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The Role of National Parliaments in the EU - Written Evidence

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Preface

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HOUSE OF LORDS

EUROPEAN UNION SELECT COMMITTEE

The Role of National Parliaments in the European Union

Written evidence

Contents

Oskar Josef Gstrein and Darren Harvey—Written evidence

This paper is a response to a call for evidence by the House of Lords of the Parliament of the United Kingdom concerning the role of national parliaments in the European Union. It covers mainly the formal role of national parliaments[106] as well as the dialogue and scrutiny of EU policies by these institutions.[107] All statements reflect the personal opinion of the authors and are not linked to their professional activities or the views of their employer.

A. What is your assessment of the existing yellow card and orange card procedures? Are national parliaments making good use of these?

1. Despite the rejection of the idea to give the member states' parliaments a position within the legislative triangle of the EU[108] by introducing a "red card procedure", their role was heightened to a potentially large extent by the Lisbon Treaty with the setting up of a so called "Early Warning System" (EWS) in protocol no. 2. Although theoretically ground-breaking and exhibiting considerable potential to alter the balance of legislative power in the EU in favour of national parliaments, the results in practice since the coming into force of the Lisbon Treaty in 2009 have been disappointing.
2. When analysing the "Annual report of the European Commission on relations between the European Commission and national parliaments" [109] and the "Annual report on subsidiarity and proportionality"[110] since 2010 the preliminary answer to this question must be negative. As is stated in the aforementioned documents, the "yellow-card" procedure has so far only been triggered once since its introduction.[111]
3. Commenting on the inadequacy of the current yellow and orange card procedures, several general difficulties can be highlighted: [112]

i.) Incentive Problems: The reluctance of majoritarian parliaments to challenge their government`s position on EU affairs and the perception that there are little electoral benefits to be gained from engaging in EU affairs.

ii.) Problems in the conception and vision of political measures: These manifest themselves in a significant number of politicians and political parties who face severe problems when aiming to transform their political concepts and goals onto the European scale. For instance, it will be clear for an MP who is a member of the British Labour Party what the basic pillars of his parties' social policy are. However, since this policy is based on national considerations and aims for national solutions, it fails to integrate into a larger European context. Additionally, the European level is

[106] As described in Points 2. b. to e. of the call
[107] As described in Point 3 of the call
[108] This triangle consists of the Council of the European Union, the European Parliament and the European Commission, who are the traditional players in drafting and adopting legislative acts in the European Union.
[109] European Commission, COM(2013) 565 final; COM(2012) 375 final; COM(2011) 345 final
[110] Ibid., COM(2013) 566 final; COM(2012) 373 final; COM(2011) 344 final
[111] Cf. ibid. COM (2013) 566 final, p. 6 ff.
[112] Cf. Gstrein and Zalewska, "National parliaments and their role in European integration: The EU's democratic deficit in times of economic hardship and political insecurity" Bruges political research papers, (28/2013), p.12 ff.; Cooper, "A virtual third chamber for the European Union? National Parliaments after the Treaty of Lisbon" ARENA working paper no.7 (2011), 10

the framework in which economic entities active on the UK market operate. For them, the internal market of the EU is the main point of reference, not the national economy. Hence, a gap in political action and social reality becomes visible.[113] This is only to a small extent an issue of conflicting interests between the Union and individual member states. It is to a much larger extent the result of a failure to create modern, coherent and sound national political concepts accounting for the consequences of being in a single market. Such political visions will only face the actual challenges if - in their effect - they reach out across national horizons and offer solutions for the European level, the level at which these socio-economic phenomena are created.

iii.) Logistical Problems: The short eight week deadline for submissions and the high volume of legislative proposals to scrutinize combined with the lack of effective mechanisms to coordinate the national parliaments' actions as required to initiate the procedure. This will be discussed in more detail below.

iv.) Weakness inherent in the subsidiarity review: The mechanism only offers an opportunity for "ex-ante" control. The lack of a "red card" for national parliament`s reasoned opinions to stop the legislative procedure results in the existing Protocol no. 2 procedure being nothing more than a mere symbolic gesture by providing national parliaments solely with the opportunity to deliver a non-binding opinion. The only way to obtain effective protection against a finalized piece of EU legislation remains a time-consuming procedure before the ECJ.[114] And even if the judges in Luxembourg were to support the claim that the respective act violates the principle of subsidiarity, this would most likely not remedy the problem since the measure would have already caused significant damage from the day of its enforcement. Furthermore, it has to be pointed out at this stage that the principle of subsidiarity's legal dimension is fairly unclear since there is no comprehensive legal definition. Clarification of this ambiguity can only come from the ECJ as the court is the sole institution competent to do so under Art. 19 par. 1 TEU.

4. According to the most recent Commission report, the total number of opinions received from national Parliaments in 2012 rose to 663; this represented an increase of 7 % as compared with 2011 (622), but a much smaller increase than in previous years (55 % in 2010, 60 % in 2011).[115] However, of these 663 only 70 were in the form of reasoned opinions under the EWS in protocol no. 2.[116] Worse still, in a European Union consisting of 27 (now 28) member states with 40 national parliamentary chambers (on accounts of there being a mixture of unicameral and bicameral national parliaments) 15 such chambers failed to provide a single reasoned opinion on proposed EU legislation during 2012.[117] Evidently, therefore, there would appear to be a fundamental disconnect between national parliaments and the European legislative process with democratically elected representatives of member

[113] Cf. on the topic Graser, "Einmal mehr: Zur Europäisierung der Sozialpolitik", Europarecht Beiheft 2013, 15, p. 15 – 31
[114] Cf. Art. 8 of Protocol no. 2
[115] Report from the European Commission, "Annual Report 2012 on relations between the European Commission and National Parliaments", p. 4
[116] Ibid.
[117] Ibid. p. 9

states routinely failing to exercise their right of ensuring proposed EU legislation complies with the principle of subsidiarity. Moreover, the large decrease in the growth rate of measures taken annually by national parliaments can be interpreted as a realisation of the fact that their efforts in previous years have been generally ineffective. Linked to this lack of engagement with the current EWS is the aforementioned problem of logistics. It has proved exceptionally difficult to coordinate the various national parliaments to act in concert and achieve the voting thresholds required for a yellow or orange card[118] and this is because each parliament tends to work slowly, according to its own timetable, and according to its own unique set of procedures.[119]

5. That being said, certain networks and informal bodies for national parliaments to coordinate their subsidiarity related concerns do exist within the current structure of EU affairs and these could be utilised far more effectively. It seems evident that the exchange of views in bodies like COSAC and the network of national parliament representatives (NPRs) improve the situation and lead to a certain common understanding on what the subsidiarity principle means in general. However, it is also clear that none of the existing structures, in their current setup, are capable of delivering the type of effective coordination required to assist the chambers of national parliaments in using their Protocol 2 competences on a case by case basis and thus render the mechanism more effective.[120]
6. That being said, the potential for effective action within the current setup was amply demonstrated by the exceptionally high level of inter-parliamentary dialogue and cooperation that preceded the first - and to date only - issuance of a yellow card to the EU by national parliaments.[121] In this regard, from a procedural perspective at least, the manner in which national parliaments managed to first collectively engage with, and then actively oppose, the colloquially named "Monti II" regulation leads one to be cautiously optimistic about an increased number of yellow or orange cards in future.
7. Substantively however, huge questions remain as to the precise scope to be afforded to national parliaments when conducting a review of proposed EU legislation`s compliance with the principle of subsidiarity under Protocol no. 2 and this constitutes a significant challenge to the proper functioning of the mechanism.

B. Is there a well-developed, common understanding of subsidiarity? If not, is there a need to develop one?

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[118] Craig, "The Lisbon Treaty. Law, Politics, and Treaty Reform", New York, (2011), p. 186

[119] Cooper, "A yellow card for the striker: How national parliaments defeated EU strikes regulation" ARENA draft paper. Available at: www.euce.org/eusa/2013/papers/12g_cooper.pdf

[120] COSAC, for instance, schedules its meetings of the national parliaments' European Affairs Committees twice a year. Looking at the eight weeks national chambers do have to gather the votes necessary in order to trigger a yellow card procedure, it is very unlikely COSAC will be able to assist or coordinate the parliaments in a specific case.

[121] For an overview of the communication and interaction between various national parliaments in the run up to the yellow card on 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) cf. Cooper, supra fn. 7

8. Despite being recognised in the EU treaty framework since the Maastricht Treaty in 1993, the precise scope, content and limits to the principle of subsidiarity in EU law remain ambiguous. Accordingly, some have noted that it remains so far unclear what exactly national parliaments can refer to when claiming that the principle of subsidiarity has been violated under the EWS.[122] As Fabbrini and Granat succinctly put it *"What should subsidiarity review comprise? Should national parliaments review only the strict question whether a legislative measure should be adopted by the EU or by the Member States? Or should national parliaments also consider the proportionality or necessity of the measure, the adequacy of its legal basis and its substance?"*[123]
9. Some scholars take the view that national parliaments, acting under Protocol no.2, should limit themselves to a narrow or restrictive review of the subsidiarity of an EU legislative proposal and should refrain from scrutinising wider concerns of legal basis, proportionality and necessity.[124] Others hold the opinion that the power of scrutiny vested in national parliaments by Protocol no. 2 should provide for a broad based review of subsidiarity that would include an evaluation of the principle of conferral, legal basis and proportionality of proposed EU legislation.[125]Indeed, from a legal point of view there are good arguments to support the view that each of these principles should work in combination with one another.[126]
10. More problematic than the mere academic dispute, however, is that this unclear situation forms the basis of a lack of common understanding between the individual national legislators. Some, like the German Bundesrat, that represents the "Bundesländer" in the national parliament, are convinced that Protocol no. 2 enables it to review proposed legislative measures in such a broad manner that the term "subsidiarity" can be seen simply as a vague headline under which each and every aspect of an EU legislative proposal may be scrutinised.[127] In contrast, other legislative bodies will probably be more restrictive when setting the scope for review.
11. This confusion over the exact boundaries of national parliament`s powers of subsidiarity review has led to incoherent and often widely divergent practice from parliaments when providing reasoned opinions under Protocol no. 2. If one considers the single instance in which a yellow card was issued so far, it is clear to see from the content of various national parliament`s submissions that a general consensus on how to correctly approach the subsidiarity review under Protocol no. 2 is lacking.[128] In

[122] Gstrein and Zalewska, p.13
[123] Fabbrini and Granat, "Yellow card, but no foul: The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike" Common Market Law Review, 50, 2013, p. 120, see also on the subject Nguyen, "Die Subsidiaritätsrüge des Deutschen Bundesrates gegen den Vorschlag der EU Kommission für eine Datenschutz-Grundverordnung", ZEuS - Zeitschrift für europarechtliche Studien, no. 3/2012, p. 283, 293
[124]Fabbrini and Granat, p. 121
[125] Kiiver, "The early warning system for the principle of subsidiarity. Constitutional theory and empirical reality" (Routledge, 2012) pp.98-100; Ritzer, Ruttloff and Linhart "How to sharpen a dull sword: The principle of subsidiarity and its control" German Law Journal (2006), pp. 737-738
[126] Trstenjak and Beysen, Das Prinzip der Verhältnismäßigkeit in der Unionsrechtsordnung, „EuR Europarecht", no. 3/2012, p. 267
[127] Cf. Nguyen, p. 283, 293
[128] See Fabrini and Granat, fn. 18

this case, several national parliaments challenged the legal basis,[129] necessity[130] and even the content[131] of the proposed legislation rather than embarking on an analysis of the principle of subsidiarity.

12. In order to improve this unsatisfactory situation, an agreement or a "common understanding" between the national legislators of the EU Member States is necessary. By defining a framework within which to conduct subsidiarity control the current patchwork approach would be replaced by a more coherent solution and as a result the position of national legislators would be dramatically improved. It is therefore "conditio sine qua non" to transform the procedure from its current status as a mere political gesture into an effective tool of political cooperation and control.
13. Member states have to express their consent to adhere to common principles or standards of review within the EWS and in so doing enhance the prospects of parliamentary coordination and cooperation in submitting national opinions. This would result in an amicably agreed and politically endorsed definition of how the subsidiarity review under Protocol no. 2 should operate.[132] Technically, the agreement should take the form of an international treaty or a common declaration; the latter being more suitable due to its less invasive character.
14. Regarding the content of such a common understanding it seems advisable to modify or even commit in its entirety to the "Subsidiarity and Proportionality Assessment Grid", a tool developed by the European Union's Committee of Regions.[133] This set of criteria does not only offer a sound basis for evaluation, it is also already being used by the Committee of Regions and the European Commission.[134] Therefore, by committing to this set of criteria, national legislators would have a valuable basis upon which to launch their activities. Additionally, such a move would present the opportunity to create a circle of regional, national and supranational institutions using and developing the same set of criteria for subsidiarity review. Especially when looking at the fruitful development of the Committee of Regions "Subsidiarity Monitoring Network" and the evolution of its most recent initiative, the "Regional Parliamentary Exchange" (REGPEX),[135] one submits that this is the correct manner in which to proceed.

C. What is the future of national parliaments in the EU?

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[129] Reasoned Opinion of the Finnish Eduskunta of 16th May 2012, Report of the Grand Committee, Su VM 1/2012 vp- M 2/2012 vp (courtesy translation); Avis de subsidiarité de la chamber des représentants de Belgique, 30th May 2012, DOC 53 2221/001; Reasoned opinion of the Portuguese Assembleia da Republica, 18th May 2012

[130] The Maltese parliament, along with the Finnish Eduskunta claimed that the proposal was not necessary to achieve goals of EU action in the particular policy field, see reasoned opinion of the Maltese Kamra tad-Deputati, (courtesy translation) paras 1-2 and Reasoned Opinion of the Finnish Eduskunta supra fn. 24

[131] According to the Portuguese Assembleia, the proposals attempts at reconciling social and economic rights within the context of fundamental rights conflicted with Portuguese constitutional tradition and the jurisprudence of the Portuguese courts, see Reasoned opinion of the Portuguese Assembleia da Republica supra fn. 24

[132] Once this "common understanding" is being applied there might be challenges from other European Institutions resulting in legal proceedings, but such a process might be positive in terms of fostering the development of a clear legal definition of the principle of subsidiarity.

[133] See www.cor.europa.eu/subsidiarity for details; Committee of Regions, Subsidiarity annual report 2012, R/CdR 1335/2013

[134] European Commission, Report from the Commission on subsidiarity and proportionality, COM(2009) 504 final, p. 4

[135] Committee of Regions, Subsidiarity annual report 2012, R/CdR 1335/2013, p.4 ff.

15. Moving to consider the prospects of this review mechanism in the future, it is submitted that a common understanding of the type envisaged above is likely to become all the more necessary in light of renewed calls for a substantial change to the relationship between national parliaments and the EU legislative process. In the Netherlands, for example, Dutch Foreign Minister Frans Timmermans recently presented a letter summarising the outcome of a "subsidiarity review" carried out by the government. The letter unequivocally states that certain policy fields in which the EU currently has competence would be better left exclusively for the member states to deal with. Although not explicitly setting out how this is to be achieved, calls for some form of enhanced role for national parliaments in reviewing compliance with subsidiarity may be reasonably expected.[136] In Britain, Foreign Secretary William Hague and his opposition counterpart Douglas Alexander have also expressed a desire to radically alter the current delineation of competences between the EU and national parliaments. In their view the current yellow card procedure should be upgraded to a red card or emergency brake procedure that would allow national parliaments to block such proposals.[137]
16. Regardless of how these initiatives play out in the future there can be no doubt that increased levels of attention being paid to the relationship between the EU and national parliaments will necessitate a proper understanding of how the principle of subsidiarity is to operate in practical terms. However, this can not only refer to the general understanding of subsidiarity (as addressed above). In order to improve the actual cooperation of European legislators on drafts of the European Commission, the already existing networks such as the Inter-parliamentary Exchange Platform (IPEX)[138] have to be upgraded. Once again borrowing the principle approach from the Committee of Regions and its Subsidiarity Monitoring Network, national parliaments should develop their activities further and commonly appoint a Rapporteur for monitoring a specific proposal of the European Commission. Through this, the process of subsidiarity review for a single act would become clearer and more easily manageable.
17. These rapporteurs, who should be highly qualified MPs with their main duties in one member state, would have the function of analysing the commission's proposal and gather opinions and statements of all member states' legislative assemblies in order to find common ground for action. Rapporteurs should be chosen through a standardised procedure in a common forum, most appropriately IPEX. They should start their activities as early as possible in the draft legislative process since they will have a limited amount of time to work on the reports; especially considering the eight week deadline parliaments have to meet in order to provide their opinions to

[136] Euractiv, "Dutch 'subsidiarity review' strikes a chord with UK euro critics" Euractiv News, June 25th 2013, available at: http://www.euractiv.com/future-eu/dutch-subsidiarity-review-strike-news-528833
[137] London Evening Standard, "Hague urges EU red card system", 1st June 2013, available at: http://www.standard.co.uk/panewsfeeds/hague-urges-eu-red-card-system-8638827.html; Douglas MP, "Britain`s future in Europe" speech delivered Thursday 17th January 2013 at Chatham House, London, transcript available at: http://www.chathamhouse.org/events/view/188423
[138] http://www.ipex.eu

the European Union. It may be necessary to set up additional supporting mechanisms on the side of the European Commission. Their appointment should be in accordance with certain criteria such as: the importance of the specific policy area of the proposal for the member state where the MPs come from and maybe also the region the MP represents; his or her professional skills and relation to the topic; the general division of such tasks between the different member states in order to maintain a necessary balance etc. It seems appropriate to have a non-enumerative set of criteria as a guideline for choosing the rapporteurs, leaving the committee of appointment a certain margin of appreciation in order to react to special circumstances that might arise in individual cases.

18. Based on their reports - which would be drafted with support from a permanent expert committee at IPEX, specifically set up for this procedure - national legislators would then decide whether or not to take action having considered the recommendations of the rapporteur. Depending on the political sensitivity of the issue, the use of an increased number of rapporteurs is certainly possible. However, the overall number should be limited to three rapporteurs, since more contributors would undermine the main objective of introducing such a mechanism: namely the streamlining of the process by providing a clear and highly qualified opinion on the topic.
19. In summary, it has to be clearly acknowledged that legislative procedures on the EU level will never be "as close" to the European citizen as their national equivalents. More importantly, however, it is questionable if understanding the issue of "democratic legitimacy" in this way is appropriate, since it is not the purpose of European institutions to replace those already existing at the national level. Clearly, it is the task of European legislation to solve European problems. Nothing more and nothing less. Therefore, it is wrong to include national parliaments in the process of European legislation as such. However, what is necessary is an improved procedure in order to clarify the sphere for national and European legislation. It is time to transform the principle of subsidiarity from a political token gesture into a legally feasible concept. The intention of Protocol no. 2 of the Treaty of Lisbon was to clarify the dimension of subsidiarity – transforming it from a gambling table of politics into a legal principle with the power to harmonize the scope of action of legislators in Europe for the common good. It is time to live up to this commitment.