Viking* and *Laval* cases have shown the readiness of the ECJ to defend the freedom of establishment and the freedom of movement of services in the internal market, while recognizing collective action as a fundamental right.¹⁵

2.2 Absence of Subsidiarity Appraisal

Strikingly, the proposal only contains one single sentence on subsidiarity compliance: 'An amendment to an existing Directive can only be achieved by adopting a new Directive'. The proposals leading to the first two yellow cards were not comprehensive either, but they at least extended to several paragraphs.

This kind of approach merits a twofold criticism. Firstly, this obviously short statement is more a unilateral dismissal of a duty of justify adherence to subsidiarity than a thorough analysis of all the options available to achieve the goals of the action sought. Secondly, this has nothing to do with subsidiarity whatsoever. Instead of providing a substantive policy analysis of subsidiarity, backed up by comparative data, the Commission takes a purely technical stance based on the form of the legal act at hand. Admittedly, the Commission's Directorate-General for Employment, Social Affairs

Passes the First Subsidiarity Test: An Analysis and Interpretation of the European Commission's Hasty Approach to National Parliaments' Subsidiarity Arguments' (2015) 16 *German LJ* 1247.

¹² European Commission, Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 128 of 8 March 2016.

¹³ See detailed background in Marco Rocca, *Posting of Workers and Collective Labour Law: There and Back Again—Between Internal Market and Fundamental Rights* (Intersentia 2015).

¹⁴ See for instance Jan Cremers, Jon E Dølvik, and Gerhard Bosch, 'Posting of Workers in the Single Market: Attempts to Prevent Social Dumping and Regime Competition in the EU' (2007) 38 *Industrial Relations J* 524.

¹⁵ Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, judgment of 11 December 2007; Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*, judgment of 18 December 2007. See an analysis of relevance to NPs in Dorte S Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (Oxford University Press 2015) ch 6.

and Inclusion did commission an expert study on wage-setting systems and minimum rates of pay, but this did not address the question of subsidiarity in any way.¹⁶

The Commission thereby failed to meet the requirements foreseen under the Subsidiarity Protocol, which obliges it to produce a detailed statement assessing the financial impact of the proposed action accompanied by qualitative and quantitative indicators that EU action is more efficient and that domestic action is insufficient. The Commission did not fulfil the duty of 'making it possible to appraise compliance with the principles of subsidiarity and proportionality'.¹⁷

In my view, this provides sufficient ground for any national parliamentary chamber to take the matter before the ECJ for violation of subsidiarity,¹⁸ which to this date remains unused. In a more informal fashion, the failure adequately to consider the principle of subsidiarity is at odds with the 'electoral' vow made by the Commission's President, Jean-Claude Juncker, and its First Vice-President, Frans Timmermans, towards a deeper dialogue with NPs, especially on subsidiarity matters.¹⁹ With this attitude, the Commission jettisoned its own promise to treat yellow cards as red cards. Yet this did not go unnoticed.

2.3 Parliamentary Reasoned Opinions

On 10 May 2016, fourteen parliamentary chambers from eleven Member States flagged the third yellow card against this EU legislative proposal.²⁰ Apart from Denmark, the other ten parliaments were from Central and Eastern Europe: Bulgaria, Croatia, the Czech Republic (both the Chamber of Deputies and the Senate), Estonia, Hungary, Latvia, Lithuania, Poland (both the *Sejm* and the Senate), Romania (both the Chamber of Deputies and the Senate), and Slovakia. This regional clusterization showcases the ability of parliaments to coalesce around a common interest, which is a corollary of successful cooperation on the previous two yellow cards. Conversely, parliaments in another six Member States submitted positive reactions within the framework of the political dialogue known as the Barroso Initiative: Spain (both the Congress of Deputies and the Senate by means of a joint statement), Italy (both the Chamber of Deputies and the Senate), the Portuguese Assembly, the UK House of Commons, and the French Senate.

A qualitative analysis of the reasoned opinions shows that the key reasons why NPs protested were sevenfold: (a) the lack of subsidiarity justification; (b) the perceived decrease in the competitiveness of lower-wage Member States with negative repercussions for their service providers' access to higher-wage markets; (c) intrusion in domestic collective bargaining schemes; (d) overregulation and legal uncertainty given that the deadline for the transposition of the Posting of Workers Enforcement Directive had

¹⁶ European Commission, 'Study on wage setting systems and minimum rates of pay applicable to posted workers in accordance with Directive 96/71/EC in a selected number of Member States and sectors', January 2016.

¹⁷ See Protocol (No 2) on the application of the principles of subsidiarity and proportionality, art 5.

¹⁸ See Protocol (No 2) on the application of the principles of subsidiarity and proportionality, art 8. See also Carlo Panara, 'The Enforceability of Subsidiarity in the EU and the Ethos of Cooperative Federalism: A Comparative Law Perspective' (2016) 22 EPL 305 and the chapter by Cristina Fasone and Nicola Lupo in this volume.

¹⁹ Jančić (n 2) 967.

²⁰ Interparliamentary EU Information Exchange (IPEX—an online database documenting NPs' scrutiny activities) <http://www.ipex.eu/IPEXL-WEB/dossier/document.do?code=COM&year=2016&number=128&extension=null> (last accessed 20 August 2016).

Table 16.1 Reasoned opinions on the Revised Posting of Workers Directive

Grounds	Parliamentary Chamber	No. of chambers
Lack of justification of subsidiarity and added value	Bulgaria, Croatia, the Czech Republic (both the Chamber of Deputies and the Senate), Hungary, Latvia, Lithuania, Polish Sejm, Romania (both the Chamber of Deputies and the Senate), Slovakia	11
Competitiveness decrease	Bulgaria, Croatia, the Czech Chamber of Deputies, Estonia, Hungary, Latvia, Lithuania, the Polish Senate, the Romanian Chamber of Deputies, Slovakia	10
Overregulation and legal certainty	Croatia, the Czech Senate, Estonia, Latvia, Lithuania, the Polish Senate, Romania (both the Chamber of Deputies and the Senate), Slovakia	9
Proportionality and necessity	Bulgaria, the Czech Republic (both the Chamber of Deputies and the Senate), Hungary, Latvia, the Polish Senate, Slovakia	7
Intrusion in collective bargaining	Bulgaria, Croatia, the Czech Senate, Slovakia	4
Legal basis	Romania (both the Chamber of Deputies and the Senate), Slovakia	3
Conferral	Denmark (minority view)	1

Source: own analysis based on the Commission's data⁵⁷

not expired;²¹ (e) the principle of proportionality; (f) legal basis; and (g) the principle of conferral. These considerations are presented above in Table 16.1.

The most important insights from the NPs' reasoned opinions are as follows. The most frequent objection put forward by the issuing chambers was of a procedural nature and challenged the lack of subsidiarity analysis and the lack of a wide enough prior consultation.²² Of the same nature was the criticism that the said Enforcement Directive was still being transposed and that this fell foul of the Commission's Better Regulation agenda, which seeks to increase mutual coherence and quality of EU legislation. Yet this agenda does not foresee any substantial improvement in the relations between the Commission and NPs.²³

The most important commonality among the reasoned opinions is that, to a certain extent, virtually all chambers carried out a substantive analysis of the proposal. The Latvian *Saeima* expressly noted that the content of the proposal is 'essential in assessing its compliance with the subsidiarity principle'.²⁴ In relation

²¹ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [2014] OJ L 159/11.

²² See on the 'proceduralisation' of subsidiarity Xavier Groussot and Sanja Bogojević, 'Subsidiarity as a Procedural Safeguard of Federalism' in Loïc Azoulay (ed), *The Question of Competence in the European Union* (Oxford University Press 2014).

²³ See a critique of this in Davor Jančić, 'The Juncker Commission's Better Regulation Agenda and Its Impact on National Parliaments' in Cristina Fasone, Diane Fromage, and Zoe Lefkofridi (eds), 'Parliaments, Public Opinion and Parliamentary Elections in Europe' (2015) 18 EUI MWP 45.

²⁴ Latvian *Saeima*, Opinion of the European Affairs Committee of 5 May 2016 http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/latvia/2016/com20160128/com20160128_saeima_opinion_en.pdf (last accessed 20 August 2016).

to this, most parliaments assessed that the equalization of pay regimes applicable to posted and local workers would extinguish the competitive advantage that they enjoy thanks to lower labour costs. Therefore, in their view, the proposal is liable to distort competition and restrict the freedom of movement of services and establishment. Instead, any convergence between the pay levels must be a consequence of economic development and not of EU action. The only exception was the majority view of the Danish *Folketing*, which supported the fight against social dumping, but was concerned that certain inconsistencies between the legal provisions of the existing Directive and those envisaged in the proposal provided insufficient clarity as to the scope of national competence for regulating pay and terms and conditions of employment.

A further important observation is that, as with the first two yellow cards, NPs extended their scrutiny beyond subsidiarity and appraised proportionality, legal basis, as well as conferral.²⁵ Although explicitly invoked only by a minority of the Danish *Folketing*, this last concern is salient because it pays attention to the existence of EU competence and not only to the way in which the Union exercises it.²⁶ Members of the Danish Liberal Party, Liberal Alliance, the Social Liberal Party, and the Conservative People's Party argued that:

[i]t is not within the EU's competence to regulate pay. What is important is thus not whether the provision is in compliance with the subsidiarity principle or not, but *whether the EU has competence to regulate at all*. The minority does not find it necessary to submit a reasoned opinion according to the protocol on subsidiarity, but finds instead that there is reason to submit a *policy statement* to the effect that the competence to regulate is questioned and that an explicit passage to this effect should be included in the current Directive.²⁷

This clearly reveals what it is that attracts parliamentary attention and what the genuine target of parliamentary monitoring should be. Indirectly, the division of competences also underlay the Polish *Sejm's* response. Based on a thorough evaluation of the proposal's substance and the Commission's impact assessment, this chamber made the case that the Commission had violated the principle of sincere cooperation, according to which the Union and the Member States 'shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.²⁸ Hence, at hand are only those tasks that fall within the boundaries of the EU constitutional settlement written down in the Treaties, which is a matter of conferral. What belies some of these assertions is the simmering political will for parliaments to engage in real politics. The Czech senators, for instance, suggested policy directions that they deemed appropriate for the Union to take. Charging highly majoritarian institutions with executing a largely technical task of subsidiarity monitoring therefore neglects and undervalues the political and legitimating potential that NPs can proffer to the Union.

²⁵ See in this respect Eric Miklin, 'Beyond Subsidiarity: The Indirect Effect of the Early Warning System on National Parliamentary Scrutiny in European Union Affairs' JEPP (forthcoming).

²⁶ See an analysis hereof in Robert Schütze, 'EU Competences: Existence and Exercise' in Anthony Arnall and Damian Chalmers (eds), *Oxford Handbook on European Union Law* (Oxford University Press 2015).

²⁷ Danish *Folketing*, 'Reasoned Opinion' of 6 May 2016 (emphases added) http://ec.europa.eu/dgs/secretariat_general/reasons/reasons_other/np/ docs/denmark/2016/com20160128/com20160128_folketing_opinion_en.pdf (last accessed 20 August 2016).

²⁸ TEU, art 4(3).

2.4 The Commission's Unwavering Response

As with the second yellow card, the Commission issued a formal collective response concluding that it had not infringed subsidiarity, that neither amendment nor withdrawal were required, and that it was maintaining the proposal as it was.²⁹ This it defended by reference to its Political Guidelines and the 2016 Work Programme, which foresee the legislative amendment proposed.

However, in its reply and on several occasions, the Commission attempted to narrow the scope of assessment that it owes to NPs by interpreting it as encompassing only the comparative efficiency test. It thereby omitted the second element of the subsidiarity test, which refers to domestic sufficiency and requires that evidence be adduced that policy objectives cannot be sufficiently achieved at the national level.³⁰ In support of this approach, the Commission relied on the latest *Philip Morris* case, where the ECJ held that it had to determine 'whether the EU legislature was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at EU level'.³¹ Yet it is astonishing that the Court should question the EU legislature's right to verify subsidiarity compliance, given that the Subsidiarity Protocol explicitly mandates that 'each institution shall ensure constant respect for the principles of subsidiarity and proportionality'.³² The Court, moreover, was concerned with the EP's and the Council's relationship with subsidiarity not with that of NPs, whose role in it is constitutionally stronger and more emphatic. This line of reasoning of the Commission is hence unconvincing.

A further pitfall is the Commission's claim that when the EU legislature adopted the 1996 and 2014 Directives the latter had 'already ... decided' that the policy goal of facilitating cross-border services provision through a broader level playing field 'was better achieved' at the EU level.³³ The subsidiarity query is, hence, practically an *acte éclairé* in the eyes of the Commission. But this is erroneous because it short-circuits the process whose purpose is to enable NPs to fulfil their Treaty duty of supervising the manner in which the Union uses and executes competence in areas where Member States may act too.

The final 'line of defence' that the Commission invoked was that subsidiarity had been justified in its Impact Assessment Report. However, the relevant passage of this report immediately enables one to discard it as a credible piece of evaluation, because it begins by stating that a regulatory framework for the posting of workers 'can only be established at EU level'.³⁴ This immediately pre-empts any role for NPs, given that the key question that requires explanation is outright answered in the positive, followed merely by a statement of *what* aims are sought but not *why* these aims can only be achieved through EU action. The European Commissioner for Employment, Social Affairs, Skills and Labour Mobility, Marianne Thyssen, publically admits this: 'We take it for granted that the objectives of the proposed directive on posted workers will

²⁹ European Commission, Communication to the European Parliament, the Council, and National Parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2, COM(2016) 505 of 20 July 2016.

³⁰ See the Commission's remark that its review is 'limited to determining whether the objective of the proposed amending Directive can be better achieved at Union level', thus omitting the second element of the test which refers to domestic sufficiency requiring evidence that policy objective cannot be sufficiently achieved at the national level (at 5).

³¹ Case C-547/14, *Philip Morris Brands SARL and Others v the Secretary of State for Health*, judgment of 4 May 2016, para 218. See European Commission (n 29) 6.

³² See Protocol (No 2) on the application of the principles of subsidiarity and proportionality, art 1.

³³ European Commission (n 29) 7. ³⁴ *ibid* 9.

be better accomplished at a European level'.³⁵ To use the academic vernacular, the Commission could be said to be both the author and the peer reviewer and that does not bode well for EU legitimacy.

A positive evolution, which follows on from the second yellow card, is that the Commission addressed NPs' concerns transcending subsidiarity by means of letters sent to the individual issuing chambers within the Barroso Initiative. This means that subsidiarity is by and large merely a pretext for a more comprehensive cross-border discussion of EU policy-making between the EU's legislative initiator and domestic parliamentarians.

3. Analysis and the Way Forward: A Need for a Rethink of the National Parliaments' Place in the EU

Both the findings of this book and the third yellow card expose the current deficiencies of EU law's 'grand scheme' on NPs. Parliaments' legislative powers have been replaced by a mechanism that steers their members away from politics and into the domain of technocracy, in which the Commission's dominance has proven virtually untouchable. This is complemented by a series of merely informal interparliamentary developments in search of a stronger voice in EU decision-making. The success of both channels, however, is subject to the discretion of EU institutions. This means that resilience in procedural terms has been overshadowed by resignation cast by the impotence of NPs to bring influence directly to bear on EU policies. Despite the Lisbon Treaty and mostly thanks to the euro crisis, domestic parliamentarians remain in limbo: empowered but constrained regarding both the use and effects of their powers. Compensation for the loss of power thus continues to be wanting even after these two events.

Consequently, the potential for democratic legitimation expected of NPs remains underwhelming. The problem is that the preemptory dimension of the early warning mechanism is not only hard to trigger, but, even more importantly, it is primarily a procedural device which is ill-suited to full-blown policy deliberation to which parliaments are excellently tailored. Instead, parliaments are forced to 'smuggle' substantive concerns to the EU level. Only a mechanism that does justice to the nature of parliaments as legislative institutions can provoke polarization and give rise to political conflict that may lead to politicization and, ultimately, democratization. Subsidiarity has therefore failed to bring about a European Union 'in which decisions are taken as openly as possible and as closely as possible to the citizen'.³⁶

It should be recalled, however, that EU founding fathers never saw domestic parliamentarians as a stand-alone force in the Union.³⁷ Even while the latter acted as members of the unelected EP before 1979, this was a provisional solution only. The default position of NPs has rather been that of curtailment. Absenteeism demonstrated in these early stages of European integration discourages permanent involvement of parliamentarians at the EU level, but periodic involvement might be both practically feasible and democratically advantageous.

³⁵ Cécile Barbière, 'Brussels Prepares to Overrule Eastern Europe on Posted Workers Directive' *EurActiv* (14 July 2016) <http://eurac.tv/2TEX> (last accessed 21 August 2016).

³⁶ TEU, art 1(2). For a more optimistic view of subsidiarity monitoring see Özlem Ülgen, 'Strengthening European Union Democratic Accountability Through National and Treaty-based Pre-legislative Controls' (2015) 16 *German LJ* 741.

³⁷ See the introductory chapter to this volume by Davor Jančić.

At a time of unprecedented economic, fiscal, socio-political, and identity crises,³⁸ can EU law afford to keep parliaments at bay? If the Union is truly to be brought closer to EU citizens, their languishing on the sidelines of the EU institutional setup is untenable. The multiplication of crises in the EU requires a serious rethinking of the value that NPs have for the democratization of European politics and law-making. If NPs are considered a constitutionally worthy source of democratic legitimacy, they need to be given greater legal prominence through a more far-reaching formalization of their European role. This ought to be done by turning them into platforms that will address issues that match the foundational legitimacy which they are ultimately called upon to provide to the EU. These EU parliamentary platforms, populated by national parliamentarians, should deal with cornerstone questions of future European integration such as European identity, European values, European solidarity, and European powers.³⁹

Normative political and public debate which can affect outcomes at the EU level is what can revive the institutional utility of NPs in a changing Europe. Expecting non-expert members of parliament to be savvy about the nitty-gritty of a vast variety of sectoral issues that require specialist knowledge is neither realistic nor desirable. Knowledge accumulation and sharing are indeed important as a basis for discussion, but it is the larger political questions of vision, direction, and method of achieving welfare in the Union that divide the electorate. This is why NPs should be viewed and treated as internal rather than external to the Union.

Before assuming office, Commission President Juncker set out a plan for a new start for Europe, which—apart from jobs, growth, and fairness—focuses on democratic change. ‘We must take care of the big issues’, he advises, because time is not one for hesitation. This is why, delivering his pre-vote candidacy presentation, he warned the EP that:

[e]ither we will succeed in bringing our citizens closer to Europe, or we will fail. Either we will succeed in making Europe a political whole that deals with the big issues and leaves the small ones alone, or we will fail. Either we will succeed, hand in hand with the Member States, with their governments, with their parliaments, with the social partners, in reducing the level of unemployment drastically, or we will fail.⁴⁰

Declaratory though they may be, these instructions for developing a ‘European Union that is bigger and more ambitious on big things, and smaller and more modest on small things’ are implausible if those institutions that are invited to approve the process of European unification are not consulted on those same big issues and if their role in European integration is not constitutionally meaningful, perceptible to their electorates, and truly contributory to the EU’s good functioning. The EU cannot function well if its component institutions, including NPs, are not truly integral to its structure.

This new executive dynamism hence needs to encompass parliaments too and they are calling for this themselves. On 30 June 2014, while still President-elect, Juncker

³⁸ See the determinants of European identity in Theresa Kuhn, *Experiencing European Integration: Transnational Lives and European Identity* (Oxford University Press 2015).

³⁹ See a programmatic example of this in Declaration ‘Greater European Integration: The Way Forward’, Rome, 14 September 2015, which was signed by the Presidents of the Italian *Camera dei Deputati*, the French *Assemblée nationale*, the German *Bundestag*, and the Luxembourgish *Chambre des Députés*.

⁴⁰ The documents from which this is drawn bundle together Jean-Claude Juncker’s political guidelines for the next European Commission, his opening statement to the EP of 15 July 2014, and the main messages from his speech to the EP ahead of the vote on the College in the plenary session of

received a letter signed by twenty-nine chairpersons of the European Affairs Committees of NPs demanding the establishment of a working group composed of both national parliamentarians and representatives of EU institutions in order to examine ways for NPs to engage in EU decision-making beyond subsidiarity and governmental accountability.⁴¹ Since a response was not forthcoming, the House of Commons renewed the call.⁴² While the impetus of this initiative has dissipated, it exhibits the parliamentarians' awareness both of the limitations of their current European functions and of the necessity for this to change. A 'red card' procedure, an upgraded version of the 'yellow card' offered to the former UK Prime Minister David Cameron as a concession to try and keep Britain in the EU, was flawed at birth as it merely sought to make the early warning mechanism more efficient. Some commentators rightly note the feebleness of the early warning mechanism and advocate enabling NPs to veto or disapply existing EU legislation by means of a 'collective facultative waiver',⁴³ or even by an act of an individual parliament.⁴⁴

Yet both of these options are reactionary and negative, as they only allow parliaments to say 'no'. Neither spells a positive, constructive role of parliamentarians that would refocus the mechanism on Juncker's big issues. Most recently, in reaction to the Commission's dismissal of the third yellow card, the Visegrad countries (Poland, the Czech Republic, Hungary, and Slovakia) undertook jointly to discuss avenues for limiting the Commission's autonomy and enhancing national participation in EU affairs.⁴⁵ These are all signs of resilience, demonstrating that parliaments actively endeavour to expand their influence and scope of scrutiny within their means in an effort to contribute to the good functioning of the Union. This expansion is presently underway in both substantive and institutional terms.

Firstly, seeking to reinforce the Union's capacity to thwart a rising number of terrorist attacks on EU territory, the 2016 Europol Regulation implements the Lisbon Treaty provisions on the 'political monitoring' of Europol by NPs.⁴⁶ A new interparliamentary forum is established under the name of Joint Parliamentary Scrutiny Group (JPSG), composed of members of both NPs and the EP. This body is to scrutinize the law enforcement activities of Europol, which are aimed at combating serious crimes across the Union. However, parliamentary tasks go beyond this and include assessing the 'impact of those activities on the fundamental rights and freedoms of natural persons'.⁴⁷ For that purpose, not only shall the Chairperson of Europol's Management Board, the agency's Executive Director or their deputies appear before the JPSG, the European Data Protection Supervisor shall too for a discussion of matters related to data protection. This vindicates the thesis, affirmed in this book (Raube and Wouters), that parliaments merit the epithet of human rights protectors.

22 October 2014. See https://ec.europa.eu/priorities/sites/beta-political/files/juncker-political-guidelines_en.pdf (last accessed 21 August 2016).

⁴¹ Jančić (n 2) 969.

⁴² House of Commons, European Scrutiny Committee, HC 342-iii 'Third Report of Session 2015–16' of 23 September 2015, para 4.8, p. 24.

⁴³ Thorsten Hüller, 'Out of Time? The Democratic Limits of EU Democracy' (2016) 23 *JEP* 1407.

⁴⁴ Damian Chalmers, 'Democratic Self-government in Europe: Domestic Solutions to the EU Legitimacy Crisis', Policy Network Paper, May 2013, 3.

⁴⁵ Aleksandra Eriksson, 'EU Failed to Learn Lesson from Brexit, Poland Says' *EUobserver*, 22 July 2016 <https://euobserver.com/economic/134458> (last accessed 21 August 2016).

⁴⁶ TEU, art 12(c) and TFEU, art 88(2).

⁴⁷ See art 51(2) of Regulation (EU) No 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and

The importance of the human rights dimension of national parliamentary work also resonates within the Council of Europe.⁴⁸

Secondly, NPs have also expressed concern over the state of the rule of law in the Union and the tensions between the Commission on the one hand, and the governments in Poland (led by Prime Minister Beata Szydło of the Law and Justice Party) and Hungary (led by Prime Minister Viktor Orbán of the Fidesz Party) on the other.⁴⁹ The reason why parliaments are competent to act in this context is because they are the Union's 'enabling' institutions.⁵⁰ This is conveniently encapsulated by this passage:

[t]he Union derives its legitimacy not from being a continent-wide democracy ... rather, it can claim legitimacy, because national parliaments have freely voted to bind themselves and follow European rules—and, most importantly, they have freely established certain sanctions for those not following said rules, with Article 7 Treaty on European Union (TEU) being the clearest example.⁵¹

Thirdly, the aspirations of NPs extend beyond the boundaries of the Union, which is visible from their increasing interest in parliamentary diplomacy,⁵² as well as their strong insistence on being granted the right to approve mega-regional EU international agreements, notably the Transatlantic Trade and Investment Partnership (TTIP) with the US and the Comprehensive Economic and Trade Agreement (CETA) with Canada.⁵³

In conclusion, it has rightly been argued that the EU's legitimacy is 'limping' and that 'a more fundamental remedy would be to buy in legitimacy from national parliaments'.⁵⁴ The spiralling multiplication of crises in the Union—spanning at least the euro, terrorism, refugees, the rule of law, and tax evasion—push NPs deeper into the realm of emergency EU policy-making. This invites two responses: on the one side, a swift response, to which executive institutions are attuned; and on the other, a reflection on the longer-term policy routes to be paved for the future, where parliaments can significantly contribute. Constraints concerning the parliamentarians' lack of time and low level of interest in EU affairs are well known.⁵⁵

replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA, and 2009/968/JHA [2016] OJ L 135/53.

⁴⁸ Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Report 'National Parliaments: Guarantors of Human Rights in Europe', Doc 12636 of 6 June 2011.

⁴⁹ COSAC, 25th Bi-annual Report, 18 May 2016 (55th Meeting, The Hague, 12–14 June 2016) ch 2.

⁵⁰ See the EP's proactive role in the rule of law debate in Judith Sargentini and Aleksejs Dimitrovs, 'The European Parliament's Role: Towards New Copenhagen Criteria for Existing Member States?' in Dimitry Kochenov, Amichai Magen, and Laurent Pech (eds), 'Symposium: The Great Rule of Law Debate in the EU' (2016) 54 *JCMS* 1085.

⁵¹ Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law Inside Member States?' (2015) 21 *ELJ* 141, 144.

⁵² *ibid.* See more on this in Stelios Stavridis and Davor Jančić (eds), Special Issue 'Parliamentary Diplomacy Uncovered: European and Global Perspectives' (2016) 11 *Hague J Dipl* 105.

⁵³ Davor Jančić, 'TTIP and Legislative-executive Relations in EU Trade Policy' (2017) 40 *WEP* 202; Davor Jančić, 'EU-Canada Strategic Partnership, CETA and the Role of Parliaments in Foreign and Trade Policy', Paper presented at the PACO Conference on 'Parliamentary Cooperation and Diplomacy in Europe and Beyond: Theories, Practices and Comparisons', Brussels, 18–19 February 2016.

⁵⁴ Carol Harlow, 'The Limping Legitimacy of EU Lawmaking: A Barrier to Integration' (2016) 1 *Eur Papers* 29, 53.

⁵⁵ See analyses in Mads Dagnis Jensen and Dorte Martinsen, 'Out of Time? National Parliaments and Early Decision-making in the European Union' (2015) 50 *Government and Opposition* 240;

But the euro crisis and other pressing challenges have raised the stakes: the Union is increasingly making law and policy on core issues of national sovereignty. This may alter the political resignation of some parliamentarians and galvanize them into action. Similarly, while the citizens' trust in NPs may even be slightly lower than their trust in EU institutions,⁵⁶ the 'Brexit' referendum has shown that the institution of Parliament does stand for democratic participation, self-rule, and identity formation. Therein lie opportunities for reforming the European prerogatives of NPs. Upgrading the status of interparliamentary cooperation seems the most expedient and most widely acceptable way to achieve this.

Merging the many parliamentary forums operating in parallel at the EU level into a single body could be one model. This body would have working groups organized according to a given policy field and, in the first period, it would exercise a formal consultative role similar to that of the Committee of the Regions. Another model would be that of a parliamentary 'Council of Elders', which would periodically meet to give broad-brush but binding recommendations on the core problems of European integration in the form of 'action plans'. These would address the principle of conferral and the management of crises. This book has merely begun disentangling the ideas and practices that inform this kind of exploration, which is bound to remain in the spotlight of EU policy-makers for years to come.

Katjana Gattermann and Claudia Heffler, 'Beyond Institutional Capacity: Political Motivation and Parliamentary Behaviour in the Early Warning System' (2015) 38 WEP 305.

⁵⁶ Some 33% of Europeans claim to trust the EU, while only 28% of them trust their national parliament and 27% their national government. Standard Eurobarometer 85, 'Public Opinion in the European Union—First Results', July 2016, 14. See further Daniela Braun and Markus Tausendpfund, 'The Impact of the Euro Crisis on Citizens' Support for the European Union' (2014) 36 J Eur Integration 231.

⁵⁷ Data extracted from http://ec.europa.eu/dgs/secretariat_general/relation/relation_other/npoi/index_en.htm (last accessed 20 August 2016).