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# Soós Edit

## European Public Policy

### 2020

#### Lesson 9

## The role of National Parliaments in the European law-making

**READING TIME:**

**30 min**



**SZÉCHENYI** 2020



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## The role of national Parliaments in the EU legislative process

The EU's democratic legitimacy not only flows from the directly elected members of the European Parliament (MEPs) but also requires that **national Parliamentarians** be involved. European democracy necessarily combines two structures of representation, with the direct representation of individual citizens in the European Parliament being complemented by the indirect representation of citizens via their national Parliaments.

National Parliaments had long only restricted possibilities in the legislation process of the EU. The role of **national Parliaments** has been on the EU agenda for a long time, but the cause has not advanced very far in practice. This is a missed opportunity for several reasons.

**First, national Parliaments** could help the EU facilitate more discussions about the EU in individual member states. By thoroughly scrutinizing actions taken in Brussels by member state governments, they could make national executives more accountable.

**Second, national Parliaments** can help EU institutions improve existing legislation so that it specifically and efficiently targets citizens' concerns. They could guide the EU's future policy agenda by encouraging action in **certain policy areas** and, at times, by discouraging the EU from intervening in other areas.

The **yellow cards** of the **early warning system** are one such tool. Since the Lisbon Treaty (2009), national Parliaments have been able to object to the European Commission's legislative proposals when they think the principle of subsidiarity is undermined. This principle dictates that the EU only acts when its member states cannot achieve the desired objective by acting individually. Although the so-called yellow card do not automatically compel the Commission to ditch proposals, it allows national Parliaments to convey public concerns about the EU's intervention into what the citizens and their parliamentarians might see as domestic matters.

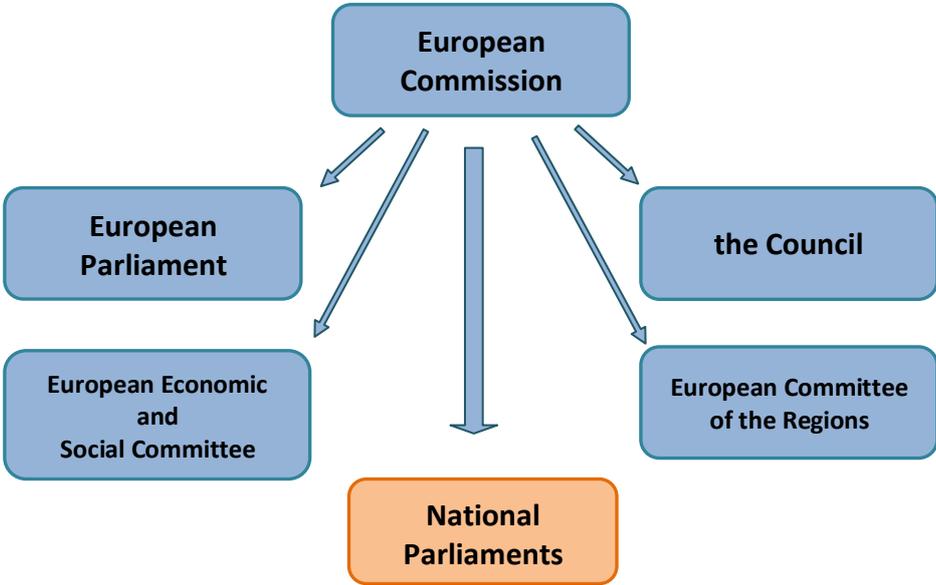
National Parliamentarians can also improve EU legislation through other channels. Unlike the Council and the European Parliament, they do not directly participate in adopting EU laws, but since 2006, they have been able to offer feedback through **political dialogue** with the European Commission on whether existing, planned, or

future legislation serves or undermines the public interest. National parliamentarians also regularly exchange views with colleagues from other member states and their counterparts in the European Parliament during the so-called interparliamentary conferences or interparliamentary committee meetings and other workshops and seminars.

In these ways, parliamentary scrutiny of EU affairs can help facilitate vital debate about the **division of competences between the EU and its member states** and about the **desirability of certain European policies**.

**1. The Commission proposal**

In accordance with the Treaty of Lisbon, the Commission only may put forward legislative proposals. This is the **'right of initiative'**. Each Commission initiative is accompanied by an explanatory memorandum, intended to show, inter alia, that the proposal complies with the principles of subsidiarity and proportionality. The proposal is forwarded simultaneously to the **European Parliament and to the Council** but also to all **national Parliaments** and, where applicable, to the **European Committee of the Regions** and the **European Economic and Social Committee**.



**2. The opinions of national Parliaments**

One of the principal features of the **Protocol (No 1) on the role of national Parliaments in the**

**European Union** annexed to the Treaty of Lisbon (2009) is the introduction of specific monitoring of subsidiarity by national Parliaments.

According to Art. 2 *'Draft legislative acts sent to the European Parliament and to the Council shall be forwarded to national Parliaments.'*

Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality in the EU legislation. **Protocol (No 2) on the application of the principles of subsidiarity and proportionality** (2009) introduced a mechanism of subsidiarity scrutiny by national Parliaments known as 'early warning system', which increases the involvement of national Parliaments in the EU policy-making process.

The new protocol opens up the possibility for national Parliaments to issue reasoned opinions on compliance with the subsidiarity principle by a **draft legislative act** when legislative proposals concern a **policy area that falls under shared competence**.

### **Subsidiarity control mechanism. The Early Warning System**

**National Parliaments may give a reasoned opinion and collectively they can influence the legislative process if a certain threshold is attained and in the set time limit.**

**A reasoned opinion** is issued by a national Parliament or chamber if it thinks that a draft EU law does not comply with the principle of subsidiarity (it thinks that the matter could better be addressed by the Member States individually, not the EU collectively).

**Yellow Card** is triggered if enough parliaments or chambers issue reasoned opinions on the draft law. A Yellow Card forces the European Commission to conduct a review.

Under the **early warning mechanism**, any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, send to the Presidents of the European Commission, the European Parliament and the Council a **reasoned opinion** stating why it considers that the draft legislative act does not comply with the principle of subsidiarity. (Art. 6, Protocol No 2)

Under Protocol No 2, each national Parliament has two votes: in countries with unicameral parliaments the sole House of Parliament has two votes, in the case of a bicameral system,



each chamber has one vote. Commission proposals can be blocked if there is a consensus among a majority of chambers.

In the case of proposals falling under the *ordinary legislative procedure*, if a draft legislative act's compliance with the subsidiarity principle is contested by a third of the votes allocated to national Parliaments (**yellow card**) the Commission has to review the proposal and decide **to maintain, amend or withdraw the draft legislative act**, also giving reasons for its decision. (This threshold shall be a quarter if the draft legislative act is submitted within the area of freedom, security and justice.)



If a draft legislative act's compliance with the subsidiarity principle is contested by a simple majority of the votes allocated to national Parliaments (**orange card**), the Commission has to justify its position by means of a reasoned opinion. (So far, no orange card procedures have been triggered.)

The procedural mechanisms are based not only on the interaction between national Parliaments and the European Commission but also on the reaction of the European Parliament and the Commission. If the European Parliament by a simple majority of its members (and the Council by a majority of 55% of its members) considers that the proposal is indeed not compatible with the principle of subsidiarity, it is abandoned.

## KEY CASES WHERE SUBSIDIARITY AND PROPORTIONALITY CONCERNS WERE RAISED

### Rasoned opinions triggered by national Parliaments

The strengthening of the subsidiarity control mechanism and participation rights at both national and European levels is often seen as an effective measure to address the perceived democratic deficit in EU decision-making. However, whether these aims can be met depends crucially on whether and how national Parliaments actually do get involved in EU affairs.

Through the **early warning system**, the Treaty of Lisbon gives the right to all national Parliaments **to scrutinise** and **influence the EU legislative process**. National Parliaments face the challenges of **Europeanised policy-making** in very different ways and to different degrees.

The **reasoned opinions** issued by national Parliaments (both chambers in bicameral systems) vary largely, they have different priorities in choosing Commission proposals to be scrutinised in the context of the **subsidiarity control mechanism**.

For example, the Swedish Riksdag has opposed Commission draft legislation on subsidiarity grounds more often than any other parliament. From Eastern Europe Lithuania, Poland submitted the most reasoned opinions. Bulgaria, Estonia, Latvia, Slovenia, Slovakia and Hungary triggered the lowest number of them.

There is a considerable variation across parliamentary chambers as well. Some parliamentary chambers have submitted a considerable number of reasoned opinions. The lower chamber (Tweede Kamer) of the Dutch parliament, upper chamber (Bundesrat) of Austria, Sénat of France, and the House of Lords of the UK have submitted a large number of reasoned opinions to the Commission.

The key topics to which national Parliaments reacted in their opinions vary from year to year and reflect the political situation and the interests of national parliaments. Under the **subsidiarity control mechanism**, the yellow card procedure was used only three times.

### Key cases where subsidiarity and proportionality concerns were raised

*1st case: Proposal for a 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 (Monti II)<sup>1</sup>*



The first use of the **yellow card** by national Parliaments in the context of the subsidiarity control mechanism was in 2012. The aim of the Commission proposal was to clarify the interaction between the exercise of social rights and

the exercise of freedom of establishment and to provide services enshrined in the Treaty of Lisbon (Art. 153). It addresses the concerns raised by stakeholders (especially trade unions) that in the single market economic freedoms prevail over the right to strike.

In May 2012 national Parliaments of the EU issued their first yellow card. Thus for the first time, national Parliaments **collectively intervened in the legislative process of the EU** to decisive effect, expressing subsidiarity concerns on the Commission's proposal for a **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. In 2012 through the case of the Monti II proposal national Parliaments proved with 12 reasoned opinions that the European

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<sup>1</sup> 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. Brussels, 21.3.2012 COM (2012) 130 final

Commission unnecessarily interfered with domestic labour laws including workers' right to take collective action.

The European Commission claimed that the Monti II proposal did not breach the subsidiarity principle but that it withdrew the draft European legislative act because of a lack of political support for it in the European Parliament and the Council.

**2nd case: Proposal for a Regulation on the establishment of the European Public Prosecutor's Office<sup>2</sup>**

The Commission proposal for a European Public Prosecutor's Office (EPPO) was adopted on 17 July 2013. National Parliaments argued that the Commission did not demonstrate that Union-level action could achieve better results than action at a national level.

National Parliaments issued 14 reasoned opinions on the proposal, representing 18 votes out of a possible 56.

The Regulation establishing the [European Public Prosecutor's Office](#) under enhanced cooperation was adopted on 12 October 2017 Council Regulation (EU) 2017/1939 and entered into force on 20 November 2017. At this stage, there are 22 participating EU countries.



The European Public Prosecutor's Office (EPPO) is a new Union body in charge of conducting criminal investigations and prosecutions for crimes against the EU budget. Expected to be operational as of the end of 2020, the EPPO will strengthen the Union's capacity to protect taxpayers' money. The EPPO will be the first supranational public prosecution office. It will investigate and prosecute fraud and other crimes affecting the EU's financial interests (so-called '[PIF' offences](#)' as defined in Directive (EU) 2017/1371).

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<sup>2</sup> Proposal for a Council regulation on the establishment of the European Public Prosecutor's Office. Brussels, 17.7.2013 COM (2013) 534 final

### 3rd case: Proposal for a revision of the posting of workers Directive<sup>3</sup>



On 8 March 2016, the Commission adopted a proposal for a targeted revision of the 1996 Directive on posting of workers, who are sent by their employer to another country for working there temporarily. These workers are currently covered by social security rules in their country of origin. In countries with high wages, employers can therefore usually pay lower wages to these posted workers than to local workers. The purpose of the review is to ensure that the implementation of the freedom to provide services in the Union takes place under conditions that guarantee a level playing field for businesses and respect for the rights of workers. The new proposal intends to redress so-called ‘social dumping’, where European companies use low-cost workers to circumvent the labour laws of the host country. The proposal provides in particular that all mandatory rules on remuneration in the host Member State apply to workers posted to that Member State.

In May 2016, a third **yellow card** was issued following the proposal for a revision of the directive on the posting of workers, as 14 national Parliaments or chambers thereof issued reasoned opinions.

Table 1: Number of yellow card procedures

| Year | Yellow card procedure | One third of votes | Number of reasoned opinions |
|------|-----------------------|--------------------|-----------------------------|
| 2012 | First Yellow card     | 19 votes           | 12                          |
| 2013 | Second Yellow card    | 18 votes           | 14                          |
| 2016 | Third Yellow card     | 22 votes           | 14                          |

Source: Annual reports of the European Commission on subsidiarity and proportionality

In the case of proposals falling under the ordinary legislative procedure, if a draft legislative act's compliance with the subsidiarity principle is contested by a simple majority of the votes allocated to national Parliaments (**orange card**), the Commission has to re-examine the

<sup>3</sup>European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. Strasbourg, 8.3.2016 COM (2016) 128 final

proposal. If it chooses to maintain the draft, the Commission has to justify its position by means of a reasoned opinion. (So far, no orange card procedures have been triggered.)

**The yellow card procedure** is an important development in relations between the European Commission and national Parliaments. The use of the yellow card is a clear expression of the **willingness of national Parliaments to make their opinion expressed** in their relations with the Commission on a particular piece of legislation.<sup>4</sup>

The EWS practice, as the yellow card cases have indicated, is that particular policy fields had better be regulated at national level instead of European level. Moreover, the **subsidiarity control on shared public policies** can promote a regulation that determines what should be European and that should be national.

In sum, the cooperation between the EU institutions and national Parliaments in the post-Lisbon era became more active and visible than they were in the past. The new provisions for parliamentary engagement in the European Union's policy-making have brought the national Parliaments closer across the EU member states.

The Treaty of Lisbon has introduced an institutional innovation that could contribute to lowering the democratic deficit of the European Union. The cooperation with EU institutions, especially with the European Commission, on EU affairs provides national Parliaments with a formal role in European the public policy-making process.



### **Further Reading**

Soós, Edit: Monitoring subsidiarity in the EU multilevel parliamentary system. *Slovak Journal of Political Sciences*, 2018. Vol. 18. No. 2. pp. 195-214.

Raunio, Tapio: National parliaments and European integration. What we know and what we should know. Oslo: Center for European Studies, University of Oslo, ARENA Working Paper No. 02. January 2009

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<sup>4</sup> European Commission. Report from the Commission. Annual Report 2013 on relations between the European Commission and national parliaments. Brussels, 5.8.2014 COM(2014) 507 final, p. 2.

## QUESTIONS

What is the role of national Parliaments in the EU legislative process?

What is a yellow card for?

Which EU document introduced the subsidiary control mechanism?

What is the difference between a yellow card and an orange card procedure?

What is the difference between reasoned opinion and yellow card?

Which proposal withdrew the European Commission? Why?

