A “Virtual Third Chamber” for the European Union? 
National Parliaments Under the Treaty of Lisbon

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The Treaty of Lisbon features a new Early Warning Mechanism (EWM) which would for the first time involve national parliaments directly in the legislative process of the European Union. This mechanism would make national parliaments into “subsidiarity watchdogs” with the power to raise objections to, and even help to block, new EU legislative proposals in cases where they deem action would more appropriately taken at the national level of authority. Under the EWM, national parliaments could in fact become a “virtual third chamber” of the EU: while they would not meet together in the same physical space, they could nonetheless collectively form a body that fulfills legislative functions – supervision of executive authority, democratic deliberation and collective decision-making – at the supranational level. This represents a new form of “democracy beyond the state” that is different in kind both from the federal model represented by the European Parliament and from the network model of interparliamentary coordination. Even if the Treaty of Lisbon fails to become law, the EWM could still be legally and legitimately put into practice in the European Union. However, a review of four early pilot projects which attempted to operationalize the EWM shows that numerous obstacles, both practical and theoretical, must be overcome before it can achieve its full potential.

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I. Introduction: National Parliaments and the Democratic Deficit

In the simplest terms, the problem of the “democratic deficit” may be portrayed simply as a shortfall in parliamentary oversight or control of the actions of the European Union. The equation may be stated in the following way: the process of European integration has shifted power from the national to the EU level, which means that national parliaments have suffered a loss of power; this loss has not been fully made up for by a compensating gain in parliamentary power at the EU level; therefore the solution to the democratic deficit, following the analogy to federal government, is to bestow greater power on the European Parliament, the one popularly elected chamber in the EU system. As it was put in one early and influential work on the subject, the democratic deficit may be defined as “…the gap between the powers transferred to the Community level and the control of the elected Parliament over them”; this gap has had the additional, malign effect of “weakening of national parliaments vis-a-vis their own executives” (Williams 1991, p.162). The essential problem is not that national parliaments themselves have lost power, but that “their loss has not been Strasbourg’s gain” (p.159). From this perspective, national parliaments can never hope to recover their lost influence, because this would require a repatriation of powers back to the national level, an intolerable reversal of the current of European integration. Instead, national parliaments must accommodate themselves to their reduced status and gain what influence they can through cooperation with the European Parliament: “[G]reater democratic accountability... will require from national parliaments recognition of the world as it is, that power is inevitably moving to Brussels and that a deal with MEPs is a prerequisite of national parliaments’ exercising some control over their ministers” (p.173). In this view, parliamentary oversight would seem to be fungible, in that its loss at the national level can be made up for at the EU level so long as a certain minimal amount is maintained overall.

However, a somewhat different perspective on the democratic deficit has begun to take hold in recent years, which views empowering the EP as an incomplete solution: in addition, national parliaments must be (re-)empowered as well.\(^1\) In this view, national parliaments are bodies that possess a peculiar democratic legitimacy, whether by dint of

\(^1\) On the evolution of this view, see Rittberger 2005, Ch.6.
their historic connection to their respective nations or simply their closer proximity to citizens. In the language associated with the spirit of subsidiarity, they are “closer to the people.” If so, the erosion of the powers of national parliaments cannot merely be offset by an increase in those of the European Parliament. Rather, a more creative approach is needed: if we reject the outright repatriation of powers back to the national level of authority, then the solution to the democratic deficit may be found instead in some new arrangement that would involve national parliaments more directly in the oversight of the EU’s activities. One important step in this direction was taken in the Amsterdam Treaty, which included a protocol that recognized the oversight role of national parliaments, and also recognized the role of the Conference of European Affairs Committees (COSAC), the interparliamentary body that oversees the coordination of the work of such committees across the EU. This idea is also apparent in proposals to create a “third chamber,” in the EU in which national parliaments would be directly represented, as a supplement to the two existing chambers, the European Parliament and the Council (for an overview, see Kiiver 2006, pp.133-145). While it is absent from some of the most prominent academic treatises on how to fix the democratic deficit (e.g. Schmitter 2000, Hix 2008), this idea has been promoted in various forms over the years by diverse political figures such as Roland Dumas, Michael Heseltine, Joschka Fischer, and – in his capacity as chairman of the European Convention – Valery Giscard d’Estaing (Kiiver 2006, p.133-4). While the Convention did not adopt Giscard’s proposal it did devise a new procedure, the Early Warning Mechanism (EWM), that would give national parliaments their first direct say in the EU’s legislative process. After the negative referendums in France and the Netherlands (2005), the EWM was revived in a strengthened form in the Treaty of Lisbon (2007).

The key innovation of the EWM is that it would for the first time formally bring national parliaments into the EU legislative process by making them “subsidiarity watchdogs” – i.e. with the power to raise subsidiarity-based objections to proposed EU legislation. It would operate as follows. Whenever new EU legislation is proposed, the proposing institution (usually the Commission) will transmit the proposal not only to other EU institutions but also to national parliaments directly for their consideration. If a national parliament judges that the proposal violates the principle of subsidiarity – i.e. it
decides that action in this case is more appropriate at the national level than at the EU level – then it may send such objections in the form of a reasoned opinion back to the proposing institution. If one third of national parliaments raise such objections (the “yellow card” scenario), then the proposing institution must formally review the measure, after which it may maintain, amend, or withdraw the draft, giving reasons for its action. Furthermore, under the ordinary legislative procedure, if a simple majority of national parliaments raises objections (the “orange card” scenario) to a Commission proposal and the Commission decides to maintain its proposal despite them, then it must explain in a reasoned opinion why it judges that the draft complies with subsidiarity. At this point the reasoned opinions of the national parliaments and the Commission will be submitted to the Union legislator (the Council and the European Parliament), which shall consider the subsidiarity compliance of the measure before concluding the first reading. At that point if either chamber decides – by a vote of 55% of Council members (15 of EU-27), or a simple majority in the European Parliament – that it violates subsidiarity, the proposal is blocked.

II. How to Evaluate the Success or Failure of the Early Warning Mechanism

In order to develop criteria for evaluating the future success or failure of this procedure, we must first establish its purpose. This is difficult because, as has been previously argued, the purpose of the EWM is in fact ambiguous (Cooper, 2006). It has two quite distinct goals: it is intended both to enhance the democratic legitimacy of the EU and to increase the compliance of EU legislation with subsidiarity. The criteria by which we judge whether these goals have been met will be different in that the first broadly concerns inputs (the quality of the democratic process) and the second concerns outputs (the quality of EU legislation). In fact, they might be thought to call for very different institutional solutions. The problem of subsidiarity compliance is, at first glance, a narrow technical or legal matter which ought to be monitored by an institution that is technocratic or quasi-judicial in character. The problem of democratic legitimacy,

2 According to news reports, it was the parliament of the Netherlands that pushed most strenuously for the “orange card.” See, Mark Beunderman, “Apathy undermines national parliaments' EU power”, EuObserver, May 11, 2007.
on the other hand, calls for a broad or even grandiose solution such as a new third chamber for the EU made up of national parliamentarians. In fact, the Convention on the Future of Europe, the body which originally devised the EWM, considered but ultimately rejected both types of reform proposals. In the end they decided, rightly, that subsidiarity is an essentially political principle which should be monitored by political institutions, and that national parliaments are natural subsidiarity watchdogs because in defending the principle they are also defending their own prerogatives. Thus in the end, the Convention settled on the EWM as a handy and creative solution to two separate problems: how to make the EU legislative process more democratically legitimate by involving national parliaments, and how to devise a subsidiarity review mechanism that would not require the creation of any new institutions. We must judge the EWM according to whether it achieves these two separate goals.

First, how will we judge the effectiveness of the EWM in promoting subsidiarity? In theory it should bring about a substantive change in EU legislation, causing the EU to legislate less often (respecting subsidiarity *per se*) and in a less burdensome manner (respecting proportionality, subsidiarity’s “sister principle”). In the future one could undertake a quantitative study of the EU’s legislative output to measure whether, in the months and years after the Lisbon Treaty comes into effect, there is a decline in its overall volume (evidence of subsidiarity’s effectiveness) or an increase in the use of less burdensome legislative instruments (evidence of proportionality’s effectiveness). In fact an empirical study of this kind, measuring the effect of subsidiarity on EU legislation after Maastricht, found strong *prima facie* evidence of both a “subsidiarity effect” and a “proportionality effect ” (Cooper 2008). But such a study of the EWM must wait until some time has elapsed after the Treaty of Lisbon has come into effect. For the present and immediate future, the EWM’s effectiveness must be assessed with a method of process-tracing – i.e. following the legislative process and making a qualitative judgement of whether national parliaments’ interventions are having an effect on legislative outcomes in the EU. This approach need not even wait until the Treaty of Lisbon enters into force because many of the elements of the EWM are already in operation in a trial form – the COSAC pilot projects, to be discussed below.
Drawing on constructivist theory (cf. Risse 2000) some have argued that the EWM should be conceived less as a situation of standard legislative bargaining (governed by the “logic of consequences”) but rather as an argument (governed by the “logic of arguing”) in which the interlocutors back up their positions with reasons and remain open to persuasion from the other side (Cooper 2006). In its original conception, the EWM was in essence an argument between the Commission and national parliaments, in the form of a structured exchange of reasoned opinions; these set out competing interpretations of the applied meaning of subsidiarity – i.e. whether the EU should legislate in a given circumstance. In the procedure, the Commission is first required to state the reasons for the legislative proposal and explicitly demonstrate that it does not violate the principle of subsidiarity. Second, when national parliaments raise objections they must do so in the form of reasoned opinions that make the case that the proposal in fact violates subsidiarity. And third, the Commission must give further reasons for its subsequent decision to maintain, amend, or withdraw the proposal. If this system functions properly, then each side will actually “listen” to the other and take its arguments seriously. If this occurs, then the system will be constructive in that it leads to better-quality legislation and, over time, the development of a common understanding of the substantive meaning of subsidiarity.

The Constitutional Treaty only contained the “yellow card” procedure, and so it was strictly advisory. (The Convention considered but rejected a “red card” scenario which would have allowed a majority of national parliaments to collectively veto a Commission proposal; the “orange card” was added later, in the IGC that ended with the Lisbon Treaty.) Thus originally national parliaments had no voting power that would give them leverage over the EU’s legislation, but only the power of persuasion (and their influence over their respective national governments); hopefully, this would lead them to make constructive arguments rather than merely expressing blunt opposition to a proposal. In the process the “anonymous hand of public reason” (Blichner 2000) would lead to the improvement of EU legislation by forcing the Commission to sharpen its arguments concerning the necessity of EU action in a given case. The addition of the “orange card” introduces a change to the EWM by bestowing a minimal element of majoritarian decision-making power on national parliaments, in that a majority of them,
acting in concert with a majority in the Council or in the European Parliament, may collectively block a Commission proposal.

This brings us to the second goal of the EWM, which is to enhance the democratic legitimacy of the EU. What theoretical and normative criteria can we develop to evaluate the EWM as a form of “democracy beyond the state”? While the Lisbon Treaty does not create an actual third chamber for the EU, it does go some way towards constituting national parliaments as a “Virtual third chamber.” As such, it represents a quite different kind of experiment in “democracy beyond the state” from a directly elected transnational assembly such as today’s European Parliament. In the same way that an online community is a “virtual” community, the EWM constitutes a body that has many of the same characteristics of a parliamentary chamber even though its members do not meet together in the same physical space. Simplifying greatly, if we think of the primary functions of a democratic parliament as oversight of the executive, public deliberation and collective decision-making, then there are elements of all three in the EWM, but all are greatly circumscribed. The deliberative function is circumscribed by its narrow scope, which is solely to determine the subsidiarity compliance of EU legislative proposals. The decision-making function is circumscribed by its limited power, which is mostly advisory except for its capacity to block EU drafts in concert with one EU parliamentary chamber.

For the foreseeable future, it is likely that the EWM will be much more important as a deliberative body than as a decision-making body, and so the criteria for evaluating it as a form of “democracy beyond the state” will depend more on the quality of its internal deliberations and its exchange with other institutions (especially the Commission) than upon its success in exercising its power in the form of yellow and orange cards. Thus many of the democracy-related criteria for evaluating the EWM will closely parallel the subsidiarity-related criteria, as both will depend on the quality of the deliberation process within it.

The success of the EWM should be judged according to how well it achieves its twin goals of enhancing democratic legitimacy and improving subsidiarity compliance, as measured against current practice under the Amsterdam Protocol. The EWM will almost certainly lessen the democratic deficit at least insofar as it will enhance parliamentary,
and thereby public, scrutiny of the EU’s legislative process. It will restore to national parliaments some measure of scrutiny over their respective national governments that has been lost due to the accumulation of powers at the European level. The process of integration has led to a tendency for national governments to negotiate with one another behind closed doors in the Council of Ministers and to present the resulting legislation to national parliaments as a “take-it-or-leave-it” fait accompli. The EWM gives the national parliament a voice, however minimal, in European legislative politics; and while its main interlocutor is in theory the Commission, in practice the intended audience of its intervention is likely to be its own national government as well as the press and the public. The EWM allows the national parliament to intervene early and vocally in the European legislative process, with the potential to mobilize domestic public opinion and influence its government at a stage when it has not yet taken a position on the merits of the proposed law. Admittedly, the limited scope and power of the EWM makes it an idiosyncratic mechanism of democratic control that hardly compensates for the loss of influence that national parliaments have suffered due to the general drift of authority to the European level. Even so, while the EWM does not necessarily erase the democratic deficit, it does modestly alleviate it.

The EWM is also likely to produce a more thoroughgoing review of proposed legislation for subsidiarity compliance than is currently the case. One advantage is that it is more focused. Under the Amsterdam Protocol, the European Parliament and the Council of Ministers merely take subsidiarity into account in their broader, more holistic deliberations on the merits of a Commission proposal. Under the EWM, national parliaments will scrutinize it not on its general merits but solely for its fidelity to subsidiarity, which will inevitably sharpen the review. Yet even more important than the focus of the review is the identity of its participants: national parliaments, moreso than any other institution, are uniquely appropriate for the role of vigilant “subsidiarity watchdogs” because they are, as one Convention debate summary put it aptly, “at the frontier of competence.”3 Recall that subsidiarity applies to those policy areas where competence is shared between the EU and the member states; whenever the EU acts in such an area, this entails a potential encroachment upon national parliaments’ bailiwick.

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3 CONV 331/02, p.10.
As one scholar observes, “national Parliamentarians are the ones whose law-making powers are liable to be curtailed by a decision that a certain matter be regulated at the Union level, so they ought to be alert to possible infringements of the principle” (Dashwood 2004, p.68). It is assumed, then, that national parliaments will defend subsidiarity because in doing so they also defend their institutional prerogatives.

There are at least two already existing institutions that have been considered to be plausible candidates for the status of a “third chamber” within the Community system, each of which is based on a mode of representation that is quite different from that of national parliaments. One is the European Economic and Social Committee (EESC), a consultative body created by the Treaty of Rome. The EESC is quasi-corporatist in structure in that it brings together representatives of capital, labour, and other socio-economic interest groups from civil society. The possibility of the EESC becoming a “third quasi-legislative chamber in a tricameral system” was considered but ultimately rejected by Lodge and Herman (1980, p.282); they foresaw that the EESC, which had never been very influential, would soon be eclipsed by the European Parliament which, at the time they wrote, was newly directly elected. Even so, the EESC is interesting because it features a form of “functional representation” that could be said to contribute to the EU’s “input-legitimacy” by serving as a complement to the EU’s principal legislative chambers, the Council and the European Parliament, whose mode of representation is more broadly territorial in character (Smismans 2000).

The other candidate for a “third chamber” is the Committee of the Regions (CoR), a consultative body created by the Treaty of Maastricht, made up of representatives of subnational – that is, regional and local – authorities. For the first time, the CoR introduced a “third level” of territorial representation into the EU that differs from the supranational and national orientation of the two main legislative bodies (Christiansen 1996). In the early years after its creation, the CoR aggressively sought the increased power and institutional status that would elevate it to a position in the EU system comparable to the Council and the European Parliament. The CoR also presented itself as a “natural guardian” of the subsidiarity principle, given that it represents those levels of authority that are “closest to the people”. The CoR demanded standing before the Court of Justice to bring actions to annul Community laws (either to defend its own
prerogatives or the principle of subsidiarity) or for the Community’s failure to act; alternatively, the CoR demanded the privileged status of an “Institution” within the Community structure, which would automatically have given it such standing. In this, the CoR was likely trying to follow the example of the European Parliament, which had used its standing to gain influence vis-a-vis the other institutions (Jones 1997). As yet, none of the CoR’s far-reaching demands have been granted.

This discussion of the EESC and the CoR is instructive in that it begs the question of exactly what is the “value-added” of providing a EU-level channel of representation for national parliaments. Whatever their flaws, both of these institutions would in different ways provide a genuinely new form of democratic representation in the EU, whether functional (EESC) or third-level-territorial (CoR). In contrast, a (real or virtual) third chamber designed to represent national parliaments – which are directly elected and oriented to the national level – will probably largely overlap with the (directly elected) European Parliament or with the (national-level-oriented) Council. No-one seems to expect that the EWM will change the character of national parliamentary elections by inserting a hitherto absent “European dimension.” The whole point of the EWM seems to be the expectation that national parliaments will exercise a strict scrutiny of EU affairs precisely because they will remain grounded in their respective national contexts, and their primary responsibility will remain domestic policy. If so, national parliamentary elections will not be fought over which persons or parties will be their most effective advocate at the EU level, and thus the EWM will not engage ordinary European citizens by bringing about a change in their opinions or voting behaviour. Thus one possible critique of the EWM is that it fails to enhance the input legitimacy of the EU from an electoral standpoint even as it does so from a legislative-procedural standpoint (because national parliaments’ institutional perspective makes them strong advocates for a robust definition of subsidiarity).

III. Will the EWM Work? Evidence from the COSAC Pilot Projects

From the forgoing analysis, it is possible to develop a number of questions that can be used to evaluate the EWM in its beginning and early stages to evaluate it as a form of “democracy beyond the state.” This list is preliminary, not final or exhaustive; it will
no doubt be subject to further refinement and elaboration. It will be observed that most 
questions are concerned with discerning the quality of the deliberative process, regardless 
of whether the “yellow card” or “orange card” scenarios are activated. The first four 
questions entail research that may be begun immediately and the last two questions entail 
a long-term quantitative analysis to be undertaken some time in the future.

Questions for immediate qualitative analysis:

1. Has the EWM caused the Commission to withdraw any legislative proposals? 
   Was the withdrawal in direct response to national parliaments’ subsidiarity 
   concerns?

2. Has the EWM caused the Commission to amend any legislative proposals? Was 
   the amendment in direct response to national parliaments’ proportionality 
   concerns?

3. Has the vertical exchange of opinions between national parliaments and the 
   Commission led to a more refined common understanding of the limits on the 
   EU’s legitimate sphere of action (i.e. subsidiarity and proportionality)?

4. Has the horizontal exchange of opinions among national parliaments led to a more 
   refined common understanding of the limits on the EU’s legitimate sphere of 
   action (i.e. subsidiarity and proportionality)?

Questions for future quantitative analysis:

5. Over time, has the EWM caused a decrease in the EU’s legislative output (effect 
   of subsidiarity)?

6. Over time, has the EWM caused an increase of the use of less burdensome means 
   in EU legislation (effect of proportionality)?

These questions can serve as a starting point for research that evaluates the 
effectiveness of the EWM. Such research need not wait for the Treaty of Lisbon to enter 
into force, because we can analyse those current and emergent practices that are closely 
associated with (and established in anticipation of) the EWM. Notably, under the 
“Barroso initiative,” since September 2006 the Commission has sent all new legislative 
proposals directly to national parliaments for their scrutiny and comment. Furthermore,
the Interparliamentary EU Information Exchange website (<http://www.ipex.eu>) was created in 2006 to facilitate the exchange of views among parliaments on pending EU legislation, including opinions on its subsidiarity compliance. This website is designed to have a dedicated “splash-page” for each pending EU legislative proposal that features an at-a-glance real-time summary of which parliaments have evaluated it and/or flagged it for possibly violating subsidiarity; this should make it much easier for national parliaments to coordinate their scrutiny. Finally, since 2005 COSAC (the Conference of Community and European Affairs Committees of Parliaments of the European Union) has conducted four trial runs of the EWM, in which national parliaments scrutinized EU legislative proposals addressing the diverse matters of railways (COSAC 2005a), cross-national divorce (COSAC 2006a), postal systems (COSAC 2007a) and terrorism (COSAC 2008a).4 At the time of writing, two more pilot projects were planned for late 2008 and early 2009, to scrutinize legislative proposals concerning equal treatment (non-discrimination), and the law relating to successions and wills.

After each pilot project, COSAC invited national parliaments to offer their comments and criticisms of the process, and these compiled comments are useful in that they give an indication of the problems that are likely to trouble the EWM in the future. Some criticisms are logistical, such as the complaint that the proposal was not translated into all official EU languages in a timely manner or that the allotted review period (originally six weeks, expanded to eight under the Lisbon Treaty) was not long enough. Another common criticism was that there was a lack of interparliamentary coordination that made it difficult for national parliaments to know one another’s opinions in a timely manner; this complaint continued even after the establishment of the IPEX website which was intended to solve this exact problem. This coordination problem goes to the heart of whether a serious deliberative exchange can be conducted in the “virtual” horizontal interparliamentary sphere, which will determine whether anything resembling a “virtual third chamber” can emerge out of the EWM.

Other criticisms from national parliaments are more profound in that they challenge the narrow scope of the scrutiny process as it is outlined in the EWM. To put it

4 These reports may be downloaded from the COSAC website: <http://www.cosac.eu/en/info/earlywarning>.
broadly, there are four possible grounds on which national parliaments could challenge an EU legislative proposal; the first is legal, and the next three are political:

A. Legal basis. Does the EU have the legal power to take the action?
B. Subsidiarity. Would action be more appropriate at the national than the EU level?
C. Proportionality. Is the proposal the least burdensome action that addresses the problem?
D. Substance. Leaving aside all matters of competence, is the action good policy?

While these four questions are analytically separable, in practice there is considerable overlap between them. However, the Treaty of Lisbon only makes allowance for national parliaments to raise objections on one of these grounds – that of subsidiarity. In the pilot projects, a number of national parliaments had difficulty disentangling these four questions, and many found the limited scope of the mandate as provided for under the EWM to be confusing and arbitrary.

One important thing the pilot projects revealed is that the EWM will inevitably be a machine of great complexity. National parliaments vary along lines of institutional structure, electoral and party systems, and political culture. The sheer extent of the variation between national parliaments bears emphasizing, as catalogued by Philipp Kiiver in a passage worth quoting at length:

In terms of political and constitutional systems, flavours of parliamentarism range from moderately adversarial government-parliament divides to strong executive dominance, from full parliamentary systems to semi-presidential systems, from formal government investiture to pragmatic workable majority rule, from proportionate representation to first-past-the-post district systems, from unicameralism to bicameralism, from a unitary state structure to devolution and federalism, from multi-party governments to single-party governments, from bipartisanship in parliament to heavy fragmentation, from rationalized parliamentarism to rule by fragile coalitions or minority cabinets, from working parliaments to talking parliaments, from sharp-tongued scrutiny to loyal regime support, from stability to volatility, from majoritarian to consensual policy-making. (Kiiver 2006, p.138.)
Furthermore, national parliaments are by definition autonomous bodies that define their own rules of procedure; consequently each parliament must decide for itself the following questions: how the subsidiarity compliance of EU legislative proposals should be monitored (most have delegated the task to either a European Affairs committee or sectoral committees); which body is formally responsible for the adoption of the reasoned opinion (whether a committee or the plenary); whether to consult regional parliaments (if applicable) on the question at hand; and whether, in bicameral parliaments, there should be a coordination of views in the reasoned opinions.\(^5\)

Furthermore, national parliaments also vary considerably in the kind and extent of scrutiny that they exercise over EU affairs. COSAC makes a broad distinction between two broad types of scrutiny system, dubbed “document-based” and “mandating” (though some systems are hybrids of the two).\(^6\) In the “document-based” system, the national parliament examines legislative proposals and other documents emanating from EU institutions, early in the decision-making process, to flag those that require further consideration; often these systems are accompanied by a (statutory or customary) scrutiny reserve which provides that government ministers must not agree to EU proposals in the Council before parliamentary scrutiny has been completed. In the “mandating” system, the national parliament’s European Affairs Committee meets prior to a Council meeting and imposes the binding negotiating position that the government minister must take in Council negotiations. There is little doubt that the mandating system gives national parliaments much more influence in that it is active, whereas the document-based system is essentially passive in character. Even so, the EWM as it stands represents a version of the document-based scrutiny system writ large.

At the time of the first three pilot projects, there were twenty-five member states – thirteen with unicameral parliaments and twelve with bicameral parliaments, making for a total of 37 separate legislative chambers of national parliaments in the EU. Of these, 31 took part in the pilot project to scrutinize the “Third Railway Package” for its subsidiarity


compliance. Of the 31 participating parliamentary chambers, 14 (representing 16 “votes”) indicated that they believed the package was, at least in part, in breach of subsidiarity – seemingly just one short of the threshold. But an important complicating factor in this exercise was that the package actually contained four separate and substantively different legislative proposals which were: a proposal for a Directive on the development of the Community’s railways; a proposal for a Directive on the certification of train crews operating locomotives and trains on the Community’s rail network; a proposal for a regulation on international rail passengers’ rights and obligations; and a proposal for a Regulation on compensation in cases of non-compliance with contractual quality requirements for rail freight services. As it turns out, the various parliaments raised objections to different proposals within the package: the number of parliaments that objected to the four measures were, respectively, 3, 5, 4 and 10. Thus if the package were considered as a whole, almost enough parliaments objected to trigger a “yellow card” review; but if the proposals were considered separately, they did not. At this early stage there was uncertainty even over so basic a question as whether the votes should be tallied according to individual elements or to the whole package.7

The second COSAC pilot project was a review of a proposed Council Regulation on divorce.8 The proposal was intended to harmonize the applicable jurisdictional and conflict-of-laws rules in cases where the divorcing couple was of differing nationality, living in different member states or living together in a state where one or both are not nationals. The legal basis of the proposed measure is Art. 65 of the Treaty, which confers legislative powers on the Community to adopt “measures in the field of judicial cooperation in civil matters having cross-border implications… in so far as necessary for the proper functioning of the internal market.” In its explanatory memorandum, the Commission justified its proposal with respect to subsidiarity by asserting that Community action was necessary to ensure legal certainty and predictability for those affected, given the scale of the problem: in a separate impact assessment, the

Commission asserts that about 170,000 “international” couples are divorced each year.\(^9\) The Commission also defended its proposal on proportionality grounds by noting that it only concerned divorce and not marriage annulments; furthermore it defended its choice of legislative instrument – a regulation, as opposed to a directive – on the grounds that to give a margin of discretion to national governments would endanger the legal certainty and predictability that is the whole point of the proposed measure.

National parliaments responded to this proposal and its accompanying justifications with some thoughtful objections that raised important issues, but that fell far short of the “yellow card” threshold.\(^10\) Only four participants in the check, representing five votes out of the needed 17, indicated that they found the proposal breached the principle of subsidiarity. The Czech Chamber of Deputies, for example, directly challenged the necessity of the measure, which it regarded as an unwarranted intervention into national regulation of family law, and a possible step towards the full harmonization of family law. However, a much larger number raised parallel and related objections either that the Commission’s justifications with respect to subsidiarity were unsatisfactory, or that the proposal breached proportionality or had an insufficient legal basis. A number of parliaments framed their opposition in terms of proportionality, asking whether the objectives of the measure could not be achieved with simpler, less prescriptive means. One of these, the Netherlands parliament challenged the significance of the problem, pointing out that the number of “international” divorces each year only represents 0.074% of the EU population. (In an unusual rejoinder, the Commission responded that the number corresponds to approximately 19% of all divorces, which “indicates that the problem is indeed considerable.”\(^11\)) Other parliaments, such as the UK House of Lords, argued that the measure exceeds the legal powers of the Community, which only has the power to legislate in the area of judicial cooperation in civil matters “…in so far as necessary for the proper functioning of the internal market” – that is, to

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ensure the free movement of persons. Without evidence showing that the absence of common rules with regard to divorce adversely affected the functioning of the internal market, then this measure could well exceed the powers granted under Article 65 TEC. This pilot project showed that at least in some cases a challenge to the necessity of a proposed measure can be framed either as a subsidiarity breach, a proportionality breach, a lack of legal basis, or some combination of the three.

The third and fourth pilot projects had even less of a negative response in that in both cases only one parliamentary chamber found the proposal in question to be in breach of the subsidiarity principle, bringing the EWM nowhere near the yellow card threshold. The third pilot project was a review of a directive “concerning the full accomplishment of the internal market of Community postal services”; its aim was to open up competition in the delivery of light-weight (less than 50 grams) items of mail, which had been the last vestige of the monopoly held by traditional national mail services, while also allowing national governments to choose from a range of actions to safeguard universal service. Only the Luxembourg parliament (representing two votes out of the needed 17) found the proposal in breach of subsidiarity, though other parliaments expressed reservations on grounds of proportionality or legal basis, or found the Commission’s justifications with respect to subsidiarity or proportionality wanting.12 (This measure became law in early 2008.)

The fourth pilot project, completed in February 2008, is the first to reflect the Treaty of Lisbon version of the EWM, which is somewhat strengthened over its incarnation in the Constitutional Treaty – with the extension of the deadline from six to eight weeks, and the addition of the “orange card” option. It is also the first to take place after the 2007 accession of Bulgaria and Romania, which will raise the one-third threshold from 17/50 to 18/54 “votes” in EU-27. It is a review of a proposed “Framework Decision on Combating Terrorism” which aims to crack down on the use of the internet to abet terrorism by adopting common legal standards that define terrorism to include “public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism.” Only one parliamentary chamber, the UK House of Commons,

found that the proposal was in breach of subsidiarity; the House of Commons argued that the measure was unnecessary because the same result had already been achieved by a Convention adopted under the auspices of the Council of Europe, outside the EU. An interesting development in this case was that the German Bundestag (lower house) submitted a statement arguing proportionality had been breached, even though subsidiarity had not; it did so to protest the fact that the Treaty of Lisbon only provided for a subsidiarity review and not a proportionality review of proposed legislation. This draws our attention to one major weakness in the EWM.

Recall that national parliaments could potentially raise objections on four broad grounds: legal basis, subsidiarity, proportionality, and substance. It is arguable that the first and fourth of these may be reasonably excluded from grounds for review: the question of legal basis ultimately falls within the jurisdiction of the European Court of Justice to decide; and a review of all EU legislative proposals for their policy merits could become too broad and unwieldy and would pre-empt the policy debates in the Council and the European Parliament. However, as has been pointed out in earlier work, and as national parliaments in the pilot project are now discovering to their dismay, the absence of proportionality form the EWM is both absurd and counterproductive. The absence of a proportionality review from the EWM is a major flaw in the Treaty of Lisbon which, if strictly followed, could have a profoundly negative effect on the quality of deliberation in the vertical exchange of opinions between national parliaments and the Commission. In short, the subsidiarity review involves deliberation over ends: is any EU action appropriate in a given case? The proportionality review, by contrast, invites deliberation over means: is the chosen action the least burdensome that will address the problem at hand? The first question invites a simple yes or no; the second question invites constructive criticism of the legislative proposal and suggestions as to how it might be improved or amended. A truly constructive argument between national parliaments and the Commission will only emerge if the scope of the EWM is

15 The distinction between deliberation over ends vs. means with respect to subsidiarity is made in Føllesdal 2000.
expanded to encompass a proportionality review. As it happens, many national parliaments are discovering this problem and are simply choosing to ignore the restriction, raising both subsidiarity-based and proportionality-based objections to EU legislative proposals in their reasoned opinions. It is yet to be seen whether the Commission will also ignore the restriction and accept these as valid, but it would be wise to do so.

IV. Conclusion: The EWM in the Process of Constitution-Making in Europe

The EWM is a significant constitutional development that should provide a rich vein for research as it takes shape in the next few years. As it stands, it is an innovative experiment in “democracy beyond the state” that is different in kind from the transnational European Parliament. The EWM has the potential to not only improve the subsidiarity compliance of EU legislation but also to create a genuinely new forum for European democratic deliberation that could lead national parliaments to evolve into a “virtual third chamber” for the EU. Of course, these two goals – subsidiarity and democracy – are closely related and complementary in that they both are intended to enhance the legitimacy of the EU by bringing it “closer to the people.” However, the actual experience of the EWM so far, in its trial form, has been disappointing for reasons that are both due to simple logistical problems and more fundamental difficulties in clarifying the very nature of the enterprise. This will be a serious task for the years, so long as the Treaty of Lisbon comes into effect and the Early Warning Mechanism begins to operate in earnest.

Concerning this final point, at the time of writing the Treaty of Lisbon is in limbo due to a negative result in the referendum in Ireland in June 2008, and its future is now uncertain. The point should be made strongly that if the Treaty of Lisbon fails to become law, the Early Warning Mechanism could still be operationalized by means that are perfectly legal and wholly legitimate. One available legal mechanism would be an Inter-Institutional Agreement (IIA), a “sub-constitutional” instrument sometimes used by the EU’s institutions to work out a common set of procedural rules. In fact an IIA was used in a very similar circumstance in 1993, to work out a common approach to the application of the principle of subsidiarity after the Maastricht Treaty (Eiselt and Slominski 2007).
Some agreement of this kind would be necessary to institutionalize the EWM, in particular to bind the Commission to abide by the rules of the yellow and orange card procedures relating to the mandatory review and possible withdrawal of legislative proposals, given that they do to some extent curtail the Commission’s right of initiative. Assuming the Commission would agree to this, the EWM could be put into practice in a manner that would be perfectly legal. Such a move would also be wholly legitimate because it would advance the cause of the democratic legitimacy of the EU. Furthermore, as it would not bestow any new powers on the EU – in fact, if anything it entails a modest shift in power back to the member states – then it is a change that would not require any Treaty amendment, so long as all the EU institutions were in accord. Thus even after yet another demoralizing treaty failure, European leaders could with a clear conscience console themselves by proceeding to establish a “virtual third chamber” for the EU.

References


