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A ‘Virtual Third Chamber’ for the European Union? National Parliaments after the Treaty of Lisbon

IAN COOPER

The Treaty of Lisbon introduces an early warning mechanism (EWM) which empowers national parliaments to intervene directly at the EU level; they may now raise objections to – and even play a role in blocking – EU legislation. The EWM represents a new model of parliamentary involvement in international relations: national parliaments now constitute a virtual third chamber for the EU. Though they do not meet together in the same physical space, national parliaments collectively form a body that can, at least to some degree, perform three key parliamentary functions – legislation, representation, and deliberation. First, it gives national parliaments the power to influence legislative outcomes at the EU level. Second, it provides a new channel of representation linking the citizen with the EU. Third, it creates a new forum for debating the substantive merits of proposed EU legislation, particularly regarding its compliance with the principle of subsidiarity.

One major theme of the Treaty of Lisbon is that it aims to enhance the role of national parliaments within the European Union. In this regard the most important innovation is the Early Warning Mechanism (EWM), which authorises national parliaments to vet new legislative proposals for compliance with the principle of subsidiarity. A previous version of the EWM, in the abandoned Constitutional Treaty (2004), was essentially advisory. But in the Treaty of Lisbon, which passed into law in December 2009, the EWM is strengthened so that a majority of national parliaments can, using the ‘orange card’ (explained below), have a hand in blocking an EU legislative proposal. With their new powers under the EWM national parliaments have in effect become a *collective actor* within the EU. Arguably, alongside the Council of Ministers (Council) and the European Parliament (EP), national parliaments collectively form a ‘virtual third chamber’

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(Cooper 2006: 283) in the following sense: even though they do not meet together in the same physical space, they to some extent fulfil the functions of a parliamentary chamber at the EU level. This development represents a new model for the direct involvement of parliaments in the affairs of the EU – and in international relations generally. As such it is an unheralded instance of democratic governance beyond the nation-state (Zürn 2000).

Among scholars, opinion is divided not only on the likely impact of the EWM but even on how to make sense of it – how to theorise about it in a way that makes it possible to assess its success or failure. If the relevant measure is influence on EU legislation, this is commonly expected to be minimal (Kiiver 2008; Raunio 2010). If the relevant measure is improvement of the EU's democratic legitimacy, many expect it to have at least a moderately positive effect (Barrett 2008; Dougan 2008: 657–61; Louis 2008; Maurer 2008; Piris 2010: 127–30), but others suspect that it will do more harm than good even in this regard (Fraga 2005; Kiiver 2006; Raunio 2007). Or if the relevant measure is subsidiarity scrutiny – and whether through the test of public reason the EU is forced to provide better justifications for its legislative proposals – here too the outlook is uncertain (Cooper 2006; Eriksen 2009: 224–8; Van Kersbergen and Verbeek 2007). What is needed is a broad theoretical account that can address all aspects of the EWM and, more generally, the changing position of national parliaments within the architecture of the EU.¹

The notion of a virtual third chamber (VTC) suggests a multifaceted analysis for assessing the EWM's impact, according to how well it fulfils the various functions of a parliamentary chamber. Here I focus on three functions: legislation, representation, and deliberation. Typically, a parliamentary chamber will: (a) have a role in the production of legislation, (b) provide a channel of representation linking the voter to the centre of decision-making authority, and (c) provide a forum for the discussion of public policy. This threefold 'functional' analysis is similar in spirit to studies of the EP that set out to assess whether it was and is a 'real' parliament (e.g. Judge and Earnshaw 2008), but it is freely adapted for present purposes.² It gives us three questions regarding the collective influence of national parliaments (NPs) at the EU level:

1. *Legislation.* Do the NPs collectively have the power to influence legislative outcomes in the EU, and do they exercise that power?
2. *Representation.* Does the EWM create a new link between the citizen and the EU that serves to enhance the democratic legitimacy of the EU?
3. *Deliberation.* Does the EWM create a deliberative forum that enhances the public discussion of EU affairs?

Here then are three independently varying criteria to employ as yardsticks to measure the collective activity of NPs to gauge whether and to what extent it approximates that of an EU-level parliamentary chamber.

Two caveats should be noted regarding this analysis. First, the three questions above are designed to ask, specifically, what *difference* does the collective involvement of NPs make, i.e. what is its 'value-added'? As it is relatively limited in power and scope, the virtual third chamber will not become a full-blown 'co-legislator' with the Council and the Parliament – the latter two now referred to as the single 'Union legislator' in the treaty (Kiiver 2011: 102) – but will remain ancillary to them. Therefore, I will not make a holistic assessment of how the 'tricameral' legislative system performs the various parliamentary functions, but only gauge the marginal difference that the introduction of the EWM makes to the pre-Lisbon 'bicameral' system. All things being equal, what is the 'value-added' of the NPs' collective involvement for legislation, representation, and deliberation in the EU? Second, the analysis here is necessarily preliminary and largely prospective, as the EWM has only been in operation since late 2009. However, further clues may be gleaned from observation of three forms of interparliamentary cooperation that were established earlier in anticipation of the treaty's passage. First, beginning in 2005 COSAC – the semi-annual conference of national parliaments' EU affairs committees (Knudsen and Carl 2008) – conducted eight 'subsidiarity tests' in which NPs scrutinised selected EU legislative proposals under conditions intended to simulate the EWM.³ Second, in 2006 the Interparliamentary EU Information Exchange (IPEX) website was created (on an initiative of the Conference of the Speakers of EU Parliaments) to facilitate the exchange of views among parliaments on pending EU legislation, including opinions on its subsidiarity compliance.⁴ Third, also in 2006 Commission President José Manuel Barroso initiated a 'political dialogue' with national parliaments, inviting them to send comments on pending legislation including but not limited to subsidiarity concerns, to which the Commission is pledged to respond.⁵ These experiences provide further material for a preliminary assessment of the EWM.

Here is the argument in outline. First I make the case that the Early Warning Mechanism represents a new model of parliamentary involvement in international affairs, a Virtual Chamber, an institutional innovation different in kind from the previous models of Domestic Oversight, Parliamentary Assembly, and Supranational Parliament. As such it is a new development in the practice of democracy beyond the bounds of the state. The subsequent three sections address in turn how the virtual third chamber fulfils the three parliamentary functions identified above. I argue that the EWM has a legislative 'value-added' in that it is likely to produce final legislative outcomes different from those that would have resulted in the pre-Lisbon 'bicameral' system. The 'orange card' gives NPs considerable formal power – more than has been generally recognised – to collectively intervene in the EU legislative process. Much like the EP of an earlier era, the VTC could use its power to become an important 'policy-influencing' body in EU affairs. However, it should be acknowledged that numerous

obstacles – lack of incentives, logistical problems, and inherent weaknesses – will make it difficult for NPs to make full use of the ‘orange card’. Yet because NPs’ opinions will carry weight with their respective governments and with EU institutions, even if this formal power is rarely used they will still exercise informal influence – significant but more difficult to quantify – over final legislative outcomes in the EU.

Parliaments have other functions beyond legislation; the significance of the VTC goes beyond its legislative impact in the EU. I argue that the EWM creates a new representative channel linking the citizen to the EU through NPs, and as such it enhances the EU’s democratic legitimacy. This channel has a representative ‘value-added’ in that it is different in kind from, albeit weaker than, the links that existed already through the EP and the Council. This assertion is based on two controversial assumptions: first, that the NP may be construed as an autonomous actor with a mandate – i.e. not only the capacity but also the right – to advance an independent position on EU affairs; and second, that NPs together form a collective entity that can itself make a claim of autonomous representative legitimacy. These assertions are elaborated in responding to criticisms that the EWM subverts parliamentary democracy at the national level (by pitting parliament and executive against one another) or distorts representative democracy at the EU level (because national parliaments do not constitute a collective that has coherence as a representative body).

In the section on deliberation I argue that the EWM and associated developments have a deliberative ‘value-added’ in that they have created a new public forum for the debate of salient EU policy questions. This forum is *virtual* in that interaction is by correspondence rather than face-to-face, which has a somewhat constraining effect on the quality of the deliberation within it. Nevertheless it enables a deliberative exchange that is both horizontal (among NPs) and vertical (between NPs and EU institutions). It is argued that the deliberative function of the virtual third chamber is focused on but not confined to the EWM: whereas the EWM empowers national parliaments to formally intervene in the EU legislative process on the specific question of subsidiarity compliance, it should be seen as the ‘hard core’ of a broader and less formal deliberative exchange among NPs and EU institutions. The success of the VTC as a deliberative body should be judged by the quantity and quality of the interaction it enables – e.g. whether it results in a net increase in the reasoned public discussion of pending EU legislation. Finally, there is a brief conclusion.

A New Model of Parliamentary Involvement in International Relations

National parliaments can be said to form a Virtual Chamber if they jointly perform the functions of a legislative chamber without meeting together in the same physical space. This term is meant to draw a deliberate contrast with the oft-proposed idea to create an *actual* bricks-and-mortar third

chamber for the representation of the views of NPs at the EU level, an idea considered in the course of the treaty reform process but ultimately rejected in favour of the Early Warning Mechanism.⁶ The word 'virtual' is used here not in the colloquial sense of 'almost' or 'quasi' but with a specific meaning, referring to a social institution that is not organised around face-to-face interaction. Thus a 'virtual community' is one whose members meet online, for example, rather than face-to-face; it is nonetheless a 'real' community in that it functions as a community even though it takes a form that is not physically based (Blanchard and Horan 1998; Wellman and Gulia 1999). Analogously, the claim that the collectivity of NPs constitute a 'virtual' EU legislative chamber is not a mere heuristic device; indeed, this is a 'real' legislative chamber but one differing from the standard version in that it does not meet in person. This point is emphasised because it underpins the claim that this virtual chamber is a genuinely new empirical phenomenon in the world of political democracy; it rests on a constructivist ontology in which things may be immaterial but nonetheless real (Wendt 1999). But the reader who is sceptical of this underlying ontology will still find the notion of a virtual third chamber to be perfectly comprehensible as a heuristic device. Of course, even in the case of the two main EU legislative institutions it may be a conceptual stretch to call them 'chambers': the Parliament meets at multiple sites and the Council meets in multiple configurations, and so both could be said to feature some degree of 'virtuality'. But the third chamber is even more virtual than these in that it *never* meets together physically in its entirety; it does not look like a (single) parliamentary chamber, even if it can be proven to function as one.

The Virtual Chamber represents a new model of parliamentary involvement in international relations, different from the three existing models of Domestic Oversight, Parliamentary Assembly, and Supranational Parliament. Domestic Oversight refers to the traditional indirect role of the national parliament in international affairs, overseeing the executive arm of government in its conduct of foreign policy. A Parliamentary Assembly (e.g. the pre-1979 EP) is an international gathering of members of different NPs who meet periodically, often within the aegis of an existing international organisation; it is a prominent deliberative forum for the discussion of common issues but has little or no legislative power (Marschall 2008). A Supranational Parliament (e.g. the post-1979 EP) is a directly elected, transnational chamber which may have substantial legislative powers; it is essentially a federal parliament transposed to the international level. A Virtual Chamber is a 'meta-parliament' made up of a group of national parliaments that directly participate in a collective decision-making procedure within an international organisation.

These models appeared in historical sequence in Europe, with each new model compensating in some way for deficiencies in its predecessor. The European Parliament (originally the Common Assembly of the European Coal and Steel Community) was created in 1952 as a Parliamentary

Assembly to facilitate direct parliamentary oversight of an international organisation – something unfeasible under the Domestic Oversight model. With direct elections in 1979 the EP became a Supranational Parliament; in the process it gained collective democratic legitimacy, overcoming a deficiency of the Parliamentary Assembly model, where national parliamentarians individually enjoyed democratic legitimacy (borrowed from their elected status in their ‘home’ parliament) but the body as a whole did not; another deficiency, its relative powerlessness, was overcome gradually as it gained new powers with further revisions of the Treaty of Rome. Finally, the Virtual Chamber model was introduced to compensate for a side effect of the creation of the Supranational Parliament – that is, NPs’ loss of their channel of direct influence in the EU; yet it also avoids a democratic deficiency of the Parliamentary Assembly model in that it revives the involvement of NPs in EU affairs through the participation not of individual MPs but of whole parliaments.

Thus the EWM was a genuine institutional innovation, for which the credit belongs to the European Convention, the body which met in 2002–2003 and produced the first draft of the Constitutional Treaty. Throughout the 1980s and 1990s a number of proposals had been put forward, often by prominent political figures, to create a ‘third chamber’ to represent the views of NPs directly at the EU level (Hoeffel 2001; Kiiver 2006: 133–45; Smismans 1998). Most of these were essentially proposals for a Parliamentary Assembly that would have amounted to recreating the pre-1979 EP alongside the current EP: it would have been an unelected transnational ‘talking shop’ without substantial legislative influence, meeting intermittently to discuss the broad outlines of policy rather than the details of legislation. If the Convention had chosen this, it would have been following well-established historical precedent and drawing on an existing institutional template. Instead, the Convention innovated, creating an altogether new institutional arrangement (and, in the process, a new model of parliamentary involvement in international affairs). The EWM was contrived as a single solution to two separate problems – how to enhance the democratic legitimacy of the EU by giving a greater role to NPs, and how to create a subsidiarity control mechanism without creating any new institutions. Thus it devised a mechanism of subsidiarity control that sets up the collectivity of NPs (not just their delegates) as ‘members’ of a larger body, tasked to scrutinise not only the broad outlines of policy but also the details of legislation, yet without the opportunity to discuss it face-to-face.

In effect, to complement the existing Supranational Parliament, the Convention rejected the Parliamentary Assembly model and devised the Virtual Chamber model as an alternative. Notably, these latter two models differ in that the strengths of one mirror the weaknesses of the other and vice versa. The Parliamentary Assembly is essentially weak on representation and legislation but strong on deliberation, in that it is an unelected body with few powers that nonetheless meets on a face-to-face basis. The Virtual

Chamber is stronger on representation and legislation in that the EWM involves elected bodies with actual influence over EU legislation, but weak on deliberation in that the whole body does not sit as a single chamber.

Legislation: The Virtual Third Chamber as a Policy-Influencing Body

How and to what extent will the virtual third chamber fulfil a legislative function? The EWM may be said to have a legislative ‘value-added’ if it influences final legislative outcomes in the EU. To address this question, we must first examine in detail the mechanics of the EWM, which are set out in the Treaty of Lisbon’s protocol ‘On the Application of the Principles of Subsidiarity and Proportionality’ (Protocol No. 2 TEU/TFEU). Whenever new EU legislation is proposed, the proposing institution (usually the Commission) must transmit the proposal not only to other EU institutions but also to the national parliaments, which are to scrutinise it for its compliance with subsidiarity and proportionality. If a national parliamentary chamber judges that the proposal violates the principle of subsidiarity – deciding that action in this case would be more appropriately left to the national level than taken at the EU level – then it may within eight weeks send such objections in the form of a reasoned opinion back to the proposing institution. Each national parliamentary system is allotted two ‘votes’ – two votes per unicameral chamber, one vote per chamber in bicameral systems – for a total of 54 votes in EU-27. If one-third of NPs raise such objections (18 of 54 votes, a ‘yellow card’), then the proposing institution must formally review the measure, after which it may maintain, amend, or withdraw the draft, giving reasons for its action.⁷ Furthermore, in areas which fall under the ‘ordinary legislative procedure’ (OLP, i.e. co-decision), if a simple majority of NPs raises objections to a Commission proposal (28 of 54 votes, an ‘orange card’) and the Commission decides to maintain its proposal despite them, it must explain in a reasoned opinion why it affirms that the draft does indeed comply with subsidiarity. At this point the reasoned opinions of the NPs and the Commission must be submitted to the Council and the EP; if either chamber decides with the NPs and against the Commission – by a vote of 55 per cent of Council members regardless of population size (15 of EU-27), or a simple majority of votes cast in the EP – that the proposal in fact violates subsidiarity, it receives no further consideration.⁸

The significance of the EWM under the Treaty of Lisbon is that for the first time NPs have the collective power to intervene directly in the legislative process at the EU level. The Constitutional Treaty version of the EWM, with only a yellow card, was essentially advisory, vulnerable to the reasonable criticism that it did not bestow any new powers on NPs because they already had the right to send angry letters to the Commission (Kiiver 2006: 153). Yet with the orange card the collectivity of NPs has unequivocally gained a legislative power, in that a majority of them acting

together can trigger an early vote in the Council and the EP on a draft legislative act. While in the OLP both of these chambers must vote on the measure later for it to become law, the orange-card-triggered vote has unique voting rules: a majority of votes *cast* in the EP is enough to stop further consideration of the measure, in contrast to the OLP where an *absolute* majority of the EP's component members is required to block it. In the Council, by contrast, the post-orange-card vote requires 15 member states (of EU-27) to block a measure, whereas in the OLP only a blocking minority of at most 13 states is required to vote it down. Thus, as compared to the OLP, in a post-orange-card vote it is easier for the EP to end consideration of a measure but more difficult for the Council to do so (Barrett 2008: xxxvi–xxxviii). Thus, overall, an orange card gives the EP more power to block a measure but it leaves the Council's blocking power effectively unchanged.

In sum, the formal powers of the collectivity of NPs are not great but neither are they inconsequential. Borrowing the terms of Philip Norton (1990), the VTC is not a 'policy-making' body, in the sense of being able to substitute its own policy for that of the executive, but it is 'policy-influencing' in that it can modify or reject – or more precisely contribute to the modification or rejection of – legislative proposals. Acting alone, the VTC cannot alter or veto a proposal, but it may do so in combination with one of the three main EU political institutions, either by making the Commission agree to amend or withdraw its proposal or, failing that, by spurring the Council or the EP to reject the measure.

It is instructive to compare the VTC to the historical experience of the EP, which in the 1980s acted strategically to leverage its initially limited powers to gain substantial legislative influence. As it happens, the VTC now has more *formal* influence over EU legislation than the EP had immediately after its first election in 1979, when its powers (under the 'consultation' procedure) were still advisory. Perhaps the closest historical parallel is with the 'cooperation procedure' introduced by the Single European Act, which gave the EP its first significant influence in the EU legislative process. Under 'cooperation', the EP could not veto legislation (a power it gained later under 'co-decision') but it could introduce amendments to a legislative proposal which, if accepted by the Commission, could be passed by QMV in the Council, whereas the unamended legislation would have required unanimity; this procedure gave the EP substantial influence as a 'conditional agenda-setter' (Tsebelis 1994). As a result, the EP acting alone had little influence, but it could have an important impact on legislation when acting in concert with one of the two main political institutions (Commission or Council) even if the other was opposed. The parallel with the VTC today is that when wielding the orange card the collectivity of NPs cannot by itself have an important impact on EU legislation, but can do so in combination with one of the three main political institutions (Commission, Council, or EP) even if the other two are opposed.

The analogy with the European Parliament breaks down, however, when it is considered that certain attributes of the EWM will impede its effectiveness by comparison. Whereas even under the consultation procedure the EP had the ‘power of delay’ (Kardasheva 2009), NPs have no such power under the EWM, which is strictly time-limited. Moreover, the EP chiefly made use of the cooperation procedure not to reject legislation but to amend it: the EP could be ‘constructive’, proposing amendments to improve legislation and more often than not to strengthen it so that it involved more forceful action at the EU level, which fit well with its broadly pro-integration bias; in this, the Commission was its natural ally. By contrast, with its ‘negative’ cast and limited scope, the EWM is structured instead with a bias towards the outright rejection rather than constructive amendment of legislative proposals, and in this endeavour none of the three institutions (with the possible exception of the Council) is a natural ally of NPs. Finally, the EP in the 1980s evinced an internal cohesion and the collective ambition to advance its position and influence in the EU, but NPs have yet to display these qualities.

Obstacles to the Legislative Effectiveness of the EWM

Despite the formal powers that national parliaments have gained under the Treaty of Lisbon, there are three kinds of factors that could impede the legislative effectiveness of the EWM – incentive problems, logistical problems, and weaknesses inherent to the subsidiarity review. First, it is questionable whether NPs (or political parties, or individual parliamentarians) have sufficient incentive to fully participate in the EWM. NPs tend to be dominated by parliamentary majorities that support their respective governments, and will be reluctant to challenge their position on EU affairs. Furthermore, political parties and individual parliamentarians have little incentive to get involved as it is unlikely to bring much electoral advantage in domestic politics (Raunio 2009, 2010).

Second, it will be logistically difficult to reach the orange card threshold, and more generally to mount a coherent and concerted response to EU legislative proposals, for a number of reasons. Participation is voluntary, which means the ‘simple’ majority required for an orange card is really an *absolute* majority (Kiiver 2008: 81). The eight-week deadline is extremely short; in addition, legislation will frequently have been agreed beforehand in informal ‘trialogues’ between the Commission, Council, and EP, and will therefore be difficult to change (Reh *et al.* 2010). The volume of proposed EU legislation that NPs are supposed to vet is quite large: over the course of 2010, 82 draft legislative acts were subject to subsidiarity scrutiny under the EWM (European Commission 2011: 3). Finally, coordination is difficult because, unlike a typical legislative body, the VTC has no internal structure of leadership; therefore opposition to a measure must be spontaneous and self-organising.

Third, even if an orange card is reached, inherent weaknesses in the EWM will tend to blunt its impact. The power of the EWM is limited, in that a majority of NPs cannot actually veto an EU legislative proposal; there is no 'red card'. The scope of the EWM is narrow, as reasoned opinions must only address subsidiarity compliance and not other grounds (legal basis, proportionality, policy substance); this means that NPs can only object to EU legislation in areas of shared competence, not to legislation in areas of exclusive EU competence or to non-legislative activity such as the Open Method of Coordination. Finally, the EWM is structured only to allow 'negative' interventions, in that NPs can only disapprove of a proposed measure rather than demanding new EU legislation or making constructive suggestions for improving legislation; as a result, the failure to raise objections could be interpreted as 'tacit consent'. These three kinds of obstacles could have a cumulative impact, preventing NPs from taking part in the EWM in the first place, preventing them from forming a majority 'orange card' even when they do take part, and limiting the impact of an orange card even if it passes. Moreover, awareness of the logistical problems and inherent weaknesses could in turn compound the disincentive for NPs to take part.

Given these obstacles, it is not surprising that to this date there has not yet been a yellow or orange card, either in the COSAC tests or in the post-Lisbon EWM. In fact, so far only two legislative proposals have provoked more than a handful of negative reasoned opinions.⁹ Still, a number of mitigating points may be raised against these obstacles. First, regarding incentives, another way of looking at the record is to observe that NPs do indeed participate in the EWM – though not in large enough numbers to reach the thresholds – and even such minimal participation requires some explanation. To varying degrees NPs can display a streak of independence vis-à-vis their respective governments concerning EU affairs (see Auel 2007; Saalfeld 2005), and it might be expected that participation in the EWM will vary in a similar way. In general, we might expect greater participation in the EWM from those parliaments with, for example, minority or coalition governments (see Holzhacker 2005) or from upper chambers in bicameral parliaments whose members are not dependent on the electoral fortunes of the lower chamber or are otherwise insulated from electoral politics.¹⁰ In addition, those parliaments with greater bureaucratic resources and expertise will have greater capacity to exercise active scrutiny in the EWM.

Second, regarding logistical problems, the COSAC subsidiarity tests showed that these are difficult but not insurmountable. While the tests exposed many of the problems likely to plague the EWM – low response rates, slow response times, and confusion regarding the subsidiarity-specific character of the review – they also showed that with practice these problems diminished over time: a great majority of NP chambers (36 of 40 chambers participated in the last test) could bestir themselves to voluntarily review the same (pre-selected) EU legislative proposal according to the same

substantive criteria, all within a tight deadline (COSAC 2010a). Admittedly, COSAC played a crucial coordinating role by choosing in advance the proposal to be vetted among myriad possibilities; unfortunately these tests were suspended after the Treaty of Lisbon became law. Yet NPs are developing new mechanisms for horizontal coordination: it is very significant that almost all NP chambers now have permanent representatives in Brussels, who hold a regular weekly meeting to discuss matters of common concern, including subsidiarity review of pending legislation.¹¹ In the future, with improved interparliamentary deliberation (see section on deliberation below), there could be much greater sharing of expertise and opinions among NPs, which would help to overcome the logistical difficulties.

Third, it is certainly true that there are formal weaknesses in the EWM: even if they succeed in forming a majority, NPs cannot by themselves veto proposed legislation, nor can they suggest amendments to it, nor can they propose new legislation of their own; their sole power is to express their opposition to it on subsidiarity grounds and trigger a vote in the Council and the EP on the question. But it is possible that these weaknesses may be counterbalanced by an increase in their informal influence as an indirect result of the EWM.

Effect on Final Legislative Outcomes

In light of these difficulties, it should be conceded that an orange card is likely to be an extremely rare event. In fairness, the orange card was *designed* to be a rare, rather than a routine, intervention in the EU legislative process, therefore the rarity of its use does not in itself prove the EWM is ineffective. The key question concerning the legislative function of the VTC is whether NPs have greater influence over *final legislative outcomes* in the EU than was the case prior to Lisbon. This increased influence is not only a matter of NPs' increased leverage; after all, the threat of an orange card must be credible to be effective, and given the difficulties even the credibility of the threat may be doubted. Rather, the fact that they now possess legislative power – even a modicum of it – lends legitimacy to their participation in legislative politics at the EU level. Moreover, it can spur them to take a more active role in EU affairs than they would have if scrutiny had remained purely on the national level (Kiiver 2008). This will be particularly true if the interparliamentary deliberation has a synergistic effect, making for a collective scrutiny that is greater than the sum of the scrutiny within individual NPs.

Let us enumerate the ways in which the Early Warning Mechanism can affect final legislative outcomes in the EU even if thresholds for yellow and orange cards are never reached. First, the Commission (or other proposing institution) is required to 'take into account' the reasoned opinions of NPs, however few in number. It must respond to them with a reasoned defence of

the proposal on subsidiarity grounds; it may decide to withdraw or amend a measure in the face of significant opposition, even if not obliged to do so. In fact, there appears to be at least one instance so far of draft legislation that was amended in response to concerns raised by national parliaments in their reasoned opinions.¹² Furthermore, this requirement can have a long-run 'disciplining effect' (Maurer 2008: 93), deterring the Commission from making legislative proposals that are likely to raise subsidiarity-based objections. Furthermore, NPs' influence may be felt both before and after the eight-week window of the EWM. Before the EWM, NPs receive and can comment upon all consultative pre-legislative documents, including the Annual Legislative Programme. Thus, even before it has been formally proposed, NPs may informally (not technically through the EWM but the political dialogue) express early, contingent opposition to a mooted legislative proposal; in addition, they also have advance notice to better prepare their opposition within the formal channel of the EWM when it is eventually proposed. After the EWM, the reasoned opinions of NPs will certainly influence (even if they do not determine) their governments' subsequent votes in the Council. Furthermore, if the EWM facilitates interparliamentary – i.e. transnational – coordination of scrutiny, then a greater number of votes in the Council will be influenced than would have been the case if scrutiny had remained confined to national channels. The reasoned opinions of NPs should also have an influence on other EU institutions, in particular the EP.¹³

One final point leads into the remaining sections of this paper. The importance of a parliamentary chamber cannot be reduced simply to its legislative function; it may perform several functions, which vary independently of one another. So it is with the virtual third chamber; even if its effect on legislative outcomes cannot be incontestably proven, it may still perform other significant parliamentary functions, such as representation and deliberation. This was historically true of the European Parliament: before 1979, as an unelected and mostly powerless Parliamentary Assembly, it exercised a deliberative function but limited representative or legislative functions; upon direct elections it became a Supranational Parliament and thus gained in its representative function; only later, in the Single European Act and subsequent treaties, did it gain a significant legislative function to put it on a par with the Council in most areas. Similarly, even if the influence of the virtual third chamber on EU legislative outcomes is modest, it may nevertheless perform important functions of representation and deliberation.

Representation: A New Link between the Voter and the EU?

How and to what extent does the virtual third chamber fulfil a representative function? The EWM may be said to have a representational 'value-added' if it provides a new link between the citizen and the system of

decision-making authority in the EU beyond those that already exist via the EP and the Council. In this regard, it is interesting that in the treaty article explaining how the functioning of the EU is ‘founded on representative democracy’ national parliaments are ascribed only an indirect role and the EWM is not mentioned:

Citizens are directly represented at Union level in the European Parliament.

Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens. (Art. 10(2) TEU)

As for the EWM, it is referenced in a separate article (still in the same ‘democratic principles’ section) that sets out, for the first time in the main text of an EU treaty, the role of NPs in the EU. The article lists six ways in which NPs ‘contribute actively to the good functioning of the Union’, one of which is ‘by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality’ (Art. 12(b) TEU). Just as the treaty’s description of the Council and the EP together as the ‘Union legislator’ downplays by implication the legislative function of NPs at the EU level, so this treaty passage downplays their representative function. Yet the EWM does contribute to representative democracy in the EU by connecting it to the citizen in a new way. If the citizen was hitherto linked to the EU by two ‘chains of representation’, a supranational chain running through the EP and a national chain running through national governments to the Council (Holzhacker 2007: 260), then the EWM constitutes a third ‘chain of representation’ in which NPs bypass national governments to participate directly in the EU legislative process. This third pathway is genuinely distinct from, albeit less important than, the first two, and as such arguably has a representational ‘value-added’ for the EU.¹⁴

The question of whether the virtual third chamber performs a representative function is inescapably normative, because if it does so then it enhances the democratic legitimacy of the EU. Unlike the previous question on the legislative function, which was mainly concerned with predicting whether NPs would be effective or ineffective in influencing EU policy, this question concerns whether their involvement will be helpful or harmful to EU democracy. Everyone agrees that a primary goal of the EWM (besides the improvement of subsidiarity scrutiny) is to reduce the EU’s ‘democratic deficit’, yet exactly *how* it will do so remains vague. By increasing NPs’ involvement at the EU level, it is supposed that somehow their democratic legitimacy will ‘rub off’ on the EU – or, as Kiiver (2006: 184) puts it, ‘beneficial properties can be extracted from them for an all-European

purpose'. Therefore, we must first clarify the democratic justification for increasing the involvement of NPs in the EU, both in general and in the specific form of the EWM, before turning to those critics who warn that this could 'potentially cause more damage than good' (Raunio 2007: 85) to democracy in the EU.

Broadly, there are three interconnected arguments in favour of the EWM on democratic grounds. First, historically European integration has had the overall effect of increasing the power of the executive branch to the detriment of the legislative branch: as powers have shifted upwards, national parliaments have lost much of their ability to scrutinise and control their own governments' conduct of EU affairs, and the increase in power for the EP has not compensated for this loss. This is the 'deparliamentarisation' thesis (O'Brennan and Raunio 2007). Second, national parliaments have a unique legitimacy and an irreplaceable role as the locus of democratic activity within their particular member states. For this reason the problem of 'deparliamentarisation' cannot be solved solely by giving new powers to the EP: despite its growing power, elections to that body are still, and are likely to remain, second-order elections in the minds of voters (Reif and Schmitt 1980). Taken together, these arguments lead to the conclusion that NPs, more than any other set of institutions, have suffered a loss of influence as a result of European integration; moreover, new powers for the EP have not and indeed cannot fully compensate for the NPs' loss of authority, and therefore the only way to address the democratic deficit is to (re-)involve NPs directly at the EU level in some way. A third argument makes the case that NPs' involvement should specifically take the form, as it does in the EWM, of subsidiarity control – the political monitoring of actions taken by the EU in areas where its competence is shared with the member states – because this gives them the opportunity to defend their sphere of competence against the encroachment of EU powers.

The idea of the virtual third chamber exercising a representative function depends on two controversial assumptions: first, that the NP can and should take a position on EU affairs independent of the national government's position in the Council; and second, NPs collectively constitute a representative body at the EU level, a virtual third chamber, in the sense that they can take joint decisions by the equivalent of a majority vote. Objections may be raised to both of these assumptions, leading to two arguments against the EWM on democratic grounds – first, that it undermines parliamentary democracy at the national level or, second, that it produces a distorted form of representative democracy at the EU level.

Does the Early Warning Mechanism Subvert Parliamentary Democracy at the National Level?

One criticism of the EWM is that it 'goes against the very principle of parliamentary democracy' in that it leads the national parliament to take

a position in opposition to its own government (Fraga 2005: 498; see also Raunio 2007: 86). In parliamentary democracy, the government is the agent, dependent on the principal, the parliament, for support; the EWM undermines this relationship by making the parliament itself an agent, in effect an independent actor at the EU level. When the NP expresses subsidiarity objections to a proposal, 'this could be potentially damaging for the government that has been consulted in drafting the initiative and has probably already discussed it in the Council' (Fraga 2005: 498). Or, as Kiiver (2006: 162–3) puts it, 'Of course the national government has formed an opinion itself, perhaps...during the consultation stage', in which case the NP's adoption of an objection is 'an act of opposition'.

This objection glosses over important facts about the timing and, by extension, the nature of the EWM and its place within the EU legislative process. The Treaty of Lisbon stipulates that, except in cases of urgency, an 'eight-week period shall elapse' between the date of a draft legislative proposal being made available to national parliaments and its placement on the Council agenda, and a further 'ten-day period shall elapse' before the Council adopts a common position on it (Art. 4, Protocol No. 1 TEU/TFEU). Plainly the intent of the treaty is that national parliaments should formally receive a legislative proposal *at the same time* as national governments, and the former should at least have a chance to scrutinise and object to it before it is taken up in the Council. Under such circumstances the NP's objection, necessarily expressed before its government has formally taken a position, is hardly an 'act of opposition'.

This leads to a broader point about the nature of the process: an NP's opposition to a proposal originating from an external source, the EU, is different in kind from opposition to an internally generated government policy. It is true that as a matter of practice national governments have often already formulated a position on a draft measure even before it has been formally proposed. There is a well-documented tendency for agreement on EU legislation to be reached at ever-earlier stages of the co-decision process in informal 'trialogues' between representatives of the Commission, Council, and EP from which NPs are excluded (Farrell and Heritier 2003a). This trend is in fact accelerating: during the 2004–2009 parliamentary term a large majority (72 per cent) of co-decision legislation was adopted at first reading, including not just technical but politically salient and redistributive legislation (Reh *et al.* 2010: 1, 36). While this trend towards 'secluded' decision-making may explain the declining influence of NPs over EU legislation – and may indeed predict the impotence of the EWM – it does not justify it; it is of questionable democratic legitimacy precisely because it evades the scrutiny of NPs (Farrell and Heritier 2003b: 14–15). Seen in this light, the intention of the EWM is to *restore*, rather than subvert, parliamentary democracy at the national level.

Does the Early Warning Mechanism Distort Representative Democracy in the EU?

Philipp Kiiver (2006) offers a thoughtful and extended critique of the idea of greater involvement of national parliaments in the EU. The distribution of 'votes' to NPs within the EWM presupposes them to be comparable, unitary actors. He cautions that 'national parliaments' are a heterogeneous grouping as regards their composition, powers and functions: this catch-all term includes such disparate bodies as

the German Bundesrat, which is a legislator but not a parliament, the federal parliament of Belgium, which is a parliament but not always a legislator, the French Assemblée Nationale, to whom the President is not accountable, the Polish Senate, to whom the government is not accountable, and the UK House of Lords, which is not even elected. (Kiiver 2006: 185)

Moreover, NPs are not unitary actors but internally divided between majority and opposition, with the majority most often in a non-adversarial relationship with the national government. Their non-unitary and heterogeneous character is unproblematic at the national level as each NP is embedded in its domestic political system, but problems arise when the Treaty 'pierces the veil' of national constitutional autonomy by addressing NPs directly and effectively turning them into EU-level actors. While NPs (of which there were 25 at the time he wrote this) are indispensable sites of representative democracy at the national level, collectively their work does not aggregate into a coherent contribution to pan-European representative democracy:

Twenty-five sets of national parliamentary scrutiny will not add up to a total of European parliamentarism. A national parliament is elected with one national mandate and not with one-twenty-fifth of a European mandate. (Kiiver 2006: 187)

NPs are insular, rightfully focused on domestic political processes and the national interest: to the public of any given member state, parliamentary scrutiny in another member state is and ought to be irrelevant. It is wrongheaded to think of NPs as casting 'votes' in the EWM in the manner of individual MPs within a parliament; even if a threshold is reached, it will be 'essentially... a coincidental sum of otherwise unrelated events' (Kiiver 2006: 164). Without the unlikely event of NPs developing a common feeling of solidarity in collective opposition to national governments, they will remain a 'phantom collective' (Kiiver 2006: 162).

Kiiver's argument is a serious challenge to the idea that a virtual third chamber can or should perform a representative function at the EU level.

Certainly it is true that NPs do not (yet) form a strong 'collective' in the sociological sense, with a common sense of identity and purpose. However, the Treaty of Lisbon does constitute NPs as a collective in a legal and procedural sense: they are formed as a kind of 'metaparliament' insofar as they can cast 'votes', in the form of reasoned opinions expressing subsidiarity objections; an absolute majority of these votes constitutes a collective decision (the orange card) which is difficult to construe as something other than a collective act with a common purpose. This is particular so if NPs have actively cooperated in forging such a majority, in which case it would hardly be 'a coincidental sum of otherwise unrelated events'. Moreover, as each 'vote' in the EWM represents the considered decision of a democratically representative body, is it fanciful to interpret a majority of such votes as representing an outcome that is meaningful for pan-European representative democracy? By way of comparison, if the votes cast by national governments in the Council of Ministers may be legitimately aggregated into an expression of pan-European representative democracy (as implied in Art. 10 TEU), then why not the votes in the EWM?

Kiiver's other concerns seem exaggerated. Certainly NPs, like all democratic bodies, are not unitary but internally divided, but by adopting a decision by majority vote they become unitary at least for the purposes of that decision. And while NPs are in many ways heterogeneous – especially if we focus on the idiosyncrasies of upper chambers in bicameral systems – in the broadest terms, all EU member states are parliamentary democracies in which the legislature (taken as a whole) performs a broadly similar function. As a matter of comparison, there is also a fair degree of diversity among the executives of national governments, but this does not prevent them taking collective decisions in the Council of Ministers and the European Council (a body notably heterogeneous in that it includes heads of state and government). Moreover, the EWM only minimally 'pierces the veil' of national constitutional autonomy. It would indeed be an ironic outcome if the EU were to impose a uniform notion of parliamentary democracy on the member states in the name of promoting subsidiarity; but as the Protocol on the Role of National Parliaments in the European Union reminds us in its preamble:

the way in which national Parliaments scrutinise their governments in relation to the activities of the European Union is a matter for the particular constitutional organisation and practice of each Member State. (Protocol No.1 TEU/TFEU)

Thus, within the EWM each national parliament decides for itself how to carry out the scrutiny procedures, such as whether the two chambers in bicameral systems should adopt joint or separate scrutiny systems, whether reasoned opinions stating subsidiarity-based objections must be adopted by

the European affairs committee or the plenary, or whether to consult regional parliaments with legislative powers (COSAC 2010b: 20–22). The EWM respects national constitutional autonomy by treating NPs as unitary actors, in that each ‘vote’ represents a genuinely democratic decision of a national parliament or chamber thereof, according to the prevailing understanding of democracy under the national constitution. In one sense, the EWM is respectful of autonomy *to a fault* in that it is voluntary, which makes it difficult for NPs to coordinate their efforts in order to engage in a substantive communicative exchange – the subject of the section that follows.

Deliberation: A Forum for the Debate of Subsidiarity Compliance

To what extent will the virtual third chamber fulfil a deliberative function? It will have a deliberative value-added over the pre-Lisbon system if it creates a forum that results in a net improvement, quantitative or qualitative, in the public discussion of salient public policy questions in the EU. This forum must be interparliamentary, in that deliberation occurs not only within individual chambers but *between* the NPs of different member states. Deliberation may be horizontal (among NPs) or vertical (between NPs and EU institutions). Of course, the deliberation is *virtual* in that the participants deliberate mostly by correspondence rather than in person; yet this circumstance does not in itself preclude the EWM producing a substantive exchange on matters of public policy that improves deliberation in the EU as a whole. A quantitative improvement would be an overall increase in interparliamentary deliberation; a qualitative improvement would be a positive change in the quality of that discussion.

Certainly, there is *prima facie* evidence of a quantitative improvement. As noted above, there has been a steady increase in interparliamentary communication in the online public forum, IPEX, the foremost ‘virtual home’ of the virtual third chamber where NPs (and the EP) exchange messages pertaining to pending legislation and other matters of common concern.¹⁵ There has also been a steady increase in the communication between NPs and the Commission under the political dialogue. In addition, the COSAC subsidiarity tests have spurred NPs to review a number of Commission proposals for subsidiarity compliance, and in doing so to engage in a substantive dialogue with other NPs on questions of subsidiarity compliance more than they would have if the EWM had never been mooted. Thus interparliamentary communication has certainly increased as a direct result of the Treaty of Lisbon.

The question of whether there has been a qualitative, as opposed to quantitative, improvement is more difficult to assess, and it goes to the heart of whether this interparliamentary communication counts as true ‘deliberation’. Ideally, deliberative democracy requires that decisions of public policy should be subject to a rigorous test of public reason, in which the proponent

is forced to justify the proposed decision to those who will be affected by it. In its design, the EWM is largely a deliberative forum. It has previously been pointed out (Cooper 2006) that the EWM is structured to set the conditions for an *argument* between the Commission and NPs over whether EU action is compliant with subsidiarity – in other words, whether in a given circumstance EU action is appropriate, or the matter should be left to the national level. The back-and-forth structure of the argument is outlined in the Treaty: first, the Commission proposal must be accompanied with reasons justifying why the measure is necessary; NPs may respond with reasoned opinions stating their objections; and the Commission must respond to the objections with further justification of its proposed action. In effect this process requires the proposal to be publicly justified by the proposing institution, usually the Commission, to those affected by the decision – EU citizens, as represented by their NPs.

Arguably, this exchange is more akin to arguing than to bargaining; in the terms of Thomas Risse (2000), it is governed more by the ‘logic of arguing’ than the ‘logic of consequences’. This was particularly true of the Constitutional Treaty’s yellow-card-only version, in which NPs’ success would have depended more on persuasion than the exercise of power (Cooper 2006). The addition of the orange card tilts the social dynamic somewhat towards a logic of consequences in that it brings in a legally binding element in the form of a majority vote; it also brings in two other institutions, the Council and EP, as arbiters that must decide between the Commission’s and the NPs’ reasoned arguments. Of course, the Council and the EP also have a deliberative function, not only internally as deliberative bodies but in requiring the Commission to justify its legislative proposals to EU citizens. Yet their exercise of this role is largely opaque – especially for the Council – at least to the average citizen; certainly, they have not been especially vigilant subsidiarity watchdogs. Ultimately, the question at hand is whether the inclusion of NPs in the process improves deliberation in comparison to the pre-Lisbon system dominated by the Council and the EP.

Has there been a qualitative improvement? While it is necessarily difficult to measure – and it is too early to make a definitive judgement – there are some indicators that can be looked to for a preliminary assessment. For example, the final COSAC subsidiarity test showed signs of improvement vis-à-vis previous tests in the qualitative exchange of substantive information regarding proposed legislation, both horizontally (among NPs) and vertically (between NPs and EU institutions). A majority of participating chambers reported that they had cooperated with other NPs in some way, whether through bilateral contacts, permanent representatives based in Brussels, or by monitoring activity and/or sharing information on IPEX (COSAC 2010a: 16–24). In addition, much more than in previous tests, almost all chambers were satisfied with the Commission’s justifications for the proposal, which included an impact assessment with quantitative and qualitative measures; this may indicate that the Commission has heeded the

complaints of NPs expressed in previous tests that their justifications had been inadequate.

A long-term measure of the deliberative function of the VTC will be if NPs succeed in shifting the terms of policy debate so that their concerns, especially with respect to subsidiarity, are given greater credence by EU institutions. The Commission, as their principal interlocutor in the EWM, has a particular obligation to heed NPs' concerns. To its credit, the Commission has voluntarily agreed to respond to every single communication from NPs, even though it is not obliged to do so. Even so, many NPs complain that the Commission's replies to their reasoned opinions are unsatisfactory as they are 'generic' – seemingly addressed to all NPs and failing to deal with the specific points raised in a particular opinion (COSAC 2011: 33). As one participant in the October 2011 COSAC meeting said, 'If we send a reasoned opinion we expect to receive a reasoned reply'. On the other hand, as noted above, there has been at least one case in which legislation appears to have been redrafted in response to concerns raised by national parliaments in their reasoned opinions. Ideally, the EWM should produce in the short term the procedural effect of a more rigorous policy debate, and possibly in the long term the substantive effect of improved (i.e. more subsidiarity-compliant) legislation.

It should be acknowledged that many of the obstacles to the legislative effectiveness of the VTC noted above can be applied equally to its deliberative effectiveness. One in particular bears closer examination. It may be objected that substantive deliberation in the virtual third chamber is hindered by the narrow scope of the EWM, focused as it is on subsidiarity compliance rather than broad policy questions. Yet while subsidiarity is sometimes called a technical or legal question, it is also irreducibly political: whether in a given case the EU should take action or leave the matter to the member states is a political question which, the Convention decided, should be adjudicated by political institutions. And NPs were brought into the process precisely because they have an institutional interest in the outcome, in advancing a definition of subsidiarity that tends to be restrictive of EU actions that might encroach upon their own sphere of activity. So the subsidiarity debate is a political debate, but one framed in an unusual way, not about the desirability of the policy but the proper level of its execution. It is true that the subsidiarity-only character of the review can tend to reduce the interventions of NPs to blunt opposition, whereas a broader review – including proportionality – would allow NPs to be more constructive, suggesting ways in which the proposal may be improved. On the other hand, this aspect makes it easier to aggregate the reasoned opinions of NPs: all findings of a subsidiarity breach, even if they are based on somewhat different reasoning, can be effectively counted as votes against the proposal, at least in the form presented.

These observations on the limited scope of the EWM return us to the larger point that the virtual third chamber, such as it is, covers a broader

terrain. In fact, deliberation in the VTC need not be limited to discussion of pending legislation, but may cover more general and long-term questions of public concern. While the VTC is in a way constituted by the EWM – in that it confers concrete legislative powers on the collectivity of NPs – the VTC need not be constrained by the procedural and substantive limits of the EWM. Perhaps the best illustration of this is the political dialogue: within the EWM, NPs may send reasoned opinions objecting to pending legislation on subsidiarity grounds; yet more loosely within the VTC they may also send opinions to the Commission regarding any matter (including the legislative programme, non-legislative measures, and NPs' own initiatives) on any grounds (including subsidiarity, proportionality, legal basis, or general policy considerations). NPs also have numerous contacts with the EP outside the EWM, such that their interaction has been described as a 'multi-level parliamentary field' (Crum and Fossum 2009). Vertical deliberation between NPs and the EP can occur on a number of fronts, and need not be limited to the discussion of legislative matters: for example, the Treaty of Lisbon sets out new frameworks for cooperation between NPs and the EP in the scrutiny of activities in the area of freedom, security and justice, and potentially in the field of foreign and defence policy (Piris 2010: 130–31). Viewed in this light, the EWM – which is the focus of the analysis in this paper – may be thought of merely as a legally binding 'hard core' within a much broader, non-binding deliberative exchange among NPs and EU institutions.

Conclusion

The foregoing analysis has shown that national parliaments' new powers under the Treaty of Lisbon allow them in effect to collectively perform parliamentary functions of legislation, representation, and deliberation at the EU level. While not on a par with those of the Council or the current EP, NPs' powers to influence legislation are nevertheless substantial, in some ways analogous to the powers of the EP under the cooperation procedure. Yet the comparison to the EP also indicates what is lacking in the VTC. The members of the EP evinced a collective ambition to advance their institutional position within the EU, which was in part driven by a sense of common purpose, a self-righteous belief that such an advance was key to the democratic legitimacy of the whole structure. Such notions seem to be lacking among national parliamentarians, most of whom have little appetite for the creation of anything like a 'third chamber' in the EU. It is an irony of the treaty reform process that national parliamentarians, who made up a majority in the Convention, created the EWM with only a yellow card; it was the leaders of national *governments* who later added the orange card in the pre-Lisbon Intergovernmental Conference. But even before national parliaments develop a sense of collective ambition or common purpose; they must develop a *collective identity*, in the minimal sense of an awareness of

themselves as constituting a new institution – an actor in its own right – at the EU level.

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Notes

1. Some recently devised theoretical concepts in this regard include a ‘polycentric paradigm’ (Besselink 2006), the EWM as a *Conseil d’Etat* for Europe (Kiiver 2011), and – to be discussed further below – a ‘multilevel parliamentary field’ (Crum and Fossum 2009).
2. Control of the executive, another important parliamentary function, has been omitted from this analysis because national parliaments have little role in this regard. It is now well established, as the Treaty of Lisbon confirms, that ‘The Commission, as a body, shall be responsible to the European Parliament’ (Art 17(8) TEU). As it happens, the idea of giving national parliamentarians a role in electing and impeaching the Commission was proposed without success in the European Convention (Kiiver 2006: 148).
3. For full details, see <http://www.cosac.eu/en/info/earlywarning/>
4. See <http://www.ipex.eu>
5. For full details, see [http://ec.europa.eu/dgs/secretariat_general/rerelations/relations_other/npo/index_en.htm](http://ec.europa.eu/dgs/secretariat_general/rerelations/rerelations_other/npo/index_en.htm)
6. Peter Hain, UK representative at the European Convention, insightfully described the EWM as a ‘virtual watchdog’, devised as an alternative to ‘a new body meeting in Brussels regularly’, which would have entailed ‘national parliamentarians all in the same place on the same day’. Remarks before the Select Committee on European Scrutiny, 20 November 2002, available at <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/103-i/2112002.htm>, at para. 3.
7. For certain policy areas within the Area of Freedom Security and Justice – specifically police cooperation and judicial cooperation in criminal matters – the yellow card threshold is one quarter, or 14 of 54 votes in EU-27.
8. The protocol also notes that after a legislative act has been adopted, a member state may, on behalf of its national parliament, challenge it before the European Court of Justice on the grounds that it violates subsidiarity (Art. 8, Protocol 2 TEU/TFEU).
9. According to COSAC (2011: 26–31), as of August 2011, 29 of the 40 chambers in the EU had issued a total of 69 reasoned opinions raising subsidiarity issues with 27 legislative proposals. All of these proposals received no more than five reasoned opinions each, with two exceptions. The Seasonal Workers Directive (COM(2010) 379) prompted ten reasoned opinions, equivalent to ten ‘votes’; and the proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM(2011) 121) provoked nine reasoned opinions, equivalent to 13 ‘votes’. The latter vote tally is the highest to date, but still short of the yellow and orange card thresholds of 18 and 28 votes respectively. However, as will

be argued below, the frequency of yellow and orange cards is not necessarily the best measure of the effectiveness of the EWM.

10. Up to August 2011, five of the 11 most active chambers (issuing three or more reasoned opinions) were upper houses of bicameral parliaments – those of Poland, Italy, France, the Netherlands, and Romania (COSAC 2011: 27).
11. 'From Parliament to Parliament', *European Voice*, 20 January 2011, p. 21.
12. The Danish *Folketing* and the German *Bundesrat* saw their concerns reflected in later versions of a Directive (COM(2010) 368) on Deposit Guarantee Schemes (COSAC 2011: 34–5).
13. Regarding the Seasonal Workers' Directive, the Commission acknowledged that NPs' reasoned opinions have been influential even in the absence of a yellow card:

In the Council and the European Parliament so far only preliminary discussions have taken place, at working group and committee level respectively. These have reflected several of the issues raised by national Parliaments in their opinions... Overall, it should be emphasised that some of the opinions received from national Parliaments on this proposal have served as an effective 'early warning' for the Commission as regards issues likely to be raised in the course of the legislative process. (European Commission 2011: 8)

It is, however, too early to know how NPs' opinions will affect the final legislative outcome in this case.

14. Admittedly, the electoral connection is less direct for NPs than for the EP because national parliamentary elections are largely fought on domestic rather than European issues; of course, that is also true of the election of national government representatives in the Council. Because of their national perspective, NPs acting together are likely to take a position on EU legislation that is often different from that of the EP. However, from the point of view of representation, it can be argued that the EP and NPs, individually and collectively, mostly complement each other, and by doing so enhance the EU's democratic legitimacy. That is the case made by Crum and Fossum (2009), who portray NPs and the EP as comprising a 'multilevel parliamentary field'. The idea of a 'virtual third chamber' has certain commonalities with this notion. Both denote forms of interparliamentary cooperation with 'systemic properties' and an 'integrated structure' (Crum and Fossum 2009: 267) in contrast to the much looser notion of an interparliamentary 'network' (cf. Slaughter 2004: Ch.3). Yet there are important differences. Crum and Fossum place greater emphasis on the 'vertical' connection between national parliaments and the European Parliament; and they are focused mainly on the representative functions of parliaments at both levels, and how these interact with and perhaps reinforce one another. The 'virtual third chamber' is formed on the 'horizontal' plane out of the relationships between national parliaments which then as a group interact vertically with EU institutions, including the European Parliament; moreover, unlike the field it has some collective agency as an institution that performs a legislative function. Still the two notions are broadly compatible: the virtual third chamber can be thought of as a particularly robust form of interparliamentary cooperation embedded within the larger multilevel parliamentary field in the EU.
15. The IPEX website has been frequently criticised as difficult to use, and its effectiveness as a communications tool has suffered as a result (COSAC 2010b: 22–3). This is unfortunate because it is a means not only for communications between parliaments but also to make their deliberations accessible to citizens. In June 2011 the website was relaunched in what is intended to be a more user-friendly format.

References

- Auel, K. (2007). 'Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs', *European Law Journal*, 13:4, 487–504.

- Barrett, G. (2008). 'Introduction', in G. Barrett (ed.), *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures*. Dublin: Clarus Press.
- Besselink, L. (2006). 'National Parliaments in the EU's Composite Constitution: A Plea for a Shift in Paradigm', in P. Kiiver (ed.), *National and Regional Parliaments in the European Constitutional Order*. Groningen: Europa Law Publishing.
- Blanchard, A., and T. Horan (1998). 'Virtual Communities and Social Capital', *Social Science Computer Review*, 16:3, 293–307.
- Cooper, I. (2006). 'The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU', *Journal of Common Market Studies*, 44:2, 281–304.
- COSAC (2010a). 'Report on the Results of the Subsidiarity Check on the Commission Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in Matters of Succession and the Creation of a European Certificate of Succession', paper prepared by the COSAC Secretariat and presented to XLIII Conference of Community and European Affairs Committees of Parliaments of the European Union, Madrid, Spain, May.
- COSAC (2010b). 'Thirteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny', paper prepared by the COSAC Secretariat and presented to XLIII Conference of Community and European Affairs Committees of Parliaments of the European Union, Madrid, Spain, May.
- COSAC (2011). 'Sixteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny', paper prepared by the COSAC Secretariat and presented to: XLVI Conference of Parliamentary Committee for Union Affairs of Parliaments of the European Union, Warsaw, Poland, October.
- Crum, B., and J.E. Fossum (2009). 'The Multilevel Parliamentary Field: A Framework for Theorizing Representative Democracy in the EU', *European Political Science Review*, 1:2, 249–71.
- Dougan, M. (2008). 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts', *Common Market Law Review*, 45:3, 617–703.
- Eriksen, E.O. (2009). *The Unfinished Democratization of Europe*. Oxford: Oxford University Press.
- European Commission (2011). 'Annual Report 2010: On the Relations Between the European Commission and National Parliaments'. Brussels, 10 June 2011. COM(2011) 345 final.
- Farrell, H., and A. Héritier (2003a). 'Formal and Informal Institutions Under Codecision: Continuous Constitution-Building in Europe', *Governance*, 16:4, 577–600.
- Farrell, H., and A. Héritier (2003b). 'The Invisible Transformation of Codecision: Problems of Democratic Legitimacy', Swedish Institute for European Policy Studies Report No. 7.
- Fraga, A. (2005). 'After the Convention: The Future Role of National Parliaments in the European Union (and the Day After... Nothing Will Happen)', *Journal of Legislative Studies*, 11:3, 490–507.
- Hoeffel, D. (2001). *Une deuxième chambre européenne*, rapport d'information, Sénat de France, available at http://www.senat.fr/rap/r00-381/r00-381_mono.html (accessed 30 June 2011).
- Holzhacker, R. (2005). 'The Power of Opposition Parliamentary Party Groups in European Scrutiny', *Journal of Legislative Studies*, 11:3–4, 428–45.
- Holzhacker, R. (2007). 'Democratic Legitimacy and the European Union', *Journal of European Integration*, 29:3, 257–69.
- Judge, D., and Earnshaw, D. (2008). *The European Parliament*. 2nd ed. London: Palgrave Macmillan.
- Kardasheva, R. (2009). 'The Power to Delay: The European Parliament's Influence in the Consultation Procedure', *Journal of Common Market Studies*, 47:2, 385–409.
- Kiiver, P. (2006). *The National Parliaments in the European Union: A Critical View on EU Constitution-Building*. The Hague: Kluwer Law International.
- Kiiver, P. (2008). 'The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity', *Maastricht Journal of European and Comparative Law*, 15, 77–83.

- Kiiver, P. (2011). 'The Early-Warning System for the Principle of Subsidiarity: The National Parliament as a Conseil d'Etat for Europe', *European Law Review*, 36, 98–108.
- Knudsen, M., and Y. Carl (2008). 'COSAC – Its Role to Date and its Potential in the Future', in G. Barrett (ed.), *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures*. Dublin: Clarus Press.
- Louis, J.-V. (2008). 'The Lisbon Treaty: The Irish "No": National Parliaments and the Principle of Subsidiarity – Legal Options and Practical Limits', *European Constitutional Law Review*, 4:3, 429–52.
- Marshall, S. (2008). 'Transnational Parliamentary Assemblies and European Security Policy', in D. Peters, N. Deitelhoff, and W. Wagner (eds.), *The Parliamentary Control of European Security Policy*. RECON report no. 6, ARENA Report No. 7/08. Oslo: Arena.
- Maurer A. (2008). 'National Parliaments in the Architecture of Europe after the Constitutional Treaty', in G. Barrett (ed.), *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures*. Dublin: Clarus Press.
- Norton, P. (1990). 'Parliaments: A Framework for Analysis', *West European Politics*, 13:3, 1–9.
- O'Brennan, J., and T. Raunio (2007). 'Introduction: Deparliamentarization and European Integration', in J. O'Brennan and T. Raunio (eds.), *National Parliaments within the Enlarged European Union*. Abingdon: Routledge.
- Piris, J.-C. (2010). *The Lisbon Treaty: A Legal and Political Analysis*. Cambridge: Cambridge University Press.
- Raunio, T. (2007). 'National Legislatures in the EU Constitutional Treaty', in J. O'Brennan and T. Raunio (eds.), *National Parliaments within the Enlarged European Union*. Abingdon: Routledge.
- Raunio, T. (2009). 'National Parliaments and European Integration: What We Know and Agenda for Future Research', *Journal of Legislative Studies*, 15:4, 317–34.
- Raunio, T. (2010). 'Destined for Irrelevance? Subsidiarity Control by National Parliaments', *Europe Working Paper* 36/2010, Real Instituto Elcano.
- Reh, C., A. Heritier, C. Koop, and E. Bressanelli (2010). 'The Informal Politics of Legislation: Explaining Secluded Decision-Making in the European Union', paper presented at APSA Annual Convention, Washington, DC, 2–5 September.
- Reif, K., and Schmitt, H. (1980). 'Nine Second-Order National Elections – A Conceptual Framework for the Analysis of European Election Results', *European Journal of Political Research*, 8, 3–44.
- Risse, T. (2000). 'Let's Argue! Communicative Action in World Politics', *International Organization*, 54:1, 1–39.
- Saalfeld, T. (2005). 'Deliberate Delegation or Abdication? Government Backbenchers, Ministers and European Union Legislation', *Journal of Legislative Studies*, 11:3–4, 343–71.
- Slaughter, A.-M. (2004). *A New World Order*. Princeton, NJ: Princeton University Press.
- Smismans, S. (1998). 'The Role of National Parliaments in the European Decision-Making Process: Addressing the Problem at European Level?', *ELSA Selected Papers on European Law*, 9:1, 49–76.
- Tsebelis, G. (1994). 'The Power of the European Parliament as a Conditional Agenda Setter', *American Political Science Review*, 88:1, 128–42.
- Van Kersbergen, K., and B. Verbeek (2007). 'The Politics of International Norms: Subsidiarity and the Imperfect Competence Regime of the European Union', *European Journal of International Relations*, 13:2, 217–38.
- Wellman, B., and M. Gulia (1999). 'Net Surfers Don't Ride Alone: Virtual Communities as Communities', in P. Kollock and M. Smith (eds.), *Communities in Cyberspace*. London: Routledge.
- Wendt, A. (1999). *Social Theory of International Politics*. Cambridge: Cambridge University Press.
- Zürn, M. (2000). 'Democratic Governance Beyond the Nation-State: The EU and Other International Institutions', *European Journal of International Relations*, 6:2, 183–221.