

National Parliaments in the European Union

Collective Action under the Early Warning Mechanism

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Abstract

The 2009 Lisbon Treaty introduced the Early Warning Mechanism into the EU decision-making process. Under this mechanism, National Parliaments monitor the compliance of EU legislative proposals with the principle of subsidiarity by issuing yellow cards in cases of violation. It is argued that in doing so, they meet a collective action problem in form of an assurance problem, hence will only ineffectively exert their scrutiny rights. Despite these theoretical predictions, National Parliaments triggered the mechanism twice so far by issuing yellow cards on COM/2012/0130/‘Monti II’ and COM/2013/0534/‘EPPO’. Thus, this thesis aims at analysing how National Parliaments managed to overcome the assurance problem in these cases. Conducting case studies based on theoretical assumptions derived from collective action theory, it is demonstrated that National Parliaments used to this end effective leadership and pre-play communication in the sense of inter-parliamentary cooperation in order to create certainty about the actions of other Parliaments and subsequently about the prospects of successful collective action. Applying the method of structured and focused comparison, four cautiously generalizable conclusions can be drawn about the importance of effective leadership and inter-parliamentary cooperation, the importance of effective information exchange between the political and the administrative level, the importance of early activity of Parliaments during the scrutiny period and the importance of the network of National Parliamentary Representatives in Brussels for overcoming the collective action problem.

Key words: Collective Action Problem, Early Warning Mechanism, EU Decision-Making, National Parliaments, Yellow Card

Words: 20094

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List of Abbreviations

Commission	European Commission
COSAC	Conference of Community and European Affairs Committees of Parliaments of the European Union
Council	Council of the European Union
EAC	European Affairs Committee
ECJ	Court of Justice of the European Union
EP	European Parliament
EU	European Union
EWM	Early Warning Mechanism
IPC	Inter-Parliamentary Cooperation
IPEX	InterParliamentary EU information eXchange
JHA	Justice and Home Affairs
MLG	Multi-Level Governance
MMM	Monday Morning Meeting
NP	National Parliament
NPR	National Parliamentary Representative

1 Introduction

NPs have undergone a remarkable fate in the EU's institutional system. For a long time, they were considered the main losers of the European Integration process, "left behind in the rush" (Norton 1996: 192). Whilst their gradual extension of scrutiny powers over their governments acting in the Council has led some scholars to observe that NPs had learned "to fight back" (Raunio/Hix 2000), others stay sceptical of this conclusion (e.g. Sprungk 2010; Wessels 2005).

Pre-Lisbon, NPs were only indirectly involved in the process of EU policy-making via scrutinizing their governments acting on EU level. Mainly due to democratic legitimacy concerns, both politicians and academics called increasingly for their direct involvement at the EU level (Cooper 2013a: 538). With the 2009 Lisbon Treaty, NPs are for the first time assigned specific roles in the main text of the Treaty. Most notably, it introduced the so-called EWM, which allocates NPs the responsibility to ensure that EU legislative drafts comply with the principle of subsidiarity. In cases NPs discover a breach, a third or more in acting together can issue a "yellow card", vetting and temporarily blocking the proposal (Brady 2013b). Hence, this mechanism expands the role of NPs by upgrading their scope to acting alongside the EU institutions in the EU legislative process.

This new instrument has received much scholarly attention; yet, political scientists still are relatively uncertain about its impact, and little is known how NPs will actually seize this new opportunity. There is however consensus in academia that the EWM is a mechanism of collective responsibility, meaning collective mobilization is the key for the effectiveness of NPs in scrutinizing subsidiarity. Subsequently, some scholars argue that the need to act collectively makes collective action theory applicable to the EWM, implying a collective action problem. Perceiving a yellow card as a collective good from the perspective of NPs, this good will only be inefficiently provided (Buzogány/Stuchlík 2011; Cooper 2013b).

Despite these gloomy predictions, NPs have "yellow carded" twice so far. In May 2012, they rejected a proposal on common EU rules to the rights to strike ("Monti II"); in October 2013 the proposal to establish a European Public Prosecutor's Office on crimes affecting the financial interests of the EU ("EPPO"). Whilst scholars concluded that the yellow card "comes of age" and that it "marks [NPs'] arrival as serious players in how the Union is governed" (Brady 2013b), a thorough analysis of how these cards came to happen despite the above-said collective action problem is still outstanding. Thus, this paper aims at analysing:

How did NPs manage to overcome the collective action problem inherent in the EWM in cases of successfully triggering a yellow card?

By that, this paper does not intend to provide a complete picture of how these two yellow cards happened, but focuses more narrowly on the inherent collective action problem as one of several internal problems in the EWM. Therefore, the paper will first offer an overview of the role of NPs in the EU (2.1), go more into depth to explain the EWM (2.2) and review the relevant literature on the issue (2.3). This will be followed by a more thorough problem definition, based on rational-choice theory and aimed at substantiating the yellow card as a collective good (3.2), analysing the collective action problem at hand and presenting it in detail (3.3), before explaining what this means for NPs under the EWM (3.4). The methodology will be presented in 5, followed by the analysis (7), which will consist of case studies of the processes leading to the two yellow cards and conduct a structured and focused comparison of these. Finally, a conclusion will be drawn (8).

2 The Early Warning Mechanism

This part will offer a brief overview of the role of NPs in the EU, explain the EWM in-depth and provide a review as to its theoretical and empirical analysis in the relevant academic literature.

2.1 The Role of National Parliaments in the EU

The attention paid to the role of NPs in the EU political system has undergone a remarkable change since the beginning of European Integration. During the early years, the role of NPs in the EU was only rarely featured. The emerging debate on the democratic quality of the EU however brought closer attention to them. Their empowerment was seen as one way to alleviate the identified democratic deficit. Politicians and scholars soon started to call for their involvement in EU affairs (e.g. Norton 1995; Raunio 1999). Pre-Lisbon, the focus was on the NPs' indirect involvement in the EU by scrutinizing their respective government's actions in the Council.

This debate gradually led to the acknowledgment of the need of NPs' direct involvement within the EU institutional framework as the only way to effectively address the problem (Cooper 2013a: 538). With the 2009 Lisbon Treaty, NPs are for the first time mentioned and assigned specific roles in the main text of the Treaty. According to Art. 12 TEU, NPs "contribute actively to the good functioning of the Union". The Treaty introduced new rights for NPs.¹ Of these, the most notable instrument to increase their direct involvement in EU affairs is the EWM, which allocates NPs the responsibility to ensure that EU legislative drafts comply with the principle of subsidiarity.

¹ I.a. information rights for NPs, new involvement rights in the evaluation of EU policies in the area of freedom, security and justice (Art. 70 TFEU), Eurojust (Art. 85 TFEU) and Europol (Art. 88 TFEU) as well as increased rights regarding the Council's exercise of the Passerelle Clause (Art. 48 (7) TFEU).

2.2 The Early Warning System

The EWM is set out in Protocol No. 2 *On the Application of the Principles of Subsidiarity and Proportionality*.

The subsidiarity principle as a core principle of the EU institutional order was first introduced by the Treaty of Maastricht, however, without a political mechanism to monitor its compliance. It is enshrined in Art. 5 (3) TEU: “In areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, [but] be better achieved at Union level”. NPs have not yet come to consensus whether to interpret this rather vague definition in a strictly legal or a broader political sense (Buzogány/Stuchlík 2011: 9).

Generally under the new Treaty, when EU legislation is proposed, the draft must provide a justification regarding the principles of subsidiarity and proportionality and be submitted not only to the other EU institutions, but also to the NPs by the proposing institution (Art. 4, 5). NPs are then to scrutinize the initiative as to its subsidiarity compliance. If an NP judges a violation, it may within eight weeks send a negative *reasoned opinion* back to the proposing institution, stating its objections (Art. 6). In this system, each parliamentary chamber is allocated two votes (per unicameral system, one vote each in bicameral systems, Art. 7 (1)). If one third of the votes raise objections, the proposing institution must review the draft, after which it may then maintain, amend or withdraw it (*yellow card*, Art. 7 (2)). Under the ordinary legislative procedure, when the number of reasoned opinions represents at least a simple majority of all votes, and the Commission decides to maintain the proposal, it must justify this in a reasoned opinion. This document, together with the objections by NPs, is passed on to the Council and EP. If any of those institutions judges indeed a subsidiarity violation,² the legislative proposal shall not be given any further attention (*orange card*, Art. 7 (3)).

Due to different systems of parliamentary government, political cultures and customs, differences among NPs regarding the application of the EWM are expected,³ but also more practically regarding the internal way of exercising this new responsibility. Basically, two models of subsidiarity scrutiny emerged: in the centralized model, the scrutiny takes place in the respective EAC, whereas in the mainstreaming model, it is carried out by the relevant sectoral committees (Buzogány/Stuchlík 2011: 8f.).

By now, the EWM has been in place for about four years. Until March 2014, NPs have, with increasing activeness⁴, in total issued 278 reasoned opinions. Two

² By a vote of 55 % of Council members, by a simple majority of the votes cast in the EP.

³ First studies as to the difference between NPs in their engagement in the EWM and in employing reasoned opinions are offered by Gattermann/Heffler (2013) and Kimmerle (2013).

⁴ 35 reasoned opinions (2010), 65 (2011), 78 (2012) and 94 (2013).

yellow cards have been triggered, and no orange card. On 22 May 2012, the so-called Monti II proposal (COM/2012/0130) met the necessary threshold. Whilst the Commission eventually withdrew the proposal, it argued that this was not because of a subsidiarity violation, but because of wider political opposition. On 28 October 2013, the EPPO proposal (COM/2013/0534) had received enough reasoned opinions to trigger the mechanism a second time. This time, the Commission decided to maintain the proposal, supported by the EP and a number of NPs (Seimas 2014: 2f.).

2.3 Major Issues of the Early Warning Mechanism in Academic Literature

The EWM has received much scholarly attention. Notably, the following issues have found academic interest.

2.3.1 Democratic Deficit

Perceiving the EWM as an attempt to alleviate the democratic deficit, opinions vary as to its impact. Whilst some argue that the opportunity to interfere directly at an early stage in the EU decision-making process has notably enhanced NPs' control activities (Mellein 2011), others do not see the EWM as a solution to the problem, arguing that it blurs existing channels of delegation and accountability in the EU (De Wilde 2012). Generally, academics agree that the actual transfer of democratic legitimacy depends on how effectively NPs make use of the new instrument.

2.3.2 Effectiveness

Drawing from this, other scholars have focused on the effectiveness of the EWM in regard to legislative outcomes. Quite some scholars see it as bringing little added value to the work of NPs, arguing that there are three kinds of factors impeding its legislative effectiveness.

First, NPs might be reluctant to challenge their parliamentary majorities in EU affairs, which are additionally unlikely to bring much electoral advantage. Second, there are logistical problems. The threshold is high, participation voluntary, the 8-week deadline short and the volume of proposed legislation large. Third, even if a card is triggered, its impact might be blunt. The power of the mechanism is limited, as for the yellow card, the Commission still holds the ultimate power, for the orange card, the outcome depends on the Council/the EP

and there is no red card. Furthermore, the EWM applies only to the area of shared competences and does neither allow NPs to scrutinize the actual policy content nor to make constructive legislative suggestions (Cooper 2012: 449-451).

These factors led some scholars to conclude that the EWM “can thus be depicted as a relatively harmless procedure, established primarily to inject legitimacy to EU governance” (Raunio 2010: 11). Others claim that its major outcome is unintended side-effects (Paulo 2012) and draw a more positive picture. Cooper, acknowledging the above-stated obstacles, concludes that “the EWM has a legislative ‘value-added’ in that it is likely to produce final legislative outcomes different from those that would have resulted in the pre-Lisbon ‘bicameral’ system” (2012: 443).

However, beyond these descriptive analyses, hardly any thorough systematic study has been conducted on the issue. Overall, there is still no agreement to this question.

2.3.3 The Early Warning Mechanism as a Mechanism of Collective Responsibility

There is consensus in academic literature that collective mobilization is the key for the effectiveness of NPs in scrutinizing subsidiarity. The EWM does not empower each parliamentary chamber individually, but collectively.

Hence, some scholars have tried to capture the collective of NPs theoretically. Cooper argues that NPs have, “with their new powers under the EWM [...] in effect become a collective actor within the EU. [They] collectively form a ‘*virtual third chamber*’ [...]” (Cooper 2012: 441f.). Kiiver (2011) shares this perception of a joint virtual body. With their new formal powers, NPs have become an institution comparable to the French *Conseil d’Etat*⁵.

Shifting the theoretical perspective, some scholars adhere to rational-choice theory/methodological individualism, arguing that the need to act collectively leads to a collective action problem. Buzogány/Stuchlík (2011) argue that the possibility of triggering a yellow card is a collective good for NPs, containing an incentive to free-ride on the reasoned opinions of other NPs. This makes collective action rather difficult. Cooper (2013) identifies a collective action problem, as “NPs are unlikely to take part [...] for the simple reason that a yellow card is unlikely, because not enough NPs participate” (ibid: 18). Knutelská (2011) simply refers to the standard literature on collective action, before concluding that this had led NPs to take various steps to facilitate information exchange and cooperation. Similarly, Buzogány/Stuchlík and Cooper conclude that “this [...] classic collective action problem [...] is solvable through effective mechanisms of

⁵ A consultative body, to which the government submits legislative proposals in order to control their lawfulness, prior to passing them on to the Parliament.

coordination” (Cooper 2013: 18) and that NPs “need to foster and enhance cross-country exchange of information and cooperation” (Buzogány/Stuchlík 2011: 18), but do not go more in-depth into the analysis of the collective action problem. Hence, a thorough analysis of the collective action problem is still outstanding.

2.3.4 Empirical Research

Other scholars that aim at empirically analysing collective action of NPs in the EWM focus on the amount of IPC between NPs. IPC has since the 1990s been a recurring theme in academia, arguing that building parliamentary networks with other NPs and the EP increases their influence in EU affairs (Slaughter 2004: 104ff). With regard to the EWM, research questions address the ability of NPs to cooperate effectively. However, the indicators and data sources scholars use do not suffice to draw a complete picture of the IPC going on and to explain how exactly this is connected to the identified collective action problem (e.g. Kaczyński 2011; Knutelská 2011; 2013).

3 Problem Definition

Following, the research problem will be explained, relying both on theoretical and empirical reasoning. Therefore, the underlying theoretical assumptions about NPs and their integration in the EU institutional system will be presented, aimed at substantiating a yellow card as a collective good. Following this, collective action theory will be introduced in order to point out the obstacles NPs meet when producing this good. It is important to note that whilst this paper relies on the notion of collective action theory and uses game theoretical language, it does so in an analogy. The theory will not be used in a mathematical sense, but rather to point theoretically out practical problems in the EWM and how they can be solved.

3.1 Assumptions about NPs and their goals

This paper is aware that NPs in the EU are in fact a rather heterogeneous group both at qualitative and quantitative level. In 28 Member States, there are 41 parliamentary chambers, ranging in size, appointment-style (Lupo 2013: 9) and embedment in political cultures and systems of parliamentary government. Hence, position and performance of NPs regarding EU matters expectedly vary from state to state (Hrbek 2012: 148). However, the present study does not aim at analysing such differences, although these might be taken into account in the analysis. It will be demonstrated below that it can be assumed that NPs as rational actors in the EU MLG system have an *equal interest* in triggering a yellow card in order to regain control over the outcome of decision-making processes. Thus, for reasons of simplification and analysis, this paper assumes homogeneity in regard to their desire to trigger a yellow card if they consider the subsidiarity principle violated; yet, NPs might have own interests going beyond that.

Furthermore, each parliamentary chamber is, for reasons of simplification, understood as a unitary actor. Whilst the empirical realities of parliaments in Europe might confront this simplification, it can be argued that collective actors with relatively homogeneous preferences can be legitimately regarded as individual units (Scharpf 1997: 52f.). Such relatively homogeneous preferences can be assumed in parliaments (Hix/Høyland 2013: 174)⁶. This is in line with the

⁶ As decisions are usually made either by simple majority of the MPs present or by absolute majority of all members, assuming that all members interested in the topic are present.

requirements of rational-choice theory, which claims methodological individualism: the individual/some analogue is the unit of analysis (Geddes 2005: 376).

The assumptions underpinning this paper are based on rational-choice theory. Whilst most of the literature on NPs in European Integration has been normative, connected to democratic legitimacy, much of the recent literature on European policy-making is closely related to rational-choice (e.g. Hosli 1995; Tsebelis/Garret 2000; Thomson et al. 2006). Investigating the role of NPs in this process should rely on approaches analysing the role of other actors in the policy-making process (Knutelská 2011: 331). Hence, NPs are perceived as rational actors, meaning they have clearly defined preferences and display instrumental rationality, choosing the best means to maximize their utility and chances of achieving these preferences (Colman 2004: 287).

However, rational-choice theory makes no assumptions about the preferences actors hold (Geddes 2005: 378). NPs in the European context are part of the EU's institutional balance, participating in the distribution of power among all EU institutions. Hence, it can be argued that the preference of NPs, independent of specific policies or topics, is to safeguard their own authority in the evolving political system (Winzen et al. 2012: 2). "The basic rational-choice assumption is that actors seek to maintain and increase their influence in the decision-making process. Therefore, [NPs] should seek influence in European decision-making" (Knutelská 2011: 331). Influence is defined as control over the outcomes of decision-making processes with the institutional power vested in the rational actor (Rasmussen 2000: 3). However, NPs cannot be understood as power-maximizers per se, seeking as much authority as possible at all times. This would not explain why they agreed to integration into the European project in the first place. Rather, they are to be perceived as reactive balancers, motivated by the desire to preserve their influence when confronted with changes in their environment (Winzen et al. 2012: 6).

3.2 The Yellow Card as a Collective Good

Based on the above-made assumption, it will be demonstrated that for NPs in the EU, the yellow card constitutes a collective good.

3.2.1 National Parliaments in the EU MLG System

As part of the EU's institutional structure, NPs are embedded in the European MLG system. MLG is the nowadays most widely accepted way of theoretically conceptualizing the political system of the EU (Bache/Flinders 2004: 2). MLG basically means "a system of continuous negotiation among [interconnected actors] at several territorial tiers, [...] as the result of a broad process of

institutional creation and decisional reallocation that had pulled some previously centralized functions of the state up [and] down” (Marks 1993: 392).

MLG goes beyond classical integration theories and entails both vertical and horizontal dimensions, as European Integration has led to a dispersion of authority across multiple jurisdictions/actors (Marks/Hooghe 2004:15f.). Multi-Level refers to the increased parallelism and distinct interconnection of multiple territorial levels of governance (Bache/Flinders 2004: 3). This does not imply hierarchy, but highlights the interplay between authorities from different levels (George 2004: 125). Governance signals that governmental actors share responsibility with non-governmental actors in EU policy-making (Bache/Flinders 2004: 3).

However, these structures tend to exclude parliaments from policy-making. Generally, the so-called de-parliamentarization thesis has been at the centre of debates about NPs in EU affairs for the last two decades, meaning that European Integration has led to an erosion of parliamentary influence in EU policy-making (Raunio 2011: 304). With the transfer of competences to supranational EU institutions, the prerogatives of NPs were substantially reduced, whereas developments on the supranational level favoured the executive branch (O’Brennan/Raunio 2007: 1ff.).

This process is reinforced by the EU MLG structure. It reduces NPs’ autonomy through existing EU rules and preferences of other MLG actors (ibid.: 7) and perceives intergovernmental policy coordination as the primary mode of governance⁷ (Raunio 2009: 324). Hence, the focus on strong Multi-Level players of the executive branch features NPs only marginally (Kiiver 2006: 236). Adding to this, MLG frequently implies a shift from formal procedures to the involvement of non-governmental actors, the reliance on networks (Piattoni 2009: 164) and informal negotiations (Peters/Pierre 2004: 76). This fosters a policy-making style where parliamentary control is difficult as the “length of the chain of delegation [makes] democratic accountability fictitious” (Papadopoulos 2008: 5). Overall, “MLG in the EU [...] involves the sharing of policy competencies by actors at different levels, muddled lines of accountability, and the [side-lining of NPs] from the intergovernmental negotiations” (Daunia/Raunio 2006: 6).

The EU MLG system combines two structures of citizen representation, with the direct representation in the EP complemented by indirect representation via NPs. The coexistence of parliamentary bodies on different levels has led scholars to observe the emergence of a Multi-Level Parliamentary Field, in which they might pose as competitors for power (Crum/Fossum 2009: 263). Indeed, the “multi-level system of representation [is] fuelled by the competitive demands of [NPs] and the [EP] seeking to preserve the authority of representative institutions in the face of adverse changes in their environment” (Winzen et al. 2012: 11).

Whilst the EP has undergone a remarkable process of institutional empowerment (Rittberger 2012: 18f.), NPs have been losing influence in the EU MLG system.

⁷ This does not mean that MLG posits national governments the same significance that liberal intergovernmentalism does.

Hence, based on the assumption of NPs being rational reactive balancers, they are expected to compensate this altered power structure. “This is exactly what we observe when we study [NPs] in the process of European integration. [P]arliamentary actors as the alleged losers of the European integration [...] identify the structural disadvantages resulting from the multi-level structure and react accordingly” (ibid.: 2f.).

3.2.2 Channels of Influence

The EU MLG system offers actors multiple access points to influence politics. NPs striving to control the outcome of EU policy-making can use the national route, scrutinizing EU decision-making indirectly by controlling their respective national government in the Council or enter the process directly on the European level by interacting with the European institutions participating in it (Knutelská 2011: 329f.).

Until recently, the domestic route was widely regarded as the principle channel for NPs to influence EU policy-making (Winzen et al. 2012: 6) and most attempts to regain power have happened at the national level, by implementing stronger scrutiny systems of EU issues in order to influence their executives’ activities in EU policy-making (Auel/Tacea 2013: 1). However, it is “insufficient to infer from formal institutional adaptation to actual parliamentary influence” (Goetz/Meyer-Sahling 2008: 9). Empirical studies have shown that the actual scrutiny-strength varies significantly between Member States and is generally rather weak. Additionally, in EU MLG, “when systematically applying the mechanisms and instruments available to [NPs] to the arena of EU governance, we find severe restrictions compared to the domestic arena” (Sprungk 2013: 554; Benz 2004: 879).

Thus, taking the “national route” does not seem an effective way for NPs to safeguard the power they have been losing. Rather, policy-making continues to be dominated by the executive (Benz 2010: 6). Thus, it is to expect that NPs turn to the other channel, the European route. “The European level currently offers national parliaments one clearly defined legal tool, namely the [EWM]” (Knutelská 2011: 331).

Whilst academia and political discourse have not yet arrived at a picture of the impact of this new scrutiny mechanism (2.3.2), it gives NPs some autonomous functions for controlling certain aspects of EU decision-making independently of their respective governments (Lupo 2013: 10). Defending subsidiarity means defending NPs’ own prerogatives, which have been substantially reduced by the transfer of legislative competences to the European level (Cooper 2013: 536). Most importantly, their negative empowerment towards EU legislation gives NPs a power-bargaining position (Kaczyński 2011: 15). “Reaching a blocking majority, even if only temporarily, increases the net bargaining power for [NPs], irrespective of their preferences” (Buzogány/Stuchlík 2011: 18). Hence, NPs as rational reactive balancers are expected to want to regain influence directly at the

European level and therefore make active use of this new mechanism in order to maximize their control over the outcome of EU policy-making processes.

3.2.3 The Yellow Card as a Collective Good

Following this line of reasoning, it can be argued that triggering a yellow card under the EWM is a collective good for NPs (Buzogány/Stuchlík 2011: 18).

A collective good, whose production is in the common interest of a given set of individuals, has two defining characteristics: *non-excludability*, meaning it is not feasible or efficient to prevent others from consuming and benefiting from the good, and *indivisibility/jointness of supply*, meaning that the consumption of the collective good by one individual does not diminish the quality or quantity of the benefit available to others (Taylor 1987: 5f.).

A yellow card on an EU legislative draft can be assumed to be a collective good, as it is beneficial for all parliamentary chambers striving for increasing control over the outcome of EU decision-making, irrespective of their preferences. Hence, the characteristic of indivisibility applies here, making NPs in the EWM non-rivalrous (ibid.: 7). Furthermore, it is also non-excludable: if a yellow card is triggered, it strengthens the power position of all NPs in the EU political system; no NP can be excluded from these benefits. Due to their common interest in producing the collective good, NPs are expected to engage in collective action, meaning “joint actions of a number of individuals which aim to achieve [some common] gain through co-ordination and co-operation” (Holzinger 2003: 2). “The Early Warning System is a mechanism of collective action” (Turşie/Nițu 2011: 39). However, the provision of collective goods gives rise to *collective action problems*.

3.3 The Logic of Collective Action

In the following, collective action theory will be presented, aimed at substantiating and explaining the collective action problem NPs are likely to meet in the production of a yellow card as a collective good.

3.3.1 Collective Action Problems

Rational-choice theory and the collective action theory are closely related, as the latter assumes rational actors and methodological individualism, reducing group actions to statements about the actions of individuals (Scott 2000: 133). Thus, one could assume “that groups of individuals with common interests [...] act on behalf of their common interests much as single individuals [...] on behalf of their personal interests” (Olson 1971: 1). However, rational individuals will actually

often not act to achieve common goals and thus have difficulties producing a collective good that depends upon collective contributions (Taylor 1987: 3).

The logic of collective action was analytically founded by Mancur Olson. In his view, collective action leads to collective action problems, meaning actions that are individually rational produce outcomes that are collectively irrational (Olson 1971: 2).⁸ “A collective action problem exists where rational individual action can lead to a strictly Pareto-inferior outcome, that is, an outcome which is strictly less preferred by every individual than at least one other outcome” (Taylor 1987: 19). Hence, collective goods will be inefficiently provided.

A broad range of different problems has been identified; the two most common ones are the Prisoner’s Dilemma and the Assurance Problem (Morris 1998: 90).

3.3.2 What Kind of Collective Action Problem?

As those two problems are different in nature, research suggests that the solutions for overcoming them differ from one another (Lee 2012: 1138). Thus, in order to analyse how to solve them, it is necessary to first characterize the problem at hand.

The prisoner’s dilemma has been widely applied to collective action settings in which free-riding on the contribution of others in the production process dominates (Runge 1984: 158). As the benefit from non-contribution is always higher, rational individuals prefer to defect,⁹ inevitably meaning the collective good is not produced (Kollock 1998: 189).

The assurance problem is of different nature – it is “the problem of coordinating one’s actions with others in situations where everyone does best by cooperating, but otherwise should all defect” (Lee 2012: 1143), meaning there is no incentive to free-ride. Rather, “each [individual prefers to] contribute [only as long as] they are assured that all others will do so too” (Udehn 1993: 251). Due to uncertainty over the others’ actions, actors might choose to defect (Runge 1984: 162).

The difference between these problems is thus the underlying preference of rational actors: contribution or defection. In order to determine these preferences and thus the collective action problem, the character of the collective good is crucial (Chong 1991: 13).

“In some cases, *no* amount of the [collective] good can be provided unless total contributions exceed some threshold. If, [...], a single individual’s contribution is insufficient to provide any of the [collective] good, [...], then each player will prefer [defection if the other player does the same], but may prefer to contribute if

⁸ He refers – non-explicitly – to the free-rider problem in order to explain this dilemma; however, not all problems in the provision of collective goods have the structure of this dilemma (Chong 1991: 6).

⁹ Not contribute to collective action.

the other contributes too. In this case, we have [...] the game of Assurance” (Taylor 1987: 37f.). The collective good is characterized by a jointness of production. The defection by only a few will destroy the entire good, making it the self-interest of rational actors to contribute, giving no incentive to defect/free-ride (Chong 1991: 13f.).

With the EWM, the Lisbon Treaty did not empower NPs individually, but *collectively*. It is not sufficient that one NP gives a negative reasoned opinion, but the mechanism is only triggered if a critical mass of NPs submits one (Korhonen 2011: 7). The threshold requires at least one third of all the votes allocated to the NPs for the “yellow card” procedure (Art. 7 (2) TEU Protocol 2). Thus, NPs are allowed to substantially influence the EU decision-making process only as a group (Knutelská 2011: 331). As the collective good cannot be provided by one NP, or only a few, the production of a yellow card is characterized by a jointness of production and thus better represented by the assurance problem than by the prisoner’s dilemma.

3.3.3 The Assurance Problem

Generally, illustrating collective action problems relies on game theory, which “is concerned with rational choice in decisions involving two or more interdependent decision makers” (Colmann 2004: 287).

Although collective action involves many participants, in game theory, the interactions are frequently presented by two-by-two games (Lee 2012: 1141). Players have well-defined preferences among possible outcomes, the latter presented by numerical payoffs (Colmann 2004: 287.). They have several strategies (usually contribution and defection), of which one is dominant, yielding the player’s best outcome regardless of what anyone else does (Kollock 1998: 185). Usually, these strategies lead to one uniquely rational solution: an equilibrium point. A collective action problem is then marked by at least one outcome that is a deficient, pareto-inefficient, equilibrium, meaning “there is at least one other outcome in which everyone is better off” (ibid: 184).

The assurance game is illustrated by the *stag hunt*. Two hunters can hunt either a stag or hare. The stag is the preferred animal of both hunters; catching it is only possible with coordinated efforts. Alternatively, each hunter can defect and hunt a hare, as this is possible by oneself. However, if one hunter continues to hunt the stag, whereas the other hunts a hare, the stag will not be caught. The former will have no prey at the end of the day; the latter will have caught only the smaller animal (after Rousseau 2007: 63).

		Hunter 1	
		Cooperation/Hunting Stag	Defection/Hunting Hare
Hunter 2	Cooperation/Hunting Stag	4, 4	0,1
	Defection/Hunting Hare	1,0	1,1

Figure 1: The Assurance Problem in a 2x2 Game Setting
 (The numerical payoff structure is imaginative, reflecting the value of a stag (4) and a hare (1))

Mutual cooperation leads to a better outcome than both unilateral and mutual defection (Kollock 1998: 190) and there is little incentive to free-ride. Hence, the assurance game involves two equilibria: mutual cooperation (4,4) and mutual defection (1,1). However, joint contribution is the by both players most-preferred, pareto-optimal equilibrium, whereas joint defection is pareto-inferior (Runge 1984: 160). The common interests and the lacking incentives to free-ride have led some scholars to conclude that an assurance game presents no dilemma: as neither player expects the inferior outcome, both contribute, leading inevitably to the pareto-optimal outcome (Taylor 1987: 39).

However, even though there is a mutual interest on a given outcome, due to the two equilibria, there is no strictly dominant strategy, but a “conditional preference for cooperation” (Elster 1979: 21): each player prefers to contribute as long as the other player contributes as well. If one of them does not cooperate, defecting is the better strategy. Hence, the choice of strategy is subject to the action by the other player. In this situation of interdependent choice, the problem is uncertainty over that action (Runge 1984: 162). Instrumental rationality implies that player’s actions are the best means to achieve the most preferred outcome – relative to the knowledge at the time of acting (Colman 2004: 287). Thus, “players in the Assurance Game fail to coordinate because they are unsure of what the other players will do, not because they wish to take advantage of the other players” (Lee 2012: 1145). The non-cooperation equilibrium is the “risk-dominant choice”, whereas the cooperating equilibrium is “payoff-dominant”. In the stag hunt, each hunter, out of fear of going away empty-handed from the hunt, chooses to go for the hare – eventually trapping both in the inferior equilibrium.

In a collective action setting with N -participants, an additional start-up problem arises. “Participation is preferred to inactivity under the right condition – the condition being that “enough others” also participate to make collective action successful” (Chong 1991: 11). Due to the uncertain prospects of collective action, everybody wants to follow the lead of others to see whether collective action is likely before they join the process (ibid.: 116). Hence, every actor has a threshold

for his participation.¹⁰ Defection is the dominant strategy below the threshold, the reverse above it (Centola 2013: 7). Once the production is started by an initial critical mass of contributors, it generates a bandwagon effect, making cooperation rational for the remaining actors. “Critical mass is provided by the people whose behavior does not depend on numbers, and the chain reaction takes care of the rest” (Schelling 1978: 89). However, which actor has an incentive to be the initial contributor?

3.4 Preliminary Conclusion

NPs have been losing influence continuously in the EU MLG system in favour of other national/European institutions and while the EP has grown into a fully-blown co-legislator. NPs as rational reactive balancers are assumed to strive to regain influence by attempting to maximize their control over the outcomes of EU decision-making processes with the institutional power vested in them. The EU MLG system offers them two channels to do so: a national route, which has generally proven not very effective, and a European route via the newly introduced EWM. For the first time, NPs can directly participate in EU decision-making by scrutinizing EU legislative proposals for their compliance with the subsidiarity principle. NPs are expected to make active use of it, as triggering a yellow card collectively strengthens their collective bargaining power on EU level, irrespective of their policy preferences, thus helps them in regaining influence.

It can be argued that triggering a yellow card is a collective good for the NPs, as its strengthening impact is in the common interest of all NPs and characterized by non-excludability and indivisibility. Usually, in the production of a collective good, rational actors meet a collective action problem. Since a yellow card is furthermore characterized by a jointness of supply, the problem at hand takes the form of an assurance problem. Thus, due to uncertainty over the actions of others and a start-up problem, the collective good will be insufficiently produced.

This means there are two obstacles for NPs to successfully triggering a yellow card. Even though all NPs would prefer to contribute to the process by issuing their own reasoned opinion, there is an incentive problem, due to uncertainty about the actions of others and the subsequent unlikelihood of reaching the necessary threshold. Thus, NPs chose not to become engaged in the process, since they would simply squander resources and energy on issuing a reasoned opinion without gaining the benefits of the collective good. Closely connected, there is a first-mover-problem. One can expect that the initial adoption of reasoned opinions in several NPs raises the level of contributions enough to create a bandwagon effect, meaning that other, more reluctant NPs issue their own opinion as the

¹⁰ Defined as the number of actors that need to cooperate before one will enter the process.

likelihood of triggering a yellow card is high enough. However, the question is who those first movers are.

Despite these obstacles, two yellow cards have been triggered since the introduction of the mechanism in 2009: Monti II and EPPO. The task is now to analyse how this was possible. Thus, this paper aims at answering: *How did NPs manage to overcome the collective action problem inherent in the EWM in cases of successfully triggering a yellow card?*

4 Scientific Relevance

This paper is positioned across a gap in the academic literature on the EWM. Perceiving the EWM as a collective mechanism, several scholars have identified a collective action problem (2.3.3). However, their analyses did not go in-depth, neither in defining the collective action problem at hand, nor, more importantly, in explaining – beyond basic statements – how it can be solved. The latter question becomes especially intriguing, as, despite the identified problems, two yellow cards have been triggered. So far, an analysis is outstanding as to *how NPs managed to overcome the collective action problem inherent in the EWM in cases of successfully triggering a yellow card*. Hence, this paper aims at closing this gap in academic literature by providing a first thorough analysis of the issue.

Furthermore, on a more practical note, this paper's analysis, if to some extent generalizable, might not only be able to explain the two yellow cards as past events, but also support NPs in their future exercise of the EWM by providing contingent solutions to the collective action problem inherent in it. This paper might add to first evaluations of the EWM that are now conducted by various NPs, including recommendations on how to improve the effectiveness of the EWM and strengthen the influence of NPs in the formulation and implementation of EU policies (e.g. Danish Folketing 2014; House of Lords 2014; see also session II of the Speakers' Conference 2014 in Vilnius).

5 Research Design

Following, the research design of this study will be presented.

5.1 Purpose of Research

This study will be explanatory, looking for the causes of the phenomenon studied (Neumann 2011: 38f.) and outcome-centred (Gschwened/Schimmelfennig 2007: 7f).¹¹ Unlike theory-building, seeking to build a mid-range theory generalizable to a broader context (Beach/Pedersen 2013: 16), the claim to extensive generalizability is absent in outcome-centred research. Thus, the purpose of this study is crafting an “explanation to the outcome of an individual case” (ibid.): how NPs managed to overcome the collective action problem inherent in the EWM in cases of successfully triggering a yellow card. Yet, good outcome-explaining studies can include theoretical claims beyond a single case (Beach/Pedersen 2011: 22) and hence serve the purpose of contingent generalization.

5.2 Use of Theory

As the presented problem definition is based on collective action theory, this ought to be the starting point of the analysis. However, the research purpose does not allow for deduction, as it is not aimed at theory-testing, but outcome-explaining.

Yet, collective action theory offers theoretical solutions to the problems it presents, which would be ignored when working solely inductive. Hence, this study will rely on theory-driven inductivism, as “the use of analytical induction does not exclude making use of deductive [theoretical ideas] to help guide the empirical approach” (George/Bennett 2005: 240f.). The underlying theoretical assumptions will thus serve as “a [hypothetical] story about why acts, events, structure, and thoughts occur” (Sutton/Staw 1995: 378) and provide guidance for

¹¹ According to Gschwened/Schimmelfennig, outcome-centric research is opposed to factor-centric research, which is primarily interested in the explanatory power of causal factors (Gschwened/Schimmelfennig 2007: 7f.).

data collection and in developing strategies for their analysis (Yin 2009: 36). Importantly, this theory application relies on the use of constructs, not variables. The former are more fluid, leaving open room for generating unintended findings, whilst still providing a focus for the research (Birley/Ali 1999: 6f.).

The underlying theory will thus not be strictly applied, but serve as a heuristic device in the further research process. Theoretical assumptions will be derived from collective action theory, not in form of variables as measurable entities, but as constructs, “a concept not directly observable or measurable” (Peng 2004: 182). Whilst there will be hypothesized causal links between possible solutions and the outcome, these will hence not be presented in a strict independent/dependent variable relationship.

5.3 Research Method: Case Study

The wording of the research question to explain *cases of yellow cards* points at conducting case studies of those cases. Case studies are non-experimental empirical inquiries in order to derive an “in-depth understanding of a single or small number of ‘cases’, set in their real-world contexts” (Yin 2012: 4). Most outcome-centric studies are conducted via case studies, as these are primarily interested in the “causes of effects and less in the effects of causes” (Blatter/Haverland 2012: 18), hence highly informative for identifying causal mechanisms¹² leading to certain outcomes (Gerring 2004: 349). Furthermore, they allow the researcher to link abstract theoretical constructs with the concrete specifics of an empirical case (Neumann 2011: 42).

Some case studies are carried out with the “aim of generalizing across a population of similar cases” (Blatter/Haverland 2012: 18), whilst others aim at investigating a single case in order to explain a single outcome (Gerring 2006: 707). The research design of this outcome-centred study presents a mixture, as it does not aim at a broadly generalizable theoretical explanation, but rather at providing an explanation for a specific outcome, yet allowing for contingent generalization.

5.4 Case Selection and Case Study Design

A case as the main unit of analysis is defined as “an instance of a class of events” (George/Bennett 2005: 5). In the present study, this unit is *a scrutiny procedure of*

¹² A causal mechanism is to be understood as “a complex system, which produces an outcome by the interaction of a number of parts” (Glennan, 1996: 52).

a EU legislative draft. These units are located in the same institutional context, involving the same actors and decision-making procedures. Yet, as one might argue, perceiving the EWM per se as the unit of analysis, and each single scrutiny procedure as embedded subcases (Yin 2009: 50), would not reflect the overall research question and will thus not be applied.

The case selection is based on the extreme case method, selecting cases because of an extreme value on the explaining factors/on the outcome of interest (Seawright/Gerring 2008: 301). It is based on the logic that causality ought to be clearest in cases where the outcome takes on its extreme value (Levy 2008: 7): successful cases of collective action, triggering a yellow card. So far, this happened twice. Thus, Monti II and EPPO will be the investigated cases. When selecting cases on the outcome, “success” would be opposed to “failure”. Yet, defining failure in regard to collective action under the EWM would exceed the scope of this study. Hence, this multiple-case study will have a no-variance design, in which all the cases selected have the same outcome (ibid.: 8).

Whilst scholars caution against selecting on the outcome, as it potentially underestimates the effects of the explaining factors, this does not apply to causal inferences drawn from within-case analysis. Furthermore, findings derived from cases initially identified by the value of their outcome may then be compared without bias (Bennett/Elman 2006: 461).

This multiple-case study will contain a comparative element. Generally, evidence from multiple cases is more compelling and the overall study more robust (Yin 2009: 53). Comparing the findings of single case studies strengthens the amount of confidence attached to the causal inferences found (George/Bennett 2005: 220). Furthermore, the comparison of two cases with the same outcome allows for the possibility of equifinality¹³.

The best known comparative case study design is the method of controlled comparison (George/Bennett 2005: 81f.), a factor-oriented approach¹⁴ that is due to its strict requirements not always feasible. Alternatively, causal mechanism derived from single case analysis – within-case analysis – can be used in conjunction with cross-case comparisons (ibid.: 179). Hence, in order to achieve the strongest results, this case study design will integrate the within-case approach with a comparative element, leading to the method of structured, focused comparison (Bennett 2008: 490). A comparison is focused “insofar as the researcher deals selectively with only those aspects of each case that are believed to be relevant to the research objectives and data requirements [and] structured when the researcher, in designing the study, defines and standardizes the data requirements of the case study” (George/McKeown 1985: 43), thereby making systematic comparison and accumulation of findings possible.

¹³ Meaning “that there may be multiple paths or combinations of different [factors] that can produce the same kind of outcome” (Bennett/Checkel 2014: 2)

¹⁴ Attempting “to establish the causal powers of a particular [factor] by comparing how it performs in different cases” (George/Bennett 2005: 179).

Hence, both cases will first be analysed by the central within-case method: process-tracing (Bennett/Checkel 2014: 2), “intended to [identify,] investigate and explain the [...] process by which various initial conditions are translated into outcomes” (George/McKeown 1985: 35). It goes beyond identifying mere correlations – causal effects – and is outcome-centred, as it analyses the causal mechanisms behind observed social phenomena (Blatter/Haverland 2012: 80). It is particularly suited to the research purpose, as it does not only generate numerous observations within a case, but enables the researcher to link them to constitute an explanation of the case. Hence, this study will not produce a descriptive narrative, but an “analytical explanation” by underlying the processes leading to the two yellow cards with theoretical explanations (George/Bennett 2005: 212). The analysis of the processes is structured by and interpreted through the theoretical constructs derived from collective action theory. It should be noted that this study does not aim at depicting strict causality, but rather causal connections.

The analytical explanations derived from process-tracing are focused¹⁵ and structured¹⁶ (Vennesson 2001: 235) and will hence build the basis for the second step of the analysis: the structured, focused comparison of the cases. However, as the main purpose of this study is to explain the outcome of the investigated case, the main focus will be on the within-case analysis, whereas the comparison will support the strength of the findings made and contribute to their contingent generalization.

5.5 Data Collection and Analysis

Although case studies and process-tracing are usually considered a qualitative research design, they can actually involve both qualitative and quantitative data (Dawidowicz 2011: 6) and use multiple data collection techniques and sources (Yin 2012: 10). The data collection of this study will hence be done in a mixed-methods approach, with some quantitative data available from primary sources. This data will, however, only be analysed as descriptive statistics. Beyond that, most of the data will be qualitative.

Qualitative data will be derived both from primary and secondary sources. The latter is somehow restricted as not many publications on the yellow cards are available, due to the recentness of events. Whilst this study will also incorporate literature on the EWM more generally, the main focus will be on primary data, collected via documentary research and interviews.

Documentary research refers to “analyzing and interpreting data generated from the examination of documents and records” (Schwandt 2007: 76). The present

¹⁵ “It deals selectively with only certain aspects of the phenomenon” (Vennesson 2001: 235)

¹⁶ “In the sense that [it is] based on a theoretical framework” (ibid.).

study will take into consideration relevant legal texts and official documents both from the EU and a national level. However, “important political processes often lack an accompanying body of documentation, [...]. [Furthermore], by presenting the official version of events, documents often conceal the informal processes and considerations that precede decision making” (Tansey 2007: 8f.). Indeed, parliamentary interaction is generally a rather informal process, producing only a limited amount of official documents, which in turn do not necessarily adequately reflect the processes leading to a decision. Hence, required is “the collection of data [often from] the highest political level, and elite interviews will frequently be a critical strategy for obtaining this required information” (ibid.: 9). Hence, documentary research will be complemented by interviewing key participants in the EWM.

The aim of the interviews is to get testimony of those that were most closely involved in this process (ibid.: 15). Hence, this study will use information derived from twelve interviews with key actors in the two yellow cards/the EWM more general, based on purposive sampling and identified through literature research.¹⁷ The interviewees are both from the administrative and political, the national and European level.¹⁸ The interviews were semi-structured, shaped by a certain focus, yet flexible (Yates 2003: 165). This ensures the gain of as much information as possible from the interviewee and is thus most appropriate for process-tracing related interviews (Tansey 2007: 8).

The data collection and analysis is guided by the underlying hypothetical assumptions linking the explanatory constructs to the outcome, as these theoretical orientation helps to focus the attention on the relevant data (Yin 2009: 130). The data will not be handled individually, but be converged in the analysis process, as each piece contributes to the understanding of the whole phenomenon (Baxter/Jack 2008: 554). Applying the method of process-tracing enables the researcher to get inside the “black box” of decision-making (Levy 2008: 6), ultimately leading to an analytical explanation of the outcomes of interest.

5.6 Methodological Limitations

As in all research, concerns about the research design’s validity need to be addressed, whether the study’s findings are true and certain¹⁹ (Guion 2002). Regarding the analysis, it is hence particularly necessary to critically assess the value of the collected data, recognizing potential limits to their usefulness

¹⁷ This means that this study will not rely on random/representative sampling, which would only be applicable if the goal was to achieve generalizability of the findings of the interviews

¹⁸ For more specific information, see Appendix I.

¹⁹ “Accurately reflecting the situation [and] that there are no good grounds for doubting the results” (Guion 2002).

(George/Bennett 2005: 99). Whilst relying on interviews can compensate for distortions existing in written evidence, interviewees might also misrepresent their own positions (Tansey 2007: 10). Therefore, this study will use triangulation of data source²⁰ and methodological triangulation²¹ to enhance the findings' validity (Yin 2009: 114ff.).

Furthermore, internal validity, the accuracy of causal claims (ibid.: 40), might be endangered. This study does not use an experimental research design or a controlled case-comparison. The disadvantage of non-experimental designs is that they only offer a poor basis for inferences about causal connections (Gravetter/Forzano 2012: 305). However, applying process-tracing and identifying the link between causal factors and outcome makes it possible to enhance the internal validity of a causal claim (Blatter/Haverland 2012: 79). Another danger stems from the use of some degree of deductivism. Alternative causal factors other than those hypothesized might be neglected, as there always is the possibility of equifinality (Bennett/Checkel 2014: 2). Yet, this study does not use theoretical variables, but constructs, which "provide a focus of the research, but [...] are inherently more general and as such leave open the scope for generating unintended findings" (Birley/Ali 1999: 7). Furthermore, investigating two cases makes it possible to detect different causal paths to the same outcome. Hence, this study is open to detect other possible causal factors explaining the specific outcomes.

Case studies are often criticized for lacking external validity, meaning that the findings offer a poor basis for generalization beyond the immediate case (Yin 2009: 43). Especially, "the price for [the advantage of process-tracing to internal validity] in comparison to cross-case approaches is that we cannot easily generalize the results of a study [...] to the population of cases with similar outcomes" (Blatter/Haverland 2012: 82). However, as this study is designed for explaining a particular outcome, broad generalizability is not the primary research purpose. Importantly, case studies never aim at statistical generalization, equated with the representativeness of the analysed sample (Yin 2009: 43). Rather, this multiple-case study includes two cases, allowing for contingent, analytical generalization and some kind of replication logic: "If two or more cases are shown to support the same [theoretical reasoning], replication may be claimed" (ibid.: 38f.). However, as so far only two yellow cards have been triggered, possible generalizable hypothesized causal mechanisms will be contingent and forward-looking in nature.

²⁰ Using multiple data sources.

²¹ Using multiple data collection methods.

6 Theoretical Solutions for Solving the Collective Action Problem

This part presents theoretical assumptions about how actors can overcome the assurance problem. These assumptions rely on the use of constructs, linked to the outcome of interest, which is ‘*overcoming the assurance problem*’, operationalized as ‘triggering a yellow card’.

6.1 Overcoming the Assurance Problem

Outside enforcement is the main solution mechanism in “classical collective action problems” (Olson 1965: 44). Yet, this would imply “overkill” in assurance problems (Holzinger 2003: 24). In the latter, “there are incentives [internal to any group] which make voluntary contributions to public goods the utility-maximizing strategy” (Runge 1984: 155). The problem is rooted in the riskiness of contributing in a situation of interdependent action, uncertainty about the actions of the other players and the prospects of collective action and conditional preference for contribution. Hence, “the solution, [...], is to get each of the players to expect that the other player will [contribute]. Mechanisms which can assure each player that the other will cooperate [...] are thus central to solving the [assurance] dilemma” (Lee 2012: 1145). Crucial for overcoming the assurance problem is thus *certainty*. Basically, the “[assurance problem] can be sorted out by either providing for pre-play communication [...] or if leadership emerges” (Gupta 2005: 86). Before these two elements are discussed, some general characteristics of the EWM need to be analysed that constitute a background for their application.

6.2 General Characteristics of the EWM “Game Setting”

These characteristics of the EWM are background characteristics beyond the control of NPs, yet influential as to the outcome of collective action.

6.2.1 Identifiability and Sequentiality

The set of actors in the EWM are easily identifiable and stay constant²²: NPs, which are hence non-anonymous to each other. In general, it has been demonstrated in experiments that this significantly affects the group's ability to coordinate, as partners display a higher cooperation rate than strangers (Keser/Winden 2000). Importantly, it facilitates pre-play communication, determining what everybody knows at a given time (Chwe 1996: 4).

In a game with a simultaneous structure, each player must choose his actions without knowing the actions of others (Cartwright et al. 2009: 8). With a sequential structure, however, players are able to condition their actions to the previous choices made. This helps overcoming the coordination aspect of a problem (Holzinger 2012: 19). It can be argued that NPs in the EWM are engaged in such sequential play. They do not issue reasoned opinions simultaneously, but within the 8-week deadline. Yet, information about actions still needs to be transferred and sequentiality gives rise to the first-mover problem.

Thus, whilst not making the mechanisms that NPs can actively practice redundant, these general characteristics provide a conducive environment for their exertion. Pre-play communication and leadership would be more difficult to engage in if the counter-parts were anonymous and the EWM had a simultaneous structure.

6.2.2 Iteration

One of the major shortcomings of the above-described game model is that it is unrepeated, whereas in real life, social interaction is often ongoing and iterated (Udehn 1993: 243). The best-known study of the iterated games is provided by Robert Axelrod (1984), who demonstrated that in an infinitely iterated prisoner's dilemma, the dominant strategy of free-riding does not apply, as "the future [can] cast a shadow back upon the present and thereby affect the current strategic situation" (ibid.: 12). Hence, under special conditions, collective action emerges between rational egoists.

It can be argued that the EWM represents an iterated game setting, as NPs scrutinize every single EU legislative proposal for subsidiarity compliance, with each scrutiny process representing one game-period, repeated infinitely. However, the collective action problem inherent in the EWM is not that of the prisoner's dilemma, but an assurance problem. Yet, taking iteration into consideration is important when analysing how to arrive at the optimal outcome.

Experimental evidence has demonstrated that iterations of assurance games favour the pareto-optimal equilibrium outcome (e.g. Berninghaus/Ehrhardt 1998). The advantage of iterated game settings "lies in the introduction of time and a

²² With the exception of the accession of Croatia in 2013.

rudiment of social interaction in [...] collective action” (Udehn 1993: 244). However, the interaction of NPs under the EWM does not take place in a static environment: even though the same main players are involved, the EU political environment is subject to constant change. Thus, a coordination problem arises new in every game (Calvert 1992: 12). Yet, iteration might have effects that go beyond single games by giving pre-play communication and leadership a more consolidated form and lead – on the basis of identifiability – to some kind of reputation-building as vital sources of information (Kollock 1998: 199). Furthermore, a long time horizon fosters the development of group identity, stemming from a belief in the interdependence and expectations of reciprocity among the actors (Karp et al. 1993: 237).

6.3 Solution Mechanisms

These above-described characteristics foster certainty among NPs in the EWM and hence constitute an important, constant background of the actions of NPs in each single “game period”. However, as they are beyond the control of NPs, solution mechanisms that players can actively apply – pre-play communication and leadership – are of crucial importance to answering how NPs managed to overcome the assurance problem.

6.3.1 Pre-Play Communication

“In general, coordination problems tend to be easy to solve if communication between the players is possible” (Holzinger 2012: 11). The positive effect of communication on the rate of cooperation in coordination games is one of the most robust findings in game theoretical experiments (e.g. Cooper et al. 2012).

Communication does not carry influence or participation itself, but information about previous/likely/prospective choices of others, giving the players a chance to remove uncertainty from the game (Kollock 1998: 194). Information does not alter the underlying payoffs, but facilitates a change in expectations about what the other player will do and thus about the prospect of collective action. Hence, all players need “to send messages that they intend to [contribute] before [they] are willing to accept the ‘risk’ of [cooperating]” (Cooper et al. 2012: 743). “That individuals first communicate with each other about their preferences, and then each individual chooses whether to participate or not” (Chwe 1996: 2), thus helps overcoming uncertainty and coordinating on the desired outcome.

Applied to the setting of NPs under the EWM, pre-play communication is understood as IPC, which is generally the focus when analysing interactions between NPs. Its function regarding NPs is “to promote the exchange of information and best practices between [NPs] with a view to reinforcing parliamentary control, influence and scrutiny at all levels [and] to ensure effective

exercise of parliamentary competences [...] in particular in the area of monitoring the [subsidiarity principle]" (Art. 1 a, b Guidelines of IPC). Hence, actively engaging in IPC for exchanging relevant information creates certainty about the actions of others and the possibility of a yellow card.

6.3.2 Leadership

Often, "the success of [collective action is] ascribed to the existence of effective leaders [...] that overcome the co-ordination problems [...] by organizing and initiating action" (Margetts et al. 2011: 2). A leader provides the necessary certainty that enables actors to converge on the action for which they have a conditional preference (Elster 1979: 83).

In sequential coordination games, there are two ways to do so: initiating collective action and mobilizing other actors to contribute (Baland/Platteau 1996: 97). In *N*-person games with threshold effects, the existence of a number of leaders "who are willing to undertake the [...] action of joining early when there are few signals of the mobilization's viability" (Margetts et al. 2011: 2) is important. These actors create certainty about the likelihood of producing the collective good, and hence a bandwagon process in which previously reluctant players join. To avoid missing the necessary threshold and falling into the pareto-inferior equilibrium, the initiators have to mobilize a sufficient number of following contributors (Baland/Platteau 1996: 81).

In general, anyone involved might be an endogenous leader. Relaxing the assumptions about strict homogeneity of the players, different characteristics might point at some being "natural leaders" (Brandts et al. 2007: 270), meaning "one means by which a leader may endogenously emerge, [is] asymmetries" (Cartwright et al. 2009: 4). Literature suggests two such asymmetries. *Asymmetric cost efforts* imply differences in the costs of contributing, and thus in the relative earning in the different equilibria. It can be expected that those players with the lowest cost efforts take on leadership (Brandts et al. 2007: 270; 274). *Preference asymmetries* imply that some actors value the collective good more than others (Reuben 2003: 24), as the achievement of the outcome has an additional, instrumental value for them. Those actors having such an extrinsic motivation (Teo/Lim/Lai 1999: 26) receive additional gains from the production of the collective good, making them natural leaders.

Applied to the setting of NPs under the EWM, leadership is understood as initiating the scrutiny procedure and mobilizing other NPs in the process. Exerting these functions makes other NPs believe in the likelihood of triggering a yellow card and the actions of other NPs, removing uncertainty from the production process. Leading NPs most likely display asymmetries. Lower cost efforts mean a higher institutional capacity for scrutinizing EU legislative proposals, as those NPs can be argued to have lower contribution costs than NPs with a less developed institutional scrutiny structure. Preference asymmetries result from the salience of EU legislative proposals, which might vary depended on the policy

field and the political culture across EU member states. Thus, some NPs might have some additional political motivation of issuing a reasoned opinion – NPs from those countries where the topic/field to be scrutinized has substantial weight in society and politics.

6.4 A Hypothetical Story of How NPs managed to overcome the Assurance Problem

Based on its specific setting characterized by identifiability, sequentiality and iteration, “*overcoming the collective action problem*” in the EWM can be achieved by creating *certainty* about the actions of the NPs in the 8-week scrutiny period regarding the issuance of reasoned opinions and thus about the likelihood of triggering a yellow card. As NPs have a conditional preference for contribution, this will give them the necessary assurance that issuing their own reasoned opinion is beneficial and persuade them to do so; which eventually leads to the necessary threshold being reached. NPs have the above-mentioned mechanisms at their disposal to create this certainty.

Engaging in ***pre-play communication*** enables NPs to *exchange information* about their actions during the scrutiny period. This leads to *certainty about the actions of others and subsequently the prospects of collective action*, which is necessary for *overcoming the collective action problem*.

Leadership allows for the *initiation* of the scrutiny procedure and the *mobilization* of other NPs. These lead to *certainty about the actions of others and the prospects of collective action* and can thus create a *bandwagon effect*, eventually *overcoming the collective action problem*.

These mechanisms are closely interconnected, and both necessary. Whilst leadership relies on communication, communication can be organized and structured by those actors taking the lead.

7 Analysis

The analysis will consist of four parts and be based on the above-constructed hypothetical story of how NPs manage to overcome the assurance problem in the EWM. The impact of the general characteristics of the EWM setting on collective action of NPs will be analysed, followed by the two case studies of Monti II and EPPO, producing an analytical explanation in each case. These explanations will build the basis for the subsequent comparison.

7.1 Impact of the General Characteristics of the EWM Setting

It has theoretically been argued that whilst both identifiability and sequentiality significantly affect a group's ability to coordinate on the preferred outcome, they are not solution mechanisms for overcoming collective action problems per se, but rather provide a conducive environment. Identifiability supports in iterated games the development of group identity and reputations among NPs. Furthermore, iteration can lead to a consolidation of the mechanisms NPs can actively apply. Following, the impact of these characteristics on collective action in the EWM is discussed.

7.1.1 Group Identity

Whilst some academics argue that in the EWM, NPs form some kind of collective actor (Cooper 2012; Kiiver 2011), others state that, in theory, every NP can carry out subsidiarity checks without any interest in the proceedings of the others (Knutelská 2011: 335).

Empirical data demonstrates that NPs perceive the EWM as an individual task, where each NP does its own subsidiarity scrutiny (interview IV). They do not see themselves as a collective institution, as there is no constant shared conscience about something (interview III). They prefer to maintain their independence in the EU institutional set-up and are rather worried of having their voices subsumed into some kind of collective voice for all issues (interview II). However, there is rising awareness that in the EWM, a reasoned opinion is reduced to a simple statement of opinion, but does not lead to a real change as long as the mechanism is not triggered (interview VI). Therefore, NPs acknowledge the importance of interacting with the other NPs and argue that in the EWM, they can produce

something like a collective output. The EWM is first and foremost an individual, but not an isolated, task that might lead to a collective outcome (interview III, XI). Thus, NPs do not share a group identity in the sense of being a collective actor, but rather acknowledge their interdependence as partners in the EWM proceedings.

7.1.2 Reputation

By now, NPs argue, they know the system well enough to know which issues will trigger in other NPs (interview II) and that there is always a group of NPs more likeminded than others, which are more easily identifiable than in the beginning (interview VII). These groupings are either built on the basis of language groups or geographical proximity (interview IX), but also depending on the issue/policy field of the respective proposal. Whilst this does not mean that NPs are all standardized, but that the group of NPs that are likeminded might differ from case to case, NPs argue that they now do get a feel for which issue might interest some NPs and not others (interview II). This constitutes a basis for intensified interaction between those likeminded NPs (interview VII).

Hence, it can be argued that NPs in the EWM have developed reputations, leading to the easy identification of potential likeminded NPs. Whilst managing expectations about the actions of other NPs to some extent, it is used as a basis for intensifying cooperation, not as a reliable source of certainty about their actions.

7.1.3 Impact on Leadership

In general, the importance of endogenous leadership for triggering a yellow card is acknowledged both in academia and in politics (interview II; Lidington 2013: 135). Each scrutiny process has some kind of leader: those NPs that first adopt a reasoned opinion usually encourage others to do so, initiate and organize the information exchange, provide substantive arguments and keep the issue on the agenda (interview II, III).

However, the de-facto group of NPs in the EWM has no internal structure of leadership, as “in the international domain, no single overarching parliamentary power is constituted in such a manner as to be able to claim ultimate authority over national parliaments” (Crum/Fossum 2013: 11). Rather, leadership has to be ad-hoc, on a case-by-case basis and not one NP has emerged as a constant, endogenous leader.

Thus, whilst the importance of leadership is acknowledged and there repeatedly is a leader, iteration has not led to a consolidated, constant version of leadership.

7.1.4 Impact on Inter-Parliamentary Cooperation

As NPs perceive the EWM as an interactive process, they acknowledge the importance of IPC in general, considering it a *conditio sine qua non* for triggering a yellow card (interview X). Therefore, their IPC network has become denser during the past decades (Buzogány 2013: 20), and the most important channels of information exchange are COSAC, the IPEX platform and the network of NPRs in Brussels (Knutelská 2011: 331). Generally, a typical way of exchanging information has developed: after each NP receives the legislative proposal, it initiates (or not) its own scrutiny procedure. If it is considering a reasoned opinion, it informs other NPs through IPEX/the network of NPRs and mostly, but not always, outlines its arguments/possibly adds a draft reasoned opinion. Eventually, it notifies the other NPs of the outcome of the procedure (interview XII; Kaczyński 2011: 10).

a) COSAC

COSAC is not an actor per se, but rather a forum for exchanging information regarding EU affairs (Knutelská 2011: 331, Art. 10 Protocol 1 TEU). Its meetings take place biannually, bringing together the EACs of NPs as well as members of the EP (European Parliaments n.d.). Whilst COSAC has become increasingly institutionalized²³ (Buzogány 2013: 21), NPs do not necessarily see it as a mechanism for exchanging information on their subsidiarity scrutiny proceedings. The meetings with the agendas of EACs are reduced in terms of what they can consider and it is quite unlikely that a biannual meeting coincides with the scrutiny timeframe of a subsidiarity-controversial draft (interview II). Thus, NPs cannot rely on COSAC for information exchange, which is thus rather seen as a symbolic debate forum for politicians (interview IX). Generally, in regard to the EWM, there is not that much information exchange on the political level (interview I, II).

Hence, information exchange in regard to the EWM via the COSAC meetings is not very effective. Rather, COSAC itself encourages NPs “to intensify their use of IPEX and other forms of cooperation in order to provide mutual information concerning their respective activities and standpoints” (COSAC 2010: 1).

b) IPEX

IPEX is an internet-based platform for the electronic exchange of information between NPs and the EP concerning EU affairs. In regard to the EWM, it facilitates IPC, as by using simple icons, NPs can indicate on each legislative draft the state-of-play of their subsidiarity scrutiny and upload substantive information²⁴ (Knutelská 2013: 42).

²³ Commanding – rather weak –bureaucratic structures and producing biannual reports on different issues related to the scrutiny of EU policies.

²⁴ Any documents they have drafted/adopted in the process.

Whilst the amount of information posted on IPEX and its use by NPs has increased since the entry into force of the Lisbon Treaty (ibid.; COSAC 2013a: 29), its usefulness in regard to the EWM is restricted. Most importantly, IPEX is not necessarily up-to-date, as there usually are delays between a parliamentary action and the posting of the respective information (ibid.: 30). NPs themselves see IPEX rather as a misting tool (interview II), that is only effective in the final stages of the scrutiny proceedings, as it is simply the final destination of what was already decided (interview III, IX).

Hence, while IPEX is a source of information under the EWM, it is not necessarily the crucial conduit of information between NPs.

c) NPRs

At the moment, all NPs except Slovakia have an NPR in Brussels.²⁵ These are officials of their respective NP, building a network that has i.a. the function to ensure the informal, day-to-day information exchange between NPs, also in regard to the EWM. As the NPRs are located in the same premises in Brussels, meet (formally) on a weekly basis in the MMMs, and are in personal contact with each other, they are the one set of actors best placed to ensure information exchange under the EWM in real-time (Neuhold/Hoegenauer 2013: 74).²⁶

NPRs argue that their information exchange system has settled down and that by now, they are running a bit on automatic in regard to the EWM (interview II). There is a consolidated way of cooperation and a positive evolution in the way of working (interview V), in the sense that the information flow has grown tremendously and, quality-wise, that cooperation has become deeper and more specific (interview IX). Furthermore, it has become more streamlined and organized (interview XI).

However, information exchange via NPRs is located at the administrative, informal level. Yet, the EWM is a political mechanism, as the final decision-makers are politicians. Thus, it is crucial that the information exchanged via and present at staff level reaches the political level (interview VII). However, one can observe a certain detachment between political and official level (interview X), meaning information present at the administrative level does not necessarily reach the crucial political level.

d) Overall Impact on IPC

Summarizing, harmonized and organized information exchange is not observable; rather, cooperation remains loose (Kaczyński 2011: 10), despite there being a “typical way” of working. Whilst one can observe some kind of consolidation

²⁵ The title and explicit job description of each NPR might however differ from NP to NP (Knutelská 2013: 37f.).

²⁶ However, this is not the only function of NPRs in Brussels. Furthermore, it is not necessarily thought to be the most important one to their work by NPRs themselves and the time allocated to working under the EWM varies across NPRs.

regarding cooperation among NPRs as the crucial conduit of information, there is no guarantee this has an impact on the political, decision-making level. The existent structures of IPC are not capable of delivering the required information continuously (Gstrein/Harvey 2013: 55). Repeated interaction has not made IPC overall straightforward and automatic.

7.1.5 Preliminary Conclusion

These background characteristics provide a conducive environment for collective action of NPs in each scrutiny period. They support the prospects of successful collective action as they have led to some kind of group identity, reputation building and a consolidated, typical way of exchanging information in regard to each single legislative proposal. However, neither of those provides the necessary certainty for solving the collective action problem alone, but rather supports NPs in their own efforts to overcome the problem. NPs have to actively create certainty in each and every single subsidiarity scrutiny in order to render the EWM successful. Thus, it is necessary in the two cases under investigation to analyse how NPs managed to trigger the yellow card mechanism.

7.2 Case Study 1: Monti II

On 22 May 2012, the first yellow card in the history of the EWM occurred when the threshold for triggering the mechanism was reached with twelve NPs issuing reasoned opinions, amounting 19 votes in total, and surpassing the necessary number by one.²⁷ The EU legislative proposal causing this was COM/2012/0130: “Proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services”, short: Monti II.

Following recent decision by the ECJ,²⁸ concerns were raised that in the internal market, economic freedoms might prevail over fundamental freedoms and collective action rights, such as the right to strike. Hence, the Commission decided to draft a proposal addressing these concerns and clarifying the relationship between those freedoms (Commission 2013: 7).

²⁷ The threshold back then was 18 votes, as the time was pre-accession of Croatia, and there were 27 EU member states; thus 54 votes in total.

²⁸ C-438/05 International Transport Workers’ Federation, Finnish Seamen’s Union v Viking Line ABP and others (2007); C-341/05 Laval un Partneri Ltd. V Svenska Byggnadsarbetareförbundet and others (2007).

The proposal is considered a rather political proposal and was met with scepticism by the relevant European public (Becker 2013: 13) and several NPs, which eventually issued twelve reasoned opinions objecting Monti II, arguing a violation of subsidiarity.²⁹ The opponents within the NPs came from across the political spectrum, although, on balance, there was a leftward tilt against the proposal (Cooper 2013b: 6).

7.2.1 Initiation and Leadership

Originally set to be published in late 2011, due to internal coordination problems the proposal was eventually issued on 21 March 2012 (Becker 2013: 13). On 27 March, the Commission sent the *lettre de saisine* to the NPs, officially notifying them, as the proposal had now been translated into all official languages, that the 8-week subsidiarity scrutiny period had started. Thus, the deadline for transmitting reasoned opinions was 22 May 2012.³⁰

Normally, the political decision to issue a reasoned opinion is made in the responsible committee before it is actually formally adopted, usually by the plenary. As the former is the effective, yet informal decision, attention will have to be paid to both dates.

Already on 21 March, the Danish Folketing initiated its scrutiny process. Its EAC, with the power to adopt a reasoned opinion for the whole NP, decided on 23 March to draft a reasoned opinion without having consulted the relevant sectoral committees in order to speed the process up. The political decision as to its adoption was made on 20 April, and it was formally adopted on 3 May (Cooper 2013b: 6f.).

Hence, the Folketing was the first NP to make the political decision to adopt a reasoned opinion. Thus, it was the initiator among all NPs. Subsequently, it took over the leadership position with the clear intention to mobilize other NPs. It raised the issue, generated a lot of early momentum, interest and awareness, and flagged Danish concerns, also by providing content (interview II, XI).

7.2.2 The Issuance of Reasoned Opinions

In total, twelve NPs adopted a reasoned opinion criticizing Monti II: the Belgian Chambre des Représentants (BE), the Danish Folketing (DK), the Finnish Eduskunta (FI), the French Sénat (FR), the Latvian Saeima (LV), the Luxembourg

²⁹ For a thorough collocation of the twelve reasoned opinions see Fabbrini/Granat 2013.

³⁰ All dates, unless otherwise marked, are taken from the official IPEX site for Monti II, IPEX n.d./a.

Chambre des Députés (LU), the Maltese Kamra tad-Deputati (MT), the Polish Sejm (PL), the Portuguese Assembleia da República (PT), the Swedish Riksdag (SE), the Dutch Tweede Kamer (NL) and the UK House of Commons (UK).

NP	Date: Political Decision	Date: Formal Adoption	Votes	Number of Reasoned Opinions 2009-2012/Total
DK	20 April	3 May	2	6/7
FR	25 April	22 May	1	14/18
SE	26 April	11 May	2	34/49
PL	27 April	11 May	1	10/12
UK	9 May	21 May	1	7/14
LU	14 May	15 May	2	14/17
FI	15 May	15 May	2	2/3
PT	15 May	18 May	2	2/3
LV	18 May	21 May	2	1/2
MT	21 May	22 May	2	3/8
BE	22 May	22 May	1	4/5
NL	22 May	22 May	1	10/15

Figure 2: Reasoned Opinions in Monti II

Data from IPEX, Cooper 2013b: 31f. and Seimas 2014: 2f.

The first six NPs to politically decide to issue a reasoned opinion did so from end-April till mid-May: DK, FR, SE, PL, UK and LU. These are NPs that had so far been rather active in employing reasoned opinions. Without going into-depth into the internal scrutiny proceedings in each of them, until 14 May, “informal” reasoned opinions amounting nine votes had been issued, meaning “half-time” for triggering a yellow card one week before the deadline.

In the last week, five NPs not so active before decided to adopt a reasoned opinion.

FI usually applies a narrow, strictly legal definition of subsidiarity, puts strong emphasis on holding its government in the Council accountable and thus participates in the EWM only marginally (interview VIII). However, in Monti II, it adopted, both informally and formally, a reasoned opinion on 15 May. PT usually focuses on the political dialogue with the Commission, paying hence less attention to the EWM (interview XI). Here, there were three committees involved

in the scrutiny process. Both sectoral committees dealing with the content of the proposal³¹ had at quite an early stage negated a subsidiarity violation. However, the Portuguese EAC decided on 15 May to issue a reasoned opinion, which was eventually adopted on 18 May.³² Interestingly, PT had then an annual priority list of proposals they were subjecting to subsidiarity scrutiny. Whilst Monti II was initially not on this list, it became so through IPC (*ibid.*). In LV, the EAC decided on 18 May that Monti II was indeed a violation of subsidiarity, with the reasoned opinion passed on 21 May in the plenary. The reasoned opinion on Monti II was the first ever adopted under the EWM in LV. The Maltese Foreign and European Affairs Committee decided on May 21 to issue a reasoned opinion, which was passed by the plenary on 22 May. As FI, PT, LV and MT are unicameral NPs, they represent two votes each, increasing the informal vote count on the morning of 22 May to 17, one short of a yellow card.

The next NP deciding and adopting a reasoned opinion was BE, where generally in the EWM, sectoral committees act on behalf of the plenary. The responsible committee in Monti II, the Social Affairs Committee, had never done so before. An MP from the governing Socialist party had prepared a draft reasoned opinion, explaining to her colleagues the significance of their vote under the EWM and the possibility of a yellow card (Cooper 2013b: 11). The text was formally voted in the early afternoon and constitutes the eleventh reasoned opinion, amounting to 18 votes and thus reaching the threshold.

The final NP to adopt a reasoned opinion was NL, increasing the vote number to 19. Usually, it is a rather active NP in the EWM. In Monti II, its initial stance was opposition on political grounds, but not because of subsidiarity violation, and the Social Affairs and Employment Committee voted on 15 April not to pass a reasoned opinion. However, the Dutch left-wing parties – aware of the rising number of reasoned opinions in other NPs and the looming deadline – managed to set the issue on the agenda of the plenary for the evening of 22 May, which voted to adopt a reasoned opinion.³³

Generally, the numbers of NPs reporting scrutinizing activity on IPEX were very high, with only nine NPs not reporting any activity (IPEX n.d./a). Those NPs either not scrutinizing at all or not issuing a reasoned opinion were mainly such that were generally not very active in the EWM and such that did not participate

³¹ The Constitutional Affairs and the Labor Committee.

³² Whilst the constitutional affairs committee was not aware of the action and arguments of other NPs, the labor committee formulated its report in such a way to open the possibility for the EAC – the initiating and the closing committee – in the end to revive or take into account what was happening in other NPs (interview XI).

³³ For the first time did a NP overturn the subsidiarity decision of the responsible committee (Cooper 2013b: 13).

for internal reasons³⁴. This is not to comprehensively explain why some NPs did not participate, but rather to complete the picture.

Hence, the order of the political decisions displays a distinct pattern: after the initiation of the process by DK, five NPs followed that had so far been rather active in issuing reasoned opinions: FR, SE, PL, UK and LU. In the final week before the deadline, five NPs became active that had until then only participated in a few cases (FI, PT, LV, MT, BE), and the final reasoned opinion came from NL.

7.2.3 Inter-Parliamentary Cooperation

Generally, there was an exceptionally high level of information exchange among NPs (Cooper 2013b: 3; Gstrein/Harvey 2013: 55).

a) COSAC

Coincidentally, the 47th COSAC meeting, taking place 22-24 April 2012 fell in the middle of the 8-week scrutiny period (COSAC n.d.).

The meeting in Copenhagen was hosted by the Folketing, which thus had, albeit limited, agenda-setting powers.³⁵ However, neither the proposal itself nor any general subsidiarity related issues were on the agenda. Rather, the Danish delegation used the opportunity to work informally on the margins of the meeting (interview VII). It approached the other delegations, telling them about their stance and encouraging them to consider the issue. Their draft reasoned opinion from 20 April was quickly translated into English and circulated at the meeting (Cooper 2013b: 8). Thus, the meeting was an opportunity for the Folketing to voice its concern, raise the awareness in other NPs, provide content and by that mobilize and encourage other NPs, hence exerting their “leading function”.

Furthermore, on the side-lines, there was a meeting of likeminded NPs and quite some informal talk (interview XI), offering national MPs a forum to discuss the proposal and raise the awareness face-to-face at political level. 16 NPs state that they had exchanged information regarding Monti II at the COSAC meeting, of which eleven thought this information to have been helpful in developing their scrutiny outcome (COSAC 2013a: 31). As the meeting took place rather early during the 8-week period, not many NPs had initiated their scrutiny procedure. Thus, the main function of this IPC was to raise the awareness on this proposal

³⁴ Such as the French Assemblée nationale, which was preoccupied with the presidential election campaign in France, the Irish Oireachtas, which was in the run-up to the referendum to the EU fiscal compact and reluctant to criticize the EU, or the Italian Houses, reluctant to criticize the proposal due to the involvement of then-prime minister Mario Monti (interview V).

³⁵ Denmark held the EU Presidency in the first half of 2012.

and put it on the committees' agenda. The COSAC meeting was important because not many NPs had Monti II on their radar (interview XI).

b) IPEX

23 NPs indicated that they had exchanged information via IPEX (COSAC 2013a: 31), with 19 NPs in total stating that this helped them in developing their own scrutiny outcome. However, some NPs stated that whilst it is crucial that information on subsidiarity scrutiny are uploaded on IPEX with the necessary sense of urgency, in Monti II, this lagged behind, especially in the final days before the deadline (ibid: 32). Hence, IPEX did not play an important instrumental role in IPC leading to the yellow card as it did not contain the most up-to-date information on what was going on in the other NPs. Rather, the crucial information flow went via the NPRs.

c) NPRs

Already on 26 March, the Danish NPR notified the other NPRs at their weekly MMM that the Folketing was going to closely scrutinize Monti II for its subsidiarity compliance (Cooper 2013b: 9). Afterwards, he circulated a mail with the content of the Danish concern, asking his colleagues to disseminate this information in their capitals (interview XI). He also created a document in a common computer folder, which every NPR could update with information from her/his home NP (Cooper 2013b: 9).

Furthermore, generally, "the vast majority of information exchanged [...] flowed via [NPR] in Brussels" (Conlan 2013: 23). By talking in the MMMs, the corridors, over coffee, via Mail and the joint computer document, NPRs facilitated the exchange of "real-time information" about the state-of-play of the scrutiny proceedings, as they are usually up-to-date regarding events in their home NP. 28 NPs had used NPRs to exchange information on the Monti II proposal, of which 26 thought this information to have been helpful in developing their scrutiny outcome (COSAC 2013a: 31). As NPs acknowledge the importance of information gathered via this channel for developing – whichever – scrutiny outcome, it can be concluded that the political level was indeed aware of the information present at administrative level at the time of their decision-making. Hence, the information exchange at staff level via NPR reached the crucial political level.

Concluding, the network of NPRs was a channel for the Folketing to exert its leading function and for NPs to engage in information exchange.

7.2.4 How did National Parliaments manage to overcome the Collective Action Problem?

In the following, an analytical explanation of how NPs managed to overcome the assurance problem in Monti II will be presented, inspired by the above-presented hypothetical story.

a) Importance of IPC

Whilst information exchange between NPs on Monti II was high, the COSAC meeting was used by the initiators to raise awareness and map a first overview of the stances of NPs towards the proposal. IPEX was not considered a reliable source of information. However, the network of NPRs with information exchange in real-time helped to compile an accurate up-to-date picture of actions in other NPs, and thus offered “a rough ‘vote count’ as the process unfolded” (Cooper 2013b: 33), indicating the likelihood of a yellow card.

Reportedly, the Finish Eduskunta, generally sceptical towards IPC, had both received and sent information for Monti II via NPRs, the COSAC meeting, parliamentary administrations, national governments and other channels (COSAC 2013b: 137f.). Similar findings are to be made regarding the Belgian Chambre des Représentants, also mentioning IPEX (ibid.: 22f.), the Maltese Kamra tad-Deputati (ibid.: 305f.), the Portuguese Assembleia da República (ibid.: 344f.) and the Dutch Tweede Kamer (ibid.: 113f.), whilst the Latvian Saeima named exchange between parliamentary administrations and the permanent representation to the Council (ibid.: 268f.). All these “following NPs” claim that the received information helped them to develop their scrutiny outcome of a reasoned opinion. Furthermore, the Portuguese EAC was aware of the stance and actions of others NPs when deciding to issue a reasoned opinion (interview XI). The Belgian Social Affairs Committee, being the committee whose political decision to adopt a reasoned opinion eventually triggered the mechanism, was conscious of the significance of their vote under the EWM and the possibility of a yellow card when voting (Cooper 2013b: 11). The Dutch Tweede Kamer, the last NP do adopt a reasoned opinion, did so in knowledge of the preceding Belgian reasoned opinion and that the vote count was very close to the threshold, whereas the exact number was still uncertain (ibid.: 13).

Hence, when the NPs made their political decision to adopt their own reasoned opinion, they had an accurate up-to-date picture of the actions of other NPs regarding Monti II and subsequently about the prospects of collective action.

b) Importance of Leadership

The Danish Folketing was the initiating NP, providing early momentum and steering the process among the other NPs during the 8-week scrutiny period. It can be argued that by taking over this leadership position, the Folketing created certainty in a situation of uncertainty about the others’ actions. Keeping the issue on the agenda and organizing the information exchange around it increased the likelihood that the yellow card was going to be reached, making it more beneficial for other NPs to adopt their own reasoned opinion. Providing content made it possible for other NPs to take on some substantive arguments, reducing their production costs of reasoned opinions in comparison to an isolated process. Thus, it supplied incentives and increased the likelihood for each single NP to issue a reasoned opinion.

Generally, the political interest in the issue was big in Denmark. As the national social welfare system is strong, the Danish labour model usually circumvents

legislative interference (Børsting 2012: 2) and Denmark would have been directly affected (Hall 2012), the proposal aroused national interest and was put high on the agenda. Additionally, the Folketing is generally considered to be one of the strongest and most active NPs in scrutinizing EU affairs, having the necessary institutional capacities to do so (Buzogány/Stuchlík 2011: 7). Thus, in game theoretical vocabulary, the Folketing had both lower costs efforts and increased preferences for producing their reasoned opinion, making it a “natural leader” in Monti II.

c) Dynamics

The Folketing was followed by five NPs that usually are rather active in the EWM; thus could have been expected to issue a reasoned opinion independently of the actions of others. “In all likelihood they were largely driven by their own internal motivations, and not greatly influenced by the actions of other parliaments” (Cooper 2013b: 10). Their reasoned opinions, representing nine votes, can be thought of as the critical mass, approximating the yellow card threshold close enough to make reluctant NPs participate as the prospects of successful collective action increased, thus overcoming the first-mover problem. Though not leaders in the same way as the Folketing, these NPs were nonetheless important as providers of the necessary critical mass to launch a bandwagon process.

This argument is supported by the fact that opposition to the proposal gained momentum towards the end of the period, as six further NPs joined the process, out of which five can be considered “unusual suspects”. It can be argued that these NPs joined as the imminence of a yellow card became clear, which, in many NPs, made the game change (interview XI).

7.2.5 Preliminary Conclusion

Concluding, in Monti II, there was strong interplay between the two solution mechanisms NPs can apply. The Folketing exerted *leadership* that provided early momentum and mobilization of other NPs by using channels of IPC. In doing so, they structured IPC and kept information flowing. Generally, *information exchange* between NPs was extensive, providing NPs with knowledge about the actions of others. Subsequently, NPs had *certainty* of about the vote count, meaning about the prospects of collective action. As the likelihood of triggering a yellow card had increased with five NPs providing the initial critical mass, reluctant NPs saw it in their interest to join the process – a *bandwagon process* was set in motion, which eventually led to *overcoming the collective action problem* when the yellow card was triggered.

7.3 Case Study 2: European Public Prosecutor's Office

On 28 October 2013, the scrutiny period for COM/2013/0534 “Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office” expired. By that date, 13 parliamentary chambers³⁶ from eleven EU member states had issued reasoned opinions reporting a violation of subsidiarity, amounting to 19 votes and exceeding the necessary yellow card threshold by five.³⁷

Until recently, the task of prosecuting crimes affecting the EU budget/financial interests of the EU had been within the exclusive competences of the member states. However, as the Commission saw them not adequately equipped and motivated to counteract such offences (Brady 2013a), it proposed the establishment of an EU level Public Prosecutor for their investigation and prosecution.

As the prosecutor would gain exclusive competences in her/his field of activity, the proposal is rather political (interview I) with a distinct federalist flavour (Brady 2013b). As such, it aroused opposition in a number of NPs, eventually leading them to trigger a yellow card on grounds of a subsidiarity violation.³⁸

7.3.1 Process leading to the Proposal

As the Lisbon Treaty foresaw the establishment of an EPPO (Art. 86 TFEU), all relevant stakeholders knew that the Commission was going to propose its creation.

Prior to the proposal's publication, there was a lot of preparatory work from the Commission. Hence, the awareness of the issue was already raised and when published, those NPs being interested were quick to position themselves (interview XI).

The Commission published the proposal on 18 July 2013; yet, it took a long time to deliver its translation into all official EU languages. The *lettre de saisine* was only sent on 21 August. Furthermore, due to a political agreement, the summer break from 1 to 31 August does not count to the 8-week scrutiny period (interview XI). Hence, it officially started 1 September 2013, meaning the deadline was 28

³⁶ This number perceives the Irish Oireachtas as unicameral. Technically speaking, it consists of two chambers (Dáil and Seanad), which scrutinize EU legislative proposals jointly.

³⁷ On the sensitive area of JHA, where the EPPO proposals is set, the necessary number of NPs to issue a reasoned opinion is a quarter, meaning 14 out of 56 votes (IPEX n.d./b).

³⁸ For a thorough collocation of the twelve reasoned opinions see Council 2013: 3f.; Franssen.

October. Yet, once the English wording of the draft was available (18 July), parliamentary staff started analysing it. NPs had therefore almost double the time than usually for their subsidiarity check (interview XII).

7.3.2 Initiation and Leadership

On 11 September, the European Scrutiny Committee of the UK House of Commons concluded that “the EPPO proposal breaches the subsidiarity principle [...]” (European Scrutiny Committee 2013: 27). Attaching a draft reasoned opinion, the political decision to object to the proposal under the EWM was made that day. It was formally adopted by the plenary on 22 October (House of Commons n.d.). Hence, the House of Commons was the first NP to make this political decision, meaning it is the first-mover initiating the scrutiny proceeding. The UK furthermore took on a leadership role in the process (interview I).

Also taking over a leadership role were the Dutch NPs (ibid.) In the Tweede Kamer, the Committee on Safety and Justice issued a negative subsidiarity judgment on 2 October. The plenary approved sending the objections to the Commission on 10 October (Eerste Kamer n.d.). On 8 October, a joint meeting of the Security and Justice and the Immigration and Asylum/Justice and Home Affairs Committee of the Eerste Kamer, having received the opinion of the Tweede Kamer, drafted their reasoned opinion, hence made their political decision. It was formally adopted by the plenary on 15 October (ibid.).

These NPs engaged in lobbying, encouraged other NPs to join the scrutiny process (interview I, XI), identified the issues that were at stake and pointed out some of the proposal’s consequences on the national level, hence providing substantive information (interview IV, VIII), and monitored the other NPs regarding to the vote count (interview II).

7.3.3 The Issuance of Reasoned Opinions

In total, thirteen NPs adopted reasoned opinions: the Cypriot Vouli ton Antiproson (CY), the Czech Senát (CZ), the Dutch Eerste (NL_I) and Tweede (NL_II) Kamer, the French Sénat (FR), the Hungarian Országgyűlés (HU), the Irish Oireachtas (IE), the Maltese Kamra tad-Deputati (MT), the Romanian Camera Deputaților (RO), the Slovenian Državni zbor (SI), the Swedish Riksdag (SE) and the UK House of Commons (UK_I) and House of Lords (UK_II).

NP	Date: Political Decision	Date: Formal Adoption	Votes	Number of Reasoned Opinions 2009-2013/Total
UK_I	11 September	22 October	1	12/14
NL_II	2 October	10 October	1	15/15
FR	3 October	28 October	1	18/18
NL_I	8 October	15 October	1	10/10
CZ	8 October	9 October	1	2/2
CY	11 October	18 October	2	3/3
HU	14 October	21 October	2	1/1
IE	16 October	23 October (Dáil), 24 October (Seanad)	2	4/4
SE	17 October	23 October	2	48/49
UK_II	22 October	28 October	1	5/5
RO	22 October	28 October	1	7/7
MT	23 October	28 October	2	8/8
SI	25 October	25 October	2	1/1

Figure 3: Reasoned Opinions in EPPO

Data from IPEX, Seimas 2014: 2f. and the websites of parliamentary chambers

After UK_I made the political decision to adopt a reasoned opinion, three generally more active NPs followed: FR and NL_I and _II. The EAC of FR adopted a draft reasoned opinion on 3 October. After having consulted the relevant standing committees, the plenary formally issued it on 28 October.³⁹

The then following four NPs are usually less active in the EWM. On 8 October, the EAC of CZ made the political decision to issue a reasoned opinion, which was adopted by the plenary on 9 October. In CY, the Foreign and European Affairs committee adopted a negative subsidiarity recommendation on 11 October; the plenary formally issued the reasoned opinion on 18 October. The Hungarian reasoned opinion on EPPO was the first it ever issued. The political decision was made by the EAC on 14 October, formalized by the plenary on 21 October. In IE, the Joint Committee on Justice, Defence and Equality, adopted a draft reasoned

³⁹ All dates, unless otherwise marked, are taken from the official IPEX site for EPPO, IPEX n.d./c.

opinion on 16 October (Oireachtas n.d./a). It was eventually formally issued on 23 (Dáil; Oireachtas n.d/b)/24 October (Seanad; Oireachtas n.d./c).

When CY made the political decision to adopt a reasoned opinion on 11 October, reasoned opinions amounting seven votes had been issued, meaning “half-time” for triggering a yellow card 2½ weeks before the deadline. The threshold was – informally, according to the political decision – met on 22 October, one week before the deadline, after SE and UK_II joined the process.

In SE, the by far most active NP in the EWM, the Committee of Justice adopted a draft reasoned opinion on 17 October (Justitiekottet 2013), which was formally adopted by the plenary on 23 October. On 22 October, the EU Lord Select Committee of UK_II adopted a draft reasoned opinion on EPPO, which the plenary approved on 28 October. Yet, as usually a sub-committee is responsible for holding the subsidiarity scrutiny and in case of a breach presents a draft reasoned opinion to the Select Committee (House of Lords n.d./a: 3), the informal decision that EPPO violates the subsidiarity principle had most likely been made before. Nonetheless, when UK_II formally adopted the draft reasoned opinion, the necessary threshold of 14 “informal” votes was met on 22 October.

Also on 22 October, the Romanian EAC saw a violation of subsidiarity, meaning “there is a strong possibility for the Chamber to issue a Reasoned Opinion” (IPEX n.d./d), which the plenary did on 23 October (Camera Deputaților n.d.). Interestingly, RO was first supposed to back the proposal, but changed its opinion in the process (interview IV).

The last two NPs to make the political decision to adopt a reasoned opinion were MT and SI. The Committee on Foreign and European Affairs of MT adopted a draft reasoned opinion on 23 October, which the plenary formally issued on 28 October (Kamra tad-Deputati 2013: 2). By doing so, it departed both from the government’s stance and from its own previous statements (The Malta Independent 2013). In SI, the EAC adopts decisions for the plenary on the basis of the opinions issued by the responsible working bodies. On 18 October, its EAC decided to scrutinize the proposal, referred it to the Committee on Justice and deliberated on 25 October that EPPO violates subsidiarity. Hence, most likely the political decision was made in-between those two dates; however, it was not possible for this analysis to uncover this. This is the first reasoned opinion SI issued in the EWM and the final one issued on the EPPO proposal.

Generally, the numbers of NPs reporting scrutinizing activity on IPEX were very high, with only ten NPs not reporting any activity (IPEX n.d./c) Those NPs either not scrutinizing at all or not issuing a reasoned opinion were mainly such that were generally not very active in the EWM and such that did not participate for internal reasons⁴⁰.

⁴⁰ Danish Folketing (opt-out arrangement of the EPPO, interview VII), Estonian Riigikogu (elections, politicians were preoccupied and the EAC did not hold meetings, interview IX), German Bundestag (newly constituted after the elections, interview X) and Lithuanian Seimas (holding EU presidency and trying to stay neutral, interview III).

7.3.4 Inter-Parliamentary Cooperation

a) COSAC

As the second COSAC meeting in 2013 took place from 27 to 29 October, it was too late to provide a forum for national MPs to meet face-to-face and engage in IPC regarding the subsidiarity scrutiny of EPPO. However, another inter-parliamentary meeting was held in Vilnius from 16 to 18 October: The Interparliamentary Conference on Economic and Financial Governance of the European Union (Seimas n.d.). Whilst the Dutch attempted to use it as an opportunity for lobbying, it was mainly finance experts attending the conference, who did not have much to do with the area of JHA. Hence, this proved not very effective (interview I).

Thus, IPC on the political level, organized by some kind of inter-parliamentary meeting, did not take place during the subsidiarity scrutiny of the EPPO proposal.

b) IPEX

On IPEX, 31 NPs reported scrutiny activity in regard to the EPPO proposal, out of which ten indicated per icon that they had important information to exchange. However, IPEX was not considered to be the most important channel of information exchange. The platform did neither indicate likely future actions of NPs nor contain information which NPs were to which degree concerned. This kind of information was exchanged via NPRs (interview IV).

c) NPRs

The UK and Dutch NPRs raised their concerns in MMMs quite early on, organized to some extent the information exchange around the proposal, following up by mails, providing substantive information and creating the jointly accessible computer document, containing information as to whether NPs were interested in the issue (interview II). Furthermore, they tried to encourage other NPRs to make their NPs scrutinize the proposal as well (interview VIII).

In general, the exchange between NPRs was extensive, with long discussions during MMMs, conversations on the corridor, over coffee (interview II), and some NPRs visiting each other's offices (interview VIII). Once the possibility of a yellow card became apparent, IPC began to intensify even further. The content of the exchanged information via NPRs comprised state-of-play information (interview II) as well as substantive information, which was mainly provided by the leading NPs (interview IV). Furthermore, some NPs engaged in some kind of "vote exchange", where on the level on NPRs, they agreed to get active in the process if some other NPs did the same (ibid.).

Whilst the information gathered at administrative level did not reach the political level in some NPs (interview X), other NPs that did issue a reasoned opinion were aware of the substance of the reasoned opinions of other NPs or of the vote count when making their decision. Whilst this will be dealt with more detailed further below, it implies that the information flow between NPRs and their respective political level worked in those NPs issuing a reasoned opinion.

Concluding, the network of NPRs was a channel for leading NPs to exert their function and for NPs generally to engage in information exchange – containing both “real time” and substantive information.

7.3.5 How did National Parliaments manage to overcome the Collective Action Problem?

The following part presents the analytical explanation how NPs managed to overcome the assurance problem in the EPPO proposal.

a) Importance of IPC

Generally, NPs engaged in extensive information exchange regarding the EPPO proposal, both substance and state-of-play concerning. While neither inter-parliamentary meetings nor IPEX served as the crucial conduit of information, it was the network of NPRs in Brussels that engaged in exchange on a daily basis. They facilitated the dissemination of substantive arguments and knew in real-time the state-of-play of the subsidiarity scrutiny in other NPs.

IPC thus enabled NPs to know about the actions of other NPs and the prospects of triggering a yellow card when they made their political decision to adopt a reasoned opinion. In its formal adoption, the Tweede Kamer referred to the fact that previously other NPs had issued reasoned opinions (Tweede Kamer 2013: 2). The Oireachtas debate before the political decision notices that other NPs have flagged their subsidiarity concerns and that Ireland ought to do the same (Oireachtas n.d./a). The Czech Senate was in possession of the draft reasoned opinion of House of Commons at the time of drafting their own (interview XII) and the Romanian NP was aware both of this and of the Dutch reasoned opinions, which actually in this case made the game change (interview IV). The Slovenian EAC, issuing its first reasoned opinion, which in EPPO formally triggered the threshold on 25 October, was not aware that it would be its vote triggering the mechanism. However, it had calculated on grounds of previous and prospective actions of other NPs that the yellow card was most likely going to be reached (Državni Zbor n.d). One of the last NPs formally issuing its reasoned opinion, the House of Lords, was aware that this has already happened, and wanted to “join that group [in order to] send a political signal to the Commission” (House of Lords n.d./b).

Hence, information exchange ensured that NPs were generally aware of the prospects of triggering a yellow card. Furthermore, engaging in “vote exchange” via NPRs not only informed other NPs about prospective actions but actively coordinated them. Hence, this increased the certainty for reluctant NPs and put their participation on a more secure footing.

b) Importance of Leadership

The UK and the Dutch NPs belonged to the first ones to issue a reasoned opinion on the EPPO proposal, taking over not only the initiating role, but also a

mobilization function: encouraging other NPs in the process, facilitating information exchange, providing substantive information and keeping track of the vote count. It can be argued that by doing so, they increased the likelihood of a yellow card and thus created some level of certainty about the successful prospects of collective action for other NPs in the scrutiny process.

In the UK, generally, JHA is a field of particular interest. Furthermore, the EPPO is covered by the UK opt-in arrangement in this field, meaning that the UK will not participate unless it opts in to the EU law establishing it (Broadhurst 2013). Thus, there is a certain national interest in the issue, also in forming the proposal according to national preferences. In the Netherlands, it is reasonable to assume that the policy field has a similar weight in politics. The Dutch government identified EU proposals aiming at harmonizing the law of criminal procedure as “primarily a matter for the member states” (Government of the Netherlands n.d.) and both NPs included the EPPO proposal in their 2013 list of prioritized proposals for scrutiny. Thus, the countries whose NPs took over the leading role in EPPO are such where the issue at hand is of substantial weight, which explains why these countries were willing to take the lead.

c) Dynamics

Did the provision of an initial level of certainty about the likelihood of a yellow card set a bandwagon process in motion? The first four NPs making the political decision to adopt a reasoned opinion are rather active in the EWM and can thus be argued to have made their decision irrespective of other NPs. They are followed by four “unusual suspects”, less active NPs, whereas the final five NPs display a mixed picture regarding activism. Interestingly, two NPs issued a reasoned opinion that had never done so before. Hence, whilst it can be assumed that these unusual suspects were persuaded by certainty about the actions of others and the prospect of collective action to join the process or even switch their vote, like RO and MT, the first four reasoned opinions, amounting merely four votes, did not provide the necessary critical mass to do so. As the awareness of the issue was raised and unofficial positioning took place before the official start of the scrutiny period, the 8-week scrutiny period proved to be rather structured (interview XI). Thus, the possibility of a yellow card became clear at an early stage, and those unusual suspects joined the process already prior to the level of reasoned opinions actually/informally adopted reaching the critical mass. Hence, they did so in certainty not about the prior, but the prospective/likely actions of other NPs. Generally, in assurance problems, such non-binding and non-verifiable “cheap talk” is expected to be credible, as there is no temptation to free-ride (Rabin 1990: 145).

Yet, this does not mean that the yellow card was straightforward. The initiating NPs were those generally more active, and though there was no drama in the final days, 2½ weeks before the deadline, only half the necessary votes were issued, meaning no NP could have absolute certainty about the outcome of the process. At this stage, the encouragement and coordinating function of the leading NPs became increasingly important and IPC intensified further in order to provide the necessary certainty for reluctant NPs to join the process.

7.3.6 Preliminary Conclusion

In EPPO, the awareness of the issue was raised already before the official scrutiny period started. NPs were thus quick to position themselves and engage in *information exchange*. UK and Dutch *leadership* supported this activeness; yet, it was mainly exerted on the level of NPRs by mobilizing other NPRs, providing content and keeping track of the vote count. This led to a *partial bandwagon* process, initiated by four generally more active NPs. Usually less active NPs were persuaded to join the process/switch their vote by the possibility of successful collective action. However, there was neither a clear-cut pattern of issuance dates distinguishing between active and less active NPs nor drama in the last days. Rather, the necessary *certainty* not only about previous, but also prospective actions of other NPs and thus the imminence of a yellow card was established rather early, *overcoming the collective action problem* by providing an initial safety-net for participation.

7.4 Comparison

On the basis of the above-developed analytical explanations of how NPs managed to overcome the assurance problem inherent in the EWM both in Monti II and EPPO, it is now possible to conduct a structured and focused comparison. Generally, both proposals were considered rather political proposals and aroused interest among the respective stakeholders and the relevant European public.

7.4.1 Inter-Parliamentary Cooperation

In both cases, NPs engaged in extensive IPC and information exchange. This exchange covered both substantive information and information about the state-of-play in the scrutiny proceedings in the various NPs. The former was mainly provided by the leading NPs and decreased the participation costs of other NPs as they could become “inspired” by these concerns. The latter enabled NPs to have an overall picture over the prospects of triggering a yellow card by providing a rough vote count. This was especially supported by the jointly accessible document on the common PC server of the NPRs in Brussels. Consequently, in both cases, their network proved to be the crucial conduit of information, compiling an accurate up-to-date picture of the courses of actions in other NPs and the likelihood of them issuing a reasoned opinion. Neither COSAC nor IPEX were perceived as capable of delivering this information. In Monti II, however, NPs also engaged in information exchange via COSAC, due to time-concurrence. The main function of this information exchange was to raise the awareness of the issue and provide a first, rough overview of the stances of NPs towards the proposal. Importantly, in both cases, the information gathered via exchange at

staff level between NPRs reached the political decision-making level in those NPs that issued a reasoned opinion. The effective transfer of information from the staff to the political level is not always a given fact due to a certain detachment between the levels, yet a pivotal factor as to the effectiveness of information exchange. Another important factor regarding IPC is that in both cases, once the possibility of a yellow card became apparent, information exchange intensified. In EPPO, furthermore, this went beyond mere information exchange. Rather, some NPs engaged in “vote exchanging” via their NPRs, meaning they attempted to actively coordinate their actions.

7.4.2 Leadership

Both cases experienced a strong leading NP, the Danish Folketing in Monti II, and in EPPO, the UK and the Dutch NPs. Interestingly, the Folketing was the initiating NP in Monti II, whereas in EPPO, whilst the leading NPs were among the first ones to make the political decision to adopt a reasoned opinion, there were also other NPs entering the process at an early stage, e.g. the French Sénat, yet not taking over a leadership position. Analysing internal reasons why these NPs might have taken over this position, it was demonstrated that in both cases, the issue at hand was of certain political weight in the respective country. Game theoretically, this can be considered an extrinsic motivation to participate in the EWM, leading to preference asymmetries which make them natural leaders. Furthermore, the Folketing has a strong institutional capacity, supporting it as a leading NP. Interestingly, it was also the NP of the country holding the presidency at the time of Monti II. In EPPO, in contrast, the presidency’s NP, the Lithuanian Seimas, stressed its efforts to remain a neutral player in the process and did not want to take over the lead, let alone issue a reasoned opinion (interview III).

In both cases, the leading NPs exerted similar functions: initiating the procedure, providing early momentum and raising the awareness of the issue. The latter was more important in case of Monti II, as not many NPs had the proposal on their radar, unlike the EPPO proposals, where there was sufficient preparatory work. Furthermore, they effectively used channels of IPC to exert their leading function and to mobilize other NPs in the process. By that, they organized to some extent IPC and information exchange around the respective proposal. In Monti II, the Folketing was able to use both the COSAC meeting taking place in April 2012 and the network of NPRs in Brussels. In EPPO, in contrast, the leading NPs could not count on this inter-parliamentary meeting. Whilst ineffectively attempting to use another meeting as a forum for lobbying on the issue, they eventually had to focus on the channel of NPRs.

7.4.3 Dynamics

The processes leading to the two yellow cards display rather different dynamics. Whilst in EPPO, the awareness of the issue was raised already before the official scrutiny period started, in Monti II, IPC and leadership were necessary. In the latter, there is a clear-cut bandwagon process, initiated by six NPs that are generally more active in employing reasoned opinions and thus issued their reasoned opinion regardless of the previous actions of others. Information exchange and leadership created incentives for more reluctant NPs to join the process by inducing certainty. In EPPO, in contrast, the pattern of the issuance of reasoned opinions relative to the activeness of NPs is more mixed. One can observe a “partial” bandwagon process, which was initiated by four more active NPs, followed by four rather inactive ones, and the final five with a mixed picture. Arguable, the four initiating NPs did not provide the necessary critical mass to set the process in motion. Nonetheless, certainty both about the actions of other NPs and about the possibility of a yellow card was created, yet at an early stage even before reasoned opinions were politically adopted. This was done through information exchange about likely/prospective actions, which was possible due to preparatory work and raised awareness prior to the official start of the scrutiny deadline. Whilst this is not to say that in Monti II, NPs did not exchange this kind of information, empirical data suggests that it was rather actual actions than unofficial positioning creating certainty, respectively positioning took place at a later stage in the scrutiny-period. Thus, in Monti II, the yellow card was triggered both informally and formally only on 22 May, the day of the deadline, whereas EPPO received the necessary number of opinions informally on 22 October, almost a week before the deadline on 28 October, and formally on 25 October.

7.4.4 Preliminary Conclusion

Both cases displayed effective leadership and the extensive engagement of NPs in IPC/information exchange.

These served the same functions, eventually creating certainty about the actions of others and subsequently the prospects of triggering a yellow card. This suggests that as predicted by the hypothetical story, these mechanisms are crucial for overcoming the inherent assurance problem.

Whilst IPC did not differ regarding its intensity and substance, the cases relied on different channels. The COSAC meeting in Monti II allowed NPs to meet face-to-face on the political level, central to the decision-making process. In EPPO, however, IPC mainly took place at the administrative level. This leads to a cautious conclusion that IPC does not necessarily rely on inter-parliamentary meetings at political level to be effective; important is, however, that information from the staff level is transferred to the political level, as happened in both cases in NPs that issued a reasoned opinion. This creates certainty at political level, which is necessary to overcome the assurance problem.

However, the main difference lies in the dynamic of the processes – at what stage the awareness of the issue was raised, when certainty was created and when the yellow card was triggered. Arguably, it is not only knowledge about previous actions that can deliver the necessary certainty for overcoming the assurance problem, but, as in EPPO, also expectations about prospective actions. These information can produce certainty at an early stage in the 8-week scrutiny period, leading reluctant NPs to join the process not just when a critical mass of reasoned opinions is actually reached, but already prior to that. Hence, in order to avoid “drama in the last days”, it is necessary that the awareness is raised, that NPs position themselves and engage in information exchange about their stances regarding subsidiarity compliance as early as possible. Furthermore, this points towards the growing importance of the network of NPRs regarding information exchange, as it is the only source of information from which NPs can get up-to-date and informal information about prospective actions of other NPs on a regular basis.

8 Conclusion

The newly introduced EWM gives NPs the right to scrutinize EU legislative proposals for their compliance with the subsidiarity principle. On the basis of rational-choice theory and MLG, it was demonstrated that NPs are expected to make active use of the mechanism and perceive the possibility of triggering a yellow card as a collective good. In the production of collective goods, however, rational actors usually meet a collective action problem. The problem at hand is the so-called assurance problem, meaning NPs face two problems in the EWM: uncertainty over the other NPs' actions leads to an incentive problem, and closely connected, a first-mover problem. Despite these theoretically identified problems, two yellow cards have been triggered by today: Monti II and EPPO. Hence, this paper aimed at answering *how did NPs manage to overcome the collective action problem inherent in the EWM in cases of successfully triggering a yellow card?*

Based on theoretical assumptions derived from collective action theory about how rational actors can solve assurance problems, this paper subsequently analysed the actions of NPs in the EWM with a focus on their efforts to overcome the above-said problems. Generally, the assurance problem can be solved by creating certainty about the actions of others and subsequently about the prospects of collective actions. A first general analysis of the EWM as a collective action setting, characterized by identifiability of actors, sequentiality of actions and iteration, revealed that they provide a conducive environment, preparing the ground for NPs to overcome the problem. Yet, successful collective action has not become straightforward; rather, NPs have to actively put effort into each single scrutiny period by exerting the solution mechanisms at their disposal: pre-play communication and leadership.

Subsequently, two case studies were conducted, tracing the processes leading to each yellow card and underlying it with an analytical explanation based on collective action theory.

Monti II closely followed the hypothetical story of how NPs can overcome the assurance problem. Strong leadership by the Danish Folketing and extensive IPC, delivering up-to-date information about the state-of-play in the various NPs, created the necessary certainty about the actions of other NPs and thus about the growing momentum towards a yellow card and the likelihood of successful collective action. This certainty was supported by the fact that by enough NPs issuing their reasoned opinions irrespective of the number of previous actions of other NPs, a critical mass was created. This made it beneficial for reluctant NPs to join in a bandwagon process.

EPPO saw strong leadership by the UK and Dutch NPs, and extensive IPC, leading to the above-said necessary certainty. However, the dynamics proved to be different: The awareness of the issue among NPs was raised even prior to the

official scrutiny period, leading to a quick positioning and engagement in information exchange about the respective parliamentary stance. Certainty providing an incentive for reluctant, usually less active NPs to join the process was not only produced by actual actions, but also by likely/prospective ones. Hence, collective action of NPs proved to be structured and the imminence of a yellow card became apparent at an unusually early stage. This led to a partial bandwagon process, with a mixed pattern of NPs' date of issuing reasoned opinion relative to their activeness in the EWM and to the avoidance of "drama in the last days".

These two case studies were followed by a structured and focused comparison, from which four main conclusions that are cautiously, contingently generalizable can be drawn.

- Certainty, leadership and IPC seem crucial for overcoming the assurance problem and successfully triggering a yellow card. On a more practical note, this suggests that NPs striving to make the EWM effective ought to actively engage in and foster IPC and encourage strong leadership. The latter most effectively is provided by an NP in whose country the issue at hand has a strong political weight.
- NPs have different channels of IPC at their disposal. In Monti II, politicians met face-to-face, yet not in regard to EPPO, where the NPs relied mainly on their NPRs. However, IPC proved to be effective both times in those NPs issuing a reasoned opinion. Hence, it is not necessarily important that politicians themselves engage in information exchange, but that the information reaches the political level one way or the other. Practically, this points towards the necessity of decreasing the detachment between political and administrative level in regard to the EWM, as inter-parliamentary meetings on political level rarely coincide with the 8-week scrutiny.
- It is not only information about previous/actual actions of other NPs that produces certainty, but also about prospective/likely actions as necessary incentives for reluctant NPs to join collective action. Practically, this means in order to overcome the collective action problem, NPs ought to position themselves early on in the scrutiny period and inform other NPs quickly about their likely actions regarding the proposal at hand.
- Furthermore, the only channel of IPC that is on a regular basis able to deliver informal information about the strength of subsidiarity concerns in each NP and thus about the likelihood of it issuing a reasoned opinion is the network of NPRs. Hence, NPs ought to make active use of this network in regard to the EWM and strive at making it even more efficient and coherent.

This paper did not aim at broadly analysing how NPs managed to trigger the two yellow cards, but had a more narrow focus on the inherent collective action problem and how it was overcome. Thus, a question for further research might be to analyse how the two yellow cards came about more generally, relative to other identified inherent problems in the EWM. That might either be done, like this paper, by applying within-process tracing or by comparing them to cases where NPs failed to trigger a yellow card. The latter approach might also have given

value-added to this paper, by comparing successful to unsuccessful cases of NPs overcoming the assurance problem in the EWM. Yet, whilst success is easily definable by a triggered yellow card, failure of collective action would imply a) a violation of subsidiarity, b) no triggered yellow card. As the question of subsidiarity compliance is sufficiently a puzzle to politicians and academia, a case study comparing cases with a variant outcome was beyond the scope of this study. However, further research might provide raster to conduct this kind of research.

Appendix I: List of Interviews

Interview I: House of Commons Representative, 12 March 2014, Brussels.

Interview II: Permanent Representative of the Houses of the Oireachtas to the EU, 13 March 2013, Brussels.

Interview III: Permanent Representative of the Seimas of the Republic of Lithuania to the European Union, 13 March 2014, Brussels

Interview IV: Permanent Representative to the European Parliament of the Romanian Chamber of Deputies, 13 March 2014, Brussels

Interview V: Representative to the European Parliament of the Italian Chamber of Deputies 13 March 2013, Brussels

Interview VI: Permanent Representative of the Swedish Parliament to the EU Institutions, 14 March 2014, Brussels.

Interview VII: Representative of the Danish Parliament to the EU, 14 March 2014, Brussels.

Interview VIII: Liaison Officer of the Eduskunta in Brussels, 14 March 2014, Brussels.

Interview IX: Permanent Representative of the Riigikogu to the European Parliament, 17 March 2014, Skype Interview.

Interview X: Scientific Assistant of the Chairman of the Bundestag's European Affairs Committee, 20 March 2014, Berlin.

Interview XI: Permanent Representative of the Portuguese Parliament to the European Union, 24 March 2014, Skype Interview.

Interview XII: Advisor of the Committee on European Affairs of the Czech Senate, 26 March 2014, Email Interview.

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