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National Parliaments and Political Control of EU Competences— A sufficient safeguard of federalism?

Jacob Öbergⁱ

It is clear that the formal inclusion of the national parliament as a political actor within the EU decision-making process has been one of the most important innovations of the Lisbon Treaty. Their role, however, remains controversial. It is on the one hand disputed whether national parliaments enjoy sufficient powers to tame ‘competence creep’. On the other hand, it is contested to what extent it is desirable that they should become involved as a legislative actor in the EU’s decision-making procedure. This essay contributes to these debates by critically examining to what extent national parliaments can contribute to the enforcement of the subsidiarity principle. The article contends that national parliaments by having taken a too expansive view of their remit under Protocol No 2 appears to have ‘misunderstood’ their role within the EU- decision making procedure. Notwithstanding this, it is sustained that national parliaments could, in the absence of other trustworthy safeguards of federalism, be seen as a promising avenue for legitimate political control of the exercise of EU competences

National parliaments- competence control- subsidiarity- Yellow Card Procedure- political safeguards of federalism

I Introduction

EU law has for a long time trusted the political safeguards of federalism and envisaged that the principal place for addressing the problems of ‘competence creep’ should lie in a stronger political monitoring of competences.¹ The current Treaty system of competence monitoring is founded on the assumption that the task of determining whether there is a competence for the Union to act in a specific case, and to what extent the subsidiarity and proportionality principles are being conformed to rests with the EU political institutions.² It is however contestable whether political control of EU competences provides for sufficient safeguards of federalism. The history of EU law suggests that leaving the issues of the limits of EU competences to the political institutions may be a hazardous policy.³ The inadequacies of political control of competences have convincingly been illustrated by Joseph Weiler with reference to the use of Article 352 TFEU (previously Article 308 EC). Weiler noted that from 1973 until the entry into

¹ See Stephen Weatherill ‘The limits of legislative harmonisation ten years after Tobacco Advertising: how the Court’s case law has become a “drafting guide”’ (2011) 12 *German Law Journal* 827, 854–860.

² See CONV 47/02, Discussion Paper, ‘Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored’, Brussels, 15 May 2002, 10, 18.

³ See Paul Craig, ‘Competence: Clarity, Conferral, Containment and Consideration’ (2004) 29 *European Law Review* 323, 324–25.

force of the Single European Act, there was a dramatic shift in the understanding of the qualitative scope of this provision. In a variety of fields, the Community made use of this provision in a manner that was clearly inconsistent with a conventional interpretation of that provision. Only a radically broad reading of the article could justify its usage as, for example, the legal basis for granting emergency food aid to non-associated states.⁴ The application of subsidiarity also reveals a poor record in providing a check against competence creep. The legislative practice of subsidiarity illustrates the problem. The Commission has seldom been able to offer examples of when subsidiarity led to a decision not to advance a proposal.⁵ The Council has been equally untrustworthy in protecting subsidiarity concerns in legislative practice. Once it is decided to introduce rules at EU level, the bargaining process involves Member States seeking to secure a result as close as possible to their own pre-existing systems and to prevent the adoption of standards of protection lower than their own.⁶

Despite this disbelief in the effectiveness of political monitoring of EU competences, it appears that the Lisbon Treaty has enhanced the possibilities for stronger political control. The European Convention suggested that monitoring of the exercise of EU competences should be intensified by strengthening control by national parliaments through an early warning mechanism.⁷ On the basis of this proposal, the Lisbon Treaty enshrined a direct involvement for national parliaments in the legislative procedure of the EU by means of the early warning system in Protocol No 2⁸ (EWS), which allows them to review legislation on the basis of the principle of subsidiarity. The role of this actor is the theme of this contribution.⁹

⁴ See Joseph H H Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* 2403, 2444–2446. Robert Schütze, *From Dual to Cooperative Federalism* (Oxford University Press, 2009) 135, 137, 155 confirms this analysis.

⁵ The Commission's recent reports substantiate this statement: Commission, 'Report from the Commission—Annual Report 2014 on Subsidiarity and Proportionality', COM (2015) 315; Commission, 'Report from the Commission on Subsidiarity and Proportionality', COM (2012) 373.

⁶ See Stephen Weatherill, 'Better Competence Monitoring' (2005) 30 *European Law Review* 23, 26–28; Schütze (n 4), 256–257.

⁷ See CONV 47/02 (n 2), 3–5; European Convention, CONV 353/02, 'Final report of Working Group IV on the role of national parliaments', Brussels, 22 October 2002, 10.

⁸ See Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality OJ [2010] C 83/206 ('Protocol No 2').

⁹ There is substantial literature examining this issue- see for a small selection of recent contributions: Kasia Granat, *The Principle of Subsidiarity and its Enforcement in the EU Legal Order: The Role of National Parliaments in the Early Warning System* (Hart Publishing, 2018, forthcoming) Federico Fabbrini and Katarzyna Granat, 'Yellow card, but no foul: The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike' (2013) 50 *Common Market Law Review* 115; Philip Kiiwer, *The early warning system for the principle of subsidiarity: Constitutional theory and empirical reality* (Routledge, 2012);

It is conventional wisdom that the formal inclusion of the national parliament as a political actor within the EU decision-making process has been one of the most important innovations of the Lisbon Treaty.¹⁰ Their role, however, remains controversial. It is on the one hand disputed whether national parliaments enjoy requisite powers to tame ‘competence creep’.¹¹ Not only do parliaments lack the powers to challenge legislation under Article 263 TFEU- it also appears that national parliaments, as further discussed in section II below, enjoys a limited mandate in reviewing EU legislation exclusively with reference to subsidiarity concerns.¹² On the other hand it is contested to what extent it is desirable that they should become involved as a legislative actor in the EU’s decision-making procedure.¹³ It has been sustained that national parliaments may restrain the Union’s capacity to address transnational collective action problems that Member States are unable to deal with individually.¹⁴

Whilst there is substantial literature that has examined the role of national parliaments in EU law, insufficient attention has been paid to the legitimacy of the national parliaments’ practice to date under the Early Warning Procedure. This essay wishes to consider this question and analyse to what extent national parliaments have been able to contribute to the enforcement of the subsidiarity principle under Protocol No 2. The article first examines the workings of the EWS and then, from a textual, teleological and functional perspective, the remit of the parliaments’ powers under Protocol No 2. The article thereafter considers the track record of national parliaments with reference to the EWS system. Whilst it is not possible within the scope of this essay to exhaustively analyse this issue¹⁵, the article purports to elucidate the argument by scrutinising the two most recent Yellow Cards against EU legislation. The second section considers the challenge against the proposal for a European Public Prosecutor (‘EPPO

Ian Cooper, ‘The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU’, 44 (2006) *Journal of Common Market Studies* 281.

¹⁰ See Michael Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, Not Hearts’ (2008) 45 *Common Market Law Review* 617, 657–661; Ian Cooper, ‘A “virtual third chamber” for the European Union? National parliaments after the Treaty of Lisbon’ (2012) 35 *West European Politics* 441, 452–462.

¹¹ See Cooper, ‘The Watchdogs of Subsidiarity’ (n 9) 300–303; Stephen Weatherill, ‘Competence creep and competence control’ (2004) 23 *Yearbook of European Law* 1, 40–42.

¹² See Fabbrini and Granat (n 9), 120–125.

¹³ See Schütze (n 4) 257–261; Katarzyna Granat, *National parliaments and the policing of the subsidiarity principle* (DPhil, European University Institute, 2014).

¹⁴ See Weatherill, ‘Competence creep and competence control’ (n 11) 33–43, 54.

¹⁵ The most significant limitation to the scope of research is that the study does not contain a detailed analysis of the first Yellow Card against the Monti II Proposal. The rationale for this limitation is that this issue has been comprehensively examined by other commentators, Fabbrini and Granat (n 9), and since such an analysis would have made this to an impossibly lengthy article.

proposal'). It accounts for the EPPO Proposal and summarises the national parliaments' objections to the Proposal. Subsequently, there is a comprehensive evaluation of the arguments of the national parliaments. The third section contains a case study of the most recent Yellow Card against the proposal for an amended Posted Workers Directive ('PWD Proposal'). It accounts briefly for the Proposal and thereupon it analyses the national parliaments' objections to the PWD Proposal as well as the legitimacy of the challenge. The concluding section of the article recapitulates the argument and reflects on whether the national parliaments have used their powers in an appropriate way.

II The Constraints of Political Control- National Parliaments' Remit under the EWS Procedure

This section considers the workings of the EWS and the scope of the national parliaments' mandate under Protocol No 2.¹⁶ The EWS system works in the following way. To ensure that the national parliaments can fulfil their monitoring tasks all 'draft legislative acts'¹⁷ sent to the Council and the Parliament shall be forward to national parliaments. Thereupon, the national parliaments have eight weeks from the date of transmission of a draft legislative act at its disposal to consider whether it wishes to issue a reasoned opinion to the EU legislator (the Parliament, the Council and the Commission) on why the draft in question does not comply with the principle of subsidiarity.¹⁸ The Commission¹⁹ must take into account the opinion issued by the national parliaments and reconsider such a draft legislative act proposed under the ordinary decision procedure²⁰ if the national parliaments' negative reasoned opinions on such an act amount to at least a simple majority of the votes allocated to the national parliaments (a

¹⁶ The thinking behind the EWS was largely taken from the discussions in the European Convention and Working Group No I: see CONV 286/02, 'Conclusions of Working Group I on the Principle of Subsidiarity', Brussels, 23 September 2002.

¹⁷ See Protocol No 2 (n 8) Art 3 and Protocol (No 1) On the Role of National Parliaments in the European Union OJ [2010] C 83/203 ('Protocol No 1'), Art 3 for a definition of this concept.

¹⁸ See Protocol No 2 (n 8), Art 4.

¹⁹ It is assumed here that the Commission drafted the act, otherwise the obligation applies to the institution that drafted the act, see Protocol No 2 (n 8), Art 7(2).

²⁰ If the ordinary decision procedure is not applicable, the threshold for triggering the yellow card is at least one-third of all the votes allocated to the national parliaments, see Protocol No 2 (n 8), Art 7(2).

‘Yellow Card’).²¹ Each national parliament shall have two votes, shared out on the basis of the national parliamentary system. In the case of a bicameral parliamentary system, each of the two chambers has one vote.²²

After reconsideration of a legislative proposal the Commission may then decide to maintain, amend or withdraw it. If it decides to maintain the draft, it should present a justification for this decision. This reasoned opinion together with the reasoned opinions of the national parliaments is then forwarded to the other EU legislative institutions, which shall consider finally whether the legislative proposal is compatible with the principle of subsidiarity. A majority of 55 per cent of the votes in the Council or a majority of the votes cast in the European Parliament can ultimately stop the draft from being adopted.²³

Having explained the workings of the EWS, the remaining part of the section is focussed on examining the national parliaments’ mandate under Protocol No 2. This issue is significant as the scope of the mandate determines to what extent national parliaments can provide a political check on the exercise of EU competences.

A literal, teleological and systemic construction of the Treaties and Protocol No 2 suggests that national parliaments have been conferred with a mandate to only review the ‘subsidiarity’ of a legislative proposal, but not its proportionality, legal basis or political merits.²⁴ In textual terms, it appears from Articles 5(3) and 12 TEU and Article 69 TFEU that national parliaments are responsible to ensure that legislative initiatives comply with the ‘principle of subsidiarity’ in accordance with the procedure set out in Protocol No 2. Whereas Protocol No 2 is generally dedicated to the application of the principles of subsidiarity *and* proportionality,²⁵ the EWS expressly refers only to the ‘principle of subsidiarity’. While Article 1 in Protocol No 2 states that each institution shall ensure constant respect for the principles of subsidiarity *and* proportionality, Articles 6 and 7 specify that a national parliaments’ reasoned opinion should only be concerned with whether the draft act complies with the ‘principle of subsidiarity’.²⁶ The Commission’s obligation to respond to the opinions of the national parliaments is equally

²¹ This threshold shall be a quarter in the case of a draft legislative act relating to the fields of ‘judicial cooperation in criminal matters’ and ‘police cooperation’; Protocol No 2 (n 8), Art 7(2); Art 76 TFEU.

²² See Protocol No 2 (n 8), Art 7(2).

²³ See Protocol No 2 (n 8), Arts 6, 7(3).

²⁴ See Granat and Fabbrini (n 9), 120–125.

²⁵ See Protocol No 2 (n 8), Title.

²⁶ That the reasoned opinion only concerns ‘subsidiarity’ is reinforced by Protocol No 1 (n 17), Art 3.

restricted to addressing ‘subsidiarity’ concerns. It is furthermore prescribed that the EU legislator’s final decision under the EWS procedure as to whether a legislative initiative should be pursued only relates to whether the legislative proposal is compatible with the ‘principle of subsidiarity’.²⁷

Secondly, it appears that the purpose of the EWS was indeed to confine review to subsidiarity. Working Group IV on national parliaments suggested that the Lisbon Treaty should contain wording that acknowledged the importance of the active involvement of national parliaments in the activities of the Union by ensuring the scrutiny of governments’ action in the Council including the monitoring of the respect of the principles of ‘subsidiarity’ and ‘proportionality’.²⁸ However, the report of Working Group I on subsidiarity, underlined that the EWS ensured that national parliaments would primarily contribute to the work of the EU legislature in applying correctly the ‘principle of subsidiarity’. Although there were discussions in Working Group IV to extend the review to competences and proportionality the initial inclinations expressed by Working Group I were difficult to shift. The final report of the two working groups concluded that review by national parliaments should relate ‘exclusively’ to the question of compliance with ‘subsidiarity’ and not to the legal basis, proportionality or substance of the proposal in question.²⁹

Thirdly, it appears that structural considerations support the view that the role of national parliaments under Protocol No. 2 should be limited to a review of the ‘subsidiarity’ of an EU legislative act. The Lisbon Treaty did not entail a transformation of national parliaments into a third legislative chamber at the EU level, next to the European Parliament and Council. There was strong opposition against the proposal of granting a legislative role to national parliaments which would have added another level of decision-making and made the already cumbersome EU law-making system even more complicated. The rejection of a ‘red card’ procedure (which would have vested national parliaments with powers to veto EU legislation) reinforced the intent of the Treaty framers to grant national parliaments a more confined position in the EU legislative process.³⁰

²⁷ See Protocol No 2 (n 8), Art 7(3)

²⁸ See CONV 353/02 (n 7,)10–11.

²⁹ See CONV 286/02 (n 16), 4–8; CONV 353/02 (n 7), 12.

³⁰ See CONV 286/02 (n 16), 6; CONV 353/02 (n 7), 2, 10.

From a functional perspective, broader political control of national parliaments may, however, seem as desirable. By including proportionality in the EWS procedure the national parliaments could examine in addition to the objectives of the action, the precise content and form of that action. The inclusion of proportionality review could also, for example, be justified by the fact that Protocol No 2 and Article 5 TEU address both principles together, and the fact that if a yellow card is triggered, the Commission must review its proposal. The extension of the review procedure to cover competence questions would allow national parliaments to confirm that each legislative proposal has an appropriate legal basis under the Treaties.³¹ Such a broader functionally designed mandate would thereto be more consonant with the national parliaments' current practice of reviewing EU legislation in the light of all the constitutional principles in Article 5 TEU.³²

Granat and Fabbrini have, however, raised comparative institutional arguments opposing such an extension of the mandate to review of proportionality and conferral. The other EU legislative institutions are, according to them, better equipped than national parliaments in evaluating the proportionality and the correctness of the legal basis. By involving multiple EU institutions (the Commission, the Council and the Parliament) the EU political process gives voice to multiple interests. It seems that the suitability and necessity ('proportionality') of a specific piece of EU legislation can be better evaluated by the interaction among EU institutions rather than by the singular assessment of separate national parliaments (whose views often reflect 'minoritarian' bias³³). Moreover, it appears that EU institutions are better furnished than national parliaments in reviewing the legal basis of a legislative measure. Although the Council may not have a comparative institutional advantage over national parliaments in this area, the Court of Justice, with an explicit function to review the legality of EU legislative acts³⁴, appears better endowed with the technical expertise than the national parliaments.³⁵ Weatherill adds to this argument that national parliaments cannot appreciate the complexities of taking decisions in a

³¹ See Diane Fromage, 'The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member State Parliaments?' (2015) *Yearbook of European Law*, doi: 10.1093/yel/yev0241, 14; Weatherill 'Competence creep' (n 11), 41–42, 45–46; House of Lords' European Union Committee, *Role of National Parliaments in the European Union*, 9th Report of Session 2013–14, HL Paper 151, London: The Stationery Office Limited, 26–29.

³² See below Section III- IV.

³³ This concept is derived from Neil Komesar, 'A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society' (1988) 86 *Michigan Law Review* 657, 671–677.

³⁴ See Art 263 TFEU.

³⁵ See Granat and Fabbrini (n 9), 124–25.

transnational context. Within the context of transnational economic integration, a decision taken by one bloc of citizens may have serious negative consequences for another politically more remote bloc of citizens. The idea underlying the legislative process of the Union is to correct such malfunctions. Since national parliaments cannot understand this context, there is a risk that national parliaments may produce selfish Member State-centric outcomes likely to damage the EU's capacity to address effectively transnational dysfunctions.³⁶

There is merit in those arguments. National parliaments will regularly pursue national interests and contest EU legislation on grounds not relating to the pursuit of the 'common good' for the EU.³⁷ It also appears that the EU institutions are well-placed to represent broader interests than national parliaments when controlling compliance with the principles in Article 5 TEU. Due to their special position in the EU legislative procedure, national parliaments may, however, be better positioned than the other EU institutions to police the exercise of EU competences. The Council, the Parliament and the Commission and the Court of Justice have performed poorly to date in taming competence creep. The explanations for the absence of political competence control are well-known. Encroachments on the limits to EU competences are necessary to obtain the confidence needed to achieve a compromise between the Member States and among the members of the European Parliament. By making themselves the vigilant guardians of the constitutional principles in Article 5 TEU, the Parliament and Council would be acting against their legitimate wish to extend its own powers. The Court suffers from similar institutional problems. Whilst the Court may have more expertise in applying the principles in Article 5 TEU, it seems from the Court's past practice that it may not be up for the task of engaging in proper competence control.³⁸ As the other EU political seems to have perverse incentives in pushing EU integration further at all costs, national parliaments may well be the only remaining alternative to provide a safeguard against illegitimate competence creep. The national parliaments have no apparent motivations to push EU integration further. Furthermore, they are only vested with powers under Protocol No 2 to issue reasoned opinions and no veto-powers or

³⁶ See Weatherill, 'Competence creep' (n 11), 33–34; CONV 178/02, Contribution from M Andrew Duff and M Alain Lamassoure, M Olivier Duhamel, M Karel De Gucht, Mme Sylvia Kaufmann, M Josef Zieleniec, members of the Convention, and Mme Pervenche Berès, alternate member, 'Issues of competence and subsidiarity, and confusion arising therefrom', Brussels, 9 July 2002, 3–5.

³⁷ See below Section III and IV for examples of misdirected criticisms against the EPPO Proposal and the proposal for an amended Posted Workers Directive.

³⁸ See further Weatherill, 'Better Competence Monitoring' (n 6) 26–28; Irene Wieczorek, 'The EPPO draft regulation passes the first subsidiarity test: an analysis and interpretation of the Commission's hasty approach to National Parliaments' subsidiarity arguments', (2015) 16 *German Law Journal* 1247, 1263–64.

powers to amend EU legislation.³⁹ The logic behind trusting the monitoring of EU competences to national parliaments is thus that they formally lie outside the EU legislative procedure.⁴⁰

Having said that, it is debateable whether granting such powers to national parliaments is desirable. Efficiency considerations counter against broadening the national parliament's mandate. A more expansive approach under the EWS would replicate the role already played by the 'Barroso initiative' through the political dialogue and increase the total number of reasoned opinions. This would slow down the legislative procedure since the Commission would have to go through and respond to all possible arguments. It may prove to be inefficient as the gathering of national parliamentarians, suffering 25 or so different mandates, timetables and workloads, will have to cope with the large volume of EU legislative acts.⁴¹ Another concern is that more extensive powers vested in national parliaments may encroach on the delicate institutional balance established by the Treaties by conceding too much to Member State control.⁴² Conferring a broader mandate to national parliamentarians risks confusing the role of those and the function of the Parliament and the Council. The role of national parliaments is to control the executive through the Council, not to act as co-legislators with the other EU institutions. The Council, who represent the Member States and thus indirectly the collective interest of national parliaments, and the European Parliament, representing the citizens of the Union, are the institution properly conferred with those tasks.⁴³ It is thereto contested that 'subsidiarity' as a principle contains proportionality review, an argument which has been made by several national parliaments.⁴⁴ Such an argument would clearly encroach on the distinction in Article 5 TEU between the assessment of how the competence is exercised⁴⁵ and the question whether regulatory action should be taken at EU level or national level⁴⁶. Given all this, it

³⁹ See CONV 255/02, Contribution by Mr Haenel, Member of the Convention: 'The complementary role played by the national and European parliaments', Brussels, 10 September 2002, 4–5; House of Lords' European Union Committee on the Role of National Parliaments' (n 31) 30, 52.

⁴⁰ See Arts 289, 294 TFEU.

⁴¹ See CONV 353/02 (n 29), 10–12; Granat (n 13), 322–323, 325.

⁴² See Art 13(2) TEU.

⁴³ See CONV 178/02 (n 36), 3–4; Weatherill, Competence creep' (n 11), 33–34.

⁴⁴ See eg Le Sénat, 'Résolution Européenne Portant Avis Motive sur la conformité au principe de subsidiarité de la proposition de règlement portant création du Parquet européen' (COM (2013) 534) No 26 Sénat Session Ordinaire De 2013–2014, 28 October 2013; Statement by the Committee on Justice, 'Reasoned Opinion of Swedish Parliament- 'Subsidiarity check on the proposal on the establishment of the European Public Prosecutor's Office', 2013/14: JuU13.

⁴⁵ See Art 5(4) TEU.

⁴⁶ See Art 5(3) TEU.

appears that there is a slight preponderance of arguments in favour of maintaining the status quo as regards the national parliaments' narrow mandate under EU law to safeguard the observance of the principle of subsidiarity.

III The Yellow Card against the EPPO Proposal

Having discussed the scope of national parliament's powers under Protocol No 2, the remaining part of the article critically examines how the national parliament perceives its mandate under this protocol. The following section considers the 'second' yellow card issued against the EPPO Proposal.

A *The EPPO Proposal and the Commission's Subsidiarity Justification*

The EPPO Proposal is arguably one of the most important reforms ever in the history of EU criminal law.⁴⁷ It appears that the seeds for the European Public Prosecutor were already envisaged in the mid-1990s with the work of Corpus Juris. This project had suggested a scheme of measures to counter the non-enforcement of offences against the EU's budget including suggestions of a single set of offences applicable throughout the Union, a common set of procedural rules for the investigation and the prosecution of such offences and the establishment of a European Public Prosecutor.⁴⁸ The real impetus for the creation of a European Public Prosecutor is, however, derived from the successful negotiation of the new Article 86 TFEU, which was enshrined in the Lisbon Treaty.⁴⁹ This provision provides the Council with a competence to 'establish a European Public Prosecutor's Office from Eurojust ... in order to combat crimes affecting the financial interests of the Union'. The EPPO shall 'be responsible for investigating, prosecuting and bringing to judgment ... the perpetrators of, and accomplices in, offences against the Union's financial interests'. It shall also 'exercise the functions of

⁴⁷ For a small selection of recent literature: Petter Asp (ed), *The European Public Prosecutor's Office—Legal and Criminal Policy Perspectives* (Jure, 2015); Katalin Ligeti, *Toward a Prosecutor for the European Union Volume I* (Hart Publishing, 2012); Leendert H Erkelens, Arjen WH Meij and Marta Pawlik, *The European Public Prosecutor's Office: An extended arm or a Two-Headed dragon?* (Springer, 2014).

⁴⁸ See Mireille Delmas Marty and John AE Vervaele, *The Implementation of the Corpus Juris in the Member States—Penal Provisions for the Protection of European Finances* (Intersentia, 2001). See also Commission, 'Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor', COM (2001)715 final, for a preliminary discussion on the design of a European Public Prosecutor.

⁴⁹ There was already a similar provision in the failed Constitutional Treaty; see Draft Treaty Establishing a Constitution for Europe, Art 3–274, [2004] OJ C 310/121.

prosecutor in the competent courts of the Member States in relation to such offences.’⁵⁰ Whilst Article 86 TFEU does not in itself establish the EPPO it provides the foundation for its subsequent establishment and constitutes consequently the legal basis for the Commission’s proposal.⁵¹

The rationales for establishing a European Public Prosecutor must be considered in conjunction with the Union’s overall policy to combat irregularities against the EU’s financial interests.⁵² The strategic importance of protecting the EU budget should not be underestimated within this context. Given the current budgetary restraints against Member States and the Union, it is crucial for the legitimacy of the Union that it ensures that the limited financial resources of the Union are used in the best interests of EU citizens. The Commission furthermore perceives that the Member States’ current efforts to protect the EU’s financial interests are insufficient, and that a European Public Prosecutor can address these shortcomings.⁵³

The Commission offers a comprehensive subsidiarity justification for the EPPO Proposal, which is premised both on the Member States’ capacity to reach the main objective of the Proposal,⁵⁴ ie ‘effectively protecting the Union’s financial interests’, and on the need for the Union to show added value in achieving this objective.⁵⁵

The Commission advances several arguments to substantiate that Member States are unable to achieve effective enforcement relating to illegal activities affecting the Union’s financial interests (the ‘national insufficiency test’). It recalls the extent of the problems of fraud and other offences affecting the EU budget which have reached disturbing levels in some areas. Recent analyses⁵⁶ identify ‘suspected fraud’ averaging about EUR 500 million in each of the

⁵⁰ See Art 86 (1)– (2) TFEU.

⁵¹ See Commission, ‘Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office’, COM (2013) 534 final, 2, 4.

⁵² The EPPO Proposal complements the PIF Directive, which determines the criminal offences and applicable sanctions for irregularities against the EU budget and the reform of the OLAF, which reinforce the administrative investigations of various forms of fraud.

⁵³ See Commission, ‘Commission Staff Working Document, Impact Assessment, Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office’, SWD (2013) 274, 7–8.

⁵⁴ This test is commonly known as the ‘national insufficiency test’, see Schütze (n 4) 250. It is built into the first part of Art 5(3) TEU: ‘in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States’.

⁵⁵ This is the ‘comparative efficiency test’ (see Schütze, n 4) built into the latter part of Art 5(3) TEU: ‘but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’.

⁵⁶ Commission, ‘Report from the Commission to the European Parliament and the Council—on the protection of the European Union’s financial interests—Fight against fraud Annual Report 2011’ COM (2012) 408.

last three years.⁵⁷ Despite the extent of the damage of offences against the Union's financial interests and the Member States' commitment under the Treaties to 'afford effective protection' to such interests⁵⁸, there are strong indications that national criminal enforcement to protect those interests is inadequate. Such criminal enforcement is often hampered by divergent legislation and uneven enforcement efforts in the Member States.⁵⁹ These shortcomings cannot, however, be addressed within the existing structures since national law enforcement can only act within national boundaries. Furthermore, Member States does not have the proper incentives to fight fraud against the Union's financial interests since national priorities tend to focus on other types of criminality. The current EU framework does neither confer the Union with the requisite powers. Whilst agencies such as Eurojust and Europol have Union-wide competences in terms of information exchange and coordination, and OLAF may conduct administrative investigations into illegal activities affecting the Union's financial interests,⁶⁰ none of these bodies enjoy powers to conduct criminal enforcement in the Member States. Under the Treaty, such powers can only be given to a European Public Prosecutor.⁶¹

In relation to the 'comparative efficiency test', the Commission suggests that the EPPO provides added value in relation to protecting the Union's financial interests. The EPPO Proposal has an intrinsic Union dimension, particularly by providing for Union-level steering and coordination of criminal enforcement affecting 'its own financial interests'. It is argued that the EU is best placed to protect those interests, if necessary, by ensuring the prosecution of offences against these interests. The Commission also suggests that national prosecution authorities often cannot and lacks incentives to address the 'transnational' elements involved. Finally, the Commission refers to the fact that Article 325 TFEU not only confers competence but also obliges the Union to act to counter fraud and illegal activities affecting the Union's financial interests.⁶²

B The Reasoned Opinions of the National Parliaments

⁵⁷ See SWD (2013) 274 (n 53), 6–7.

⁵⁸ See Art 325 (1) - (4) TFEU.

⁵⁹ See COM (2012) 408 (n 56), 9–19.

⁶⁰ See 1999/352/EC, ECSC, Euratom: Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF) [1999] OJ L 136/20, 31.5.1999, Art 2.

⁶¹ See Art 86 TFEU.

⁶² See Art 325 (1) TFEU; EPPO Proposal (n 51), 2–3; SWD (2013) 274 (n 53), 6–9, 25–27.

The national parliaments' yellow card against the EPPO Proposal was, although not unprecedented,⁶³ striking in demonstrating the nature of serious political control of the exercise of EU competences.⁶⁴ Eleven national parliaments⁶⁵, including 14 chambers, issued reasoned opinions, including both chambers in the United Kingdom (House of Lords and House of Commons) and the Netherlands (Dutch Senate and Dutch House of Representatives). The national parliaments' total reasoned opinions amounted to 22 votes. Since this constituted more than one-third of the total amount of votes (56) allocated to the parliaments, the Commission announced that the yellow card procedure⁶⁶ was triggered on 6 November 2013.⁶⁷

The first point to be made in relation to the national parliaments' review of the EPPO Proposal, is that their examination was not limited to subsidiarity in its Treaty-based definition.⁶⁸ Many of the parliaments' reasoned opinions included in their subsidiarity test the principle of conferral (Article 5(2) TEU) and proportionality considerations (Article 5(4) TEU).

The proportionality-based challenges to the Proposal were addressed to the choice of regulation, the management of the EPPO and its impact on other EU institutions. The Cyprus Parliament suggested that subsidiarity test entailed examining whether the EPPO Proposal went beyond what was strictly necessary in order to achieve the objectives of the Union, as stated in Article 5(4) TEU.⁶⁹ It condemned in this respect the choice of a regulation for the Proposal contending that proportionality entails that the form of an EU action should not be too restrictive and that a directive from this perspective would be preferable.⁷⁰ Another proportionality criticism was that

⁶³ The Yellow Card procedure had been triggered two years earlier in relation to the Monti II regulation: Commission, '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', COM (2012) 130 final.

⁶⁴ See Fromage (n 31), 22–23; Wiczorek (n 38). The parliaments' reactions are perhaps not surprising given the controversial nature of the proposal, in particular the EPPO's potential intrusion into the Member States' core of sovereign powers in relation to criminal enforcement: See Katalin Ligeti and Michele Simonato, 'The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?' (2013) 4 *New Journal of European Criminal Law* 7, 8;

⁶⁵ Holland, Cyprus, Czech Republic, France, Hungary, Ireland, Malta, Romania and Slovenia and Sweden.

⁶⁶ Protocol No 2 (n 8), Art 7.

⁶⁷ See Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2: COM (2013) 851 final, 3.

⁶⁸ See Art 5(3) TEU.

⁶⁹ The French Senate (n 44) and the Swedish Parliament (n 44) endorsed a similar test.

⁷⁰ See House of Representatives of the Republic of Cyprus, 'Reasoned Opinion submitted by the House of Representatives of the Republic of Cyprus with regard to the Commission's proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office [COM (2013) 534]' (executive summary in English), 2.

there are other less far-reaching models measure than the EPPO that could achieve the objectives of protecting the EU's financial interests. The EPPO Proposal was criticised for adversely impacting upon the work of OLAF and Eurojust, highlighting a concern that the transfer of resources and expertise from these institutions to the EPPO would undermine the ability of OLAF and Eurojust to assist and coordinate the work of the Member States.⁷¹ A particular challenge was addressed to the management of the envisaged EPPO where several parliaments argued that the strongly centralised proposal seemed to go beyond what was necessary to achieve the objective of better management. A collegiate mode of governance of the EPPO with rotation country by country of the overall managing role as Chief Prosecutor would meet more acceptance in the Member States.⁷²

Other opinions included considerations of lack of sufficient competence. This included criticism of the EPPO's exclusive competence in relation to offences affecting the EU's financial interests in Article 12 and its thereto attached ancillary competence in Article 13 of the Proposal. It was questioned particularly whether the exercise of this competence exceeded the authorisation enshrined in Article 86 TFEU, since this provision does not provide for such exclusive competence. National parliaments also underlined the lack of clarity in respect of the EPPO's competence and the difficulty of establishing what offences affect only the Union's 'financial interests'.⁷³

⁷¹ See Swedish Parliament (n 44) 1–2; Cyprus Opinion(n 70); Joint Committee on Justice, Defence and Equality (Ireland), 'Reasoned Opinion of Joint Committee on Justice, Defence and Equality, COM(2013)534 Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office', October 2013, 2–3; Seimas of the Republic of Lithuania, Committee on European Affairs, 'Opinion on the European Commission Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office', 16 July 2014, No V-2014-4174L; Chamber of Deputies (Romania), 'Reasoned opinion finding the lack of conformity of the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with the principle of subsidiarity' COM(2013)534 (courtesy translation); House of Commons, 'Reasoned Opinion of the House of Commons concerning a Draft Regulation of the Council on the establishment of the European Public Prosecutor's Office (EPPO)'; House of Lords, 'Reasoned opinion by the United Kingdom House of Lords on Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final', 12558/13, 28 October 2013, 5–6.

⁷² See the French Senate (n 44), Senate of the Republic of Poland, 'Opinion of the European Union Affairs Committee of the Senate of the Republic of Poland on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office' COM (2013)534, adopted at the meeting of 9 October 2013 (courtesy translation); Lithuanian Opinion (n 71).

⁷³ See Lithuanian Opinion (n 71); Hungarian National Assembly, 'Summary of the reasoned opinion adopted by the Hungarian National Assembly on 21 October 2013 concerning the Proposal for a Council regulation on the establishment of the European Public Prosecutor's Office [COM(2013)534]'; 2013/0255(APP); Irish Opinion (n 71); Romanian Opinion (n 71); Dutch Senate of the States General, 'Reasoned opinion (breach of subsidiarity) on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office (DOC(2013)534)', 17 October 2013, 153768.01 U; House of Lords' Opinion (n 71), 5–7.

With regard to the parliaments' understanding of subsidiarity, several parliaments proposed that this principle also entails an assessment of whether the proposed EU legislation entails an unnecessary restriction on Member State competence.⁷⁴ These parliaments were particularly critical of the EPPO's exclusive jurisdiction to not only prosecute crimes against the EU's financial interests⁷⁵ but also prosecute offences inextricably linked with offences against the EU's financial interests^{76,77}. They suggested that criminal law is primarily a national competence and that the criminal enforcement of offences against the financial interests of the EU should be a power of national authorities. Furthermore, as fraud is committed at national level, fighting appropriately against such offences depends mainly on taking a firm line at this level.⁷⁸

The test of national 'insufficiency' was also applied by several national parliaments.⁷⁹ They criticised the Commission for not having examined whether optimising current EU coordination mechanisms and action by the Member States within the existing framework for cooperation would be sufficient for achieving the proposed objectives of the EPPO regulation. It was contended that the Commission should wait for the implementation of the PIF Proposal, the reform of OLAF and the reform of Eurojust and evaluate measures to improve that framework before drawing the conclusion that the proposed objectives cannot be achieved sufficiently well by the Member States. Strengthening the existing framework and improving Member States' control systems would address the issue of the fragmentation of national prosecutions without creating extra fragmentation between separate frameworks for investigating EU fraud in each Member State.⁸⁰

⁷⁴ Such a test is similar to the one of 'federal proportionality' proposed by Schütze (n 4), 265–66.

⁷⁵ See EPPO Proposal (n 51), Art 11(4).

⁷⁶ See EPPO Proposal (n 51), Art 13 providing that 'Where the offences referred to in Article 12 are inextricably linked with criminal offences other than those referred to in Article 12 and their joint investigation and prosecution are in the interest of a good administration of justice the European Public Prosecutor's Office shall also be competent for those other criminal offences....'.

⁷⁷ See Hungarian National Assembly (n 73), 1; Cyprus Opinion (n 70), 2-5.

⁷⁸ See Romanian Opinion (n 71), 2-3; Dutch Senate (n 73); Irish Opinion (n 71), 2-3; Lithuanian Opinion (n 71); Cyprus Opinion (n 70); Polish opinion (n 72); Swedish Parliament (n 44).

⁷⁹ See Art 5(3) TEU.

⁸⁰ See the reasoned opinions referenced in n 67.

The national parliaments furthermore contended that Article 5(3) TEU also requires that the Commission's proposal must conform to the procedural form of subsidiarity.⁸¹ The Cyprus House of Representative contended that subsidiarity entails a presumption for action at Member State action which must be disproven by the EU legislator with convincing evidence. It recognised that the Commission itself, in its cost-benefit analysis (CBA), admitted that the CBA was pushing the limits of what is possible within such an analysis due to the fact that the data available was known to be seriously incomplete (the decision of the location of the EPPO had not been taken and there was no comprehensive analysis of the performance of the Member States' judicial systems).⁸² The Commission nevertheless concluded on the basis of questionable assumptions that more effective prosecution will be achieved through the EPPO failing to substantiate the case for action at the EU level by qualitative and quantitative indicators.⁸³ The Hungarian National Assembly sustained in a similar vein that the real added value of Union action was not sufficiently justified by the EPPO Proposal. It particularly criticised the absence of an analysis of the difficulties concerning the implementation of the rules in the Proposal on ancillary competence, the right to reallocate cases, the determination of jurisdiction, or the admissibility of evidence.⁸⁴ The Swedish Parliament contended that the Commission had been unable to show that the aim of this proposal, ie to efficiently combat crimes against the financial interests of the EU, could be better achieved via further measures at EU level instead of at national level nor that national measures would be insufficient to achieve said objective.⁸⁵ The House of Commons underlined that the onus is on the Commission to provide a convincing justification of why it considers that a proposal complies with the principles of subsidiarity. In the absence of such a justification, there is a breach of that principle. They also reached the conclusion that the Commission had failed to provide sufficient

⁸¹ See Fromage (n 31), 13; Philip Kiiver, 'The Conduct of Subsidiarity Checks of EU Legislative Proposals by National Parliaments: Analysis, Observations and Practical Recommendations' (2012) 12 *ERA Forum* 535; Wieczorek (n 38), 1254-57.

⁸² See SWD (2013) 274 (n 53), 16-17.

⁸³ See Cyprus Opinion (n 70) 2-3; Protocol No 2 (n 8), Art 5.

⁸⁴ See Hungarian National Assembly (n 73) 1; Irish Opinion (n 71); Romanian Opinion (n 71), 2-3; Croatian Parliament, 'Opinion of the European Affairs Committee on the Proposal for a Regulation on the establishment of the European Public Prosecutor's Office', Zagreb, 1 April 2014 (courtesy translation), 2-3, Dutch House of Representatives of the States General, 'Reasoned opinion (breach of subsidiarity) on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office (DOC(2013)534', The Hague, 10 October 2013 (courtesy translation); House of Lords' Opinion (n 71); underlining the procedural obligations in Art 5 of Protocol No 2 and the Commission's failure to show added value of EU action.

⁸⁵ See Swedish Parliament (n 44), 2-3.

qualitative and quantitative substantiation for action at EU level thus breaching Article 5 of Protocol (No 2).⁸⁶

Some national parliaments also applied the ‘comparative efficiency’ test in Article 5(3) TEU, holding that the EU legislator must show by cogent evidence that action at the EU level, rather than at Member State level provides for added value.⁸⁷ The House of Lords’ and the House of Commons’ opinions questioned the advantages of the Proposal arguing that the Commission’s estimate of the costs and benefits lacked credibility. The Commission estimated start-up costs chargeable against the EU budget at EUR 2.5 million and annual running costs of EUR 6.1 million, which appeared too low for an organisation which is expected to be responsible for a caseload of 2,500 complex fraud cases per year. The benefits were also based on questionable assumptions (given that the EPPO’s powers largely replicate those already available to national authorities), including an increase rate of convictions of almost 25 per cent, and a rate of recovery of the sums defrauded of 15 per cent.⁸⁸

C Evaluating the Merits of the National Parliaments’ Objections

The Commission did not, as in the case of the Monti II regulation, withdraw its proposal but proceeded to forward it to the Council and the Parliament.⁸⁹ It defended fiercely the Proposal by addressing most of the criticisms raised by the national parliaments. The Commission did, consistent with the argument above⁹⁰, discard arguments not connected to subsidiarity (eg ‘proportionality’ and ‘lack of competence’).⁹¹ It argued that the EPPO Proposal contained sufficient reasoning and quantitative and qualitative indicators thus conforming to the

⁸⁶ See House of Commons’ Opinion (n 71), 3–4. House of Lords’ Opinion (n 71) 7.

⁸⁷ See Cyprus Opinion (n 70), 2; The Parliament of the Czech Republic Senate, ‘On the Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office’, 9th Term Committee on EU Affairs, 180th resolution delivered on the 18th meeting held on 8 October 2013, Senate Press no N 082/09, 2–3.

⁸⁸ See House of Lords’ Opinion (n 71), 4–8; House of Commons’ Opinion (n 71), 6–8; Irish Opinion (n 71).

⁸⁹ Although the Proposal has been substantially revised through discussions in the Council, a general approach has been agreed by the Council and the Parliament. The Proposal cannot, however, be adopted by unanimity as Sweden has confirmed that it will not participate in the Regulation: Council, ‘From Presidency to the Council’ Proposal for a Regulation on the establishment of the European Public Prosecutor’s Office’, *General approach*, 5445/17, Brussels, 31 January 2017. With reference to the exclusive competence of the EPPO, it was, also proposed by the Greek presidency that it should be exchanged for a concurrent competence, which means that both the EPPO and national prosecution authorities are competent to enforce crimes against the EU budget: Council ‘From Presidency to the Council’ Proposal for a Regulation on the establishment of the European Public Prosecutor’s Office’, *Draft Regulation*, 5766/17, Brussels, 31 January 2017, Arts 17 and 20.

⁹⁰ See above Section II.

⁹¹ See Commission Communication (n 67), 4–5.

procedural requirements of the Treaties.⁹² The Commission contended, in contrast to the national parliaments' arguments, that the Proposal both satisfied the Member States insufficiency test and the 'comparative efficiency' test.⁹³ The Member States' feeble track record and perverse incentives in prosecuting crimes against the EU's financial interests as well as the intrinsic 'Union dimension' of the measure were key arguments in defending the proposal.⁹⁴

The argument pursued here largely agrees with the Commission's contentions. The legitimacy of the national parliaments needs however to be more comprehensively analysed. The 'national insufficiency' test is first considered. A review of the EPPO Proposal and the impact assessment suggests that the Commission both with cogent reasoning and qualitative and quantitative indicators showed that the action of the Member States is insufficient with reference to the objective of effectively enforcing offences against the EU's financial interests. Contrary to the allegations of the House of Commons, the Commission explained in detail why it considered that Member State action would be insufficient in achieving this objective. It also submitted reasons that were connected to the substantive understanding of subsidiarity embraced by the Court of Justice.⁹⁵

The key argument, which appears compelling, is that the Member States' track record in enforcing offences against the EU's financial interest was feeble and not expected to improve in the future. The Commission was also able to substantiate the contention that the Member States' current activities were insufficient to achieve the objective of an effective protection of the EU's financial interests. The analysis of OLAF's annual statistics indicated that national criminal proceedings were not effective (showing that no judicial decisions had been taken in 54.3 per cent of the actions in the period between 2006 and 2011⁹⁶) and that more than half of

⁹² See Protocol No 2 (n 8), Art 5; Art 296 TFEU.

⁹³ Referring to the case law of the Court of Justice to support their contentions: Case C-58/08 *Vodafone* [2010] ECR I-4999, para 72; Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079, para 32.

⁹⁴ See Commission Communication (n 67), 6–12.

⁹⁵ See, however, differently Fromage (n 31), 9–10, 17 and Wiczorek (n 38), 1254–57, arguing that the Commission's reasoning was insufficient. Fromage argument is premised on the basis that the Commission could only conform to its obligation to provide reasoning by giving subsidiarity arguments in the explanatory memorandum. This view, although plausible, is contradicted by the Court of Justice's case law in Case C-58/08 *Vodafone* (n 93) which suggests that the EU legislator can conform to reasoning requirements by employing also other preparatory documents such as the impact assessment.

⁹⁶ Percentage of actions transferred in the period from 2006 to 2011 by OLAF to Member States without reported judicial decisions; see OLAF, 'The OLAF report 2011' (Luxembourg, Publications Office of the European Union, 2012) table 6, 20.

actions transferred by OLAF⁹⁷ to the judicial authorities of the Member States in the same period were dismissed before trial and the average conviction rate remained low (42.3 per cent).⁹⁸

It also appears clear that the Commission would not have to prove that all Member States' prosecution powers works poorly to meet the 'national insufficiency' test.⁹⁹ Article 5(2) TEU suggests that a necessary condition for Union action is that at least one Member State has inadequate means at its disposal for achieving the objectives of the proposed action.¹⁰⁰ It is, however probably sufficient if one Member State does not achieve the stated EU objective.¹⁰¹ In this respect it seems, as contended below, very unlikely that Member States ever would achieve the objective of enforcing crimes against the EU's interests. Having said that, it may be queried whether arguments based on Member State sufficiency would have any import for the final subsidiarity assessment. This is because the need for EU action can also be demonstrated if the Union would be substantially more efficient than Member State action, eg when the EU can produce the required outcome at a considerably lower cost than Member States.¹⁰² 'Functional' and 'consequentialist' considerations favours focusing on the 'comparative efficiency' test when assessing subsidiarity compliance.¹⁰³ For subsidiarity to maintain its capacity to function in an efficient way and to not overburden the Court in its task of applying the principle, the interpretation of subsidiarity must focus on the 'comparative efficiency' test. It would always be difficult for claimants to argue, based on competing scenarios that Member States' actions could have reached the same objective and for the Court of Justice to evaluate this issue.¹⁰⁴ By focusing on Member State alternatives, we would also

⁹⁷ 51.2% of the actions transferred in the period from 2006 to 2011 by OLAF to Member States with reported judicial decisions that were dismissed before trial, OLAF report 2011 (n 96), table 6, 20.

⁹⁸ See Commission Communication (n 67), 3–4.

⁹⁹ See, however, Wieczorek (n 38), 1258-59 making such an argument.

¹⁰⁰ See Koen Lenaerts, 'Subsidiarity and Community Competence in the Field of Education', (1994) 1 *Columbia Journal of European Law* 1, 22.

¹⁰¹ The Court would never accept a more stringent understanding of this condition: See Case C-547/14 *Philip Morris Brands and Others* (Court of Justice, 4 May 2016), paras 220-226; Joined cases C-154/04 and 155/04 *Alliance for Natural Health and others* [2005] ECR I-06451, paras 104-107; Case C-58/08 *Vodafone and Others* (n 93), paras 72-80.

¹⁰² The reference in, Article 5 TEU to 'the scale or effects of the proposed action' supports the primacy of the 'comparative efficiency' test.

¹⁰³ These are well-recognized method of interpretation of EU Law; Giulio Itzcovich, 'The Interpretation of Community Law by the European Court of Justice' (2009) 10 *German Law Journal* 537, 549- 555; Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart Publishing, 2012) 210-219.

¹⁰⁴ See George Bermann 'Taking subsidiarity seriously' (1994) 94 *Columbia Law Review* 332, 391-92.

miss the essential question of subsidiarity which is whether there is a transnational market failure or transnational interests which the Union legislator is capable of addressing.¹⁰⁵

Following this line of argument, it appears that the Commission put forward plausible reasoning to support the ‘comparative efficiency’ of EU action in achieving the objectives of the EPPO Proposal. The basic rationale for EU action is that the EPPO’s competence is limited to ‘criminal offences affecting the financial interests of the Union’.¹⁰⁶ This argument is compelling. If one considers in which situations it is important to have special protection for Union interests it is in such scenarios where that interest would not, because of Member States’ perverse incentives, be protected by the Member States. The EU institutions have much less capacity to influence a specific Member States’ legislation unless they require Member States to take their interest into account. Member States are neither likely to give special protection to EU interests or transnational interests when legislating. There is, as argued by Neyer and Joerges, a legitimate suspicion that the legitimacy of governance of Member States may because of ‘protectionist’ reasons be flawed in certain situations. Because a single states’ democracy represents collective identities of the citizens of that state, it may not have proper mechanisms ensuring that foreign interests are considered properly within their decision-making processes. It appears sensible to have special protection for the interests of the Union, where those interests, because of ‘protectionist’ and ‘pecuniary’ reasons, are not likely to be protected by the democratic processes within the Member States. National public authorities do not, although many national parliaments contended it to be otherwise, have the same incentives as an impartial European Public Prosecutor to defend the financial interests of the EU. It is thus precisely the transnational dimension of the proposed action, ie that it directly concerns the Union’s financial interests, which makes the EU a more legitimate body than Member States to act on a matter.¹⁰⁷

For the same reasons, the national parliament’s criticism of the annex competence in Article 13 of the proposed EPPO regulation, which is not restricted to offences against the EU’s financial

¹⁰⁵ See Koen Lenaerts, ‘The Principle of Subsidiarity and the environment in the European Union: Keeping the balance of federalism’ (1994) 17 *Fordham International Law Journal* 846, 875-880; Edward T Swaine, ‘Subsidiarity and self-interest: Federalism at the European Court of Justice’ (2000) 41 *Harvard International Law Journal* 1, 53-55.

¹⁰⁶ See EPPO Proposal (n 51), Art 12.

¹⁰⁷ See Christian Joerges and Jürgen Neyer, ‘From intergovernmental bargaining to deliberative processes: The constitutionalisation of comitology’ (1997) 3 *European Law Journal* 273, 294–5; Alexander Somek, ‘The argument from transnational effects I: Representing outsiders through freedom of movement’ (2010) 16 *European Law Journal* 315, 323-325, 329 for a general account of this argument.

interests, appears convincing. The Commission contended that crimes affecting the financial interests of the Union are often linked to other crimes that do not affect those interests thus justifying EU action. Without joined prosecution there would be a risk for parallel enforcement concerning closely connected offences (potentially breaching the principle of *ne bis in idem*) which would undermine the efficiency of anti-fraud activities.¹⁰⁸ Although there is a pragmatic thrust behind the Commission's argument, it is incompatible with the subsidiarity principle. Subsidiarity only allows for EU action in cross-border situations where the democratic process within the Member States is likely to lead to a failure to protect such interests.¹⁰⁹ The situation with regard to ancillary offences does not (not being addressed to the Union's financial interests), however, concern transnational interests. In such a scenario Member States have no perverse incentives to not prosecute such offences (as compared to the case of offences against the EU's financial interests) and may be well-placed to enforce such offences given their understanding of the local situation.¹¹⁰

Another subsidiarity concern with the EPPO Proposal was whether it would be necessary for the EPPO to also have competence over cases affecting the Union's financial interests but were lacking cross-border implications. The Commission argued that the inclusion of such cases within the EPPO's remit would be the most effective way of ensuring an effective Union-wide prosecution policy. This is an intricate issue since the EPPO's competence, according to a strict understanding of subsidiarity, should be limited to pure cross-border cases, where either a victim or a suspect is involved in a trial in another state than the state in which they are citizens.¹¹¹ A more appropriate interpretation which restrains EU competence in a reasonable way without hampering the pursuit of effective criminal enforcement is that the remit of Article is not only limited to 'pure' cross-border cases but also covers cases which have a strong transnational dimension, i.e. potential transnational implications cannot be used as justifications

¹⁰⁸ See Commission Communication (n 67), 4–12.

¹⁰⁹ See Richard Lang, 'The EU's New Victims' Rights Directive: Can Minimum Harmonization Work for a Concept like vulnerability?' (2013) 22 *Nottingham Law Journal* 90, 94; House of Lords' European Union Committee, *The European Union's Policy on Criminal Procedure*, EU Sub-Committee E (Justice and Institutions), EU Criminal Procedure Policy, Bar Council of England and Wales—Written Evidence, 30th Report of Session 2010–12, HL Paper 228 (London: The Stationery Office Limited) 13.

¹¹⁰ See nn 73-78 for the national parliaments' criticism of the annex competence.

¹¹¹ See Kimmo Nuotio 'Harmonization of Criminal Sanctions in the European Union—Criminal Law Science Fiction' in Asbjørn Strandbakken and Erling Johannes Husabø (eds), *Harmonization of Criminal Law in Europe* (Intersentia, 2005) 465–466, 470.

for the EPPO to act on the matter.¹¹² This could be the case where the defendant is from the same Member State but where the criminal act has taken place in another Member State or where the act is committed against the EU's financial interests. Regardless whether the case of fraud only has local implications, the Union should be able to protect its budget and act on the matter where the offence is directed against the EU's interests.¹¹³ This is again because Member States, as proposed above and recognised by some national parliaments,¹¹⁴ are unlikely to give priority to protecting such interests. The need to confer the EPPO this wider competence arises out of the nature of the crimes in question, which by affecting the Union's own financial interests has an intrinsic Union dimension.¹¹⁵ From this perspective it appears that the limitation of the EPPO's competence to 'criminal offences affecting the financial interests of the Union' is substantiated by plausible qualitative indicators as required by the subsidiarity principle.¹¹⁶

In terms of the national parliaments' argument that existing EU structures were adequate, the Commission legitimately contended that those structures would not be sufficient to achieve the objective of fighting fraud effectively.¹¹⁷ The proposed reforms of OLAF and Eurojust could not lead to any substantial improvements since those structures by their very nature cannot address the insufficient level of enforcement in the Member States. The powers of OLAF are limited to administrative investigations and it cannot involve itself in carrying out criminal proceedings.¹¹⁸ Eurojust's powers are equally limited as it cannot conduct proceedings by themselves nor be given such powers under the Treaties.¹¹⁹

The criticism of the House of Lords and the House of Common that the EPPO system might not bring the added value claimed by the Commission is, however, partly endorsed. It is unconvincing to argue, as the Commission does, that divergences *per se* between the Member States on how Union fraud is enforced constitute support for Union action. There is also meagre

¹¹² See Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-08419, paras 83–84.

¹¹³ See differently Wiczorek (n 38), 1262–63 criticising the extension of EPPO competence to crimes having only a national dimension.

¹¹⁴ See Lithuanian Opinion (n 71); Hungarian National Assembly (n 71); Irish Opinion (n 71); Romanian Opinion (n 71); Dutch Senate of the States General (n 73); Dutch House of Representatives (n 84); House of Lords' Opinion (n 71).

¹¹⁵ See EPPO Proposal (n 51), 4; Commission Communication (n 67), 11–12.

¹¹⁶ See Protocol No 2 (n 8), Article 5.

¹¹⁷ See Commission Communication (n 67), 7–8.

¹¹⁸ See OLAF Decision (n 60), Art 2.

¹¹⁹ See Art 85 TFEU.

support for the claim that an absence of action will lead to forum shopping by perpetrators. On the contrary there is no compelling evidence substantiating that fraudsters consider the contended higher plausibility of prosecution argued to be happening by the EPPO regulation.¹²⁰ The Commission is nevertheless right to argue that the EPPO might bring an added value by possibly discovering cross-border links which would not be noticed in national investigations. It would also be capable of more effectively direct investigations, by pooling expertise and know-how in the EPPO. The EPPO would furthermore have an overview of all the available information and thus be able to determine where the investigation can most effectively be pursued. The strength of the Commission's argument is somewhat reduced by the fact that geographical fragmentation and the specificities of the AFSJ entail that the Commission may not be able to ensure uniform prosecution practices of the Member States. However, it is arguable that the Commission is not striving for a uniform regime but that it may be satisfied with a more coherent Union-level prosecution regime.¹²¹ The 'fragmentation' argument would also, if taken seriously, have unreasonable repercussions. It would mean that all legislative initiatives under the AFSJ would fail the subsidiarity test as the EU legislative act would not apply uniformly in the Member States.¹²² Given all this, it appears that the Commission's argument on the EPPO's added value is substantiated and thus arguably consistent with the subsidiarity principle.¹²³

IV The Third Yellow Card Against the Amended Posted Workers Directive

The most recent Yellow Card concerns the very contested proposal for an amended Posted Workers Directive.¹²⁴ The Commission accepted on 20 July 2016 that the national parliaments successfully had been able to trigger the Yellow Card for this proposal.¹²⁵ Within the deadline

¹²⁰ See for this general argument Thomas Elholm, 'Does EU Criminal Cooperation Necessarily Mean Increased Repression?', 17 (2009) *European Journal of Crime, Criminal Law and Criminal Justice* 191, 221; Sakari Melander, 'Ultima Ratio in European Criminal Law', 3 (2013) *European Criminal Law Review* 45, 56–59.

¹²¹ See Commission Communication (n 67), 9; SWD (2013) 274 (n 53), 26-27.

¹²² See, however, Wiczorek (n 38), 1260-1261.

¹²³ See Commission Communication (n 67), 9–10.

¹²⁴ See Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of service, COM (2016) 128 final.

¹²⁵ The Proposal is not likely to be adopted in the near future due to serious political divisions among the 'old' (Western Europe) and 'new' Member States (Central and Eastern Europe) as regards the necessity of more stringent regulations of posted workers' rights: See Diane Fromage and Valentin Kreillinger, 'National

laid down in Protocol No 2 fourteen chambers of national Parliaments sent reasoned opinions pertaining to said directive, thus triggering the procedure.¹²⁶ This controversial case study shed further light on the use by national parliaments of their powers and how one could conceptualise subsidiarity. Whilst this seems at first sight as repetition of the first yellow card against the Monti II Regulation, which also concerned the balance of free movement of services and concerns for social dumping¹²⁷, it will become clear in the following that the circumstances were different

A The Revised Commission Proposal on Posting of Workers

It is commonplace that posting, and its regulation is open to debate. It will always be delicate to strike the appropriate balance between the need to safeguard the transnational provision of services and the legitimate need for host Member States to apply and preserve their labour laws and industrial relations.¹²⁸ The prominent and contentious *Laval*¹²⁹ and *Viking*¹³⁰ judgments from the Court of Justice exposed the difficulty of reconciling the two objectives pursued by the Posting Directive 96/71/EC, namely that of the facilitation of the provision of services within the internal market and that of the protection of the rights of posted workers.¹³¹ In the aftermath of *Laval* and *Viking*, the Commission has proposed to revise the previous Directive 96/71/EC, primarily with the objective of finding a balance closer to the ideas of a ‘social market economy’.¹³²

Parliament’s Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive’ 10 (2017) *European Journal of Legal Studies* 125,154-158; Catherine Stupp, ‘Divides deepen between member states over posted workers bill’ (Euractiv.com, 24 March 2017): <https://www.euractiv.com/section/economy-jobs/news/divides-deepen-between-member-states-over-posted-workers-bill/>.

¹²⁶ See Protocol No 2 (n 8), Article 6 and 7; COM (2016) 505 final, 2.

¹²⁷ See Granat and Fabbrini (n 9), 126-139 for a comprehensive discussion of the Monti II Proposal and its context.

¹²⁸ See for a small sample of contributions: Claire Kilpatrick, ‘Laval’s Regulatory Conundrum: Collective Standard-Setting and the Court’s New Approach to Posted Workers’ (2009) 34 *European Law Review* 844; Anne Davies, ‘One Step Forward, Two Steps Back? Laval and Viking at the ECJ’ (2008) 37 *Industrial Law Journal* 126; Norbert Reich, ‘Free Movement v Social Rights in an Enlarged Union – the Laval and Viking Cases Before the ECJ’ (2008) *German Law Journal* 125.

¹²⁹ Case C-341/05 *Laval* [2007] ECR I-11767.

¹³⁰ Case C-438/05 *Viking* [2007] ECR I- 10779.

¹³¹ See Fromage and Kreillinger (n 125).

¹³² See Loïc Azoulay, ‘The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization’ (2008) 45 *Common Market Law Review* 135; Jean-Claude Juncker, ‘State of the Union 2016’ (European Commission, 14 September 2016), http://europa.eu/rapid/press-release_SPEECH-16-3043_en.htm. Accessed 11 December 2017.

The Commission justified the revised Posting of Workers Directive along these lines. The Commission sustained that the 1996 Directive established a structural differentiation of wage rules applying to posted and local workers which is the source of an unlevel playing field between posting and local companies. The key problem with the 1996 Directive according to the Commission is that it allows service providers to apply their own labour laws to their workers with the only exception that the host state could impose a core of minimum rules (eg salaries and vacation).¹³³ The Commission's real concern are differentiation on wages, particularly between posted workers from low-cost economies and local workers in high-cost economies. Such differentials are estimated to be the driving factor of flows from low- to high-wage countries, which represented one third of the total stock in 2014, and part of the comparative advantage for a further 15% of workers being posted from medium- to high-wage countries. Such differentiation translates into a competitive advantage for posting companies over local companies in receiving countries as the former need only adhere to statutory minimum wage requirements or such minimum salaries that follows from universally applicable collective agreements. This practice is claimed to be inconsistent with the principle that service providers ought to pursue their business under the same terms that are imposed by the state on its own nationals (the 'level playing field').¹³⁴ The general argument is well-rehearsed in literature which suggests that the current system imposed by the 1996 Directive leads to displacement of local workers in labour intensive sectors and a 'race to the bottom' caused by ever reduced salaries and standards for workers.¹³⁵

The Commission's proposal to amend the 1996 Directive entails the introduction of equal rules on the remuneration of posted workers, coupled with the extension of the validity of universally binding collective agreements to posted workers in all economic sectors. It removes the reference to 'minimum' rates of pay applicable to posted workers and ensures that all the elements of remuneration legally applicable to local workers in host Member States become

¹³³See Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1, Art 3.

¹³⁴ See Commission, 'Commission Staff Working Document, Impact Assessment, Accompanying the document Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services', SWD (2016) 52 final, 33-39; Art 57 TFEU.

¹³⁵ See Jan Cremers, 'Economic freedoms and labour standards in the European Union' (2016) 22 *Transfer: European Review of Labour and Research* 149,157; Catherine Barnard, 'Social dumping and the race to the bottom: some lessons for European union from Delaware?' 25 (2000) *European Law Review* 57; Aukje van Hoek and Mijke Houwerzijl, 'Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union' (2011), 21 March 2011. Available at: http://csdle.lex.unict.it/Archive/LW/Data%20reports%20and%20studies/Others%20reports%20and%20studies/20110422-124139_Posting_workers_Mar11pdf.pdf. Accessed 31 January 2018.

applicable to posted workers.¹³⁶ The principle of equal treatment is also imposed with regard to posted workers in sub-contracting chains and posted workers hired out by temporary agencies to ensure sufficient protection for such workers (which are in a particularly vulnerable position).¹³⁷ It also addresses the mismatch between the rules on posting and the Regulation on the coordination of social security systems which entails that posted workers are considered as integrated into the host country after 24 months entailing the full application of the host state's labour laws. The socio-economic thrust is thus to alleviate the present claimed competitive advantage of posting firms with reference to local firms in the host state arising from differentiated wage treatment of posted workers with respect to local workers in the host country. The Proposal benefits domestic firms (especially SME's, in higher-wage countries) vis-à-vis low-wage competitors by being able to compete more efficiently on non-wage factor and thereto workers from low wage-countries which will obtain the entitlement to the remuneration conditions set by company-level agreement where collective agreements are not universally applicable.¹³⁸

The Commission's subsidiarity argument centres on the Union dimension of posting and the fact that posting plays an essential role in the internal market.¹³⁹ The aims with the Proposal, which are to facilitate the cross-border provision of services through posting of workers by improving the clarity of applicable labour rules in the host Member State, to ensure a level playing field between posting companies and local companies in the host Member State and to safeguard that posted workers have an adequate level of protection in the host Member State, cannot be achieved by Member State action alone. A framework for posting of workers between Member States can thus only be established at EU level. The Proposal does not change the approach of the 1996 Directive which only provided for an EU-wide hard core of protective rules of the host Member State which had to be applied to posted workers. The Proposal thus respects the competence of national authorities and social partners to establish their labour legislation, organise wage-setting systems and determine the level of remuneration in accordance with national law and practices.¹⁴⁰

¹³⁶ See COM (2016) 128 (n 124), Amended Art 3(1) of Directive 96/71/EC, 11.

¹³⁷ See COM (2016) 128 (n 124), Amended Art 3(1) B and 3(1) C of Directive 96/71/EC, 11.

¹³⁸ See SWD (2016) 52 (n 134), 9-21, 42-48.

¹³⁹ See COM (2016) 128 (n 124), 2.

¹⁴⁰ See SWD (2016) 52 (n 134), 19-20.

B Analysis of the Arguments of the National Parliaments

The primary objection voiced by national parliaments in their reasoned opinions is that the PWD Proposal breaches the Treaty provisions relating to the free movement of services.¹⁴¹

Whilst the legal basis of the Proposal is identical to Directive 96/71/EC there has been a clear shift in focus. Instead of facilitating the free movement of services, the Proposal concerns primarily the workers' protection and the fight against social exclusion. The argument suggests that service providers legitimately should be able to use their competitive advantage brought by differences in remuneration. It is argued that the new rules on equal pay for 'national' workers and posted workers restricts business opportunities for providing transnational services and leads to more expensive services.¹⁴²

Although the argument appears compelling, this is an objection of legal basis and not subsidiarity. These opinions express criticism pertaining to the EU's competence rather than assessing the need for EU action (subsidiarity). The argument that the differences in labour

¹⁴¹ See Art 56 and 59 TFEU.

¹⁴² See Seimas of the Republic of Lithuania, 'Committee on European Affairs, Conclusion on Potential Non-Compliance with the Principle of Subsidiarity of the Proposal of the European Commission for a Directive of the European Parliament and of the Council Amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 Concerning the Posting of Workers in the Framework of the Provision of Services', Document No COM (2016) 128 final, 20 April 2016 No 100-P-43, 2; Parliament of Romania, Chamber of Deputies, 'Decision regarding the adoption of the reasoned opinion on the Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM (2016) 128' (Courtesy Translation), 13 April 2016, 2-4; The Senate of the Parliament of the Czech Republic, Resolution of the Senate, 'On the Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Senate Print no. N 077/10, COM(2016) 128', Delivered on the 23rd session held on 27th April 2016; Hungarian National Assembly, Committee on European Affairs, Reasoned Opinion (Courtesy Translation), 10 May 2016; The European Affairs Committee of the National Council of the Slovak Republic, 'Resolution regarding the proposal for a directive of the European Parliament and the Council amending the Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (COM(2016)128' (Courtesy translation), 10 May 2016; Romanian Senate, 'Reasoned Opinion of the Senate of Romania on the proposal for a directive of the European Parliament and the Council amending the Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services COM(2016)128' (Courtesy translation), 4 May 2016, 2; Riigikogu, 'Resolution of the Riigikogu, Reasoned Opinion to the Presidents of the European Parliament, the European Commission and the Council of the European Union on Non-conformity to the Principle of Subsidiarity of the Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services' (Courtesy translation), 10 May 2016; Croatian Parliament, European Affairs Committee, 'Reasoned Opinion on Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services COM (2016) 128' (Courtesy translation), 6 May 2016; European Affairs Committee of Saeima, 'Opinion on COM (2016) 128 Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services' (Courtesy translation), 5 May 2016.

costs are a legitimate element of companies' competitiveness in the EU internal market is also a question of competence as it is directly addressed to the problems with the use of the legal basis of Articles 53(1) and 62 TFEU.¹⁴³ The contention by some national parliaments that the Proposal did not sufficiently respect the autonomy of social partners and their relations within the collective negotiation was equally an objection to competence rather than subsidiarity. This was apparent from the fact that these parliaments argued that the Proposal for these reasons breached Article 152 TFEU. The latter is a question of substance rather than a question of which is the best regulatory level.¹⁴⁴ Another competence-related objection advanced by the parliaments was that the Proposal breached Article 153 TFEU by setting the remuneration for posted workers. It was sustained that Article 153(5) TFEU excludes EU competence in this matter and that the rules relating to remuneration matters fall within the exclusive power of Member States.¹⁴⁵ This argument is clearly a competence objection as it questions whether the Union acts contrary to the distribution of competences between Member States and the Union. Apart from the fact that it is highly questionable whether the proposed directive in a strict sense determines the system for setting remuneration (given that the proposal does not replace national system but only gives the possibility to Member States to impose their own rules on remuneration on service providers¹⁴⁶) this contention falls beyond the national parliaments' remit under Protocol No 2.¹⁴⁷

Whilst the Commission did not sufficiently underline this point, the key justification for holding that the Proposal respects subsidiarity is (as in the case of the 'failed' Monti II regulation) that the regulation of posting is an issue of an intrinsic transnational character. The cross-border element manifests itself in the fact that a service provider decides to temporarily pursue its business in another Member State by means of posted workers. Posting therefore always requires a transnational movement of posted workers as well as the cross-border provision of

¹⁴³ See Commission, 'Communication from the Commission to the European Parliament, the Council and the National Parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2', COM (2016) 505 final, 6-7; Fromage and Kreillinger (n 125), 149-151.

¹⁴⁴ See Czech Senate (n 142); Slovakian Opinion (n 142); Croatian Opinion (n 142).

¹⁴⁵ See Parliament of Denmark European Affairs Committee, 'Reasoned opinion on the Commission proposal for a revision of the Posting of Workers Directive', 6 May 2016; Hungarian Reasoned Opinion (n 142); Slovakian Opinion (n 142).

¹⁴⁶ See COM (2016) 128 (n 124), amended Art 3(1) and recital 12, 10-12.

¹⁴⁷ See Section II for this argument.

services by such workers. The Proposal thereto claims to facilitate exercising the free movement rights enshrined in Article 57 TFEU by addressing inconsistencies in current EU rules.¹⁴⁸

The intriguing subsidiarity question is what happens when the EU legislator intervenes, not to address a transnational market failure (eg obstacles to the fundamental freedoms movement or distortions to competition) but instead legislate primarily to correct the rise of ‘social’ problems/exclusionary effects caused by wage competition between posted workers and national workers. In this scenario, it is contestable whether the main thrust of EU economic regulation, the correction of market failures caused by ‘protectionist’ regulation can explain the need for EU action.¹⁴⁹ The argument for EU intervention would be that the potentially ‘vulnerable’ group of persons in this instance, the posted workers, may not be protected by the Member State where they temporarily perform their work. The rights of those workers would then be safeguarded by common EU rules.¹⁵⁰ It is, however, debateable whether this group of people will be protected by the Proposal. The likely consequence of the Commission’s proposal for equal rules on remuneration for posted workers and national workers is that it will not be profitable for service providers to engage in transnational posting practices. Since posting companies in labour intensive sectors compete mainly on labour costs their competitiveness will be reduced substantially if the Commission’s proposed stricter rules on wages are imposed. The PWD Proposal would thus have the consequence that many workers cannot move to another Member State to perform their work since there is no incentive for firms to engage in the cross-border provision of services by posting.¹⁵¹ This would in its turn entail that posted workers will potentially have no work to perform as their firm cannot profitably maintain a working force in the absence of the possibility to post workers to other Member States. Moreover, contrary to what is commonly perceived¹⁵² posting appears overall to have positive effects. Recent research suggests that posting does not generally lead to displacement of local labour force (although it could occur in some sectors and in some Member States) nor degeneration of labour standards. There is instead evidence suggesting that posting is likely to

¹⁴⁸ See COM (2016) 505 (n 143), 6-7; Granat and Fabbrini (n 9) 121; Romanian Chamber of Deputies (n 142).

¹⁴⁹ See Mattias Kumm, ‘Constitutionalizing Subsidiarity in integrated markets: The case of tobacco regulation in the European Union’ 12 (2006) *European Law Journal* 505, 506-521, for this argument.

¹⁵⁰ See Joerges and Neyer (n 107); Kumm (n 149); Somek (n 107), for this general argument.

¹⁵¹ See SWD (2016) 52 (n 134), 29-43.

¹⁵² See Barnard (n 135); Jan Cremers ‘In search of cheap labor in Europe’ (2010) CLR European Institute for Construction Labor Research; Jon Kvist ‘Does EU enlargement start a race to the bottom? Strategic interaction among EU member states in social policy’ 14 (2004) *Journal of European Social Policy* 301.

lead to positive welfare effects such as productivity increases, improved labour force allocation, higher incomes for posted workers, higher employment along with improvements of existing domestic workers' welfare. Given all this, it seems that the economic and social/democratic argument for stronger EU intervention in relation to cross-border posting is contestable.¹⁵³ Whilst there is a fundamental flaw in the Commission's economic thrust for imposing more stringent rules on remuneration for service providers posting workers, it is questionable whether this criticism would be sufficient to establish a breach of the subsidiarity principle. It is certainly legitimate to question whether the Union has opted for the right balance between workers' rights and service providers' freedom to post workers and whether the EU is really addressing a market failure (but rather a 'social' problem). There is, however, a feeble case for holding that the Member States could have sufficiently addressed the issue. The regulation of posting is *per se* a transnational issue which the European Union typically is better placed to address than Member States. It is arguably only the EU institutions who can simultaneously appreciate the interests of service providers, posted and local workers in all Member States as well as the different interests of the social partners in the Member States.¹⁵⁴

Apart from competence objections, national parliaments also questioned the proportionality of the PWD Proposal, underlining the procedural demands imposed by this principle.¹⁵⁵ It was particularly observed that the Proposal did not include a detailed financial statement on the effects for companies providing for posted workers and service providers, and other economic and social sectors. It was also contended that the administrative burden was disproportionate to the aim pursued thus breaching Article 5 of Protocol no 2.¹⁵⁶ Proportionality objections were also addressed to the form of intervention. The Proposal was considered too intrusive as the approximation of wage levels rather should be caused by a gradual convergence in living

¹⁵³ See eg Lucia Della Pellegrina and Margherita Saraceno, 'Posted workers: complements or substitutes for local employment? Empirical evidence from the EU', (2013) Paolo Baffi Centre Research Paper n. 136 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2287841). 6-7, 15-21; Frederic De Wispelaere and Jozef Pacole, 'An Ad Hoc Statistical Analysis of Short Term Mobility- Economic Value of Posting Workers- The impact of intra-EU cross-border services, with special attention to the construction sector', (2016) KU Leuven Hiva Research Institute for Work and Society, 17-25; Roland de Bruijn, Henk Kox and Arjan Lejour 'Economic benefits of an Integrated European Market for Services', (2008) 30 *Journal of Policy Modeling* 301.

¹⁵⁴ See n 150 for reference to literature holding that EU intervention primarily must be justified with reference to the transnational interests involved.

¹⁵⁵ See Art 5 (4) TEU.

¹⁵⁶ See Romanian Senate (n 142), Czech Senate (n 142), 1-2.

standards and pay in all member states.¹⁵⁷ However, even though proportionality, as mentioned above is a principle which is part of Protocol No 2, the national parliaments' mandate has been constrained to subsidiarity review.¹⁵⁸ This is consequently not an argument which the Commission would need to examine when it reviews whether the Proposal should be upheld under Protocol No 2.¹⁵⁹

The national parliaments also advanced the test of 'insufficiency' of Member States' action, arguing that the Commission was unable to show that the envisaged objectives could not be sufficiently achieved by the Member States. The proposed rules on posted temporary agency workers¹⁶⁰ was criticised suggesting that existing EU rules allow Member States to align the rights of posted temporary agency workers with the rights of 'local' temporary agency workers in the host state. It was sustained that Member States were better furnished to determine the necessity of aligning the rights of temporarily posted workers.¹⁶¹ However, the Commission convincingly addressed this argument. Member States having the option, but not the obligation, to apply such rules also to posted temporary agency workers would not fully achieve the objective of ensuring that posted temporary agency workers and local temporary agency workers are protected by the same mandatory rules. Member States can under such circumstances choose not to do so, hence failing to provide an adequate protection of posted workers in such other sectors. This issue was thus better addressed at EU level.¹⁶²

Doubts also arose over the necessity to establish at the Union level rules concerning the application of collective agreements¹⁶³, which have been declared universally applicable, to all

¹⁵⁷ See Lithuanian Seimas, Committee on European Affairs (n 142); Romanian Chamber of Deputies (n 142); Czech Senate (n 142), 2-3; Hungarian Reasoned Opinion (n 142); Slovakian Opinion (n 142); Romanian Senate (n 142); Latvian Opinion (n 142).

¹⁵⁸ See Section II.

¹⁵⁹ See Protocol No 2 (n 8), Arts 6 and 7.

¹⁶⁰ See COM (2016) 128 (n 124), amended Art 3(1) (B).

¹⁶¹ See Sejm of the Republic of Poland, 'The reasoned opinion of The Sejm of the Republic of Poland of ... stating reasons why the Sejm considers that the proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services does not comply with the principle of subsidiarity', 13 April 2016.

¹⁶² See COM (2016) 505 (n 143), 5-7. Recital No 12 in the Proposal, COM (2016) 128 (n 124), confirms that 'it is within Member States' competence to set rules on remuneration in accordance with their law and practice'.

¹⁶³ COM (2016) 128 (n 124), amended Art 3(1) (A).

sectors of the economy rather than only to the construction sector¹⁶⁴.¹⁶⁵ According to the evidence in the impact assessment, the adoption of the proposed measure would only have an impact on four Member States. The proposed rules would neither translate into the adoption of uniform standards for all posted workers, as the Directive leaves the decision to introduce such agreements with the Member States.¹⁶⁶

This touches the argument made in relation to the EPPO Proposal as to what is required to meet the ‘national insufficiency’ test.¹⁶⁷ The wording of Article 5(2) TEU, underlining that the effectiveness of Member States’ actions is the decisive standard, suggests that it is sufficient for the EU legislator to meet the ‘national insufficiency’ test if more than one Member States is unable to achieve the objective of the proposed action. The latter part of the formula in Article 5(2) TEU ‘but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’ furthermore suggests that the subsidiarity test would also be met if the Union would be substantially more efficient in its action. An example of the latter scenario would be where the Union would achieve the required outcome at a considerably lower cost than the Member States. The fact that the problem does not concern all Member States is thus not a compelling subsidiarity objection.¹⁶⁸ It is also, very unlikely, as argued below, that Member States alone, due to their perverse incentives, ever would achieve the objective of achieving a proper balance between workers’ rights and freedom to service providers.¹⁶⁹

The national parliaments furthermore included the procedural side of subsidiarity suggesting that the impact assessment was not founded on sufficient qualitative or quantitative indicators. It was proposed that the impact study exhibited the absence of sufficient statistic data regarding a great part of the Proposal (eg the number of the posted workers for more than 24 months). It was also observed that the Commission had failed to undertake a rigorous analysis of the financial implications for the EU internal market and the adverse effects of the PWD Proposal with regard to the general increase of the cost of cross-border services (eg costs relating to

¹⁶⁴ See Directive 96/71/EC (n 133), Art 3 (10).

¹⁶⁵ See COM (2016) 128 (n 124), amended Art 3(1) (A).

¹⁶⁶ See Lithuanian Seimas, Committee on Social Affairs (n 142); Polish Sejm (n 161); Chamber of Deputies Romania (n 142).

¹⁶⁷ See Art 5(2) TEU.

¹⁶⁸ See the literature referred to in nn 104-105 substantiating this point.

¹⁶⁹ See Case C 58/08 *Vodafone*, Opinion of AG Maduro (n 93), paras 33-34; Granat and Fabbrini (n 9), 120-125.

transport, information on the applicable regulations, translation of documents, etc).¹⁷⁰ Whilst it is contestable whether the Commission has demonstrated a substantive added value of EU involvement¹⁷¹, it is probably sufficient for the EU legislator to evince the existence of ‘comparative efficiency’ of such an action with reference to Member State action.¹⁷² The Commission seems to have satisfied this burden by substantiating the need for action by qualitative and quantitative evidence (research studies, statistics).¹⁷³ This evidence illustrates the existence of the problem including a satisfactory economic analysis with reference to the different scenarios and their effects on the relevant actors (eg medium sized and small enterprises).¹⁷⁴

Some national parliaments¹⁷⁵ also contended that the obligation in Protocol No 2 to organise large consultations with the interested parties (especially European social partners and some Member States) had not been observed.¹⁷⁶ It appears clear that procedural subsidiarity involves issues such as whether the relevant actors had been consulted with reference to the issue should be better regulated at EU level or national level and that the Court is competent to enforce such procedural obligations.¹⁷⁷ Nevertheless, the impact assessment exhibited that the Commission had organised consultations with several different partners; Member States, social partners and civil society. Whilst national parliaments may have been unimpressed by these consultations, the Commission appears to have satisfied the demands imposed by primary EU law.¹⁷⁸ It would be another thing if no consultation at all had taken place or where it was clearly demonstrated that the premises of the Commission’s proposal were terribly inaccurate due to the absence of

¹⁷⁰ See Lithuanian Seimas, Committee on European Affairs (n 142); Romanian Chamber of Deputies (n 142); Czech Senate (n 142); Hungarian Reasoned Opinion (n 142); Slovakian Opinion (n 142); Romanian Senate (n 142); Latvian Opinion (n 142).

¹⁷¹ See the discussion above at nn 148-154.

¹⁷² See the discussion in Lenaerts, ‘The Principle of Subsidiarity and the environment’ (n 105) 865, 878–9, 895; Jacob Öberg, ‘Subsidiarity as a Limit to the Exercise of EU Competences’ 36 (2017) *Yearbook of European Law* 395,401-405.

¹⁷³ See Protocol No 2 (n 8), Art 5.

¹⁷⁴ See SWD (2016) 52 (n 134), 6-18; 29-45.

¹⁷⁵ See n 170 for reference to those parliaments.

¹⁷⁶ See Protocol No 2 (n 8), Art 2; Art 11 (3) TEU.

¹⁷⁷ See Protocol No 2 (n 8), Art 8. Fromage and Kreillinger (n 125), 147-148, 150-151, developing this point.

¹⁷⁸ See SWD (2016) 52 (n 134), 4-5.

adequate consultation. In such a case, it is plausible to claim that the minimum requirements imposed by the Treaties and Protocol No 2 have been breached.¹⁷⁹

It was also more generally observed by the parliaments that the Proposal did not contain a comprehensive subsidiarity justification thus arguably breaching Article 5 of Protocol No 2.¹⁸⁰ It was considered insufficient to only state, as the Commission did in the Proposal, that ‘an amendment to an existing Directive can only be achieved by adopting a new Directive’ as this statement does not explain why action must be taken at an EU level. The absence of a justification also makes it difficult for the national parliaments to scrutinise the respect for the subsidiarity principle¹⁸¹. Admittedly, the national parliaments’ reasoning on the lack of justification is in line with the principle as it is defined in Protocol No 2.¹⁸² The Commission thereto recognised that the justification was succinct (although sufficient to allow both the Union legislature and national parliaments to determine whether the draft legislative act at issue complies with the principle of subsidiarity).¹⁸³

Having said that, it is contestable whether the Commission’s feeble justification amounts to a breach of procedural subsidiarity. First, it is important to underline that the Court of Justice does not impose very far-reaching requirements on justifying EU legislation. The ‘giving reasons’ requirement in Article 296 TFEU entails pursuant to settled case law that the statement of reasons must show unequivocally the reasoning of the Union legislator.¹⁸⁴ Nevertheless, the reason-giving requirement in Article 296 TFEU seems in light of case law to be of a merely formal nature and only require that reasons, whatever their merits, are offered.¹⁸⁵ The Court’s deferential approach to the giving reasoning requirement in Article 296 TFEU mirrors its case law on procedural subsidiarity. When the Court reviews the procedural form of subsidiarity it appears sufficient that subsidiarity is mentioned and that there is a justification, regardless how

¹⁷⁹ See Fromage and Kreillinger (n 125), observing this point, 147-148.

¹⁸⁰ See Polish Sejm (n 161); Croatian Opinion (n 142); Latvian Opinion (n 142); Czech Senate (n 142).

¹⁸¹ See Art 5(3), Art 12(b) TEU; Protocol No 2 (n 8), Art 6.

¹⁸² See Art 10 (3) TEU; Protocol No 2 (n 8), Art 2.

¹⁸³ See COM (2016) 505 (n 143), 8-9.

¹⁸⁴ See Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-02405, para 22; Joined cases C-154/04 and 155/04 *Alliance for Natural Health and others* (n 101), paras 133–134.

¹⁸⁵ See Martin Shapiro, ‘The Giving Reasons Requirement’ (1992) *University of Chicago Legal Forum* 179, 182, 198, 215.

scant or unconvincing it is, for compliance with subsidiarity.¹⁸⁶ It is thus unlikely that the Court would strike down the Proposal on procedural grounds.¹⁸⁷ It is thereto unconvincing to claim that subsidiarity compliance can only be defended by the justification offered in the PWD Proposal. If the Commission has issued an impact assessment, the PWD Proposal's conformity with subsidiarity should also be assessed in the light of this preparatory document, which as a rule, contain more substantive justifications on matters of subsidiarity.¹⁸⁸

Although the subsidiarity justification offered in the impact assessment could be criticised as being too insufficient¹⁸⁹, there is an argument therein which appears compelling. If the objective is to accomplish an equal playing field for posting companies and local companies, it is obvious that the Member States acting alone will not be able to achieve this objective. Member States are not well-placed to strike the balance between workers' rights and the freedom to provide services. It is likely that Member States would tend to favour local companies and workers in priority over posted workers and posting companies in terms of labour law regulation. If the objective is to strike the balance between freedom of service providers and posted workers in a cross-border context, it is, as contended above, arguable that the EU institutions are better placed to make this balancing act.¹⁹⁰

Finally, the parliaments more generally contested whether the new initiative added anything to existing legislation. It was suggested that the current legislation, Directive 96/71/EC and the Enforcement Directive¹⁹¹ ensures appropriate social protection of the rights of posted workers. Directive 96/71/EC requires Member States to impose minimum rules for posted workers. This directive furthermore allows Member States to impose universally applicable collective agreements on posted workers and more favourable conditions for such workers in several

¹⁸⁶ See Case C-547/14 *Philip Morris Brands and Others* (n 101), paras 220-226. Case C-58/08 *Vodafone and Others* (n 93), paras 72-80; Case C-233/94 *Germany v Parliament and Council* (n 184), paras 26-28.

¹⁸⁷ See Öberg (n 172), 405-406.

¹⁸⁸ See Case C-58/08 *Vodafone and Others* (n 93), paras 39, 43, 45, 55, 58, 59, 63, 65; Case C-310/04 *Spain v Council* [2006] ECR I-07285, paras 122-135 for support of a broader approach including the impact assessment in the assessment of legality.

¹⁸⁹ See Fromage and Kreillinger (n 125), 141-143, holding that the procedural subsidiarity objection was compelling.

¹⁹⁰ See SWD (2016) 52 (n 134), 19-20. See also Section II for the general argument.

¹⁹¹ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (the IMI Regulation) [2014] OJ L 159/11.

instances.¹⁹² EU legislative intervention should be avoided as further alignment of wage levels in the Member States should come because of further economic development of individual Member States. It was thereto observed that the waiting period for transposing the Enforcement Directive was not to an end and that the impact of that directive had not been thoroughly assessed.¹⁹³

Whilst there is some force in this argument, it is apparent that the proposed amendments address different problems than current EU legislation. The problem that the amended PWD addresses is the fact that posted workers' right to remuneration according to the host state rules are not protected by the current EU rules and this problem will not be resolved by the Enforcement Directive.¹⁹⁴ Only an obligation, and not an option, to apply such rules in sectors other than the construction sector allows to fully achieve the objective 'to provide a more level playing field between national and cross-border service providers' and to ensure sufficient protection of posted workers. Otherwise, Member States could choose not to apply the rules to all posted workers which would entail failure to reach the stated objectives.¹⁹⁵ There is consequently a case for mandatory EU legislation on subsidiarity grounds.

V Conclusions and Reflections

This article explored political control of EU competences by scrutinising the role of national parliaments under Protocol No 2. The scope of the national parliament's remit under Protocol No 2 was first considered. It was argued that the national parliaments' role is confined to subsidiarity according to the definition in the Treaties.¹⁹⁶ A textual, systemic and teleological interpretation suggested that the wording of the Treaties and the attached Protocols as well as the Treaty drafters' intention was to restrain the national parliaments' review to subsidiarity concerns. Whilst functional reasons favoured an extension of this mandate to 'proportionality' and 'legal basis' review (and a broad reading of Article 5(3) TEU to include 'proportionality'

¹⁹² See Lithuanian Seimas, Committee on European Affairs (n 142); Czech Senate (n 142); Romanian Chamber of Deputies (n 142) van Hoek and Houwerzijl (n 135); Della Pellegrina and Saraceno (n 153), 4-5.

¹⁹³ See Lithuania Seimas, Committee on Social Affairs (n 142); Romanian Chamber of Deputies (n 2); Czech Senate (n 2), Slovakian Opinion (n 142); Romanian Senate (n 142); Riigikogu (n 142); Croatian Opinion (n 142); Latvian Opinion (n 142); Polish Sejm (n 161).

¹⁹⁴ See, however, Fromage and Kreillinger (n 125), 149.

¹⁹⁵ See COM (2016) 505 (n 143), 6-7.

¹⁹⁶ See Art 5(3) TEU.

review) it was apparent that such a wide mandate would come at an excessive cost in terms of efficiency and possibly upset the institutional balance in the Treaties as well as the current wording of Article 5 TEU. On balance, the latter arguments made the case for a narrow mandate confined to subsidiarity review. This legal analysis revealed a tension between the idea of taming ‘competence creep’ by means of an ‘external’ political actor and the limited possibilities of this actor to perform this task.¹⁹⁷

This tension was illuminated by two case studies: (I) the Yellow Card against the EPPO Proposal and, (II) The Yellow Card against the amended Posted Workers Directive.¹⁹⁸ The review of the EPPO Proposal suggested that national parliaments’ review of this draft proposal went well beyond the narrow mandate in Protocol No 2 and covered issues such as lack of competence, proportionality and the substance of the Proposal. The national parliaments were particularly critical to the potential intrusions on national sovereignty that the Proposal would entail. Although the EPPO Proposal was controversial and open to legitimate substantive criticism, it is arguably not the role of national parliaments within their review powers under Protocol No 2 to object to EU legislation on such grounds. The core case for EU regulation of the EPPO is thereto convincing. As the EPPO’s competence was limited to offences ‘against the Union’s financial interest’ it was clear that the transnational dimension of the regulated issue and the strong Union interests involved (the protection of the EU budget) made the EU a better regulator of the issue in subsidiarity terms. There was, nevertheless, force in the national parliaments’ subsidiarity critique of the competence to prosecute ancillary crimes (given the lack of a clear Union dimension) and their procedural objections to the absence of compelling evidence supporting the added value of EU action.¹⁹⁹

Granat and Fabbrini’s analysis of the first yellow card against the Monti II Proposal follows the same line of argument. In their analysis this proposal obtained a yellow card without having committed a ‘foul’. It was observed by them that national parliaments were unable to identify any fault in the Commission proposal relating to subsidiarity and rather reacted to an issue of political saliency. It was furthermore difficult to attack the Monti II Proposal on substantive grounds of subsidiarity since it addressed an issue—transnational labour disputes—that

¹⁹⁷ See above Section II.

¹⁹⁸ See above Section III.

¹⁹⁹ See above Section III (C).

inherently falls outside the remit of individual Member States.²⁰⁰ Admittedly, it is contestable whether the Proposal lived up to the demands of procedural subsidiarity given the absence of a detailed subsidiarity statement.²⁰¹ Be that as it may, this criticism does not undermine the point that national parliaments adopted a yellow card against a proposal whose objective was to primarily regulate a transnational matter clearly making the Union a better regulator than Member States by principle.²⁰²

As regard the Proposal for an amended Posted Workers Directive, the national parliaments' reasoned opinions again primarily centred very much of their analysis on questions outside the remit of subsidiarity. The objections to the use of the legal basis of Article 53 and 62 TFEU, the contention that the Commission proposal breached Article 152 and Article 153 (5) TFEU as well as the criticism relating to the adverse effect of the Proposal on certain actors were addressed to the EU's competence and the proportionality of the measure. These observations contribute to the line of argument pursued in this article that national parliaments have to a certain degree misinterpreted their role under Protocol No 2. Having said that, there is a more nuanced judgment as to the national parliaments' general approach which revolved more around subsidiarity in stringent terms compared to the previous yellow cards. The parliaments contested for example the absence of a Commission analysis of existing Member State measures and the lack of an EU added value. They also advanced several legitimate procedural objections relating to the absence of sufficient data as well as the absence of proper consultation. Ultimately it is, however, difficult to contest the PWD on subsidiarity grounds. It is apparent that the PWD, as the Monti II Regulation, posting, which intrinsically is concerned with cross-border problems. The EU institutions are better positioned, given the transnational nature of the issue, to balance the divergent cross-border interests (posted workers and service providers), Member State interests (of retaining their powers to regulate the labour market) and collective interests (labour organisations and NGOs) involved in posting.²⁰³

It is appropriate to take a step back and reflect on the appropriateness of national parliaments as a political safeguard of federalism. It is suggested that the national parliaments' expansive review of the EPPO Proposal and its competence-based criticism of the Third Postal Workers

²⁰⁰ See Granat and Fabbrini (n 9), 116, 135–143.

²⁰¹ See Fromage and Kreillinger (n 125), 130-131.

²⁰² See Öberg (n 172), 395-405.

²⁰³ See above Section IV.

Directive may be a part of a broader trend of the national parliaments' 'misunderstanding' of their role under Protocol No 2.²⁰⁴ It is arguable that the majority of the arguments advanced in the parliaments' reasoned opinions should have been addressed within the framework of the political dialogue and not through the yellow card procedure.²⁰⁵ Having said that, the general assessment of national parliaments' role in countering 'competence creep' is positive. One of their contributions is that they can alert the EU legislator that the issue at stake can be also sufficiently achieved at the national level.²⁰⁶ This function is very valuable as the EU legislator and the Court of Justice, if there is subsequently an action for annulment, becomes aware of potential subsidiarity concerns with EU legislation at an early stage. National parliaments are also well-placed to control whether competences illegitimately are exercised on EU level where they could have better been exercised on national level.²⁰⁷ Furthermore, the fact that a yellow card has adverse consequences in political terms gives the Commission proper incentives to avoid national parliaments' disapproval and thoroughly justify its legislative initiatives in subsidiarity terms.²⁰⁸ The yellow card procedure against the EPPO Proposal and the PWD Proposal illustrates this idea. Not only were these legislative initiatives reasonably justified in subsidiarity terms, but the Commission also made a committed effort to address the national parliaments' subsidiarity arguments in their reasoned response.²⁰⁹ In this sense, it appears that

²⁰⁴ The national parliaments' reasoned opinions against the Customs Infringement Proposal (See Commission, 'Proposal for a Directive to the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions', COM (2013) 884 final) is a further case in point. In this case, it was equally clear that the national parliaments' opinions focussed primarily on the choice of the legal basis and the proportionality of the measure. The Swedish Parliament and the Lithuanian Parliament criticized the Proposal for containing features that were of a 'criminal law character' going beyond the scope of the proposed legal basis, Article 33 TFEU. The Danish Parliament and the Swedish Parliament also made a proportionality argument contending that the Proposal expressed a more far-reaching harmonization of the rules on sanctions than what is necessary to achieve strengthened customs cooperation: See Seimas of the Republic of Lithuania Committee on European Affairs on possible non-compliance with the principle of subsidiarity of the Proposal of the European Commission for a Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions, COM (2013) 884 Document, No ES-14-51, 9 July 2014 No 100-P-71. See Swedish Parliament, 'Statement by the Committee on Taxation—Reasoned opinion of the Swedish Parliament', 2013/14: SkU35 Appendix 2; Folketingets Europaudvalg, 'Begrundet udtalelse om forslag om toldovertrædelse, KOM (2013) 884', Reasoned opinion KOM (2013) 0884—Danish (1).

²⁰⁵ See also Fromage and Kreillinger (n 125), 144-147, 157-160, discussing the political rationales for why the PWD Proposal and the EPPO Proposal has been subjected to Yellow Card procedures. See also Diane Fromage, 'Increasing Inter-Parliamentary Cooperation in the European Union: Current Trends and Challenges' (2016) 22 *European Public Law* 749.

²⁰⁶ See Granat (n 13), 322–323.

²⁰⁷ See above Section II; Art 5(3) TEU.

²⁰⁸ See Wiczorek (n 38), 1264-66.

²⁰⁹ See, however, differently Wiczorek (n 38), 1267-70, considering that the Yellow Card against the EPPO Proposal was a lost opportunity as to the quality of the subsidiarity debate. The argument in Section III nevertheless

there was a proper subsidiarity discourse between the Commission and the national parliaments. This suggests that the Commission gradually appears to demonstrate a more open approach to national parliaments showing readiness to thoroughly consider parliaments' opinions and to discuss the contested issues with them. This seems to be a feature of the Juncker Commission, which perhaps, more than its predecessors, take its obligation to justify legislation in subsidiarity terms in Protocol No 2 more seriously.²¹⁰ All this suggests that national parliaments could be viewed as a promising avenue for legitimate political control of the exercise of EU competences.

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demonstrates that the Commission and the national parliaments did quite some work on discussing the substance and meaning of subsidiarity.

²¹⁰ See above Section III-IV; Fromage (n 31), 21–23; Granat (n 13) 324–328; Fromage and Kreillinger (n 125), 132-133, 158-160.