

A Yellow Card for the Striker: How National Parliaments Defeated EU Strikes Regulation

In May 2012 national parliaments of the EU issued their first yellow card under the Early Warning Mechanism of the Treaty of Lisbon. A sufficient number of them – equivalent to one-third – raised objections to the *Monti II* legislative proposal regarding the right to strike, so that the Commission was required to review the proposal, and eventually withdrew it. This paper shows in detail how national parliaments achieved this result, using the available tools of interparliamentary coordination – in particular, the initiative of one determined parliament (Denmark), COSAC, and the network of national parliament representatives in Brussels. A dynamic political process was initiated which drew in previously inactive parliaments. In the end, the yellow card threshold was surpassed with just hours to spare. An analysis of the process vindicates the notion that national parliaments now constitute a collective entity at the EU level, a virtual third chamber in the EU legislative system.

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I. Introduction: “A Rather Harmless Procedure”?

On the evening of May 22, 2012, the *Tweede Kamer*, the lower house of the Netherlands parliament, adopted a “reasoned opinion” objecting to a legislative proposal coming from the European Union (EU). The proposal, known by the nickname *Monti II*, was controversial because it was widely seen as hurting the interests of EU workers by limiting their right to strike. National parliaments had been newly empowered, under the Early Warning Mechanism (EWM) established by the Treaty of Lisbon, to raise subsidiarity-based objections to EU legislative measures in the first eight weeks after they were proposed. The *Tweede Kamer* was the last national parliamentary chamber to voice its objections to *Monti II*, doing so in the final hours before the eight-week period elapsed. In the end, twelve parliamentary chambers – seven unicameral parliaments, plus five chambers from bicameral systems – passed reasoned opinions. This meant that under the rules of the EWM, the very first “yellow card” had been triggered. As a consequence, the institution which proposed *Monti II*, the Commission, was required to review it, after which it had three options: it could maintain, amend, or withdraw the proposal. In September 2012, the Commission decided to withdraw it. Thus for the first time, national parliaments (NPs) had collectively intervened in the legislative process of the EU – to decisive effect.¹

The occasion of the first yellow card – and the fact that it precipitated the withdrawal of the targeted legislation – challenges the commonly held view that the EWM is toothless. Around the time of its inception one scholar judged it to be a “rather harmless procedure, with only a marginal impact on the EU’s legislative process” (Raunio 2010: 13), and most academic observers who looked at the EWM took a similar view (Bellamy and Kröger 2012; De Wilde 2012; Fraga 2005; Kiiver 2006; Raunio 2007, 2009). Three kinds of mutually-reinforcing obstacles – logistical problems, incentive problems, and weaknesses inherent to the EWM – stood to prevent NPs from using the EWM to substantially affect EU legislation (Cooper 2012: 449-451). Daunting logistical obstacles – the fact that participation in the EWM is voluntary, the institutions of interparliamentary coordination are weak, there is no internal structure of leadership among NPs, and the deadline is short – made it

¹ The research findings presented here are based largely on interviews with direct participants or witnesses of the events described. They were conducted in person in Nicosia and Brussels, as well as by telephone and email. The author would like to warmly thank all anonymous interviewees.

difficult to reach the yellow card threshold; and these were compounded by the NPs' lack of a strong incentive to participate given the improbability of success, and that even if successful NPs cannot actually veto a legislative proposal. Moreover, the "harmlessness" of the EWM seemed to have been confirmed by the empirical record. Prior to *Monti II*, only three legislative proposals got even half the votes needed for a yellow card – those concerning seasonal workers (9 votes), corporate tax (14 votes) and border controls (10 votes). And in the initial 20 months of the EWM, 10 of the 40 parliamentary chambers in the EU issued no reasoned opinions at all, and 9 chambers issued only one (Bellamy and Kröger 2012). Most NPs seemed largely apathetic to the EWM while most reasoned opinions were produced by a small handful of particularly active chambers: this meant that, arithmetically, it would be difficult to reach the threshold for a yellow card. Yet the story of *Monti II* shows that all these obstacles can be overcome.

This bulk of this paper is a detailed reconstruction of the process leading up to the *Monti II* yellow card. Two main empirical findings emerge, which will come as a surprise even to those who closely study NPs in the EU. First, national parliaments coordinated with one another to an unprecedented degree, far more than is commonly realized. The Danish parliament played the role of "initiator," in that it decided early that it would oppose *Monti II* and actively encouraged other NPs to do the same. The opposition spread at COSAC, a meeting of NPs' EU affairs committees, which serendipitously took place in Copenhagen in the middle of the eight-week review period for *Monti II*. And the network of National Parliament Representatives (NPRs) in Brussels played a key role in keeping each other up to date as to the state of play in their respective NPs, allowing the participants to know in real time how many reasoned opinions had been passed – i.e. where the "vote count" stood as the deadline approached. This shows that after the Treaty of Lisbon NPs developed an organizational capacity that helped to put a yellow card within striking distance.

The second empirical finding is that *Monti II* set in motion a dynamic process wherein many NPs which do not normally participate in the EWM were persuaded to jump in and pass a reasoned opinion in the final days of the review period, in the knowledge that the vote count was closing in on 18 even as the deadline was looming. Paying close attention to the date on which each NP made the political decision to pass a reasoned opinion – even if the formal decision came later – a distinct pattern

emerges. The first chamber to do so was the Danish parliament, on April 20. Then, between late April and mid-May, five more parliamentary chambers followed suit, all of which were among the most active participants in the EWM (defined as those which passed five or more reasoned opinions prior to *Monti II*): the French *Sénat*, Polish *Sejm*, the Swedish *Riksdag*, the UK House of Commons and the Luxembourg *Chambre des Députés*. Then, in the final week before the deadline, five more chambers took action, which were hitherto among the less active participants in the EWM (defined as those which passed two or less reasoned opinions prior to *Monti II*): the parliaments of Finland, Portugal, Latvia, Malta, and the Belgian *Chambre des Représentants*. Whereas the chambers in the first group likely would have passed reasoned opinions regardless of the activities in other NPs, those in the second group were heavily influenced by the growing momentum towards a yellow card.² Taken together, these two empirical findings show that each NP does not make its decision whether to pass a reasoned opinion in isolation, but rather they extensively interact with and influence one another.

Most of this paper is given over to tracing in detail the process that led up to the yellow card (Section II). It is a dramatic story with a number of unexpected twists and a nail-biting climax, the outcome of which was uncertain until the very end. Yet while it played out mostly in public view, it is still largely unknown as it unfolded not in a single location but in parliaments and committee chambers scattered across the capitals of Europe. Even most of those who were directly involved – many of whom were interviewed for this article – only know a part of the story and not the whole. After that, there is a brief summary of the Commission response to the yellow card, and the NPs’ reaction to it (Section III). After this I reflect on what the experience of the yellow card means for many of the theories that have been developed concerning the EWM (Section). It is argued that it vindicates the notion that NPs now constitute a “virtual third chamber” in the EU (Cooper 2012). Finally I conclude (Section V) that the EWM is a new forum for democratic politics in the EU.

² The twelfth and final reasoned opinion breaks the pattern in that it came from one of the most active chambers, the Netherlands *Tweede Kamer*, but there were unusual circumstances in that case, explained below.

II. How the Yellow Card Happened

The Commission formally adopted the *Monti II* legislative proposal on March 21, 2012, but the EWM clock began ticking on March 27, when it sent a *lettre de saisine* to NPs officially notifying them that, as the proposal had now been transmitted in all official languages, they could address a reasoned opinion to the EU institutions within the subsequent eight-week period. Under the EWM, the NP of each member state is allotted two “votes” (regardless of population size) – one per chamber in bicameral systems, and two for each unicameral parliament – to make a total of 54 votes in EU-27. In EU-27, there are 13 bicameral parliaments and 14 unicameral parliaments, thus there are 40 chambers in total (although two bicameral chambers, those of Ireland and Spain, exercise joint scrutiny). In order to achieve a yellow card, they must amass reasoned opinions from the various chambers representing a minimum of 18 votes, one third of the total. They had until 22 May to do so. Attention to detail must be paid when reconstructing the story, because each parliament has different procedures for adopting a reasoned opinion, and its own combination of competent bodies – sectoral committee, European Affairs Committee, or plenary – involved in the process. Moreover, as we shall see, a number of parliamentary chambers deviated from their normal procedures in the case of *Monti II*, as awareness grew of its significance and of the rising likelihood of a yellow card.

The Monti II Proposal and National Parliaments’ Arguments Against It

Limitations of space do not permit a full summary of the *Monti II* proposal and the NPs’ reasons for opposing it (see Fabbrini and Granat 2013). Its full title is the “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). Its purpose was to reconcile collective action rights (especially the right to strike) with the economic freedoms of the internal market, in the wake of two controversial 2007 judgements of the ECJ, *Viking* and *Laval* (see Davies 2008). It follows from 2010 report by (then-) Professor Mario Monti and is in part modelled after the “Monti Regulation” of 1998 – hence the nickname *Monti II*.

Unusually, the legal basis of the proposal was the “flexibility clause” (Art. 352 TFEU) which empowers the EU to take action in a circumstance where it lacks a power specified by the Treaty. This meant that the proposal would require unanimous approval in the Council, as well as the approval of the EP. This was a “special” (rather than the “ordinary”) legislative procedure, which meant for NPs that it was subject to the yellow card but not the orange card under the EWM. In addition, many thought that it should be subject to heightened scrutiny as it meant that the EU would be exercising powers not specified in the treaty; in fact, post-Lisbon statutes in at least two member states (Germany and the UK) required that any use of the flexibility clause be authorized by a prior act of parliament, otherwise the government must vote against it in the Council.

As required by the treaty, NPs objected to *Monti II* on the grounds that it violated the principle of subsidiarity, although these objections frequently overlapped with broader objections on policy grounds, or to its legal basis. The most common objections were: the legislation is unnecessary because existing national arrangements are sufficient to address the problem; the legislation has no value-added vis-à-vis the current legal status quo; EU intervention in this area might disturb well-functioning national arrangements; and that the proposal does not achieve its objective of clarifying the relationship between social rights and economic freedom or reconciling them in practice in cross-border situations. While the opponents to *Monti II* within the NPs came from across the political spectrum, and many were motivated more by protecting national autonomy than workers’ rights *per se*, there is on balance a leftward tilt to the campaign against it. Broadly, it was a yellow card for – that is to say, in defense of – the striker.

Tools of Interparliamentary Coordination

Any effort to coordinate the various NPs of the EU to act in concert to achieve a yellow card is presented with a host of logistical problems. Each parliament tends to work slowly, according to its own timetable, and according to its own unique set of procedures. Moreover, all NPs within the EU are formal equals. If indeed NPs constitute a “virtual third chamber” at the EU level, it is a peculiar kind of chamber: there is no internal structure of leadership, no speaker, no government or opposition,

no parties. As all actions in the EWM are voluntary, every vote in this “chamber” must be a free vote. In other words, if there is to be a yellow card, then it must be the result of a spontaneous, self-organizing, bottom-up process. This said, NPs do have some tools of interparliamentary coordination at their disposal, most of which proved useful in this case. First of all, it is often the case that one parliamentary chamber will take on the role of “initiator” (“leader” is perhaps too strong a word), being the first to move to adopt a reasoned opinion and then to encourage others to do so. In the case of *Monti II*, the initiator was the parliament of Denmark, which in turn (as we shall see) made use of the other tools of interparliamentary coordination. Second, there is COSAC, a twice-yearly gathering of representatives of European Affairs Committees of the NPs and the EP. COSAC has often been derided as a mere talking shop – it has no independent decision-making power – but it does provide an opportunity for national parliamentarians to meet together on a face-to-face basis, which proved extremely valuable in this case. Third, there was the network of national parliament representatives (NPRs): almost all NPs have civil servants stationed in Brussels as permanent representatives, and these played a crucial role in coordinating the response to *Monti II*. Finally, there is IPEX, an online platform for interparliamentary exchange. This is an indispensable tool for the public dissemination of information related to parliamentary scrutiny of EU matters; however, IPEX did not play an important instrumental role in interparliamentary coordination in the run-up to the yellow card, because it did not contain the most up-to-date information about what was going on in each parliament.³ That information was in the hands of the permanent representatives in Brussels.

In the case of *Monti II*, the Danish *Folketing* was the initiator. It was the first to move to adopt a reasoned opinion, acting with particular haste, with the clear intention of trying to influence other parliaments to adopt reasoned opinions as well. Scrutiny was initiated on March 21, the very day of its adoption by the Commission, and the decision to draft a reasoned opinion was made two days later in the European Affairs Committee (EAC) on March 23. The Danish EAC has the power to adopt a reasoned opinion for the whole parliament. Normally, it would consult the relevant sectoral committee (in this case, the Employment Committee) for its opinion on

³ IPEX does have internal forums in which NPs can privately exchange information about parliamentary scrutiny. However, they are not used.

subsidiarity compliance, but in this case they did not; this was done to speed up the process. The political decision to adopt a reasoned opinion was made unanimously on April 20. It was formally adopted on May 3, making it the first parliamentary chamber to do so. The position of the Danish *government* was that it was opposed to Monti II for its political content; it did not find the proposal in breach of subsidiarity, but thought the Commission's subsidiarity justifications were insufficient. Thus in Denmark, the push for a reasoned opinion clearly came from the *parliament*, not the government. The decision to adopt a reasoned opinion on *Monti II* was unanimous across parties in the *Folketing*. While Denmark is governed by a centre-left coalition with a Social Democrat prime minister, the push for a reasoned opinion in the EAC was led by the chair, Eva Kjer Hansen, who is a member of the opposition Liberal (*Venstre*) party.

National parliamentarians were given a serendipitous opportunity to discuss the *Monti II* proposal face-to-face basis when there was a meeting of COSAC in Copenhagen, on April 22-24. This, coincidentally, fell right in the middle of the eight-week scrutiny process for *Monti II* and, also coincidentally, was hosted by the Danish parliament, which had at that point staked out its opposition to the proposal. As we have seen, the Danish EAC adopted a reasoned opinion on April 20, just in time for the COSAC meeting. The reasoned opinion was hastily translated into English, so that it could be circulated to other NP delegations in attendance in Copenhagen. A COSAC meeting is always hosted by the parliament of the member state holding the Council presidency, such as Denmark did in the first half of 2012. Chairing a COSAC meeting bestows very little power, but it does give the host parliament some agenda-setting power for that particular meeting. However, the Danish parliament did not use that power to put *Monti II*, or even more general subsidiarity issues, onto the public agenda of the Copenhagen COSAC. Instead, the Danish delegation, and the Danish EAC chair in particular, used the occasion to informally approach members of other parliaments on the margins of the COSAC meeting to tell them that they were going to adopt a reasoned opinion in opposition to *Monti II*, and to sound them out regarding whether they might do the same. Whether it made a difference that such (unofficial) advances came from the nominal chair of the meeting is impossible to know. But it is likely that the fact that the COSAC meeting took place at all, allowing the participants in the EWM to meet on a face-to-

face basis, spurred some NPs – the Latvian parliament, for example – to pass reasoned opinions which they would not have otherwise. Such advances were probably more effective with NPs in which the decision to adopt a reasoned opinion is made by the EAC (e.g. Latvia) than by the sectoral committee (e.g. the Belgian lower house), because it is the members of the former who attend COSAC meetings.

The coordinating role of the NPRs was also crucial. Currently every NP, with the exception of Slovakia, has at least one staff representative to the EU institutions; they all work in close proximity to one another, in a suite of offices provided courtesy of the European Parliament. This group meets on a weekly basis at Monday Morning Meetings (MMMs), which are also attended by officers from IPEX and COSAC but not from other EU institutions, unless they are invited for the occasion. Here the NPRs discuss internal issues including matters of subsidiarity control in NPs. This group is also continuously in contact with one another through a common email list and can share documents privately on a common server. The most basic role of these NPRs, civil servants from the home parliament, is as conduits of information, telling people back home what is going on in Brussels and vice versa. But theirs is also an interpretive role, in both directions: they view events in Brussels through a parliamentary lens, reporting back home with an eye to what national parliamentarians care about; and they interpret and explain events in their home parliaments for their colleagues in Brussels (Dias Pinheiro 2012). Having this group in place makes it possible for an NP to know, in real time, the state of play in other NPs of the subsidiarity review of a given proposal. In the case of *Monti II*, it was the Danish NPR who notified his colleagues very early, at the MMM on 26 March, that his parliament would be closely reviewing the proposal for its subsidiarity compliance. Furthermore, once the reasoned opinion was issued, he created a jointly accessible document on the common server with a box for each NP, so that each NPR could put in up-to-date information about the status of *Monti II* in his or her home parliament. In this way, the NPRs were prompted to check back with their home parliament and fill in current details; as a result the common document provided them all with a better picture, both comprehensive and up-to-date, of the scrutiny process for *Monti II* than was available anywhere else.

How the Votes Came In

After Denmark, five parliamentary chambers that are generally active in the EWM – the French *Sénat*, the Polish *Sejm*, the Swedish *Riksdag*, the UK House of Commons and the Luxembourg *Chambre des Députés* – moved to adopt reasoned opinions on *Monti II* relatively early in the process, between late April and mid-May. In all likelihood they were largely driven by their own internal motivations, and not greatly influenced by the actions of other parliaments. In the French *Sénat*, the European Affairs Committee adopted a reasoned opinion quite early, on 25 April; it was formally adopted (in identical form) by the plenary on 22 May, after the sectoral committee was consulted. In the Polish *Sejm*, the effective decision to adopt a reasoned opinion was taken on April 27, when the European Affairs Committee drafted a reasoned opinion; it was formally adopted by the plenary on 9 May. In the Swedish *Riksdag*, the decision was made in the Labour Market Committee, which decided to draft a reasoned opinion on 26 April, which it adopted unanimously on 3 May, and which was formally adopted in the plenary on 11 May. In the UK House of Commons, on 9 May the European Scrutiny Committee received a voluminous report on the proposal, including a draft reasoned opinion; this reasoned opinion was eventually passed by the plenary on 21 May. The Luxembourg *Chambre des Députés* passed a reasoned opinion through its Committee on Labour on Employment on 14 May, and then through the plenary on 15 May.

Then in the final week five chambers that were less active in the EWM passed reasoned opinions, the parliaments of Finland, Portugal, Latvia, Malta, and the Belgian *Chambre des Représentants*. The Finnish *Eduskunta* is an interesting case, because it takes a particular view of its role in EU-related matters. Generally, the *Eduskunta* is a strong and active parliament in domestic affairs, including the scrutiny of the Finnish government in its conduct of EU policy, but it takes a skeptical view of inter-parliamentary cooperation and political dialogue with the Commission, which it views mostly as a waste of time. Moreover, it takes the view that in the EWM a reasoned opinion should be addressed to subsidiarity as narrowly defined in the treaty, whereas most NPs merely use it as an opportunity to comment on the substance of the proposal. Yet these scruples about a strict definition of subsidiarity were put to the test when the *Eduskunta* was confronted with *Monti II*, which threatened – as in Denmark and Sweden – the model of industrial relations common to the Nordic

countries, in which arrangements are made at the national level. The Grand (European Affairs) Committee decided on 11 May, on the proposal of the Labour Market Committee, to initiate a formal inquiry into the subsidiarity compliance of Monti II. The plenary adopted a reasoned opinion on 15 May.

Thus on 15 May, one week before the deadline, there were 11 votes cast out of the 18 votes needed for a yellow card. Nine votes were certain (the parliaments of Denmark, Sweden, Finland and Luxembourg, and the Polish *Sejm*) and two votes were almost certain but not yet formally approved (the French *Sénat*, and the UK House of Commons). A further seven votes were needed, but it was uncertain whether there were still enough parliamentary chambers actively scrutinizing *Monti II* to make up the difference. In a discouraging sign, on 15 May, the sectoral committee in the *Tweede Kamer* voted against adopting a reasoned opinion. At this point three parliaments who rarely participate in the EWM – those of Portugal, Latvia, and Malta – took action. In all three cases, the participants were very much aware of the activities in other parliaments, including the fact that the votes in the EWM were piling up and nearing the yellow card threshold, and that the deadline was looming.

The Portuguese *Assembleia da República* is by far the most active parliament in the political dialogue – it has sent literally hundreds of letters to the Commission – but not in the EWM, in the context of which, prior to *Monti II*, it had issued only one reasoned opinion. Prior to the decision of the European Affairs Committee, two sectoral committees, on Constitutional Affairs and Social Security and Labour, had already concluded that *Monti II* did not breach subsidiarity. The rapporteur in the Committee on Social Security and Labour was an opposition Socialist MP, Maria Helena André, who had previously been Minister of Labour and, before that, deputy secretary-general of the European Trades Unions Congress (ETUC). Her report of 30 April was a guarded critique of the proposal, saying that while it goes “in the right direction,” it is problematic “in its current form” as it “limits the right to take collective action” (p.14). This provided ammunition for the European Affairs Committee, which surprised everyone by deciding on 15 May that *Monti II* was in breach of subsidiarity after all; it proposed a reasoned opinion, which was adopted by the plenary on 18 May. On that same day, four days prior to the deadline, the European Affairs Committee of the Latvian *Saeima* – which had never before passed a reasoned opinion – also decided that *Monti II* was in breach of subsidiarity, and

passed a reasoned opinion on behalf of the whole house. A crucial factor in the Latvian decision was that the chair of the committee had been personally approached at the Copenhagen COSAC meeting by the Danish chair – both are from parties that sit in the ALDE party group meeting – on the subject of *Monti II*. Then on 21 May the Foreign and European Affairs Committee of Malta's House of Representatives adopted a reasoned opinion. As the parliaments of Portugal, Latvia and Malta are all unicameral, they represent two votes apiece. In the EWM, Malta's House of Representatives – representing some 400,000 people – has twice as many votes as the UK House of Commons on which it is modelled.

Thus on the morning of the final day, the vote tally stood at 17 certain or near-certain votes, just one vote short of the yellow card. At this point there was an unexpected intervention from the Belgian *Chambre des Représentants*. This chamber has an unusual arrangement in which the relevant sectoral committee, rather than the European Affairs committee or the plenary, may pass a reasoned opinion on behalf of the whole house. Prior to *Monti II*, only two reasoned opinions had been adopted on behalf of the *Chambre des Représentants*, and both of those came from a different sectoral committee than the one in this case. In the Committee on Social Affairs, the idea of passing a reasoned opinion objecting to *Monti II* was first put forward by an opposition MP, Zoé Genot, from the Green party. Yet when the Committee met on 22 May, it was another MP, Myriam Vanlerberghe from the governing Flemish Socialist Party, who arrived with the text for a reasoned opinion, already approved by six committee members from the six governing parties. (The Minister for Employment, also a Flemish Socialist, had already made known that she opposed *Monti II*; the text of the reasoned opinion echoed many of the points made by the minister in her letter to the committee.) She explained to her colleagues the significance of the vote under the EWM, and the possibility of a yellow card. This was the text that was voted on in the committee at about 3 pm on 22 May. As it turned out this was the eleventh reasoned opinion adopted by a parliamentary chamber, bringing the total number of votes in the EWM to 18, the threshold for a yellow card. Apparently this vote came as a complete surprise to the other NPRs in Brussels. Ironically, they were better informed about events in Lisbon, Riga, and Valletta than about the parliamentary machinations unfolding just across town in the Belgian legislature.

The final act of the drama took place in the *Tweede Kamer*. From the beginning the Netherlands parliament has been an active participant in the EWM; when the Treaty of Lisbon was signed, the Dutch prime minister even claimed credit for the fact that the system had been strengthened with the addition of the “orange card” (de Wilde 2012: 3). Normally the political decision whether to pass a reasoned opinion takes place within the sectoral committee, and is formally adopted later in the plenary. *Monti II* was first tabled on April 10 in the Social Affairs and Employment Committee, which sought the government’s position before making a decision. The government position was highly equivocal: it opposed *Monti II* on political grounds, but maintained that there was no subsidiarity breach even as it seemed to accept that the legislation was unnecessary. Then, to complicate things, the centre-right minority government fell on April 21 when the far-right party withdrew its support; it continued in office as a caretaker government until new elections were held. As a result a number of internal meetings were cancelled, followed by a recess in early May. It was May 15 when the Social Affairs and Employment Committee finally met for a vote on *Monti II*, which split on party lines. Members from left-wing opposition parties voted for a reasoned opinion, but the right-wing governing parties voted against it, even though they were opposed to *Monti II* on substance; they argued that the government could deal with the question when it came up in the Council. At this point, the left-wing parties – aware of the rising number of reasoned opinions in other NPs, and the looming deadline – gathered the 30 votes necessary to have the issue put on the agenda of the plenary, scheduled for 22 May. The debate took place in the evening, around 7:15 pm; the assembled members knew of the Belgian reasoned opinion and the vote total was very close to the yellow card threshold (the exact number was still uncertain, as not all reasoned opinions had been uploaded to the IPEX website). The Minister for Social Affairs and Employment was actually present in the chamber, and continued to argue against a reasoned opinion, maintaining that it is more appropriate that the government oppose *Monti II* later, in the Council. Despite this, the centre-right government parties joined those on the left to vote in favour of a reasoned opinion, so in the end the plenary vote was unanimous. This was the first time that the plenary had, in effect, overturned the subsidiarity decision of a

committee. With just a few hours to spare, the last – as it turned out, the nineteenth – vote was cast in the EWM, and the yellow card was passed.⁴

The Subsidiarity Watchdogs That Didn't Bark

Twelve of the forty parliamentary chambers voted to adopt a reasoned opinion; what happened in the other 28? In general, the level of scrutiny for this proposal was unusually high, in that most parliaments reported at least some scrutiny activity to IPEX. Even so, nine chambers (representing 14 votes out of 54 in total) reported no scrutiny information at all, and so were essentially absent from the process. One of these was the French *Assemblée Nationale*, where all parliamentary business was suspended during the presidential election campaign, and in preparation for the parliamentary elections which followed (though as we have seen, electioneering did not hinder subsidiarity scrutiny in the French *Sénat*). Most of the other absentees are chambers that only minimally participate in the EWM, if at all – such as the parliaments of Estonia, Greece, Hungary, and the Slovenian upper chamber, none of which have ever issued a reasoned opinion. Of the rest, two chambers, the Czech Senate and the Czech Chamber of Deputies, also found that *Monti II* was in breach of subsidiarity, but did so after the deadline had passed; in addition one chamber, the Polish Senate, following a line of reasoning all its own, found that the proposal violated not subsidiarity but proportionality. Most of the rest of the chambers only reported that they did not subject the proposal to intensive scrutiny, and so did not come to a conclusive judgement its subsidiarity compliance. In Ireland, members of the *Oireachtas* were doubtless distracted by the campaign for the Fiscal Treaty referendum, held on May 31, and were perhaps reluctant to criticize an EU initiative at that moment. Only four chambers positively reported their finding that the proposal did *not* violate the principle of subsidiarity – the Italian Senate, the Lithuanian *Seimas*, and the two chambers of Spain's *Cortes Generales*.

⁴ From the point of view of each chamber, its vote is cast at the moment when the reasoned opinion is formally approved according to its own rules. Yet for it to be fully official, and known to the wider world, it must be transmitted by parliamentary officials to the Commission and uploaded to IPEX. In fact, six reasoned opinions were uploaded to IPEX in the final 24 hours. While the Tweede Kamer was the final vote in the EWM, it was not the last reasoned opinion to come in – that was the UK House of Commons. The IPEX information officer was in the office until midnight that night to see that the last reasoned opinions came in before the deadline.

In fact, the Spanish parliament is also an interesting case, because a closer examination of its scrutiny process also has elements of “vote-switching,” such as took place in Portugal and the Netherlands, but in the other direction. Initially, the rapporteur appointed to the *Monti II* file was an opposition Socialist MP, Ramón Jáuregui – previously an S&D MEP, minister in the Zapatero government, and Minister for Justice, Economic Affairs and Employment in the Basque Government. He drafted a reasoned opinion finding that the proposal violated the principle of subsidiarity; however, it was voted down on 9 May in the Joint Committee for the EU, in which government parties hold a majority. After this a second report was prepared, which came to the positive conclusion that the proposal did not violate subsidiarity; this report was adopted – not as a reasoned opinion, but a contribution to the political dialogue – by the Joint Committee on 21 May.

III. Commission Withdrawal and Fallout

In early June the Commission confirmed that the yellow card threshold had been reached in the case of *Monti II*. As this was an unprecedented circumstance, there was uncertainty about what procedures would follow. In the case of a yellow card, the Treaty of Lisbon requires simply that the draft be reviewed, after which the Commission “... may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.” Thus it should be emphasized that the yellow card is not a veto but only represents a “warning” (like in football); the Commission would have been entirely within its rights to refuse to change the proposal, or to amend it in any way it saw fit. In the event, it decided to withdraw *Monti II*. Moreover, while no timetable is indicated in the treaty, the Commission’s action was relatively swift, by EU standards: it announced the withdrawal in September, just three months after the yellow card. Yet if it may be presumed that objecting NPs would be pleased by the outcome, many were perturbed by the manner of the withdrawal.

The treaty requires the Commission to give “reasons” for its decision but does not indicate what form they should take. However, the Commission had also made a political commitment – in the form of a letter dated 1 December 2009, the date the Treaty of Lisbon became law – that its response to a yellow card would come in the form of a “Commission Communication, which will be subsequently sent to all

national Parliaments, as well as to the legislator and to IPEX.” Yet the Commission did not respond to the yellow card with a formal “Communication” but rather with a *letter*, dated 12 September, that was addressed to the various NPs but was identical in content and did not respond to their individual concerns. What this letter stated was that the Commission had carefully assessed the arguments put forward by NPs but concluded that *Monti II* did not breach the principle of subsidiarity. Instead, the Commission said it was withdrawing the proposal *not* due to opposition from NPs but because it “...is unlikely to gather the necessary political support within the European Parliament and Council to enable its adoption.” The perceived slight to NPs was compounded by the fact that the withdrawal was first announced to the European Parliament’s committee on employment and social affairs by the responsible Commissioner, László Andor.⁵ Furthermore, in a letter to the EP President, Commission president Barroso referred in passing to the withdrawal of *Monti II* as simply part of a reordering of priorities, “focusing our resources on proposals on which political agreement can be achieved before mid-2014,” without even mentioning NPs or the yellow card.⁶

The Commission response to the yellow card was seen by many as graceless and high-handed. The Commission had, since 2006, cultivated the idea that NPs were partners in a political dialogue: NPs were welcome to express their views on all EU-related matters, whether subsidiarity-related or not, and the Commission pledged to listen and respond individually to their concerns. Yet in the single most important case, where the involvement of NPs actually affected the outcome, the Commission did not engage substantively with their concerns. At the next COSAC meeting, in Nicosia in mid-October, some national parliamentarians complained about this to Maroš Šefčovič, Vice-President of the Commission for Inter-Institutional Relations, who apologized for the timing of the withdrawal announcement. Language was inserted into one of the concluding documents of the meeting, calling on the Commission “...to provide individual responses to the Reasoned Opinions submitted and reasoning for why it considers that the principle of subsidiarity has not been breached.” Interestingly, the members of one delegation argued privately against the inclusion of this language – that of Denmark. The Danes, it would seem, were not

⁵ <http://www.europeanvoice.com/article/2012/september/commission-scraps-right-to-strike-law-plan/75099.aspx>

⁶ http://europa.eu/rapid/press-release_MEMO-12-661_en.htm?locale=en

interested in asking the Commission to tell NPs again, in greater detail, that they are wrong about subsidiarity. In a small way this illustrates different attitudes about the purpose of the EWM. To the Danes, it was not the justifications that mattered, but the outcome. National parliaments had won.

Yet *did* they win? How are we to assess the Commission's claim that it withdrew *Monti II* for lack of political support in the EP and Council, and not due to the subsidiarity objections of NPs? It is not surprising that the Commission refuses to concede the substantive point to NPs by agreeing, after all, that the proposal did in fact infringe subsidiarity; probably Commission officials believe that their judgement of the subsidiarity compliance of *Monti II* is correct, and besides, they wish to uphold an interpretation of subsidiarity that is broadly permissive of EU action to give themselves a free hand in future legislative initiatives. But if the Commission response is meant to imply that the withdrawal has nothing to do with the yellow card, then that is utterly implausible. The yellow card forced the hand of the Commission, requiring it to make a positive decision about the fate of the proposal. Even if it stood little chance of passage, the proposal could have languished in legislative limbo indefinitely in the absence of a yellow card. Thus it may be said for certain that NPs *precipitated* (caused and/or hastened) the demise of the legislation.

It is certainly true that political opposition was widespread. In the EP, where as it happens the rapporteur for the file was a Danish MEP (from the S&D group), it is difficult to see how it could have gained majority approval: the withdrawal was welcomed by parties both on the left (S&D⁷, Greens⁸) and the right (EPP⁹, ECR¹⁰). Moreover, it is even more difficult to see how it could have gained unanimous approval in the Council; a number of national ministers of Employment and Social Affairs had expressed misgivings about the proposal as early as 25 April, when it was discussed informally in the relevant Council group (EPSCO). Under such circumstances it seems very unlikely that the measure would have passed. Yet even

⁷ Available at:

<<http://www.socialistsanddemocrats.eu/gpes/public/detail.htm?id=137260§ion=NER&category=N EWS>>.

⁸ Available at: <<http://www.greens-efa.eu/right-to-strike-7988.html>>.

⁹ Available at:

<<http://www.eppgroup.eu/press/showpr.asp?prcontroldoctypeid=1&prcontrolid=11384&prcontentid=18976&prcontentlg=en>>.

¹⁰ Available at: <<http://ecrgroup.eu/?p=7038>>.

so, it was far too early for either the Council or the EP to take *formal* position on the legislation; in fact, they were prevented from doing so by the rules of the EWM. For the eight weeks when NPs were reviewing the proposal, the EP and the Council were not permitted to adopt positions on it; then after the yellow card was triggered the legislative process was effectively suspended while everyone waited for the Commission to decide whether to maintain, amend, or withdraw it. The only legislative bodies which had formally taken a position on *Monti II* were the NPs. By withdrawing it, the Commission stopped the legislative process before it had even begun.

Even if the real reason for the withdrawal was opposition in the EP and the Council, it is worth asking: where did this opposition come from? While some stakeholders, like the ETUC, were opposed to *Monti II* from the beginning, in other quarters it took time for opposition to build. The response of many governments was equivocal or noncommittal, taking a wait-and-see approach to the legislation. Spurred by the EWM, NPs took an early stand against the legislation that could well have made the difference. The EWM itself was a dynamic process in which opposition snowballed as NPs influenced one another and a growing number were swayed to come out against *Monti II*. It is not hard to imagine that this growing political opposition also influenced opinion in the EP and, in particular, the Council. By themselves, NPs did not defeat *Monti II*, because the EWM does not give them a veto over EU legislation. But certainly NPs were the proximate cause of its withdrawal, and the instrument of its demise.

IV. A Test Case for Theories of the Early Warning Mechanism

The first yellow card offers an empirical test case for many of the theories and predictions regarding the EWM. First of all, does it disprove the common perception that its impact has been inconsequential in EU politics? Of course, one could argue that, despite *Monti II*, the EWM has had “hardly... any measureable impact to date” (de Wilde 2012, p.12). After all, in the first three years of its operation, there has been only one yellow card (in which one third of NPs raise objections), and zero orange cards (in which a majority of NPs raise objections). *Monti II*, the one legislative proposal among hundreds to receive a yellow card during that period, is by

definition not a typical case but an extreme outlier. Yet arguably the designers of the EWM envisioned that while NPs would routinely review legislative proposals for their subsidiarity compliance, yellow and orange cards were expected to be exceptional occurrences, signifying such a strongly negative reaction of NPs to an EU proposal that it entails a break with normal legislative procedure. Even if it is an exceptional case, a detailed examination of *Monti II* is warranted because it gives us insight into the political dynamics that arise in such exceptional, but important, cases; while singular, this case nevertheless challenges commonly held beliefs about the EWM.

It should also be noted that the EWM could also exert a more subtle influence over EU legislative outcomes in other cases. There have been a few proposals that attracted numerous reasoned opinions but fell short of the yellow card, such as those concerning seasonal workers, the calculation of corporate tax, border controls and, most recently, gender balance on corporate boards. It is possible that NPs' opinions, both under the EWM and the less formal "political dialogue," could influence subsequent debates in EU institutions even in the absence of a yellow or orange card. For example, in the case of the Seasonal Workers Directive, which attracted nine reasoned opinions from NPs but not enough for a yellow card, some of the substance of their opinions could be discerned in later Council debates (Cooper, forthcoming 2013). Yet in all such cases it is simply too soon to tell whether those opinions will affect the final legislative outcome – whether it ultimately passes into law and, if so, what form it takes – because the process is still ongoing. *Monti II* is the only case thus far that reached a definitive conclusion, because the measure was withdrawn.

Moreover, the fact of the first yellow card, combined with the ever-increasing activism of NPs in EU affairs, makes the occurrence more likely in the future. One of the above-noted "incentive problems" impeding the EWM was that NPs are unlikely to take part for the simple reason that a yellow card is unlikely, because not enough NPs participate in the EWM. This is a classic collective action problem, but it is solvable through effective mechanisms of coordination. If enough NPs take part to make a yellow card likely, then this changes the incentives for the previously inactive NPs. It seems likely that this is what occurred in the case of *Monti II*: enough NPs had passed reasoned opinions, or signalled their likelihood to do so, that fence-sitting NPs saw it in their interest to jump into the process, or indeed to switch their "vote"

within the EWM from a tacit “yes” to a vocal “no” to the proposal. The fact that a yellow card has happened once changes the common perception of its likelihood, which could permanently shift NPs’ incentives to take part.

Phantom Collective or Virtual Third Chamber?

More broadly, this reconstruction of the events surrounding the first yellow card can help to answer a number of unresolved theoretical questions about the EWM, such as (1) whether NPs can be said to constitute a collective entity at the EU level, (2) how and to what extent NPs cooperate with and influence one another, (3) whether the behaviour of NPs is akin to “voting,” and (4) whether the process as a whole is mainly a narrow legal/technical review of, or a broader political check on, EU legislation.

One theoretical question raised by the creation of the EWM was whether it formed NPs into a collective entity at the EU level. One skeptical commentator, calling NPs a “phantom collective,” insisted that they “will not form any type of collective,” that each NP conducts scrutiny on an individual basis wherein the scrutiny activities of other NPs are irrelevant, that it is highly misleading to think of NPs casting “votes” in the EWM “just like individual MPs do within their parliament,” and that if the yellow card threshold is reached this will be “essentially, even if parliaments keep each other up to date about their plans, a coincidental sum of unrelated events” (Kiiver 2006: 162, 164,). The opposing view was that with their new powers NPs constituted a “virtual third chamber” alongside the Council and the EP, performing some of the functions of parliamentary chamber at the EU level without meeting together in the same physical location; one such function is legislative, insofar as NPs have a collective role in checking EU legislation, even though they cannot veto it (Cooper 2012). From this perspective, NPs form a kind of “metaparliament” at the EU level: when NPs adopt reasoned opinions raising subsidiarity objections to a legislative proposal, they are in effect casting votes against it, and when a yellow or orange card threshold is reached that is in effect a collective decision. As we shall see, the experience of *Monti II* lends credence to the latter perspective.

Prior to *Monti II*, it was doubted whether NPs would or could successfully coordinate their efforts to reach a yellow card threshold within the eight-week deadline. The tools of interparliamentary coordination are weak in comparison, say, to those in the hands of national governments, whose representatives meet on a constant and permanent basis. Yet NPs used what tools they had to advantage, and these went beyond correspondence among NPs bilaterally and through the IPEX database. Informal discussions of *Monti II* also took place on face-to-face basis among MPs during the COSAC meeting in Copenhagen, which fell in the middle of the eight-week scrutiny period. While the NPs as a group have no “leader,” the Danish parliament in this case played the role of “initiator,” encouraging other NPs to look more closely at *Monti II*. And in particular, NPs were constantly updated on the state of play in the EWM through their network of Permanent Representatives of National Parliaments (NPRs) in Brussels. In this way, NPs were aware that momentum was building towards a yellow card as the number of reasoned opinions, representing “votes” under the EWM, kept ticking upward.

NPs engaged in behaviour that in some ways strongly resembled voting in a legislative chamber. Some participants attempted to persuade others to “vote against” *Monti II*, not only by informing them of their intention to vote against it but by sharing their reasons for doing so. Many NPs that voiced their intentions early probably did so for internal reasons, but many of the later votes were likely swayed by the growing likelihood of a yellow card on one hand, and the impending deadline on the other. While those NPs which took action early were probably would have done so anyway, many of the late entries were unexpected. There are a number of cases of “vote-switching,” in which a NP appeared to be likely to vote one way but then suddenly voted the other way: for example, a draft opinion which would normally stand as the common opinion of the NP was suddenly overturned later in the scrutiny process; this happened in Portugal, the Netherlands, and (in the other direction) Spain. And towards the end, the process features “bandwagoning” behaviour in that some fence-sitters joined with the early dissenters to put the vote over the top and make the yellow card happen. Of course, at each point the various participants acted out of some unknown combination of conviction and calculation. Moreover, the outcome was uncertain until the final hours of the process. In other

words, the yellow card was a product of democratic politics. It was certainly *not* a “coincidental sum of unrelated events.”

More generally, what is the overall purpose of the EWM? Is it more akin to a legal or a political exercise? One author argues that, despite the fact that they are political institutions, NPs engage in “what can best be described as legal review”: they “...behave in a court-like manner, accepting or at least attempting to use subsidiarity as a legal principle” (Kiiver 2012: 76). From this perspective, the EWM might best be described as a legal accountability mechanism, comparable to a *Conseil d’Etat* in domestic politics, issuing non-binding advice on the legality of pending legislation (Kiiver 2011). In this view, its purpose is not to generate a yellow and orange cards but a reasoned exchange requiring EU institutions to provide better justification for its legislative proposals: the EWM “...is not about national parliaments’ power to veto European directives, but about the duty of Brussels to explain and justify its legislative initiatives” (Kiiver 2012: 17; see also Cooper 2006). Perhaps this description is apt for some cases, but it hardly applies to the exchange between NPs and the Commission in the case of *Monti II*. It is fairly clear that a large part of the reason so many NPs raised objections to *Monti II* was not because they thought the justifications for it were inadequate – though they did think that – but because it was a legislative measure that they intensely disliked and wished to see defeated. Furthermore, in response to the yellow card, the Commission did not attempt to provide further justification for *Monti II*; breaking from custom, it did not even respond individually to the objections of the NPs. Rather, in a move replete with irony, the Commission effectively gave in to the demands of NPs by withdrawing *Monti II*, but at the same time insisted that the measure was in compliance with subsidiarity but was being withdrawn for lack of political support in the Council and the European Parliament. So in this case at least the EWM was much more about stopping unwanted legislation than ensuring its proper justification.

One final question touches on the democratic purpose of the EWM. It has also been speculated that the EWM could be “instrumentalized” by national governments, in that a government could effectively instruct its parliament to issue a reasoned opinion in order to boost its own negotiating position (Maurer 2008, p.87); if this practice were commonplace it could negate any democratic benefit to be derived from giving NPs an independent voice in EU affairs. For the most part, this did not seem to

occur in the case of *Monti II*, though it is difficult to draw firm conclusions. In fact, in most member states, there is no discernible difference between the views of the government and the parliament regarding either the policy substance or the subsidiarity compliance of the proposal. Only one reasoned opinion was passed by an upper chamber, the French Senat; it was controlled by left-leaning parties in opposition to the then-governing right-leaning president and lower chamber. In many cases the only extant government position is a cautious analytical memorandum prepared by the civil service. Even so, in most cases it is fairly clear that the initiative for a reasoned opinion originated in the parliament: in Denmark, for example, it was the EAC chair – an opposition MP – who was the strongest advocate for a reasoned opinion and a yellow card. In one case, the Belgian lower house, it seems likely that the government prompted the chamber to adopt a reasoned opinion, whereas in another case, Spain, it seems likely that the government pressured the NP *not* to adopt a reasoned opinion. In the Netherlands, the *Tweede Kamer* took action in defiance of the government’s initial position that a reasoned opinion was unnecessary. But *Monti II* may not be the best test of this question, as it is based on the “flexibility clause” requiring unanimity in the Council: governments may be more likely to try to “instrumentalize” the EWM in future cases where they do not have a veto in the Council.

V. Conclusion

With the passage of the first yellow card, and the subsequent withdrawal of the targeted legislation, the NPs have been shown themselves to be a collective force in EU politics. The European Convention created the EWM in order to give NPs more influence over EU affairs, with the hope that it would ultimately relieve the EU’s democratic deficit. It would be folly to try and draw general conclusions from one case about whether the system makes the EU as a whole more democratic. But a detailed reconstruction of the first yellow card can at least point to some answers about the nature and purpose of the EWM. It is not a legal or a technical exercise. It is a new arena for democratic politics in the EU.

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