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The Early Warning System for the Principle of Subsidiarity

Constitutional theory and empirical reality

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The Early Warning System for the Principle of Subsidiarity

This book offers a comprehensive systematic analysis of the European Union's Early Warning System (EWS) for subsidiarity, which was introduced by the Treaty of Lisbon. The book includes both a detailed theoretical analysis of the EWS as well as an assessment of how national parliaments have responded to EU legislative proposals under the system. Philipp Kiiver explores whether the EWS could function as a mechanism of legal accountability offering a partial remedy to the European Union's much-discussed accountability deficit. The Early Warning System for the Principle of Subsidiarity provides an overview of the historical developments of national parliamentary involvement in the EU and also considers the broader implications of the EWS, including its relationship to democracy and legitimacy.

The book will be of particular interest to academics and students of EU Law, Constitutional Law and Political Science.

Philipp Kiiver is an associate professor of European and comparative constitutional law at Maastricht University. He obtained his law degree (2003) and his PhD (2005) from Maastricht, and specializes in international parliamentary studies. He is the co-author of an introduction to comparative constitutional law and has published several books and articles on the role of national parliaments in the European Union.

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Preface

This book is the result of a research project funded with a Veni grant by the Netherlands Organization for Scientific Research (NWO). The project had originally started as a study into different accountability mechanisms in national parliaments, but it eventually developed into an in-depth analysis of the European Union's early warning system for subsidiarity with, it is hoped, many gems for both academics and practitioners. I am grateful to NWO which has funded this research, and to my colleagues at the Montesquieu Institute Maastricht and within the growing international community of lawyers and political scientists who deal with national parliaments in the EU. I appreciated the opportunity to discuss my papers and draft chapters with them. Thanks to Thomson Reuters for the kind permission to reprint part of an earlier article in the *European Law Review* and incorporate it in Chapter 6 of this book. Special thanks go to Professors Aalt Willem Heringa and Luc Verhey who both, as always, gave me much freedom to pursue various endeavours which included, but were not limited to, writing this book.

Maastricht, June 2011

Contents

1 Introduction

The Treaty of Lisbon introduced several innovations to the European Union's institutional architecture. One of the most prominent of them was the inclusion of a so-called early warning system for the principle of subsidiarity.[1] Under this system, national parliaments of the EU Member States are entrusted with the task of reviewing EU legislative proposals and of issuing, if they find that a proposal breaches the principle of subsidiarity, a written complaint called reasoned opinion. Incoming reasoned opinions are counted and weighed as votes: each parliament has two votes, chambers in bicameral parliaments have one vote each. If the number of votes reaches certain thresholds then the initiator of the proposal, typically the European Commission, may withdraw, amend or maintain its proposal but must, in that case, justify its decision. The entry into force of the early warning system marks a culmination of a sequence of Treaty reforms that addressed the principle of subsidiarity and the involvement of national parliaments in EU lawmaking. It was the Maastricht Treaty of 1992 that featured a subsidiarity clause in its text[2] and two Final Act declarations in its annex dealing, respectively, with the role of national parliaments in the EU and with the cooperation between national parliaments among themselves and collectively with the European Parliament.[3] The Treaty of Amsterdam included Protocols on both the details of the application of the subsidiarity principle and on the role of national parliaments in the EU.[4] And now the Constitutional Treaty and, after it failed to enter into force, its successor instrument, the Lisbon Treaty, included an early warning system based on both Treaty provisions and Protocols.[5] In fact this system addresses national parliaments and subsidiarity together, by allowing the former to enforce the latter.

Yet while the early warning system (EWS) has been presented as a major selling-point in the ratification process for both the Constitutional Treaty and the Treaty of Lisbon, we should note that it was also met with rather mixed feelings. Political declarations of course stressed what a positive breakthrough this system supposedly was. But a cynic might dismiss the entire EWS as pure window-dressing, and indeed there are several highly critical academic commentaries on it already from the period when the EWS was originally inserted into the Draft Constitutional Treaty drawn up by the European

Convention.[6] Most academic criticism was, and is, based on the observation that the EWS is a non-binding mechanism and does not amount to a 'red card'. The Commission is at no point obliged to amend, let alone withdraw, any of its proposals irrespective of the number of reasoned opinions issued by national parliaments. The basic feature is a 'yellow card'. The addition by the Lisbon Treaty of a supplementary mechanism called 'orange card', whereby the European Parliament or the Council may reject proposals if more than half the national parliaments' votes had constituted objections,[7] still leaves the discretion with the EU institutions and does not amount to a national parliamentary veto power either. A very fundamental observation can therefore be made that essentially the EWS did not grant the national parliaments any rights they did not already have.[8] The absence of a genuine veto right for national parliaments, while it was widely acknowledged, was not universally criticised, though. Several authors approved of the system as an appropriately 'soft constitutional solution',[9] in that it did not infringe too much upon the Commission's independence[10] and did not excessively distort or block the smooth running of European decision-making in general.[11]

On a practical note, it is pointed out by both scholars and practitioners that the time periods for subsidiarity review are prohibitively short and thresholds seem unattainably high so that the EWS may in fact never be triggered. Under the Lisbon regime, national parliaments have eight weeks for their review although in practice this may well be both longer than that and, through an urgency clause that is usually overlooked, significantly shorter than that.[12] Regarding thresholds, to trigger the initiator's obligation to withdraw, amend or re-justify proposals the EWS prescribes one-quarter of total votes to constitute objections for proposals regarding the area of freedom, security and justice, and one-third for all other proposals.[13] In an EU with 27 Member States this means 14 and 18 out of 54 votes, respectively. As an illustration, to generate the standard 18 votes one would need negative reasoned opinions originating, for example, in five unicameral parliaments (two votes each), four lower chambers and four upper chambers (one vote each).[14] However, much depends on what one counts as a reasoned opinion, and it shall be argued later on that a broad understanding of the scope of the EWS is in order.[15]

Finally, it is pointed out that breaches of subsidiarity do not seem to be a problem in real life. As Raunio notes:[16]

> The image of Commission and other EU institutions, constantly stretching and overstepping the limits of their powers, is also somewhat outdated. There appears to be a broad consensus, also among national MPs, that the overwhelming majority of the Commission's legislative proposals have not been problematic in terms of the subsidiarity principle.

The Finnish parliament had reported already in 2004 that it had reviewed all its EU dossiers since Finland's EU accession in 1995 and that it had not

discovered a single case where it might have established a breach of subsidiarity, although possibly of proportionality.[17] Proportionality is however not formally included as a review standard for reasoned opinions under the EWS, in spite of the fact that EU legislative proposals must be justified in the light of both subsidiarity and proportionality.[18] Still, a case can and shall be made that the scope of the subsidiarity principle can and should be interpreted sufficiently broadly.[19]

Either way, notwithstanding all these highly critical considerations, there are good reasons to have a closer look at the EWS and to view it in a much more positive light.[20] For the truth is that the EWS did not just come into existence on 1 December 2009 when the Lisbon Treaty entered into force. Already in late 2004, when the EU was still anticipating the ratification of the Constitutional Treaty, COSAC, the half-yearly conference of the European affairs committees of the national parliaments and a delegation from the European Parliament, had decided to start experimenting with the EWS as if it was in force.[21] Furthermore, after the ratification of the Constitutional Treaty had failed, the Barroso initiative committed the Commission to observing the EWS procedure nevertheless.[22] This means that when the EWS came into force officially in 2009, already several years' worth of practical experience as well as correspondence between national parliaments and the Commission had accumulated.[23] This in turn allows us to subject the EWS not only to a theoretical analysis from a legal and political science point of view, but also to an empirical analysis. This empirical analysis first of all reveals that EWS practice in reality does not entirely match the black-letter law. It also allows us to see the EWS in a new light as far as its added value is concerned, and to develop much more robust theories regarding its actual and potential impact on national parliamentary involvement in the EU.

The present volume thus represents an in-depth study of the EWS that includes both a theoretical and an empirical analysis. It first provides an overview of the historical developments of, and the legal and political science literature on, national parliamentary involvement in the EU (Chapter 2). It then thoroughly discusses virtually each and every procedural aspect of the EWS, including implications that are not evident and that are therefore usually overlooked (Chapter 3). The book continues with an empirical analysis of how national parliaments seem to define the principle of subsidiarity based on the wording of their reasoned opinions (Chapter 4). After all, it is known that subsidiarity is hard to define in practice, and this book offers a bottom-up approach based on how parliaments *themselves* use it on the ground. For that purpose, as well as for the purpose of the other chapters, the book systematically incorporates the body of material that has resulted from the correspondence between national parliaments and the European Commission thus far: again, not just since the entry into force of the Treaty of Lisbon in 2009 but since the start of COSAC's informal pilot projects in 2004.

The book then goes on to offer two innovative, even unorthodox analytical theories of the EWS. One discusses the EWS as an accountability mechanism

(Chapter 5), specifically as an instance of legal accountability. It should be noted that the existing literature does not usually treat the EWS as an accountability regime and, furthermore, tends to associate legal accountability with courts rather than with parliaments. As such, the EWS might turn out to play a role in the EU's much-discussed accountability deficit. The other theory offered here draws an analogy between the role of national parliaments under the EWS and the domestic consultative role of a council of state as it exists in France as well as in southern European countries and the Benelux countries (Chapter 6). Many national parliaments are still struggling to find a proper role in the EU, and the role of a council of state offers, it is argued, a workable and recognisable role model. The final analytical section (Chapter 7) discusses some broader implications of the EWS, including its relation with democracy and legitimacy as well as the typology of national parliaments as it results from the empirical analysis of EWS practice.

The main argument of this study is that we should not be quick to dismiss the EWS as meaningless, for two reasons. The first is that a national parliament's participation in the EWS might raise European awareness among parliamentarians, which might in turn translate into greater attention to the political aspects of proposed EU legislation and the government's opinion on it. Without conferring any significant powers on national parliaments, the EWS might thus become a catalyst for the exercise of those powers that national parliaments already have.[24] The second reason is that it is sensible to appreciate the value of the EWS in its own right, not just as a catalyst but also as an actual involvement mechanism, even though it might amount to little more than a minimum standard of participation. The precondition for such an appreciation is that we make sure that our expectations are realistic. This concerns the scope, purpose and effect of the EWS as well as the nature of national parliaments and their interest and capacity to use it. As a start we should, for example, stop assuming that the EWS is primarily about the right to *veto* EU legislation: such assumption is bound to lead to disappointment. Instead, based on both the constitutional theory and the empirical reality of the EWS, we should accept that it is much more about the duty to *justify* legislation. Thus, with realistic expectations and an open mind, we should be able to embrace the EWS for what it is: not a panacea, not even a major institutional rupture, but definitely more than mere window-dressing.

2 National parliaments in the European Union

The involvement of national parliaments in the EU legislative process had been one of the most prominent features of the Treaty establishing a Constitution for Europe, its Draft version as presented by the Convention and its successor, the Treaty of Lisbon. However, attention for this issue had already been growing throughout the 1990s in both politics and the literature.

2.1 The European role of national parliaments

In the 1960s the parliaments of the then six Member States of the European Economic Community confined their involvement mostly to the consideration of an annual government report on the progress of European integration.[1] A somewhat greater activity was noticed in 1973 when – along with Ireland – the United Kingdom and Denmark joined the Community. These newcomers were both more sceptical about the merits of ever-closer union and had more robust parliamentary traditions.[2] The UK Parliament became famous for adopting a scrutiny reserve resolution barring British ministers in principle from agreeing to Council measures pending scrutiny in the national parliament; the Danish Folketing gained notoriety for issuing negotiating mandates to Brussels-bound ministers, although it may be questioned whether the Danish system is truly convincing or, due to the national idiosyncrasies, suitable as a role model for other Member States.[3] Still, with progressive integration and thus with the conferral of more competences to European institutions, especially after the adoption of the Single European Act and the Maastricht Treaty, parliamentary scrutiny of governments' EU policy gained importance in other Member States as well.[4] The phenomenon national parliamentarians saw themselves confronted with was that legislative powers were delegated to the EU institutions, notably the Council, and therefore to what is domestically the executive. Whereas in a parliamentary system the government is accountable to the national parliament, this is much more difficult to enforce in the context of EU decision-making. Here, after all, the agenda is set externally, transparency is traditionally poor, complexity is high, compromise-building is crucial, and the possibility that individual governments are

simply outvoted in the Council makes it hard to allocate responsibility for a certain policy decision with any one participant. Besides, we should not forget that policy preferences or a political culture of benevolent consensus for EU integration, of non-competition with the European Parliament, and of deference to the government in foreign affairs, as well as an absence of salience and of voter interest, are all factors that contribute to a low willingness on the part of parliamentarians to invest time, energy and political capital in European affairs in the first place.

Still, the traditional and, according to empirical findings, the most commonly used mechanism for national parliamentary involvement in the EU is the calling to account of ministers and, possibly, the consultation with them before they attend the Council of Ministers in Brussels.[5] The Treaty of Amsterdam sought to accommodate national parliaments somewhat as its Protocol on the role of national parliaments granted them a six-week period before Commission proposals would be put on the Council agenda so that a minimum time window for scrutiny could be observed.[6] The Constitutional Treaty affirmed the Amsterdam Protocol and added, as far as the legislative process is concerned, a number of additional involvement facilities for national parliaments, including the subsidiarity early warning system (EWS); this the Treaty of Lisbon took over, and it expanded the minimum scrutiny delay from six to eight weeks. Furthermore, additional rights including veto rights have been added by the Constitutional Treaty and the Treaty of Lisbon. As a result, national parliaments now enjoy a catalogue of rights, privileges, facilities or explicit mentions as a matter of EU law, most though by no means all of which are summarised in Article 12 TEU.

It should be noted that Article 12 TEU is a rather odd provision. It starts out by stating that:

> National Parliaments contribute actively to the good functioning of the Union:

whereby the colon implies that parliaments' contributions to the good functioning of the Union are effected only through those means that are expressly listed in the remainder of the Article. This cannot be right, though. A host of provisions are not restated in Article 12 whereas there is no reason to assume that in those cases national parliaments somehow do *not* contribute to the Union's good functioning, or to any lesser extent than under those provisions that are included. Nor is it the case that Article 12 only refers to other TEU provisions and not to TFEU provisions: it refers to relevant Articles in both Treaties, it simply does not mention all of them. In all likelihood, Article 12 TEU is an attempt to upgrade the visibility of national parliaments in a prominent part of the EU Treaty, only one that has been made too hastily and thus a tad sloppily. For practical purposes, it would therefore be pragmatic to treat this first sentence of Article 12 TEU as a declaratory stand-alone provision,

ignore the colon and pretend that it ends with a full stop. The remainder is then a non-exhaustive list of examples of national parliamentary contributions pursuant to EU Treaty law. In order to provide a better overview, listed below are all explicit instances of national parliamentary involvement pursuant to EU Treaty and Protocol provisions. The list roughly distinguishes between such instances depending on whether national parliaments are addressed in a passive or active capacity.

2.1.1 Information rights

- The national parliaments' right to receive directly the Commission's consultative documents, the annual legislative programme as well as any other instrument of legislative planning or policy (Article 12 (a) TEU and Article 1 Protocol No. 1 TEU/TFEU);
- the right to receive directly EU draft legislative acts: from the Commission if it concerns Commission proposals, from the European Parliament if it concerns initiatives of the European Parliament, and from the Council if it concerns proposals from a group of Member States or requests or recommendations from the Court of Justice, the European Central Bank or the European Investment Bank (Article 12 (a) TEU and Article 2 Protocol No. 1 as well as Article 4 Protocol No. 2 TEU/TFEU);
- the right to receive amended drafts and legislative resolutions of the European Parliament and positions of the Council on draft legislative acts (Article 4 Protocol No. 2 TEU/TFEU);
- the right to receive directly the agendas for and the outcome of meetings of the Council (Article 5 Protocol No. 1 TEU/TFEU);
- the right to have special attention drawn to planned applications of the flexibility clause (Article 352 TFEU) in the context of the regular subsidiarity enforcement procedure of Protocol No. 2 TEU/TFEU;
- the right to be notified of planned applications of the ordinary Treaty revision procedure (Article 12 (d) and Article 48 (2) TEU);
- the right to be notified of planned applications of the general passerelle within the simplified Treaty revision procedure (Article 12 (d), Article 48 (7) TEU and Article 6 Protocol No. 1 TEU/TFEU);
- the right to be notified of planned applications of the special passerelle in the area of family law (Article 81 (3) TFEU);
- the right to be notified of the receipt of EU membership applications (Article 12 (e) TEU and Article 49 TEU);
- the right to receive an annual report from the Commission on the application of Article 5 TEU on the principles of conferral, subsidiarity and proportionality (Article 9 Protocol No. 2 TEU/TFEU); and
- the right to receive the annual report of the Court of Auditors (Article 7 Protocol No. 1 TEU/TFEU).

2.1.2 Provisions envisaging or implying an evaluation by national parliaments

- The national parliaments' right to be informed of the content and results of evaluations of policies in the area of freedom, security and justice (Article 12 (c) TEU and Article 70 TFEU);
- involvement in the evaluations of the activities of Eurojust (Article 12 (c) TEU and Article 85 (1) TFEU) pursuant to regulations to be adopted on Eurojust's structure, operation, field of action and tasks;
- involvement in the political monitoring or scrutiny of Europol (Article 12 (c) TEU and Article 88 (2) TFEU) pursuant to regulations to be adopted on Europol's structure, operation, field of action and tasks; and
- the right to be informed of the proceedings of the Council's standing committee on the operational cooperation on internal security (Article 71 TFEU).

2.1.3 Provisions envisaging or implying active input from national parliaments

- The respect by the EU institutions of an eight-week period between the transmission of a draft legislative act and its placing on the Council's provisional agenda, during which no agreement may be reached; the respect of a ten-day period between the draft act's placing on the provisional agenda and the adoption of a position; and the duty for the Council in each case to justify exceptions in cases of urgency (Article 4 Protocol No. 1 TEU/TFEU). In the light of the first two recitals of the Preamble of Protocol No. 1, this minimum delay rule is meant as an opportunity for domestic parliamentary scrutiny and the expression of opinions on EU draft legislative acts;
- the enforcement of the principle of subsidiarity (Article 12 (b) TEU as well as Article 5 (3) TEU, and again Article 69 TFEU specifically for the area of freedom, security and justice, all referring to Protocol No. 2 TEU/TFEU). The Protocol in turn includes:
    - the EWS for the submission of reasoned opinions which in turn triggers certain consequences when certain thresholds are reached (Article 3 Protocol No. 1 and Articles 6 and 7 of Protocol No. 2 TEU/TFEU); and
    - the jurisdiction of the Court of Justice to hear annulment actions for alleged breaches of subsidiarity notified by Member States on behalf of national parliaments (Article 8 Protocol No. 2 TEU/TFEU);
- the participation of representatives of national parliaments in Treaty amendment Conventions within ordinary Treaty revision (Article 12 (d) and Article 48 (3) TEU);

- the right for each parliament to veto the application of the general passerelle within simplified Treaty revision (Article 12 (d) and Article 48 (7) TEU);
- the right for each parliament to veto the application of the special passerelle in the area of family law (Article 81 (3) TFEU); and
- inter-parliamentary cooperation in accordance with Protocol No. 1 TEU/TFEU (Article 12 (f) TEU). Protocol No. 1 TEU/TFEU in turn includes:
    - the right for COSAC to issue contributions, without however binding national parliaments or prejudging their positions (Article 10 Protocol No. 1 TEU/TFEU); and
    - the task for COSAC to promote the exchange of information and best practice between national parliaments and the European Parliament (Article 10 Protocol No. 1 TEU/TFEU).

It is evident that the above list is significantly longer than the list contained in Article 12 TEU. Article 12 includes relatively banal rights, such as the right to be notified of EU membership applications, but it at the same time omits rather significant facilities like the binding veto right of each national parliament in the family law passerelle. Be that as it may, apart from these instances inside and outside of Article 12 TEU there is a general declaratory provision contained in the second clause of Article 10 (2) TEU, stating that:

> 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.

The extent to which this statement is actually true depends on domestic constitutional law and practice, it cannot have any constitutive value in that it neither prescribes nor codifies any particular accountability arrangements in parliamentary, presidential or semi-presidential systems. Indeed, in spite of all the cited facilities and in some cases actual rights reserved for national parliaments, primary EU law maintains that it does not seek to prescribe how parliaments control their own governments when the latter act in a European capacity. The Preamble of Protocol No. 1 TEU/TFEU on the role of national parliaments in the EU, already in its original Amsterdam version, continues to stress in the very first recital that:

> the way in which national Parliaments scrutinise their governments in relation to the activities of the Union is a matter for the particular constitutional organisation and practice of each Member State.

And indeed, the effect or effectiveness of much if not all of the EU rights and facilities essentially depends on what parliaments or chambers themselves are