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Subsidiarity, proportionality and the role of the national parliaments in the European legislative process

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Subsidiarity, proportionality and the role of the national parliaments in the European legislative process

Abstract

Since the entry into force of the Lisbon Treaty (2009), the EU national parliaments have had the right to control the principle of subsidiarity through the Early Warning System (EWS). This study, commissioned by the European Parliament's Policy Department for Justice, Civil Liberties and Institutional Affairs at the request of the AFCO Committee, examines how the EWS has worked over the past 15 years. It also looks into the interaction of Parliament, the European Commission, local and regional entities, the Committee of the Regions, the Court of Justice of the EU and the Council with national parliaments to this end. Moreover, it considers the principle of proportionality and the EU institutions' relationship with it.

This document was requested by the European Parliament's Committee on Constitutional Affairs.
It constitutes an update of the Study on "Controlling Subsidiarity in Today's EU: the Role of the European Parliament and the National Parliaments".

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LIST OF ABBREVIATIONS

BRASS-G	Better Regulation and Active Subsidiarity Steering Group
CALRE	Conference of European Regional Legislative Assemblies
CEMR	Council of European Municipalities and Regions
Commission	European Commission
CoR	Committee of the Regions
Council	Council of the European Union
COSAC	Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union
CJEU	Court of Justice of the EU
ECPRD	European Center for Parliamentary Research and Documentation
EEC	European Economic Community
EU	European Union
EWS	Early Warning System
IPEX	Platform for Interparliamentary EU Information Exchange
JURI Committee	Parliament's Committee on Legal Affairs
Parliament	European Parliament
REFIT Programme	(Commission's) Regulatory Fitness and Performance Programme
REGPEX	REGional Parliamentary EXchange
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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EXECUTIVE SUMMARY

Since 1992, the principle of subsidiarity, a general principle of European Union (EU) law, has played a key role in the EU as it functions today. This principle determines which player in the EU or from its Member States should act to reach a specific objective, whereby the lowest level of governance should always be favoured when possible.

As a general principle of EU law, the principle of subsidiarity has been liable for judicial review by the Court of Justice of the EU since the Maastricht Treaty. However, the Lisbon Treaty added the possibility of a political control mechanism by national parliaments in the framework of the Early Warning System (EWS). If a national parliament/chamber considers that a legislative proposal does not respect the principle of subsidiarity, it may adopt a reasoned opinion. National parliaments should consult regional parliaments with legislative powers 'where appropriate'.

The Political Dialogue has been much more frequently used than the EWS, which has only been activated on three occasions since 2009, leading to its effectiveness being repeatedly questioned. National and regional parliaments' interest in this System appears to have decreased over time, and several initiatives including the creation by the European Commission of the Task Force on subsidiarity, proportionality and 'doing less more efficiently' have been launched over the years to improve its functioning.

As a follow up to the recommendations issued by the Task Force, which also devoted specific attention to the need to duly consider and involve the local and the regional levels of governance, several reforms have been implemented. For instance, a subsidiarity grid is now used by the European Commission in its legislative proposals. The Committee of the Regions has also sought to improve the procedures in place to promote the respect of the principle of subsidiarity even further.

In general, the European Parliament has devoted increased attention to national parliaments' reasoned opinions and contributions since the Lisbon Treaty entered into force in 2009, and the European Commission has, too, become increasingly committed to guarantee the respect of the principle of subsidiarity and to engage in a dialogue with national and regional parliaments.

This notwithstanding, discussions on potential future reforms regularly resurface, for instance in the framework of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC). Parliaments are keen to play a more active and positive role, as opposed to being limited to the negative role, which the EWS allows them to play. With this in mind, they have regularly proposed that they be attributed an indirect right of initiative (so-called green card) akin to the one of Parliament contained in Art. 225 TFEU.

The Lisbon Treaty, furthermore, acknowledged the possibility for national parliaments to ask their governments to launch an action for annulment on the ground of a subsidiarity breach, and the Committee of the Regions may, too, avail itself of the same right. These changes are in line with the increased importance devoted to the local and the regional levels in the control and the implementation of the principle of subsidiarity which is evident from the explicit mention of the local and the regional dimensions.

The French National Assembly availed itself of this possibility in August 2024. The fact that it is the only national parliament to have done so since 2009 and the limited number of yellow cards raised to date point towards the fact that there has not been any subsidiarity issue. In this sense, a reform of the EWS system that would consist in lowering the thresholds applicable or in extending the eight week-deadline to raise reasoned opinions is unlikely to have a significant impact, and other possible reforms should be preferred.

To improve the existing situation, the following **recommendations** are thus made:

- The Commission should continue to **apply lower thresholds** than the ones existing within the EWS **for the provision of aggregated answers** if the number of reasoned opinions is significant. The **established eight-week deadline should be applied in the most flexible manner possible**.
- The **European Commission should continue to provide detailed and individual answers to all the reasoned opinions it receives**, and it should, along with the EU legislator, **outline the impact of reasoned opinions (and contributions) on a given legislative proposal.**
- National parliaments should be attributed a **more positive and proactive role** by, for instance, **creating a green card** that would operate with thresholds that are both reachable and not so low as to trigger very numerous green cards. In any case, the **European Commission should consider all the input** it receives as potential ideas to take on board its policy agenda, regardless of the number of chambers supporting it. This would perhaps be even more desirable where national parliaments intervene in support of a European Citizens' Initiative.
- National parliaments should **always provide an English translation of the contributions** they submit in the framework of the Political Dialogue.
- **IPEX should be used as the sole platform of interparliamentary exchange**, and it should be improved further by, for instance, setting up automatic notifications also for regional parliaments where a certain number of parliaments/chambers (for instance: 4) indicate that they are scrutinizing a specific proposal.
- **Parliaments should participate at an earlier stage**, more specifically, when consultations take place.
- **Collective efforts towards the closer scrutiny of the Commission's Annual Work Programme** should be revamped and the **Commission should engage in a dialogue with parliaments**, within COSAC or otherwise.
- **Parliaments should play a role in the 'fit for the future' initiatives** of the European Commission as they are the best placed to identify the existing shortcomings and resulting needs.
- **Parliaments' specific importance as (national) organs of democratic representation** should be recognised and they should be attributed an enhanced status when the Interinstitutional Agreement on Better Law-Making is revised.
- **The links between the IPEX and the REGPEX Platforms** should be improved.
- **A single 'subsidiarity hub'** should be created based on IPEX where reasoned opinions as well as contributions, CoR opinions, answers by the Commission, resolutions of the European Parliament etc. would be collected.

1. INTRODUCTION

1.1. Introducing the principle of subsidiarity within the EU

The **principle of subsidiarity is one of the principles that guides the actions of the European Union** (EU) today. According to this principle enshrined in Article 5(3) TEU, in areas of non-exclusive competence, the EU shall only act if Member States are unable to reach a defined objective and where the EU is better able to reach said objective by reason of the scale or effects of the proposed action (insufficiency and EU added-value tests, respectively). Both requirements are cumulative, meaning that EU action is justified only if both conditions are fulfilled:[1]

Article 5 (3) TEU

> *Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*

As detailed further in Sub-section 2.2. on the evolution of the principle of subsidiarity within the EU legal order, this principle has been included in the Treaties since the Single European Act (1987), and it has been a general principle of EU law since the Treaty of Maastricht (1993). **This principle**, however, **has been more salient within the EU since the Treaty of Lisbon** entered into force in 2009, as **this Treaty specifically entrusted national parliaments with the task of guaranteeing the respect of subsidiarity**. In the framework of the **Early Warning System (EWS)**, national parliaments assess whether an EU legislative proposal breaches subsidiarity. The functioning of the EWS is defined in Articles 6 and 7 of Protocol No 2 on the application of the principles of subsidiarity and proportionality[2]:

Article 6 of Protocol No 2

> *Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.*
>
> *If the draft legislative act originates from a group of Member States, the President of the Council shall forward the opinion to the governments of those Member States.*
>
> *If the draft legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the opinion to the institution or body concerned.*

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[1] Subsidiarity may both justify and hinder EU action, or as it used to be put in the Amsterdam Treaty, it is a ''dynamic concept' allowing 'Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified'. Article 3, Protocol (No 30) on the application of the principles of subsidiarity and proportionality, OJ C 340, 10.11.1997, p. 173–306.

[2] Protocol (No 2) on the application of the principles of subsidiarity and proportionality, Consolidated version of the Treaty on the Functioning of the European Union, OJ C 115, 9.5.2008, p. 206–209.

Article 7 of Protocol No 2

1. The European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, shall take account of the reasoned opinions issued by national Parliaments or by a chamber of a national Parliament.

Each national Parliament shall have two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote.

2. Where reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the draft must be reviewed. This threshold shall be a quarter in the case of a draft legislative act submitted on the basis of Article 76 of the Treaty on the Functioning of the European Union on the area of freedom, security and justice.

After such review, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.

3. Furthermore, under the ordinary legislative procedure, where reasoned opinions on the non-compliance of a proposal for a legislative act with the principle of subsidiarity represent at least a simple majority of the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the proposal must be reviewed. After such review, the Commission may decide to maintain, amend or withdraw the proposal.

If it chooses to maintain the proposal, the Commission will have, in a reasoned opinion, to justify why it considers that the proposal complies with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinions of the national Parliaments, will have to be submitted to the Union legislator, for consideration in the procedure:

(a) before concluding the first reading, the legislator (the European Parliament and the Council) shall consider whether the legislative proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national Parliaments as well as the reasoned opinion of the Commission;

(b) if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration.

According to Article 6 of Protocol No 2, following the transmission of a legislative proposal in all official languages, **national parliaments have eight weeks to submit reasoned opinions if they consider that the proposal in question breaches the principle of subsidiarity**. Each national parliament has two votes, whereby each chamber has one vote in bicameral parliaments. Where the total number of votes expressed in favour of a subsidiarity breach within the defined eight-week period equals one-third (one-fourth in the area of Freedom, Security and Justice), a so-called **yellow card** is triggered (Article 7(2) of Protocol No 2) and the institution which is the author of the proposal – in most cases, the European Commission (the Commission) – must review it. That institution may decide to maintain, amend or withdraw the legislative proposal at stake (and must explain its decision).

In the framework of the ordinary legislative procedure, where the total number of votes equals one-half (**orange card** procedure; Article 7(3) of Protocol No 2), the Commission must also review the proposal, which it can maintain, amend or withdraw. In the case of an orange card however, the Commission must justify in a reasoned opinion why the principle of subsidiarity is respected, and the EU legislators – the European Parliament (Parliament) and the Council of the European Union (the Council) – are, too, called to individually assess whether a breach exists.

The EWS has only been activated on three occasions since 2009. In addition to having been rare, these yellow cards were all triggered under exceptional circumstances, either because of the legal basis used, or because of the political context in which they were presented to the Commission.[3] In none of these three occasions did the yellow card push the Commission to withdraw its proposal: in the first case, it decided to withdraw the proposal despite considering that no subsidiarity breach had occurred, and in the other two cases, it simply maintained its proposal as it was originally submitted. These decisions disappointed (some) national parliaments,[4] especially considering that reaching the threshold necessary to trigger a yellow card is very demanding in terms of resources, requires anticipation and important coordination efforts.

It is interesting to note that parliaments managed to have an impact on the piece of legislation finally adopted in some of the cases in which half of the number of votes required to trigger a yellow card was reached.[5] In other words, the reasoned opinions adopted by national parliaments over the past fifteen years have had an impact, even if only three yellow cards have been reached.

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[3] The first yellow card reached in 2012 concerned 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 also known as the Monti II Proposal (COM(2012) 130). This proposal was adopted on the basis of the flexibility clause (Article 352 TFEU) despite the fact that article 153(5) TFEU explicitly prohibits any Union intervention in the right to take collective action. The second yellow card triggered in 2013 concerned the proposal to establish a European Public Prosecutor's Office (Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final). A new legal basis (Article 86 TFEU) was introduced to this end in the Lisbon Treaty, and it foresees the possibility to resort to enhanced cooperation if all Member States fail to agree. The third yellow card dates back to 2016 and was raised on the ground of the Commission's proposal on posted workers (Proposal for a directive of the European Parliament and the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of Services COM(2016) 128 final). On that occasion, it is primarily motivation of a political nature (and indeed influence by governments) that led national parliaments, stemming almost exclusively from Eastern European Member States, to adopt reasoned opinions. For detailed analyses of the three yellow cards, see: G. Barrett, 'Monti II: The subsidiarity review process comes of age…or then again maybe it doesn't', *Maastricht Journal of European and Comparative Law*, 2012, pp. 595-600; F. Fabbrini and K. 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*, 2013, pp. 115-144; M. Goldoni, 'The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation', *European Constitutional Law Review*, 2014, pp. 90-118; D. Jancic, 'The Game of Cards: National Parliaments in the EU and the Future of the Early Warning System and the Political Dialogue', *Common Market Law Review*, 2015, pp. 939-376; D. Fromage, 'The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member States Parliaments?', *Yearbook of European Law*, 2016, pp. 5-27; D. Fromage and V. Kreilinger, 'National Parliaments' Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive', *European Journal of Legal Studies*, 2017, pp. 125-160.

[4] European Parliament, Resolution of 18 April 2018 on the Annual reports 2015-2016 on subsidiarity and proportionality, 2017/2010(INI), point 26.

[5] I. Cooper, 'National parliaments in the democratic politics of the EU: The subsidiarity Early Warning Mechanism, 2009-2017', *Comparative European Politics*, 2019, pp. 919-939. National parliaments themselves seem to believe that they have had an influence as they noted: 'COSAC highlights that since the entry into force of the Treaty of Lisbon, the role of national Parliaments has been enhanced within the European constitutional framework, and they have proved to be active players in ex ante scrutinising EU policies *and influencing EU draft legislations* by using the means of political dialogue and subsidiarity checks under Protocols No. 1 and No. 2 of the Treaty of Lisbon.' (emphasis added). COSAC, Contribution of the LXXII COSAC, OJ C 2024/7493, 27.3.2024, p. 2.

The **importance of the sub-national dimension** in assessing the respect of the subsidiarity principle is now expressly recognised in the Lisbon Treaty: the local and regional levels should be duly taken into account when assessing whether the Member States are unable to reach the objective defined, while the Lisbon Treaty also foresees that regional parliaments with legislative powers be consulted by their national parliaments 'where appropriate' (Article 6 of Protocol No 2).

Additionally, alongside the possibility for national parliaments to control the respect of the principle of subsidiarity *ex ante*, a **possibility for them to launch a procedure in front of the Court of Justice of the EU** (the Court of Justice, CJEU) ***ex post*** – following procedures that must be detailed at the domestic level – was also expressly guaranteed in the Lisbon Treaty (Article 8 of Protocol No 2). However, this new parliamentary prerogative has been only used on one occasion (see Section 3.3. below). The importance devoted to the local and regional dimension is visible in this respect as well, as the **Committee of the Regions** (CoR) has also been guaranteed the **possibility to launch a procedure** if it concerns a piece of legislation for the adoption of which it had to be consulted.

In January 2022, national parliaments (and Parliament) launched a **Working Group on the role of the national parliaments in the European Union in the framework of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC)**.[6] Although the mandate of this Working Group was not limited to the sole issue of the control of the respect of the principle of subsidiarity, this group of 41 national and European parliamentarians also examined the EWS. In fact, during its constitutive meeting, it was noted that the 'control of the principle [of subsidiarity is] not operating satisfactorily and, furthermore, that it [is] carried out less and less by the national parliaments. In addition, this prerogative only allows them to impose a veto and, as several contributors [from national parliaments] pointed out, this is no longer enough for them'.[7] This statement is in line with Parliament's view that 'the current structure of the procedure for the subsidiarity control mechanism results in national parliaments' committees for the EU dedicating excessive amounts of time to technical and legal assessments with short deadlines, which complicates the goal of holding a deeper political discussion on European politics'.[8] However, the Working Group was short-lived as it finalised its activities on 14 June 2022, meaning it only existed during the French presidency of the Council.

An evolution of the way in which national parliaments have performed their control of the principle of subsidiarity, and of how EU institutions have complied with their obligation to respect that principle, may thus be observed since the Lisbon Treaty entered into force. Criticism regarding the efficiency of the EWS has regularly been voiced, and initiatives to improve the functioning of the EWS were launched. Among these efforts is the **Task Force on subsidiarity, proportionality and 'doing less more efficiently'** created by the Commission in 2017 (detailed in Section 3.1.2. below). National parliaments and Parliament themselves have also examined this issue – both individually and collectively – on numerous occasions since the Lisbon Treaty entered into force. For instance, they created the COSAC Working Group on the role of the national parliaments mentioned previously whose establishment was, among other reasons, motivated by shortcomings inherent to the EWS. In addition to this, it is worth noting that **national parliaments have been much more active in the framework of the informal Political Dialogue** with the Commission than in the framework of the EWS. The former

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6 More information on the Meeting of the Chairpersons of COSAC, 13-14 January 2022 is available at: https://secure.ipex.eu/IPEXL-WEB/conferences/cosac/home.

7 COSAC Working Group on the role of the national parliaments in the European Union, Minutes of the constitutive meeting held on 8 February 2022, p. 1.

8 European Parliament, Resolution of 24 June 2021 on European Union regulatory fitness and subsidiarity and proportionality – report on Better Law Making covering the years 2017, 2018 and 2019 (2020/2262(INI)), point 4.

Dialogue was established in 2006 by then Commission President Barroso after the Treaty establishing a Constitution for Europe was rejected by the Dutch and French peoples.[9] In its framework, **national parliaments may express their opinion on any aspect of a legislative proposal at any point in time** (in addition to being able to submit opinions collectively, and on their own initiative, that is independently of the existence of any EU legislative proposal or consultation document).[10] Furthermore, the Dialogue is more flexible and potentially politically more attractive since it takes both a written and an oral form.

The aforementioned initiatives show that there still seems to be some room for improvement in the functioning of the EWS. In any event, a deeper reflection in its respect appears to be necessary 15 years after the entry into force of the Lisbon Treaty, and as contemplations on the future of Europe and its democracy are regularly debated.[11]

To define solutions for the existing issues, the evolution of the way in which Parliament and the national parliaments have performed their control over time must first be assessed. Furthermore, assessing the role played by other European Institutions, including the Commission, the CoR the CJEU and the Council can help to understand the overall context and to suggest some recommendations for the future. Also, an analysis of the role played by the principle of proportionality in the EU, which is closely related to subsidiarity, can contribute to shed light on the definition and the role of the principle of subsidiarity. Beyond this, examining parliaments' role in ensuring the respect of the principle of subsidiarity also begs the question of the need to reconsider this control in the broader context of national parliaments' role within the EU, and of the EU's relationship to national authorities at various levels of governance (i.e. local, regional and national) more generally.

The following sections therefore examine these issues in turn. The study begins first by specifically focusing on the parliamentary control of the principle of subsidiarity at both the EU and the national levels (Section 2). Then, it turns to the question of how the Commission, the CoR, the CJEU and the Council have dealt with this principle since it was first introduced as a general principle of EU Law at Maastricht (Section 3). Thereafter, the analysis considers the principle of proportionality (Section 4). Section 5 concludes this study and offers a few recommendations for the future. However, before this in-depth analysis may be performed, the principle of subsidiarity and the principle of proportionality, the context of their introduction and their evolution in the EU legal order need to be recalled first; to which the remainder of this introduction is dedicated.

1.2. The principle of subsidiarity and its evolution in the Treaties since Maastricht

The principle of subsidiarity has been included in the European Treaties since the 1987 Single European Act.[12] However, the Single European Act only referred to subsidiarity in the area of environmental policy, and this principle only became a general principle of EU law with the entry into force of the

[9] See generally on this Dialogue and its origins: D. Jancic, 'The Barroso Initiative: Window Dressing or Democracy Boost?', *Utrecht Law Review*, 2012, pp. 78-91.

[10] The Dialogue is not limited to its written dimension, but also takes the form of visits by Commissioners to national parliaments. See on both of these aspects the European Commission's Annual reports on relations with national parliaments.

[11] Democracy was indeed one of the themes examined by selected European citizens in the framework of the Conference on the Future of Europe to which more is available at https://futureu.europa.eu/?locale=en.

[12] Article 130R.

Treaty of Maastricht in 1993.[13] As a consequence, from then onwards, subsidiarity became liable for judicial review by the Court of Justice. However, this remained the only enforcement mechanism available within the EU until the Treaty of Lisbon attributed a special responsibility to national (and, to some extent, regional) parliaments in this regard.

The explicit recognition of the principle of subsidiarity in the Treaties was a response to the criticism from, primarily, the German *Länder* and the United Kingdom that the European Community was acting unduly by neglecting the existence of federal entities in some of the Member States, and by ever self-expanding its competences without consent from its Member States. As such, it was meant to limit European action to those cases in which it was truly necessary.

Defining the principle of subsidiarity has been difficult to date. Indeed, the need to further clarify it was evident soon after it had been included as a general principle of EU law.[14] However, it is worth noting that the **definition included at Maastricht has only marginally evolved over time**. With the entry into force of the Lisbon Treaty, the regional and local dimensions were added to the elements that needed consideration in the performance of the (national) insufficiency test ('the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, *either at central level or at regional and local level*' (emphasis added)), but no further clarifications were included in the Treaties. In fact, the assessment criteria that had been included by protocol no 30 to the Amsterdam Treaty on the application of the principles of subsidiarity and proportionality (on which more is included below (sub-section 1.3.)) in order to provide some guidance were removed. Nevertheless, the Commission declared soon after the entry into force of the Lisbon Treaty that parliaments should continue to be inspired by these indications.[15] Also, a subsidiarity grid was devised in 2018 in an attempt to use a common definition of the principle of subsidiarity (see sub-section 3.1.3.).

One of the difficulties in seeking to define the principle of subsidiarity derives from its closeness to the principle of proportionality. In accordance to the Treaties,

Article 5 TEU

> *4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*
>
> *The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.*

As such, proportionality refers to the intensity of the EU action, while subsidiarity allows to determine who of the EU or its Member States should act. Therefore, the subsidiarity analysis has to be conducted prior to the proportionality analysis. The intensity with which the EU acts may have an impact on the outcome of the subsidiarity test (that is: it may affect the EU added value test). Hence, even if the EWS formally only refers to subsidiarity, proportionality has been gradually integrated into the subsidiarity test as exemplified by the fact that the subsidiarity grid introduced based on the recommendation of

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[13] Article 3B. See general information on this historical evolution: D. Fromage, 'Subsidiarity: From a General Principle to an Instrument for the Improvement of Democratic Legitimacy in Lisbon' in M. de Visser and A.P. van der Mei (eds) *The Treaty on European Union 1993-2013: Reflections from Maastricht* (Maastricht, Intersentia, 2013), pp. 139-156.

[14] Heads of states and governments provided some guidance at the Edinburgh summit of the European Council held in December 1992. European Council, Conclusions of the Presidency, Edinburgh, 12 December 1992.

[15] European Commission, Annual Report 2011 on relations between the European Commission and National Parliaments, Brussels, 2012, p. 3.

the Task Force on subsidiarity, proportionality and 'doing less more efficiently' covers both subsidiarity and proportionality.

The **major changes introduced at Lisbon** thus consist of the **creation of the EWS, the express recognition of parliaments' possibility to request their government to bring a claim before the CJEU on the ground of a subsidiarity breach, with the same possibility also available to the CoR**.

The introduction of the principle of subsidiarity in the EU legal order should be viewed against the general background of growing trends in favour of Euroscepticism and allegations that a democratic deficit existed (and still exists in the eyes of some individuals) within the EU. To counter these trends, national parliaments and Parliament were thus attributed a growing role within the EU. This evolution culminated with the entry into force of the Lisbon Treaty, which defined democracy within the EU for the first time ever, as being anchored on two pillars constituted by, on the one hand, Parliament and, on the other hand, national parliaments (Article 10 TEU):

Article 10 TEU

> *1. The functioning of the Union shall be founded on representative democracy.*
>
> *2. Citizens are directly represented at Union level in the European Parliament.*
>
> *Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.*

The Treaty also attributed a larger role to Parliament, and entrusted national parliaments with the task of 'contribut[ing] to the good functioning of the Union' (Article 12 TEU):

Article 12 TEU

> *National Parliaments contribute actively to the good functioning of the Union […] by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality […].*

The role of national parliaments within the EU had been contemplated long before the Lisbon Treaty entered into effect; indeed, this subject was first mentioned in the Maastricht Treaty. However, **the Lisbon Treaty undoubtedly represented a breakup point and a reinforcement of the importance of national parliaments**, both formally because they were now mentioned in the main text of the Treaties on several occasions, and in terms of substance, as some rights of information and participation were being directly attributed to them in the Treaties for the first time, with the goal of enabling national parliaments to contribute to the good functioning of the Union. Concerning the subject of prerogatives, national parliaments' capacity to control the respect of the principle of subsidiarity is both the most salient and most frequently used.[16] However, it entails some shortcomings and, as discussed further in the conclusion of this study, the question of the suitability of the rights attributed to parliaments within the EU, as well as that of the direct relationship between the EU and national parliaments (and national institutions, in general) needs exploring.

[16] This is the case because national parliaments are called to scrutinize all the draft legislative proposals adopted in areas of non-exclusive competence. The other prerogative granted to them by Article 48(7) TEU, the capacity to veto resorting to the general passerelle clause is bound to remain exceptional, as passerelle clauses are by definition, used on rare occasions only.

1.3. The principle of proportionality

As mentioned above, the principle of proportionality is now defined in Article 5(4) TEU. It is addressed in Protocol no. 2 on the application of the principles of subsidiarity and proportionality together with the principle of subsidiarity. This notwithstanding, the EWS formally only opens the possibility for national parliaments to flag a breach of the principle of subsidiarity. Moreover, the principle of proportionality applies no matter the area of competence in which the Union is acting, while subsidiarity only applies in areas of non-exclusive EU competence.

The principle of proportionality within the EU has various, competing origins spanning from the UK to Germany over France.[17] However, the French and the German traditions are the ones at the origin of the emergence of this principle at the European level. Proportionality was established by the Court of Justice earlier in the integration process than subsidiarity was as this already happened in 1970.[18] On the occasion of the *Internationale Handelsgesellschaft* case,[19] the Court recognized the existence of constitutional traditions common to the Member States from which it draws inspiration to protect fundamental rights, which allowed it to apply the principle of proportionality. The Court, however, did not follow the opinion of Advocate General Dutheillet de Lamothe who had argued in favour of anchoring the principle of proportionality in a specific Treaty provision, namely in Article 40 TEEC on the Common Agricultural Policy.[20] The principle was later on formally included in the Treaties on the occasion of the Maastricht revision, just like the principle of subsidiarity. In fact, both were included in the same article 3b TEU. Proportionality and subsidiarity were also the subject of the same protocol (no. 30) annexed to the Treaty of Amsterdam. As it is also the case with the principle of subsidiarity, the provisions relating to proportionality were also more detailed in that protocol than in the version currently in force. It foresaw that

6. The form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Directives as provided for in Article 249 of the Treaty, while binding upon each Member State to which they are addressed as to the result to be achieved, shall leave to the national authorities the choice of form and methods.

7. Regarding the nature and the extent of Community action, Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well established national arrangements and the organisation and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.

By contrast, Article 5 of Protocol no. 2 provides that

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17 This part of the analysis draws upon E. Bjorge and J. Zglinski, 'The principle of proportionality in EU law and its domestic application: ni tout à fait le même, ni tout à fait un autre' in K. S. Ziegler, P. J. Neuvonen and V. Moreno-Lax (eds) *Research Handbook on General Principles in EU Law* (Edward Elgar, 2022), pp. 191-208.

18 It had already been mentioned in earlier case law related to the European Coal and Steel Community. P. Craig, 'Proportionality, Rationality and Review', *New Zealand Law Review*, 2010, pp. 265-301, pp. 267-268.

19 Case 11/70 *Internationale Handelsgesellschaft*, EU:C:1970:100.

20 Case 11/70 *Internationale Handelsgesellschaft*, EU:C:1970:100, p. 1129-1130. In so doing, it followed the opinion of Advocate General Dutheillet de Lamothe. Opinion of Advocate General Dutheillet de Lamothe in case 11/70 delivered on 2 December 1970, p. 1147.

Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.[21]

In order to determine whether 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties' (Art. 3(4) TEU), the Court has devised a three-pronged test.[22] It has established that 'the principle of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued'.[23] In other words, the measure must be suitable to reach the goal defined (suitability/appropriateness), it must be necessary to that end (indispensability/necessity) and the measure adopted must not impose too high a burden on the individual in relation to the defined goal (reasonableness/proportionality *stricto sensu*).[24]

Also, it should be noted that, as is further developed in section 4, proportionality is a general principle of EU law which the Court regularly examines and on whose ground it has annulled EU norms.[25] In this regard, it distinguishes itself from the principle of subsidiarity. Cases touching upon proportionality are both frequent and varied meaning that they regard very numerous areas of EU law including Common Agricultural Policy, transport, Internal Market or Monetary policy as well as fundamental rights. Moreover, proportionality may serve to determine the intensity of EU action, and it is in this latter context that it overlaps with the principle of subsidiarity. In all, proportionality is a far-reaching principle, also because it binds EU institutions and bodies as well as Member States authorities and private action.[26]

Having now recalled what the principles of subsidiarity and of proportionality entail, how their definitions have evolved over time and which procedure now allows national parliaments to control the

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21 Emphasis added.

22 There is sometimes a debate in scholarship as to the content of this test, and the number of prongs it contains. E. Bjorge and J. Zglinski, 'The principle of proportionality in EU law and its domestic application: ni tout à fait le même, ni tout à fait un autre' in K. S. Ziegler, P. J. Neuvonen and V. Moreno-Lax (eds) *Research Handbook on General Principles in EU Law* (Edward Elgar, 2022), pp. 191-208, p. 195. Relatedly, it has been argued that '[w]hen it resorts to proportionality, the CJEU uses different formulas in different areas of law', ibid.

23 Judgment of the Court of 12 July 2001, *Jippes and Others*, Case C-189/01, EU:C:2001:420, par. 81.

24 See also: M. Klamert, 'Article 5' in M. Kellerbauer, M. Klamert and J. Tomkin (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019), p. 74.

25 Some have explained this by the fact that the principle of proportionality may be found in the TEU, in the TFEU and in secondary legislation. B. Pirker, *Proportionality Analysis and Models of Judicial Review A Theoretical and Comparative Study*, Europa Law Publishing, 2013, p. 235.

26 B. Pirker, *Proportionality Analysis and Models of Judicial Review A Theoretical and Comparative Study*, Europa Law Publishing, 2013, p. 196.

respect of the principle of subsidiarity, the next section turns to the analysis of the parliamentary control of the subsidiarity principle since the Lisbon Treaty's entry into force.

2. THE CONTROL OF THE PRINCIPLE OF SUBSIDIARITY BY PARLIAMENTS AND ITS EVOLUTION

2.1. National parliaments and the principle of subsidiarity

It may generally be said that the introduction of the EWS, and the Political Dialogue that preceded it, originally sparked great interest among national parliaments.[27] In fact, the introduction of this **System may be viewed as an important factor in the Europeanisation of national parliaments**, as it provided an incentive to those parliaments that had not yet adapted their internal procedures to be involved in EU affairs by the entry into force of the Lisbon Treaty to do so. However, **criticism regarding the EWS itself soon began to arise**, and **several initiatives have been launched over the past 15 years by parliaments themselves to improve its functioning**. National parliaments have also adapted their scrutiny procedures over time, both collectively and on an individual basis. In the following sub-sections, a summary of parliaments' control of the principle of subsidiarity is first made (2.1.1.), whereas the following sub-section depicts on-going discussions (2.1.2.).

2.1.1. Looking back at fifteen years of parliamentary control of subsidiarity

Figure 1: Reasoned opinions and contributions (2010–2024)

Source: Personal compilation based on the data contained in the Commission's Annual Reports on the application of the principles of subsidiarity and proportionality and relations with national parliaments (for 2024, the data was kindly provided by the Commission).

[27] This enthusiasm was, at the time, largely shared by regional parliaments with legislative powers, and by academics. Among the latter, a few examples of early contributions to the debate are: P. de Wielde, 'Why the Early Warning System does not alleviate the Democratic deficit', *OPAL Online Paper Series*, 2012, pp. 1-23; P. Kiiver, 'The Early-Warning System for the Principle of Subsidiarity: the National Parliament as a Conseil d'Etat for Europe', *European Law Review*, 2011, pp. 98-108. P. Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality*, Routledge, 2012.

As is visible from Figure 1, **contributions submitted by national parliaments in the framework of the Political Dialogue have been much more numerous than reasoned opinions** adopted on the ground of a subsidiarity breach. A few of the contributions may, in fact, have been reasoned opinions received at too late a point to be counted as such, yet others raise subsidiarity or proportionality issues without taking the form of a reasoned opinions. Indeed, considering how unlikely a yellow card is and how difficult it is for national parliaments to measure the impact of their reasoned opinions, they may opt for sharing their subsidiarity concerns in the framework of the Political Dialogue. In fact, within the Commission reasoned opinions and contributions are treated identically at the administrative level, hence reasoned opinions and contributions may equally influence the decision-making process. By contrast, Parliament has two separate procedures for reasoned opinions and contributions, whereby the former receive more attention than the latter (see sub-section 2.2.). Several other explanations could be found to justify the limited number of reasoned opinions, and national parliaments' much more active engagement in Political Dialogue.

The limited number of reasoned opinions and the fact that only three yellow cards have been triggered in a period of more than 15 years indicates that **there have not been any major subsidiarity issues since 2009**.[28] The characteristics of the EWS could have also prevented parliaments from adopting reasoned opinions in due time (the eight-week deadline is often deemed too short and the thresholds necessary to trigger a yellow or an orange card too high),[29] but these may not have been the only factors explaining a limited number of opinions. In the first years after the entry into force of the Lisbon Treaty, the limited number of opinions could have been related to the need for parliaments to adapt to the new procedure. In accordance with Protocol No 1 on the role of national parliaments in the European Union, they receive numerous documents, which they have occasionally struggled to filter and scrutinize adequately. Fluctuations in the number of proposals made by the Commission every year are an additional factor explaining the variation and limited number of opinions overall alongside, for example, elections at the national and European levels (for instance, in 2019 and in 2024 European elections took place leading to a drop in the number of legislative proposals). In recent years, the limited number of reasoned opinions could be explained by a certain disillusion of parliaments towards the EWS. Also, some national parliaments prefer to focus on the scrutiny of their government's action.[30] They have been critical of the Commission's responses to their reasoned opinions, as detailed further below. Adopting a reasoned opinion has additionally been viewed by some parliaments as overly negative and anti-European, as well as too reactive and not sufficiently proactive to be an attractive tool.

In contrast to the limited use of the EWS, national parliaments have shown a preference for and a keen interest in entering a (political) dialogue with the Commission.[31] That procedure, although it does not

[28] In its Resolution of 19 April 2018 on the implementation of the Treaty provisions concerning national parliaments, the European Parliament considered that 'the limited use of the 'yellow card' procedure could indicate that the principle of subsidiarity is, on balance, respected within the EU' (2016/2149(INI)), point 14.

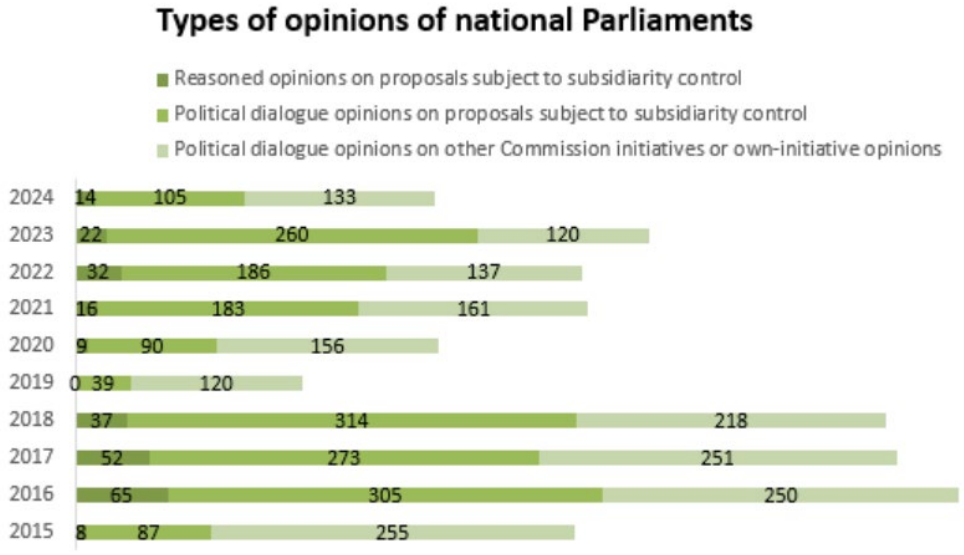
[29] These arguments have been made on very numerous occasions, *inter alia* in: COSAC, 22nd bi-annual report, 2014, in the framework of the work of the Task Force on subsidiarity, proportionality and 'doing less more efficiently' and most recently in COSAC's LXXII Contribution (2024).

[30] This is, for example, the case of the Finnish parliament. The Swedish parliament also believes that 'it is more effective that the Parliament acts via the Government rather than directly to the EU institutions via a mechanism like the "green cards"'. COSAC, 38th bi-annual report, p. 22.

[31] It is less clear whether the Political Dialogue in its written dimension is indeed a dialogue, implying a follow up to the Commission's response. Based on the information available on the Commission's dedicated website (https://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm), it appears that it is only in rare cases that parliaments/chambers react to the Commission's response to their opinion. It is also rare for them to submit more than one opinion/contribution on a given proposal.

provide them with any guarantees of any kind due to its informal character,[32] not only allows them to play the positive and proactive role within the EU they strive for, it also offers them much more freedom: contributions may be submitted at any point in time on any aspect of a proposal (or even on their own initiative).[33] As Figure 2 illustrates, national parliaments regularly submit contributions on Commission initiatives that are not subject to their subsidiarity check, or on their own initiative. Thanks to this framework, national parliaments are much freer and can also transmit a political statement to the Commission that they would have originally adopted with the goal of submitting it to their government.

Figure 2: Types of opinions according to the European Commission (2015-2024)



Source: Information kindly provided by the Commission.

The Political Dialogue can also be used to submit contributions adopted collectively by several parliaments. In fact, **discussions on a green card** that would be submitted as part of an 'enhanced Political Dialogue' flourished around 2014 when national parliaments discussed the possibility that they be attributed the right to invite the Commission to consider making a legislative proposal on a given subject (much like Parliament can invite the Commission to do so under Article 225 TFEU).[34] As further discussed below in Sub-section 2.1.2, this initiative appears to have gained momentum again in the past years, for instance in the context of the Working Group on the role of the national parliaments in the

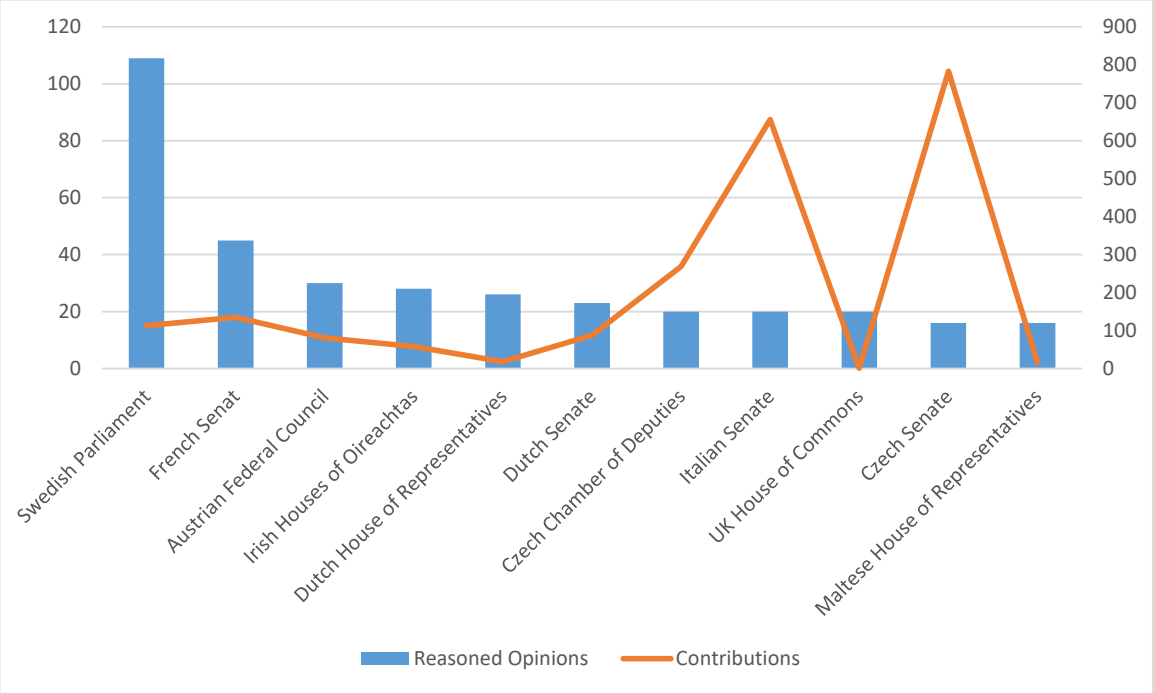
[32] In that framework, the European Commission does not have any obligation to follow up on the contributions it receives. However, even in the framework of the EWS, which is indeed enshrined in the Treaties, national parliaments have criticised the fact that they had difficulty in identifying if and how their input had had any influence.

[33] The liberty enjoyed by parliaments in this context, however, also induces a high level of heterogeneity among the contributions such that only an analysis of the content of the individual contributions allows to draw meaningful conclusions on the Political Dialogue and its evolution.

[34] See for a historical overview of this initiative: C. Fasone and D. Fromage, 'From veto players to agenda-setters? National parliaments and their "green card" to the European Commission', *Maastricht Journal of European and Comparative Law*, 2016, pp. 294-316; S. Pazos Vidal, *Subsidiarity and EU multilevel governance. Actors, Networks and Agenda*, Routledge, 2019, pp. 196f. At the time, parliaments made three attempts to propose a green card but only the first one launched on the initiative of the French National Assembly on food waste was successful. See further on this: D. Fromage, 'National parliaments in the Juncker Commission era: the 'green card' initiative and beyond', *Quaderni costituzionali*, 2015, pp. 1024-1026.

EU launched in January 2022 in the framework of COSAC.[35] However, it is not only with a view to proposing a green card to the Commission that national parliaments have used the Political Dialogue collectively. On several occasions, they coordinated amongst themselves to share their priorities on the basis of the Commission's Annual Work Programme as well.[36] However, and even if the vast majority of national parliaments now examine the Commission's Annual Work Programme,[37] there does not appear to be any coordination effort anymore within COSAC.

Figure 3: Reasoned opinions and Contributions adopted by the ten most active chambers in the EWS (2010-2023)

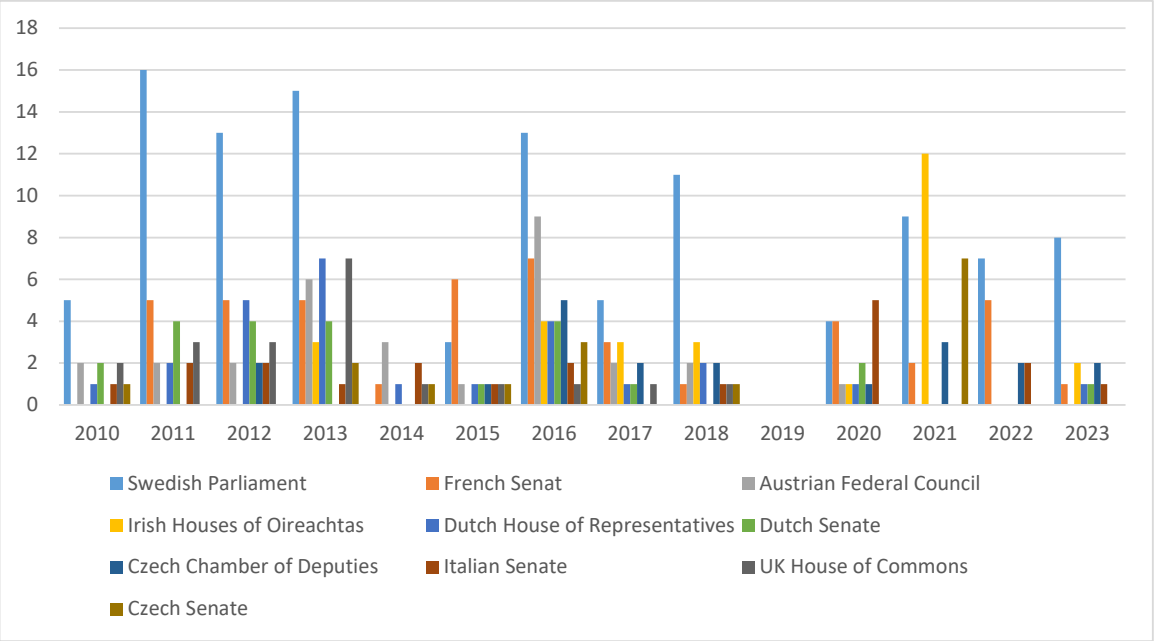


[35] The French Senate also recently advocated in favour of the introduction of a green card. Rapport d'information n° 592 (2021-2022) de M. Philippe Bonnecarrère, fait au nom de la mission d'information Judiciarisation, 29 March 2022, p. 112f.

[36] For instance, this happened in 2015 and 2016.

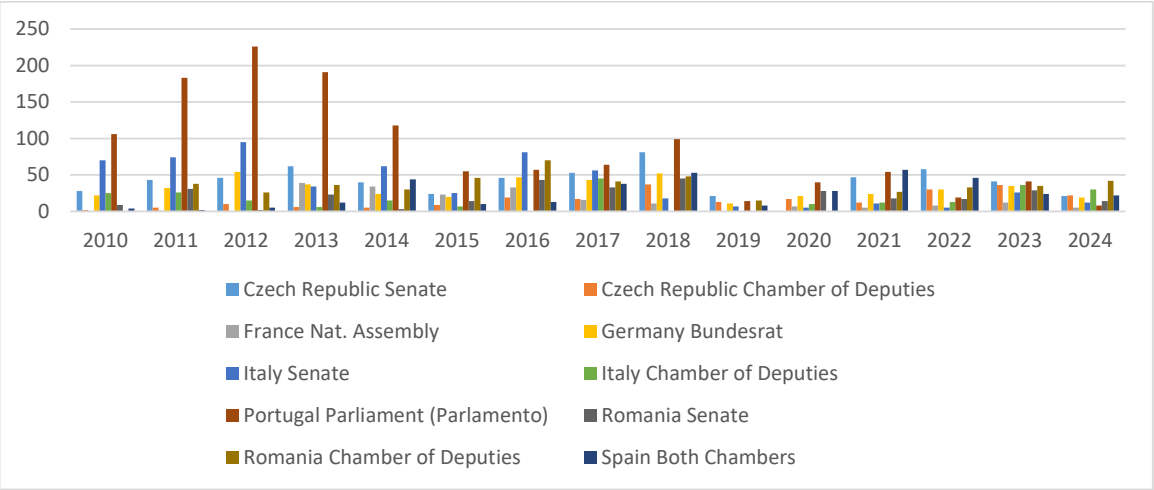
[37] 33 out of 37 respondent parliaments declared that this is the case. COSAC, 42nd bi-annual report, p. 14.

Figure 4: Reasoned opinions adopted by the ten most active chambers (2010-2023) by year



Source: Personal compilation based on the data contained in the Commission's Annual Reports on the application of the principles of subsidiarity and proportionality and relations with national parliaments.

Figure 5: Contributions adopted by the ten most active chambers (2010-2023) by year



Source: Personal compilation based on the data contained in the Commission's Annual Reports on the application of the principles of subsidiarity and proportionality and relations with national parliaments.

Before examining on-going debates, it bears emphasizing that, as is visible in in Figures 3, 4 and 5, and in the Annex, on the one hand, **important differences exist in the levels of engagement of the various chambers** since some of them are very active, whilst others rarely submit reasoned opinions or contributions. On the other hand, the levels of participation of the various chambers have varied over time. As illustrated by Figure 4, this even applies to the Chambers that participate in the EWS the most. These differences may be explained by the factors previously outlined, and also by some changes in

the (political) preferences and the personality of the actors involved, or by changes in the procedures of control in place.[38]

Finally, another element that should be mentioned is the evolution of the tools at parliaments' disposal to inform each other of the progress of their scrutiny procedures, and to coordinate their views. Parliaments continue to resort to the long-established European Center for Parliamentary Research and Documentation (ECPRD), although this channel of interparliamentary cooperation is more useful to for instance share best practices on existing procedures than it is to discuss positions on specific legislative procedures.[39] Next to the by now very well-established network of EU national parliaments' representatives in Brussels,[40] the **Platform for Interparliamentary EU Information Exchange (IPEX)[41] has become a key information hub** for EU affairs-related parliamentary activities, including regarding subsidiarity scrutiny. However, as is visible from the discussions that took place during the IPEX Correspondents' meeting held in October 2021, from COSAC's 39th bi-annual report,[42] and from the users' survey launched in April 2025[43] parliaments are still seeking to further improve it.[44] Information exchange among parliaments additionally remains a debated issue.[45] A **possible evolution could make IPEX even more useful for facilitating parliaments to coordinate their positions and possibly reach a yellow or a green card**. The situation that had existed previously whereby parliaments used different channels of communication,[46] and where the information concerning parliamentary activity was scattered across a series of individual websites, has undoubtedly improved since IPEX has centralized and significantly enlarged the amount and types of information available on one platform. But more could still be done,[47] and some practical recommendations are made in the conclusion of this study.

2.1.2. Evolution and on-going discussions

Figures 1, 2, 4 and 5 and the Annex reveal that **important fluctuations have existed in the level of participation in the EWS and in the Political Dialogue**. This notwithstanding, the **general trend seems to have been towards declining participation** in general (Figure 1). Moreover, the few reasoned

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38 For instance, in 2017 the Italian Senate amended the procedure allowing its participation in the EWS and in the Political Dialogue. As a consequence of this, it ceased to be among the most active chambers in the Political Dialogue for some time. See on this evolution of the level of participation of the Italian parliament: C. Fasone, 'Verso un declino della partecipazione del Parlamento italiano al dialogo politico con la Commissione europea?' (1/2020), Osservatorio sulle fonti.

39 See on this channel of interparliamentary cooperation the dedicated part on Parliament's website (https://www.europarl.europa.eu/relnatparl/en/networks/ecprd) and N. Brack, 'The Parliaments of Europe: full part actors or powerless spectators? A state of play 2010–2020', Study requested by the AFCO Committee PE 698.534, 2021, p. 38.

40 See: https://www.europarl.europa.eu/relnatparl/en/networks/representatives-of-national-parliaments.
See also the European Parliament's Annual reports on the Relations between the European Parliament and EU national parliaments. For instance, Annual Report 2023 p. 78. For an academic standpoint, see: C. Neuhold and A.-L. Högenauer, 'An Information Network of Officials? Dissecting the Role and Nature of the Network of Parliamentary Representatives in the European Parliament', *The Journal of Legislative Studies*, 2016, pp. 237-256.

41 https://ipexl.europarl.europa.eu/IPEXL-WEB/.

42 COSAC, 39th bi-annual report: 'Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, presented to the LXIX Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union', 14–16 May 2023, Stockholm, p. 26-31.

43 At the time of completing this Study, the survey is still on-going.

44 A third version of the website was recently launched to this end. However, some improvements still appear to be necessary as information may be difficult to find or duplicated. This was also highlighted by the Polish *Senat*. COSAC, 39th bi-annual report, p. 31.

45 This topic was most recently considered by Secretaries General of the European Union Parliaments. Meeting of the Secretaries General of the European Union Parliaments Budapest, 9-10 February 2025 and is regularly examined by secretaries general and speakers.

46 COSAC, 26th bi-annual report, 2016.

47 Some national parliaments made some suggestions in this sense in COSAC's 39th bi-annual report, p. 30-31.

opinions that are indeed adopted are scattered across a variety of proposals: in 2023, only three Parliaments/chambers adopted a reasoned opinion on the same proposal;[48] in 2024, only two legislative proposals attracted the attention of more than one Parliament/Chamber.[49]

According to a survey performed in the framework of COSAC between 2019 and 2021, 19 out of the 35 responding chambers/parliaments had not adopted any reasoned opinion, whilst 14 of them had adopted between one and five.[50] Similarly, more than one-third of the respondents had not submitted more than five contributions in the framework of the Political Dialogue over the same period of time, and eight of them had not submitted any. Only 6 parliaments/chambers submitted between 5 and 10 contributions, whilst only five respondents submitted up to 20 contributions. Four chambers only had submitted more than 20. In early 2022, only 23 out of the 35 responding chambers/parliaments systematically examined whether legislative proposals complied with the principle of subsidiarity.[51] **This situation has further deteriorated in recent times.** According to a survey disseminated by COSAC in 2024, 'since 2019 more than half of the Parliaments/Chambers (20 out of 36) responded they did apply [the subsidiarity checks], while 15 responded they did not'.[52] Those national parliaments that found subsidiarity concerns did so on the basis of general concerns, or the fact that a measure at the national or the regional level would be more effective in their view. Other reasons included issues with the legal basis, a lack of necessity or the lack of cross-border character of the proposed act, or issues of concurring competences. Yet other reasons in general were also mentioned, alongside a lack of added value, a lack of proportionality, too many delegated acts, the fact that the competence in question would best be regulated at the national level, and insufficient justification by the Commission as to why the measure should best be adopted at the EU level. Moreover, out of the 21 parliaments that adopted reasoned opinions between 2019 and 2024, 62% of them had adopted between 1 and 5 opinions over that period, 24% between 5 and 10, 9% between 10 and 20 and 5% more than 20. The Swedish *Riksdag* is the parliament that adopted most opinions followed by the Czech *Poslanecká sněmovna* and French *Sénat*, themselves followed by the Czech *Senát*, the Hungarian *Országgyűlés*, the Irish Houses of the *Oireachtas*, the Italian *Camera dei deputati* and the Maltese *Kamra tad-Deputati*. The Spanish *Cortes Generales* and the German *Bundestag* did not adopt any reasoned opinion over that period.

Figure 3 also shows that even among the Chambers that are most active within the EWS, some of them focus on the EWS and barely participate in the Political Dialogue (Swedish Parliament), while others (Italian and Czech Senate) are also very active in the Political Dialogue. The pandemic undoubtedly had an impact on this evolution, as national parliaments had to implement procedures for remote working. Furthermore, European Parliament elections were organised in 2019 and 2024, which caused the Commission to make only a limited number of legislative proposals in the course of those years. This corresponds also to the decline in the number of legislative proposals made by the Commission in general – a factor which has an immediate impact on the level of participation in the EWS. But it also **confirms the scepticism voiced by national parliaments** in the framework of the COSAC Working group, and on numerous other occasions before that and since.

[48] Written Report of the IPEX Information Officer on the work of IPEX in 2023, p. 3.

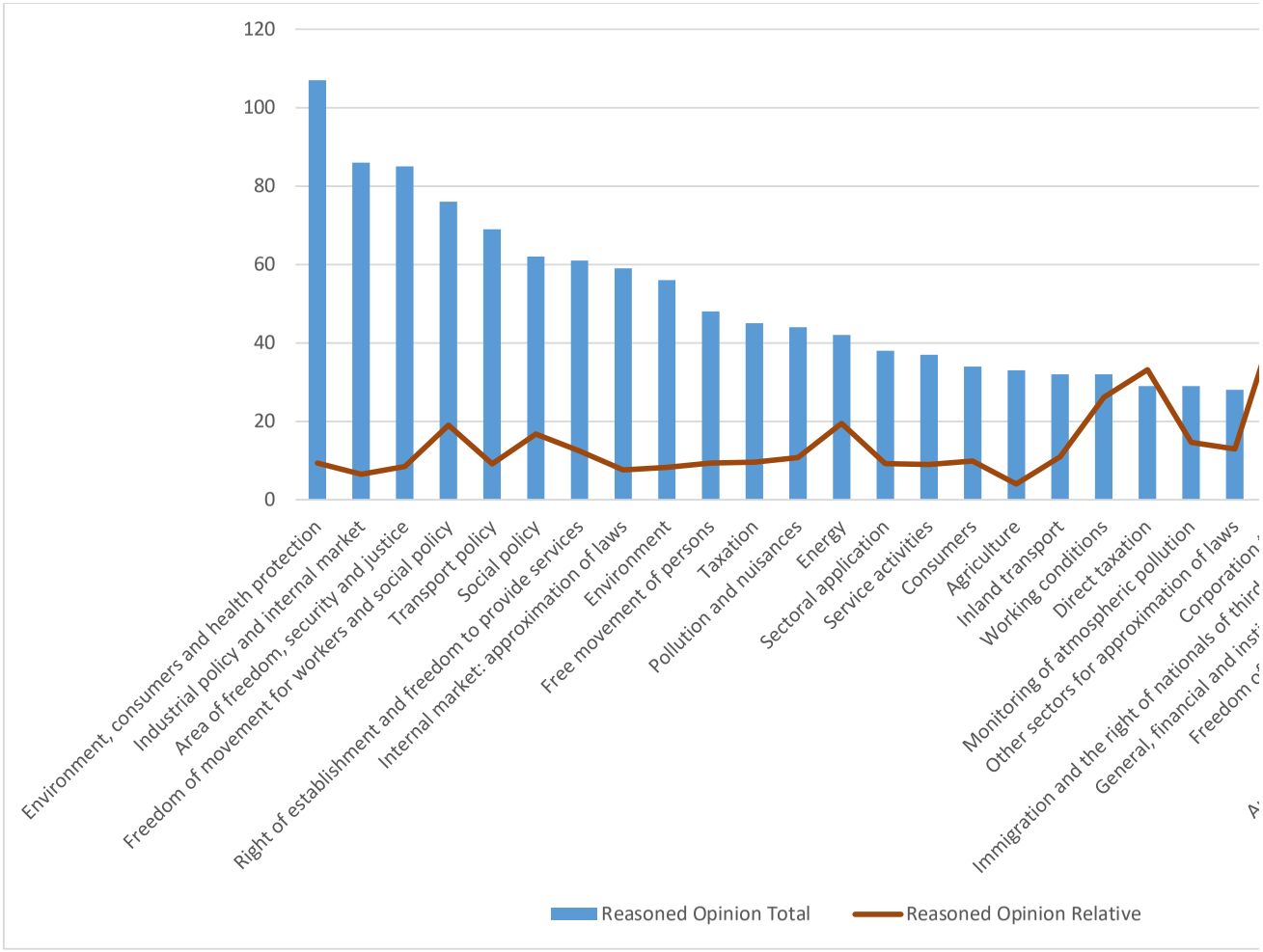
[49] Written Report of the IPEX Information Officer on the work of IPEX in 2024, p. 3.

[50] COSAC, 37th bi-annual report, 2022, p 5.

[51] This information is extracted from COSAC, 37th bi-annual report, 2022, p. 5.

[52] COSAC, 42nd bi-annual report, p. 14.

Figure 6: Reasoned opinions relative to the total number of Commission proposals (2010-2023) per policy



Source: Personal compilation based on the data available on the IPEX database (I thank K. Suchodolski for his support in collecting the data). Lex, some proposals may be considered as falling under two policy areas and may therefore be counted more than once.

As illustrated by Figure 6, the number of proposals made by the Commission in each of the policy areas varies over time and between subject matter. In relative terms, the proposals on the free movement of workers, on the area of freedom, security and justice, and on corporation tax attract reasoned opinions the most.[53] This is unsurprising considering that the third yellow card concerned the proposal for the revision of the posted workers directive and that the EWS has on occasions been used to voice political opposition to a project relative to the free movement of workers. The Area of Freedom, Security and Justice and corporation tax are also matters which are still perceived as close to national sovereignty. By contrast, more classical areas of EU action including the Internal Market or the Common Agricultural Policy do not attract as many reasoned opinions relative to the total number of proposals made.

As mentioned in the introduction, national parliaments (and Parliament) launched a **Working Group on the role of the national parliaments in the EU** in the framework of COSAC in January 2022.[54] Although its mandate was broader than the sole control of the respect of the principle of subsidiarity, this group of 41 parliamentarians also examined that issue. As noted, the EWS has been criticized, but the necessity to more frequently resort to it as opposed to creating a new green card procedure has been considered as well. Parliaments' support for a green card was reiterated in October 2024 when they stated that 'The constructive engagements of national Parliaments in shaping the content of EU policies should be further enhanced in the future by full exercise of their European functions, including the working on the green card initiative.'[55] It would consist in attributing a similar 'indirect right of initiative' to national parliaments as the one Parliament has in accordance with Art. 225 TFEU. Half of the national chambers/parliaments (18 out of 36 respondents) declared in October 2024 that they had debated the introduction of a green card (in most cases (15/18) at the level of the EU affairs committee).[56] This notwithstanding, only three of them have adopted a resolution on this matter.[57] This idea had previously been supported by national parliaments in the framework of COSAC's Working Group on the role of national parliaments in the EU, which devised a detailed procedure for the introduction of green cards. One chamber would launch an initiative and submit it to all the other chambers for comment 'within a certain period of time and in an informal manner', after which the chamber would draft a text taking the received comments on board. Thereafter, the compromise proposal would be sent to all the other chambers for formal support 'within a certain period of time'. Should one fourth of the total number of votes calculated according to the rules contained in Protocol no. 2 annexed to the Treaties support the initiative or should the votes received amount to the representation of a quarter of the EU population and come from at least a quarter of Member States, the proposal would be deemed adopted and the green card procedure thereby launched. Nonetheless, parliaments/chambers would remain free to implement this new right or reject it.[58] While supporting the green card proposal, Parliament made its own proposal as regards the modalities whereby one third of the national parliaments would have to

[53] By contrast, the Commission makes most proposals in the areas of Industrial policy and internal market, Environment, consumers and health protection (229 and 214 proposals between 2010 and 2023, respectively). The Area of freedom, security and justice only comes third (192 proposals).

[54] More information on the Meeting of the Chairpersons of COSAC, 13-14 January 2022 is available at: https://secure.ipex.eu/IPEXL-WEB/conferences/cosac/home.

[55] COSAC, Contribution of the LXXII COSAC, OJ C 2024/7493, 27.3.2024, p. 2-3. This echoes the support parliaments had already expressed earlier that year. COSAC, Contribution of the LXXII COSAC, OJ C 2024/7493, 27.3.2024, p. 16.

[56] COSAC, 42nd bi-annual report, p. 16.

[57] Parliaments had already expressed their support for the green card in response to the proposal made in this sense by the Working Group established under the French presidency (19/36 respondents, whereby the other respondents did not have any official position to share and none of them expressed their opposition to the initiative). COSAC, 38th bi-annual report, p. 22.

[58] COSAC Working Group, Conclusions on the Role of National Parliaments in the EU, June 2022, p. 12. It is interesting to note that Parliament had opposed the definition of these thresholds. Letter from the European Parliament, 8 June 2022.

support the proposed initiative.[59] Moreover, the idea was launched to merge the green card with the European Citizens' Initiative whereby when the Treaties are next revised, it could be required that the Commission submits a legislative proposal 'if a qualified minority of Houses or national parliaments' (such as one-quarter of Member States) express their support' for a European Citizens' Initiative.[60] Local and regional authorities have also expressed their support in favour of introducing a green card.[61] Based on this support and strive for reforms, one may speculate that **the decreasing participation in the EWS and in the Political Dialogue is perhaps the illustration of a deeper mutation towards a decreasing interest in these procedures more generally**. Other channels of interaction with the Commission, for instance in the form of dialogues with commissioners, and other means of participation in EU affairs, in general, could become more popular.

2.2. Parliament and the principle of subsidiarity

Parliament is involved in the control of the respect of the principle of subsidiarity in two ways: as an EU co-legislator generally tasked with guaranteeing its respect and as an addressee of the reasoned opinions and the contributions adopted by national parliaments. In the present study, more emphasis is placed on the latter of these two responsibilities as it allows to better assess the EWS and its functioning since the Lisbon Treaty entered into force.

To set the overall context, one may recall that based on the Treaties and on the 2016 **Interinstitutional Agreement on Better Law-Making**, **Parliament is generally committed to respecting the principle of subsidiarity**.[62] To this end, like the Council, it is called to take into account the Commission's impact assessments when adopting amendments, or produce its own impact assessments where necessary. The intention devoted to this subject has increased over time. Whereas Parliament rarely did so in the past,[63] it now does so on a more regular basis with the support of the European Parliament Research Service (EPRS).[64] The EPRS scrutinises upon request by committees the subsidiarity- and the proportionality-related aspects of the impact assessments prepared by the Commission, and it 'draw[s] attention to any concerns expressed, notably by national Parliaments and the Committee of the Regions'. It also contributes to making sure that Parliament respects those principles itself, among others by preparing impact assessments of main amendments proposed by Parliament or by analysing the added value of the proposals for new legislation made by Parliament and by calculating the cost of no EU action. The EPRS additionally scrutinises subsidiarity and proportionality when it drafts impact assessments.[65]

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[59] European Parliament, Resolution of 17 January 2024 on the implementation of the Treaty provisions on national parliaments (2023/2084(INI)), point 17.

[60] Italian Chamber of Deputies, Political Dialogue Contribution on Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) 2019/788 on the European Citizens' Initiative (COM(2023)787 final), 18 December 2024, p. 3.

[61] Contribution on 'procedures and subsidiarity' by Apostolos Tzitzikostas, President of the European Committee of the Regions, to the Working Group on European Democracy of the Conference on the Future of Europe, 2022, p. 7.

[62] The EP and the Council undertake to take full account of the Commission's impact assessments in their fulfilling their legislative functions (Article 14). Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, p. 1–14.

[63] European Parliament, Resolution of 24 June 2021 on European Union regulatory fitness and subsidiarity and proportionality – report on Better Law Making covering the years 2017, 2018 and 2019 (2020/2262(INI)), point 26.

[64] European Commission, Annual Report 2021 on the application of the principles of subsidiarity and proportionality and on relations with national parliaments, COM(2022) 366 final, p. 4.

[65] For illustration, in 2021, the EPRS produced, among others, 33 initial appraisals of Commission impact assessments and 2 substitute impact assessments examining aspects that had not been considered in the Commission's original impact assessment, as well as 7 ex post European implementation assessments, 27 implementation appraisals, 3 'implementation in action' papers. In 2022, they amounted to 45 initial appraisals, 1 comprehensive analysis, 6 ex post European

With regard to its **treatment of national parliaments' reasoned opinions, they have gradually gained importance in Parliament's work**, as mirrored by the increasing level of detail devoted to subsidiarity-related issues in Parliament's annual reports on relations with national parliaments.

Since it also receives national parliaments' reasoned opinions and contributions, Parliament has thus devised procedures to treat them. In accordance with its Rules of Procedure, the Committee on Legal Affairs (JURI) is responsible for the 'interpretation, application and monitoring of Union law and compliance of Union acts with primary law, notably the choice of legal bases and respect for the principles of subsidiarity and proportionality'.[66] A standing rapporteur for subsidiarity is nominated among the members of the JURI Committee based on a rotating system among political groups.[67] The standing rapporteur oversees Parliament's subsidiarity mechanism and prepares the reports which JURI regularly drafts based on the Commission's annual reports on subsidiarity and proportionality.[68]

JURI's central role in controlling the principle of subsidiarity within Parliament also derives from the fact that it is responsible for the in-depth analysis of the reasoned opinions received: it controls whether they indeed raise subsidiarity-related issues and may rather consider them as contributions where necessary.

Generally, contributions and reasoned opinions are made available to all actors in Parliament (Members, political bodies and European Parliament services) by the European Parliament Directorate for Relations with national parliaments. It also provides those actors with specific expertise and briefings on parliaments' contributions and reasoned opinions, which are used throughout the legislative cycle in trilogue negotiations or where contributions and reasoned opinions are used to draft committee reports. Since 2010, the European Parliament Directorate for Relations with national parliaments has also prepared a Monthly State of Play Note, which provides an overview of those reasoned opinions and contributions received since the last published Note and indicates which files are on the agenda for the next plenary session.[69] The Note is published on Parliament's website prior to each plenary session, and it is enclosed in the meeting file for the European Parliament's Conference of Committee Chairs. Reasoned opinions (and their translations) and contributions have been made publicly available to all via the CONNECT database since 2017, and Parliament has streamlined the submission process of reasoned opinions and contributions even further. The National parliaments Submission Tool allows national parliaments to easily upload their reasoned opinions and contributions on a restricted online platform. The content of the Submission Tool is automatically fed into CONNECT, the Legislative Observatory (OEIL) and to the E-Committee platform. In this way, the functioning of the EWS and of the Political Dialogue has been improved and made more user-friendly.

In addition to the attention devoted to the EWS and the Political Dialogue, Parliament has recently adopted three resolutions relevant to the control of the respect of the principle of subsidiarity.

implementation assessments, 20 implementation appraisals, and 4 'implementation in action'. In 2023, they were 41 initial appraisals, 1 detailed appraisal and 1 substitutive impact assessment as well as, among others, 1 complementary impact assessment, 7 implementation assessments, 22 implementation appraisals, 2 'implementation in action.

66 Par. XVIII of Annex VI to the Rules of Procedure (10th parliamentary term), https://www.europarl.europa.eu/doceo/document/RULES-10-2025-01-20-RESP-JURI_EN.html.

67 European Parliament, Annual Report on the Relations between the European Parliament and EU national parliaments 2020, p. 44, respectively.

68 European Parliament, Resolution of 18 April 2018 on the Annual reports 2015-2016 on subsidiarity and proportionality (2017/2010(INI).

69 European Parliament, Annual Report on the Relations between the European Parliament and EU national parliaments 2020, p. 47.

In its first resolution on proposals for the amendment of the Treaties,[70] Parliament proposed that the 'subsidiarity review by the Court of Justice of the European Union be strengthened'. However, it did not define further how this would have to be implemented (see sub-section 3.3. below on the Court of Justice). Parliament also called for the opinion of regional parliaments with legislative powers to be taken into account in the reasoned opinions on legislative drafts of national parliaments. It would have to be seen whether any such requirement at the EU level would be in line with the EU's duty to respect the constitutional identity of the Member States (Art. 4(2) TEU). By contrast, the additional proposals made by Parliament seem more feasible: it calls for an extension of the eight week-deadline to twelve weeks and proposes the introduction of a green card mechanism (see on the latter sub-section 2.1.2. above).

In its second resolution, which concerned reports on Better Law-Making,[71] Parliament suggested that where a proposal attracts at least two reasoned opinions, the members of the JURI Committee be alerted and that the reasoned opinions received be the subject of genuine discussions of the same Committee.

Moreover, Parliament adopted a resolution on Implementation of the Treaty provisions on national parliaments in January 2024.[72] On that occasion as well, it recalled national parliaments' interest in being involved on substance (and not only on subsidiarity). It called for an extension of the eight-week period for the control of the respect of the principle of subsidiarity to twelve weeks when the Treaties are next revised. It advocated in favour of green cards being introduced and addressed to the Commission, or to Parliament after it has been granted a full right of initiative. By contrast, it expressed its opposition to any red card. Parliament also supported the reinforcement of IPEX.

2.3. Conclusion

So far, a **limited use of the EWS by national parliaments** has been observed, although this System had sparked a considerable interest immediately before and after the Lisbon Treaty entered into force. Although a general decrease in the total number of reasoned opinions submitted by national parliaments is observed, **other factors have also had an undeniable influence** in this evolution, such as the (diminishing) number of proposals adopted by the Commission or the Covid-19 crisis. Additionally, **fluctuations are visible in the number of contributions transmitted in the framework of the Political Dialogue**, but these are harder to account for on a general level, as the variety of submitted contributions demands their individual analysis before any meaningful conclusion may be drawn. It remains that **this informal written dialogue between the Commission and national parliaments** – originally established to compensate rejecting the Treaty establishing a Constitution for Europe – **has not only endured over time but has also been quite successful**.

The decrease in national parliaments' interest can be viewed against a general background characterized by the fact that EU affairs have become mainstreamed within national parliaments thanks to the EWS, but also more generally following the euro area crisis, in particular. That crisis affected national parliaments' core prerogative (their 'power of the purse'), after which several of them obtained new prerogatives as part of the reform packages adopted in response to the crisis. The COVID crisis

[70] European Parliament, Resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties (2022/2051(INL)).

[71] European Parliament, Resolution of 23 November 2023 on European Union regulatory fitness and subsidiarity and proportionality – report on Better Law-Making covering 2020, 2021 and 2022 (2023/2079(INI)).

[72] European Parliament, Resolution of 17 January 2024 on the implementation of the Treaty provisions on national parliaments (2023/2084(INI)).

and the NGEU Programme adopted in response to it as well as the responses to the numerous crises which the EU has been confronted with over the past fifteen years have affected how national parliaments (can) scrutinize EU affairs.[73] Even if the references to national parliaments included in pieces of secondary legislation have remained scarce,[74] they still have undoubtedly been affected by the policy changes adopted at the EU level and have been led, for example, to scrutinize some of the national plans. These are some shifts, among others, that may explain why parliamentary interest in the principle of subsidiarity has declined over time.

Concerning Parliament and its interaction with national parliaments in the control of the respect of the principle of subsidiarity, it may be said that it **quickly adapted its working methods** after the Lisbon Treaty had entered into force to ensure that reasoned opinions and contributions could be used in the legislative process. Over time, **the procedure in place has progressively improved**, leading to reasoned opinions gaining more importance in Parliament's work.

[73] For example, the Eurogroup played a key role in the design of the solution adopted to mitigate an economic downturn during the pandemic and national parliaments have fewer capacities to scrutinize Eurogroup representatives than they have to control Council members. Likewise, national parliaments had to adapt to be able to play a role in the design and the implementation of the national Recovery and Resilience Plans adopted as part of the implementation of the Recovery and Resilience Facility. See on the former: B. Dias Pinheiro and D. Fromage, 'Parliamentary oversight of the EU economic recovery plan – lessons learned and which way forward?' in D. Utrilla and A. Shabbir (ed) E*U Law in times of pandemic. The EU's legal response to COVID-19*, EU Law Live Press, 2020, pp. 102-116 and on the latter COSAC, 35th bi-annual report, 2021. See additionally on the EU response to the crises it has been confronted with since 2009 and their impact on decision-making procedures: D. Fromage, A. Héritier and P. Weismann (eds) *EU Regulatory Responses to Crises: Adaptation or Transformation?*, Oxford University Press, 2025.

[74] A search on Eur-Lex in January 2025 reveals 1766 files, which mention "national parliaments", but 1564 of those only contain the formula "After transmission of the draft legislative act to the national parliaments,". 53 of the remaining acts mention national parliaments, but only to specify that they were not notified following the procedure established in Article 4 of Protocol (No 1) on the Role of National Parliaments in the European Union. National parliaments are also mentioned in the preamble of sector-specific documents including three state aid decisions and 27 European Semester recommendations.

3. THE EU INSTITUTIONS AND THE PRINCIPLE OF SUBSIDIARITY

Considering that the Commission authors the vast majority of the legislative proposals made at the EU level, it plays a key role in guaranteeing its respect. The Commission is thus examined first in the following analysis (3.1.). Next, local and regional authorities individually, and especially the CoR in its quality as one of the institutions called to control subsidiarity are considered (3.2.), while the CJEU's role is analysed third, due to the limited number of cases in which it has been called upon to control the respect of the principle of subsidiarity to date (3.3.). Finally, some reflections on the Council's role in the control of subsidiarity are included last (3.4.).

3.1. The European Commission and the principle of subsidiarity

As noted above, the EWS is complemented by the Political Dialogue between the Commission and national parliaments. Although the latter takes place on an informal basis, it usefully complements the former and has indeed been largely favoured by national parliaments. Also, the perception by national parliaments of their relationship with the Commission in this context will influence their incentive to participate in both the EWS and the Political Dialogue. The following sub-sections therefore recall the evolution of the Commission's relationship to national parliaments in the framework of the EWS and the Political Dialogue since the entry into force of the Lisbon Treaty (3.1.1) before turning to the Task Force on subsidiarity, proportionality and 'doing less more efficiently' and the follow up of its recommendations to date (3.1.2., and 3.1.3.).

3.1.1. The EWS and the Political Dialogue since the entry into force of the Lisbon Treaty

This section presents an overview of the relationship between the Commission and national parliaments first. Second, it zooms in on how the Commission reacted to the three yellow cards.

In general, the **Commission's attention to the principle of subsidiarity and its control by national parliaments has increased over time**. This is so not only because it created a dedicated Task Force in 2017 or has launched other specific initiatives. Every year, the Commission publishes reports on the application of the principles of subsidiarity and proportionality and its relations with national parliaments,[75] and over the years, the level of detail of the reports has increased. This is illustrated, for instance, by the fact that the Commission has been presenting an analysis of the legislative proposals that attracted most feedback by parliaments in recent years. Yet, room for improvement still exists, as noted further below.

Moreover, **although national parliaments had been critical of the quality of the Commission's replies to their contributions in the past,[76] it now appears that they are largely satisfied with it**: 24 out of the 31 responding parliaments/chambers involved in the COSAC survey of 2022 found that the Commission 'mostly addressed the issues raised in their opinions within the Political Dialogue'. Six of them, however, considered this mostly not to be the case, and one parliament, the Cypriot one, found this not to be the case at all.[77]

The **Commission's reaction to the three yellow cards** triggered so far may hardly be generalised because they were triggered in three exceptional sets of circumstances, and because these episodes have remained particularly rare, thus making any generalisation risky. Nevertheless, the way in which

[75] Until 2018, these reports were published independently from each other.

[76] COSAC, 16th bi-annual report, 2011, p. 7.

[77] COSAC, 37th bi-annual report, 2022, p. 7.

the Commission reacted on those occasions certainly had an impact on national parliaments' readiness to participate in the EWS, and on their perception of this procedure in general.

The Commission's reaction to the three yellow cards differed quite significantly. In the first case, national parliaments received a standardised answer more than two months after the yellow card had been triggered. On the occasion of the second yellow card however, the Commission's reaction was swifter (three weeks) and it sent individual answers in response to each of the reasoned opinions. After the third yellow card was triggered, the Commission's response was also thorough. The first and the second yellow cards were triggered under the presidency of José Manuel Barroso, whereas the third yellow card happened under Jean-Claude Juncker's presidency. The personality of the President of the Commission does not seem to have been instrumental in determining how the Commission reacted. Rather, it would appear that the context played an important role (the Monti II proposal which gave rise to the first yellow card was based on the flexibility clause and the proposal itself was very brief, such that some doubted whether the Commission had really sought to have this proposal approved).

Since 2016, the EWS has remained inactivated and has not yet been activated under the presidency of Ursula von der Leyen, so only speculations may be made at this stage. Considering how engaged the Commission has been in promoting its Better Regulation agenda, it may be anticipated that the Commission could react with matched celerity and eagerness, as in the case of the second and third yellow cards, to engage with national parliaments' opinions should a fourth yellow card be triggered.

3.1.2. The Task Force on subsidiarity, proportionality and 'doing less more efficiently'

The Commission launched the **Task Force on subsidiarity, proportionality and 'doing less more efficiently'** in 2017 in order to 'mak[e] recommendations on how to better apply the principles of subsidiarity and proportionality, identify[…] policy areas where work could be re-delegated or definitely returned to Member States, as well as ways to better involve regional and local authorities in EU policy making and delivery'.[78]

The Task Force was chaired by then European Commission First Vice-President in charge of Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights, Frans Timmermans. Contrary to what the Commission had originally intended, it was composed of only six members – three representatives from the CoR and three representatives of national parliaments – since Parliament refused to take part in this initiative. It 'considered that participation in the task force set up by the Commission would disregard [its] institutional role and standing as the only directly elected Institution of the European Union, representing the citizens at Union level and exercising functions of political scrutiny over the European Commission'.[79]

The Task Force convened during the first half of 2018 and published its final report on 10 July 2018.[80] It adopted **nine recommendations**, and generally promoted the concept of '**active subsidiarity**', which 'denote[s] an improved engagement with all stakeholders and local and regional authorities throughout the entire policy cycle'.[81]

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78 Article 3, European Commission, Decision on the establishment of a Task Force on subsidiarity, proportionality and 'doing less more efficiently', 14 November 2017.

79 European Parliament, Resolution of 18 April 2018 on the Annual reports 2015-2016 on subsidiarity and proportionality, 2017/2010(INI), point 8.

80 Report of the Task Force on subsidiarity, proportionality and 'doing Less More Efficiently', 2018.

81 European Commission, Communication on 'The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking', COM(2018) 703 final, p. 6. For instance, this concept has since been promoted by the CoR. See for example: Committee of the Regions, Subsidiarity Annual Report 2020, 10 March 2021, p. 3.

First, it advocated a **common definition of subsidiarity** by resorting to a subsidiarity grid common to the Commission, the EU co-legislators, the CoR, and regional and national parliaments to assess subsidiarity, proportionality, and the legal basis of new and existing legislation.

Second, it recommended that the **Commission flexibly apply the eight-week deadline** defined in the Treaties by taking recess and holiday periods into account. Its **annual reports on subsidiarity should reflect the opinions received by both national and regional parliaments**, and '[i]t should also make available to the co-legislators, in a comprehensive and timely manner, information about proposals where significant concerns have been raised in respect of subsidiarity'.[82]

Third, the Task Force proposed that **the next Treaty change be used to extend the deadline set for parliaments to submit their reasoned opinions**, and that in general they be given the possibility to 'express fully their views about subsidiarity, proportionality and the legal basis (conferral) of the proposed legislation'.

Fourth, the Task Force **advised in favour of the involvement of national, regional and local authorities** in policymaking.

Fifth, the Commission **should always include the local and the regional dimensions** in its impact assessments.

Sixth, **Parliament and the Council should also use the subsidiarity grid**, and the **Commission should highlight any views it received from local and regional authorities during the consultation period**.

Seventh, it also suggested making the interface between IPEX and REGPEX (see below sub-section 3.2.2) more efficient.

Eighth, it suggested that **the REFIT initiative be enhanced** by 'develop[ping] a mechanism to identify and evaluate legislation from the perspective of subsidiarity, proportionality, simplification, legislative density and the role of local and regional authorities.'

Lastly, **more effective implementation of existing initiatives should be preferred to new legislative proposals**.

In response to this report, the Commission adopted a communication in October 2018.[83] Although it did not foresee any major reforms, it committed to propose a subsidiarity grid, and agreed to extend the eight-week deadline on an informal basis. Also, it introduced its 'one in, one out' principle, whereby each new piece of legislation must replace a previously existing one. It additionally simplified the procedure for its public consultations in the framework of which a single 'call for evidence' has replaced previously existing consultations launched at various stages of the pre-legislative process. Furthermore, the input provided by national parliaments, as well as by national, regional or local authorities, is clearly identified and distinguished from input from other stakeholders.[84]

The Commission also announced that it intended "to prepare an aggregated response where a significant number of national Parliaments have raised similar concerns even where the threshold for a "yellow card" is not attained. [...] The aggregated response would set out the Commission's position on the issues raised and be transmitted to the European Parliament and the Council as rapidly as

[82] Note that the number of opinions required for there to be 'significant concerns' was not defined by the Task Force.

[83] European Commission, Report on The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking, COM(2018) 703 final.

[84] European Commission, Annual Report 2021 on the application of the principles of subsidiarity and proportionality and on relations with national parliaments, COM(2022) 366 final, p. 2.

possible "[85]. A significant number would be reached by at least 4 reasoned opinions representing at least 7 votes.

These reforms, which have since been introduced, are detailed in the next section which also serves to evaluate 15 years of interactions between European Commission and national parliaments.

3.1.3. The European Commission's interaction with parliaments and its evolution

The creation of the Task Force on subsidiarity, proportionality and 'doing less more efficiently' can be viewed against an **overall background characterised by the Juncker Commission's commitment to better regulate and act only where necessary**. To achieve that objective, in 2015 the Juncker Commission prepared **guidelines on Better Regulation** accompanied by a **Better Regulation Toolbox**, which were later updated in 2017.[86] They guide Commission staff throughout the entire policy cycle, and have better defined how the principle of subsidiarity (and the principle of proportionality) ought to be taken into consideration.[87] The Commission also set up a **Regulatory Scrutiny Board** in 2015,[88] which replaced the Impact Assessment Board that had existed since 2007. This independent body 'shall assess the quality of draft impact assessment reports, fitness check reports and major evaluation reports',[89] and thus has a broader mandate than its predecessor who focused exclusively on impact assessments. Especially after the Impact Assessment Board was first created and until as late as 2017, concerns were regularly raised regarding insufficient subsidiarity justifications in impact assessments.[90] However, significant improvements were made, and the justification provided by the Commission is now found to be satisfactory.[91] The Regulatory Scrutiny Board noted in 2023 that 'Regarding the subsidiarity and EU value added component, the Board observed that the overall quality score stabilised on an acceptable level for 'positive' and 'positive with reservations' opinion types. However, draft reports that received a 'negative' opinion showed in several cases deficiencies in the demonstration of the necessity and added value of EU action'.[92] Hence, **even if the quality seems to be overall satisfactory, some improvements still appear to be necessary**.

It should additionally be reminded that subsidiarity not only plays a role when the Commission drafts a new legislative proposal, but is also a key consideration in the retrospective evaluation assessments it

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85 European Commission, The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking, COM(2018) 703 final, p.8.

86 See further on this the dedicated part of the European Commission's website: https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en#documents.

87 European Commission, Communication on 'The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking', COM(2018) 703 final, p. 4.

88 European Commission, Communication to the Commission 'Regulatory Scrutiny Board Mission, tasks and staff', C(2015) 3262 final, Mai 2015.

89 Article 2, Decision of the President of the European Commission on an independent Regulatory Scrutiny Board, P(2020) 2.

90 This is visible in the annual reports these Boards have produced. For instance, in 2015 and 2016 weaknesses in this domain were identified in close to 20% of cases, and in 2017 subsidiarity issues featured in approximately 30% of the negative opinions adopted. Regulatory Scrutiny Board, Annual Report 2016, 2017, p. 13, Regulatory Scrutiny Board, Annual Report 2017, March 2018, p. 20. National parliaments also raised this issue in numerous opinions, as noted for instance by the European Parliament. European Parliament, Resolution of 13 September 2012 on the 18th report on Better legislation – Application of the principles of subsidiarity and proportionality (2010) (2011/2276(INI)), point 9. The European Parliament had been concerned early on by the fact that the European Commission was using a 'standard recital' to justify its compliance with the principle of subsidiarity. European Parliament, Resolution on the Commission report to the European Council on better lawmaking 2000 (P5_TA(2003(0143), point 17.

91 The Regulatory Scrutiny Board noted concerning 2020 that '[o]n average, the analysis of subsidiarity and EU value added was satisfactory, even for impact assessments that received an initial negative opinion. This was comparable to previous years'. Regulatory Scrutiny Board, Annual Report 2020, May 2021, p. 19.

92 Regulatory Scrutiny Board, Annual Report 2023, May 2024, p. 17.

conducts as part of its '**Fit for future' Platform**, the aim of which is to 'help[] the Commission to simplify laws, reduce related unnecessary regulatory burdens, and to tap into the expertise and experience in lower levels of governance and of stakeholders to ensure that legislation achieves its objectives in the most efficient way, taking into account experience from national, local and regional authorities'.[93] This platform replaced the REFIT programme in 2021 (which itself was part of the Commission's Better Regulation agenda), another aspect considered by the Task Force. [94] As such, it contributes to the observance of the principle of subsidiarity, among others because it provides feedback on how existing legislation is being implemented. The CoR's RegHub also contributes to the 'Fit for future' Platform (see Section 3.2.2 below).

Furthermore, an **Interinstitutional Agreement on Better Law-Making approved in 2016**[95] recalls the Commission's, Parliament's and the Council's commitment to respect the principle of subsidiarity (Article 2). It highlights that the impact assessments produced by the Commission should ensure that this principle is duly respected, and that a statement on this matter is to be included in the explanatory memoranda as well (Articles 12 and 25, respectively). In this way, justifications on the respect of the principle of subsidiarity are always included: in the case of proposals which are not of significant economic, environmental or social impacts and which thus do not have to be accompanied by an impact assessment (Article 13), the justification in terms of subsidiarity are included in the explanatory memorandum. Commission President von der Leyen also vowed to renew the Interinstitutional Agreement during her next term when she was applying for the presidency of the Commission.[96]

As a follow up to the recommendations issued by the Task Force, **the Commission additionally revised its toolbox in late 2021**.[97] Its **Tool no. 5 'Legal basis, subsidiarity and proportionality'** details how the Commission should act to ensure that the principle of subsidiarity is respected. For instance, the subsidiarity grid that had originally been designed by the CoR had to be appended to significant or politically sensitive legislative proposals accompanied by an impact assessment which do not fall under the EU's exclusive competence. Tool no. 5 also details the practical steps that need to be taken to assess subsidiarity. The toolbox was further revised in July 2023 to include a new competitiveness check as a mandatory index to the impact assessments and to reflect how the 'one in, one out' policy is applied in a different manner.[98]

Finally, following the adoption of the report by the Task Force, **an informal agreement was also reached according to which the period between 20 December and 10 January is now excluded** from the eight-week period reserved to the scrutiny of the principle of subsidiarity.[99]

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93 European Commission, Annual Report 2021 on the application of the principles of subsidiarity and proportionality and on relations with national parliaments, COM(2022) 366 final, p. 2.

94 European Commission, The EU's efforts to simplify legislation – 2019 Annual Burden survey, August 2020, p. 10.

95 Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, p. 1–14.

96 Ursula von der Leyen, Europe's choice. Political guidelines for the next European Commission 2024-2029, 2024, p.7.

97 European Commission, 'Better Regulation' Toolbox November 2021 edition, 2021, p. 30f.

98 European Commission, Annual Report 2023 on the application of the principles of subsidiarity and proportionality and on relations with national parliaments, COM(2024) 493 final, p. 2.

99 European Parliament, Resolution of 24 June 2021 on European Union regulatory fitness and subsidiarity and proportionality – report on Better Law Making covering the years 2017, 2018 and 2019 (2020/2262(INI)), point 13.

3.1.4. Reflecting upon fifteen years of European Commission's engagement with parliaments in subsidiarity-related issues

There is little doubt that, since the entry into force of the Lisbon Treaty, **the exchanges between national parliaments and the Commission have been regular and frequent, both in the framework of the EWS and even more so in the framework of the Political Dialogue**. In the same vein, it is also clear that this fifteen-year period has been characterised by a (much-welcome and needed) **constant thrive towards improvement of the existing procedures**, as is for instance evident from the establishment of the Task Force on subsidiarity, proportionality and 'doing less more efficiently', the enhanced quality of the subsidiarity justifications contained in the impact assessments, or the inclusion of the subsidiarity grid in the latest version of the Commission's Better Regulation Toolbox.

The **aggregated response** the Commission has committed to provide since 2018 where a proposal triggers a significant number of reasoned opinions is certainly a welcome initiative to compensate for the fact that the thresholds necessary to trigger a yellow card are hard to reach. However, in recent years, only few proposals even reached that lower threshold for an aggregated answer. Hence, even if this initiative responds to the demands previously expressed by national parliaments,[100] it has had only a limited impact to date. National parliaments have regretted that the impact of their reasoned opinions (and contributions), that is the way in which they may have had an influence during the legislative process, was not always easy to identify, thus raising the question of the **added value of their participation** in the absence of a yellow card. Some are even in favour of the inclusion of a brief summary of the contributions submitted by national Parliaments during consultations in the explanatory memorandum of legislative proposals (18 parliaments/chambers; 18 had not adopted any official position and none was against the proposal according to a COSAC survey of November 2022).[101] National parliaments' concern in terms of the added value of their participation when no yellow card is reached is certainly legitimate. However, it also hinges on the limits inherent to the EWS as it is established under the current Treaties. Formally, the Commission is only allowed to amend, withdraw or maintain a proposal based on the subsidiarity assessment conducted by parliaments. In other words, the Commission is not permitted to introduce substantive amendments other than the content-based input received by parliaments – hence why they should **make their voices heard early on in the legislative process**, as detailed in the conclusion of this study. This is supported by the Commission and the Italian Senate.[102] COSAC's Working Group on the role of national parliaments in the EU had suggested that they be involved from the pre-legislative phase.[103] National parliaments recently called for the dialogue between them and the Commission to be enhanced: 'in particular when the European Commission is drawing up its strategic priorities and annual work programme, so that the expectations of the national parliaments can be taken into account in the EU's major policy guidelines'.[104] This would be beneficial, both for potential subsidiarity concerns to be considered early on, and for national parliaments to be able to exercise a more proactive role, which is not limited to subsidiarity check. The Commission appears to support this, as it also recently stated that '[i]t stands ready to strengthen the dialogue with the national Parliaments through the established channels of communication and

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100 This was put forward by the German Bundesrat in 2018 and reiterated in 2021. Bundesrat, Official Document 554/18 (Decision), p. 4 and Bundesrat, Official Document 738/21 (Decision), p. 3.

101 COSAC, 38th bi-annual report, p. 22.

102 Reply of the European Commission to the Contribution of the LXXI Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) plenary meeting, held in Brussels from 24 to 26 March 2024, p. 7 and COSAC, 39th bi-annual report, p. 30.

103 Reply of the European Commission to the Contribution of the LXXI Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) plenary meeting, held in Brussels from 24 to 26 March 2024, p. 10f.

104 COSAC, Contribution of the LXXII COSAC, OJ C 2024/7493, 27.3.2024, p. 3.

cooperation to facilitate their input to and feedback on the Commission's political and legislative initiatives'.[105] The fact that public consultations now better distinguish between local, regional and national authorities and allow to see their input more clearly[106] is certainly a step in this direction as is the enhanced usage of territorial impact assessments by the Commission.[107]

Alternatively, parliaments should seek to influence the legislative process by trying to request from their government representative in the Council that he or she defends their views. This is because the thresholds defined within the EWS are difficult to reach and because the Commission is always free to decide to maintain, withdraw or amend the proposal.

Yet another alternative would consist in parliaments' seeking to gain some influence by means of the recently introduced **rapporteurs' dialogue between national parliaments rapporteurs and Parliament's rapporteurs**.[108] This dialogue has been organized by Parliament's Directorate for Relations with National Parliaments since 2023. It seeks to enhance the dialogue between rapporteurs to allow them to exchange at an early stage. In this way, national parliaments may be better informed about the position of the European rapporteur, while being better able to share their opinions and views with him/her. However, this possibility should be used only for matters that are of particular importance to parliaments and a dialogue with the own government should be favoured, not least because it is likely to be more successful.

3.2. Sub-national entities and the principle of subsidiarity: The Committee of the Regions, Local and Regional Entities

As noted in the introduction, the definition of the principle of subsidiarity described in the Treaties has not been significantly amended since it was first introduced in the Treaty of Maastricht. Nevertheless, following the adoption of the Lisbon Treaty, **express reference to the local and regional levels is now made in the definition of the principle of subsidiarity**. In addition to this, the **CoR's ability to bring a case before the CJEU on the ground of a subsidiarity breach** has also been specifically recognised. These innovations should be viewed against the **background of a larger role reserved to the sub-national dimension in the EU Treaties**.[109] This trend has not only endured since the Lisbon Treaty, but it has arguably grown even further as illustrated, for instance, by the importance devoted to the local and regional levels in the final report of the Task Force on subsidiarity, proportionality and 'doing less more efficiently', or by the resolution recently adopted by Parliament in which it emphasized that **approximately 70 per cent of EU legislation is implemented by local and regional authorities**.[110]

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[105] Reply of the European Commission to the Contribution of the LXXI Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) plenary meeting, held in Brussels from 24 to 26 March 2024, p. 7. The Commission had already expressed the same position in response to parliaments' suggestions in this sense in 2022. Reply of the European Commission to the Contribution of the LXVIII Conference of Parliamentary Committees for Union Affairs (COSAC) plenary meeting adopted in Prague, 13-15 November 2022, p. 4.

[106] European Commission, Annual Report 2022 on the application of the principles of subsidiarity and proportionality and on relations with national parliaments, COM(2023) 640 final, p.1.

[107] Territorial impact assessments have been used by the CoR since 2013 to 'analyse the potential asymmetric territorial impacts of EU policy and legislative proposals'. The CoR has sought to promote them among EU institutions as part of the Better Regulation agenda. CoR, Territorial impact assessment Territorial Impact Assessment | European Committee of the Regions.

[108] European Parliament, Annual Report 2023 on Relations between the European Parliament and EU national parliaments, 2024, p. 63.

[109] See on this C. Panara, *The sub-national dimension of the EU. A legal study of multilevel governance*, Springer, 2015, in particular p. 160f.

[110] European Parliament, Resolution of 24 June 2021 on European Union regulatory fitness and subsidiarity and proportionality – report on Better Law Making covering the years 2017, 2018 and 2019 (2020/2262(INI)), point 3.

The following section first considers the role of local and regional entities, then analyses their control of subsidiarity (3.2.1.), and looks at the evolution of the CoR's role in the scrutiny of subsidiarity and where we stand at present (3.2.2.). A final sub-section draws a balance on the participation of local and regional entities since 2009 (3.2.3.).

3.2.1. Local and regional entities and their control of the principle of subsidiarity

Great variety exists among local and regional entities within the various Member States. In particular, only six Member States have regional parliaments with legislative powers. Those parliaments may have up to three avenues to exercise influence at their disposal, but this varies in the various Member States. First, they may be represented in one of the two parliamentary chambers, as is the case in Austria, for instance. Second, a procedure may exist through which they are consulted by their respective national parliament.[111] Third, they may try to make their voice heard at the CoR level directly. It should be noted that the Treaties only acknowledge (indirect) rights to regional parliaments with legislative powers in the area of subsidiarity. However, this does not necessarily mean that no rights have been guaranteed to other types of sub-national entities in the various Member States,[112] nor that this distinction is justified, although it is probably understandable.

Furthermore, in general, it may be observed that regional participation in the EWS has decreased over time. This trend is visible both in the case of the individual participation examined here, as well as the collective participation via the CoR analysed in the next sub-section. For example, regional parliaments with legislative powers cooperate in the framework of the Conference of European Regional Legislative Assemblies (CALRE), which has also instituted its working group on subsidiarity. Although CALRE had been quite engaged with this matter, no activity has been reported since 2018 on its website.[113] The Catalan Parliament had been very active in fostering regional participation in the EWS in its early years as well, but this interest has faded over time as well.[114]

However, the CoR has been very active in this domain as examined next.

3.2.2. The Committee of the Regions and the subsidiarity check

Since its creation, **the CoR has been committed to contributing to the control of the respect of the principle of subsidiarity, and is considered to have been quite active in that area**.[115] Subsidiarity is

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[111] The fact that a regional parliament finds a subsidiarity breach does not, however, necessarily lead its national parliament to adopt a reasoned opinion. Their chances seem to be higher if more than one regional parliament finds a subsidiarity breach. P. Reimers, 'Influence Through Co-operation? Regional Parliaments' Participation in the European Union Subsidiarity Scrutiny', *JCMS*, 2025, pp. 1-21.

[112] This may however happen on an informal basis, as in the case of Romania. See further on this issue: P. Schmidt, T. Ruys and A. Marx, *The subsidiarity early warning system of the Lisbon Treaty. The role of regional parliaments with legislative powers and other subnational authorities*, Committee of the Regions, 2013.

[113] https://www.calrenet.eu/. It did co-organise a workshop on 'multilevel governance and active subsidiarity for sustainable recovery and resilience' with the CoR in 2021. European Commission, Annual Report 2021 on the application of the principles of subsidiarity and proportionality and on relations with national parliaments, COM(2022) 366 final, p. 6.

[114] It had organised several events and published several books among which: Parliament de Catalunya, *El control del principi de subsidiarietat*, 2010; M. Palomares i Amat, *Parlaments regionals i procediment d'adopció de decisions a la Unió Europea*, Parlament de Catalunya, 2005.

[115] In addition to the initiatives mentioned below, it commissioned three studies in 2006, 2013 and 2018. C. Jeffery and J. Ziller, *The Committee of the Regions and the implementation and monitoring of the principles of subsidiarity and proportionality in the light of the Constitution for Europe*, Committee of the Regions, 2006; G. Vara Arribas and D. Bourdin, *The Role of Regional Parliaments in the Process of Subsidiarity Analysis within the Early Warning System of the Lisbon Treaty*, Committee of the Regions, 2013 and P. Schmidt, T. Ruys and A. Marx, *The subsidiarity early warning system of the Lisbon Treaty. The role of regional parliaments with legislative powers and other subnational authorities*, Committee of the Regions, 2013. See generally on the CoR's role in controlling the respect of the principle of subsidiarity: S. F. Nicolosi

one of the elements it takes into consideration when adopting an opinion.[116] As detailed in the following paragraphs, it has adapted its institutional structures with a view to conducting that control: it adopts an annual work programme and produces annual reports on this matter, and has launched several initiatives to collect the views of its members and promote subsidiarity in general.[117]

In 2007, the CoR created the **Subsidiarity Monitoring Network**.[118] This network brings together **Parliaments and Governments from regions with legislative powers**, **local and regional authorities without legislative powers** and **local government associations** in the EU (152 members as of April 2025[119]). National delegations and chambers of national parliaments may also participate. Membership within the network is thus very diverse. It aims at enabling the dialogue between regional and local authorities and the Commission regarding political documents and legislative proposals, which directly affect these authorities and the policies they are responsible for. This network exists thus as the main gateway for these authorities to be actively involved in monitoring the principles of subsidiarity and of proportionality. More specifically, the network aims at:

> '1. Raising awareness as regards the practical implementation of the subsidiarity and proportionality principles;
>
> 2. Keeping CoR rapporteurs and members informed about contributions regarding subsidiarity and proportionality from a representative network of local and regional stakeholders;
>
> 3. Identifying measures for better law-making, cutting red tape and increasing the acceptance of EU policies by EU citizens;
>
> 4. Acting as a laboratory for the identification and exchange of best practices and experiences between local and regional authorities on the application of the subsidiarity principle and the decentralised implementation of EU policies at the local level'.[120]

Members of the network may submit their opinions on all political or legislative documents subjected to an opinion by the CoR, and the rapporteur from the CoR drafting a report on a specific matter may request their opinion on subsidiarity, proportionality or any other matter. Their views are sometimes sought during the impact assessment consultations, and the network is also used for exchanging experiences and best practices on subsidiarity, the implementation of EU policies at the regional and local level and better regulation as seen from a local and regional perspective. In sum, the network may organise impact assessment consultations, targeted consultations, and its members may submit open contributions. The **REGional Parliamentary EXchange (REGPEX)** platform created in 2012[121] is a **sub-network of the Subsidiarity Monitoring Network**. It facilitates the participation of regional parliaments with legislative powers in the EWS and serves as a means for regional parliaments and governments to exchange information. It has 76 members in total.[122]

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and L. Mustert, 'The European Committee of the regions as a watchdog of the principle of subsidiarity', *Maastricht Journal of European and Comparative Law*, 2020, pp. 284-301, p. 296.

116 Article 51 CoR Rules of procedure OJ L 65, 5.3.2014, p. 56.

117 See also the CoR's Annual Reports on subsidiarity.

118 https://portal.cor.europa.eu/subsidiarity/thesmn/Pages/default.aspx.

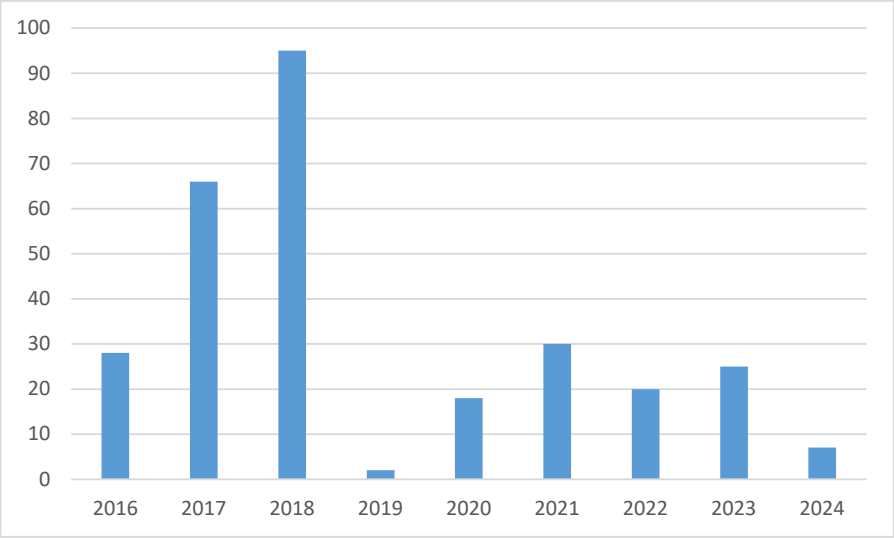
119 List available on the CoR's website CoR - The SMN Partners.

120 Committee of the Regions, 'The Subsidiarity Monitoring Network', https://portal.cor.europa.eu/subsidiarity/thesmn/Pages/default.aspx.

121 https://portal.cor.europa.eu/subsidiarity/regpex/Pages/default.aspx.

122 Their list is available at CoR - REGPEX partners.

Figure 7: Contributions to REGPEX by year (2016-2024)



Source: Personal compilation based on the CoR's Annual reports on subsidiarity.

One may observe some variations in the number of opinions submitted via REGPEX over time. Even if one excludes 2019 and 2024 because of the elections to the European Parliament and the related drop in the number of Commission proposals, it remains that t**he number of contributions shared has been much lower in recent years compared to what it used to be in the past.** Interestingly, the Austrian Bundesrat – which brings together the regional parliaments of Austria – uses the REGPEX platform to share its reasoned opinions. The French Senate also uploads its reasoned opinions on REGPEX, although neither one of these chambers are regional chambers.

In recent years, REGPEX has mostly been used by Austrian regional governments and parliaments, German regional parliaments, and occasionally by Italian regional parliaments and the French Senate. **The variety of actors using REGPEX, and thus presumably those adopting reasoned opinions, has significantly decreased over time**. Following the first years after its establishment, other actors like the Belgian and Spanish regional parliaments, the Association of Finnish Local and Regional Authorities, Denmark Local Government, or the Council of European Municipalities and Regions (CEMR), had also used REGPEX, but they no longer do, or do so on rare occasions only.

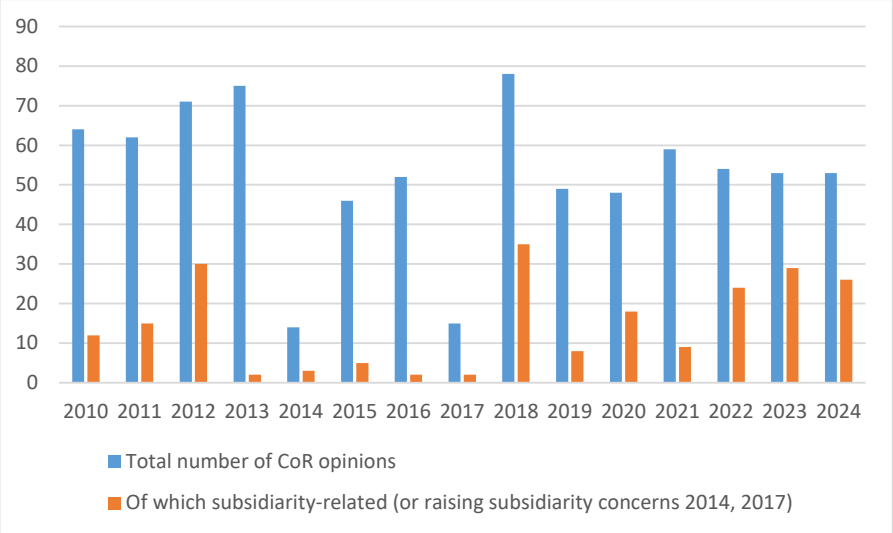
Table 1: CoR opinions contemplating subsidiarity (2010-2024)

Year	Total number of CoR opinions [NB : not all opinions concern legislative proposals]	Of which address subsidiarity (or raise subsidiarity concerns (2014, 2017))
2024	53	26
2023	53	29
2022	54	24

2021	59	9
2020	48	18
2019	49	8
2018	78	35
2017	15	2
2016	52	2
2015	46	5
2014	14	3
2013	75	2
2012	71	30
2011	62	15
2010	64	12

Source: Personal compilation based on the CoR's Annual reports on subsidiarity (NB: data for 2013 and 2016 were compiled manually from the CoR's website).

Figure 8: CoR opinions and share of subsidiarity-related opinions



The CoR also adopts its own opinions, some of which contemplate subsidiarity issues as well. The number of opinions that raised subsidiarity issues has varied substantially over time and was particularly

low during the mandate of Commission President Juncker (2014–2019), with the exception of 2018. One may also observe that the CoR generally submits fewer opinions of which a higher number raise subsidiarity issues. Furthermore, those opinions are related to the opinions submitted via REGPEX as many of the opinions eventually adopted by the CoR are based on REGPEX opinions.[123]

Moreover, in 2012 the CoR revised its subsidiarity strategy with a goal of:

> '1) reinforcing the governance structure of the CoR's subsidiarity monitoring;
>
> 2) establishing a comprehensive approach for monitoring subsidiarity during the whole EU decision-making process;
>
> 3) involving relevant EU and national institutions in these activities; and
>
> 4) consolidating the CoR's readiness regarding any potential action before the Court of Justice'.[124]

Among the initiatives for reaching these objectives is the creation in 2012 of a **Subsidiarity Steering Group** chaired by the coordinator of the Subsidiarity Monitoring Network, composed of one member per political group. The Steering Group played a key role in allowing the CoR to be involved in the control of the principle of subsidiarity. For instance, the Steering Group promoted the coordination and the political follow up of subsidiarity monitoring activities throughout the year and defined subsidiarity monitoring activities on a yearly basis, as well as suggested relevant tools and procedures of the Subsidiarity Monitoring Network to support the work of the rapporteurs designated in the legislative process. In June 2022, the Subsidiarity Steering Group was replaced by the Better Regulation and Active Subsidiarity Steering Group (BRASS-G) which started to function in November of the same year. Its role is to 'streamline the CoR governance in relation to Better regulation and to further strengthen [...] the strategic orientation and coordination of the CoR Better regulation instruments.[125]In the fulfilment of their tasks, the Subsidiarity Steering Group and the BRASS-G since November 2022 are supported by a group of (local and regional) experts selected among the members of the Subsidiarity Monitoring Network, according to their expertise in terms of subsidiarity and in EU law. They form the **Subsidiarity Expert Group**. This Expert Group provides input for the Subsidiarity Annual Work Programme, and the Group may be consulted by rapporteurs if they so choose. The experts play a key role in promoting multilevel governance as their input 'creates a link with subsidiarity debate in the Member States, strengthens mutual understanding and brings the CoR closer to its local and regional partners and thus to the needs of Europeans [...and] the Expert Group also serves as a network of 'core' CoR contact points for subsidiarity in the Member States'.[126]

The subsidiarity scrutiny by the CoR starts at the pre-legislative phase and continues throughout the whole legislative cycle, including until after the proposal has been adopted. To this end, the Subsidiarity Expert Group first selects certain legislative proposals based on the work programme of the Commission and its Roadmaps for the legislative process. The selected proposal should present a clear political interest for local and regional authorities, touch on competences of local and regional authorities, and bear a potential subsidiarity dimension. Preference is given to legislative proposals, and the CoR's priorities and initiatives included in the work programme of the thematic commissions

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[123] For example, European Commission, Annual Report 2021 on the application of the principles of subsidiarity and proportionality and on relations with national parliaments, COM(2022) 366 final, p. 5.

[124] Committee of the Regions, A new subsidiarity strategy for the Committee of the Regions, 2 May 2012, https://portal.cor.europa.eu/subsidiarity/Documents/A8782_summary_subsi_strategy_EN_modif1_final.pdf.

[125] Committee of the Regions, Better Regulation and Active Subsidiarity Steering Group (BRASS-G) Better Regulation and Active Subsidiarity Steering Group (BRASS-G) | European Committee of the Regions.

[126] Committee of the Regions, Subsidiarity Annual Report 2020, March 2021, p. 11.

are duly considered. The identified priorities are then contained in the CoR's Subsidiarity Work Programme drafted by the Steering Group and endorsed by the Bureau of the CoR. These proposals are monitored by the administration of the CoR: it flags those proposals that might bear subsidiarity issues that would require action by the CoR. When a proposal that might bear subsidiarity issues arises, all the relevant political and administrative stakeholders are mobilized to define and plan the subsidiarity monitoring activities that need to be carried throughout the year, both before and after the adoption of the proposal at stake by the Commission.

Additionally, the CoR has organised Subsidiarity conferences every other year since 2008.[127] These events seek to 'strengthen the EU inter-institutional dialogue on subsidiarity scrutiny and allow [...] for a true exchange between all players involved in the subsidiarity monitoring process'.[128] The latest of these conferences took place in Warsaw in 2024. The recommendations stressed the need to enhance cooperation between the CoR and the Commission as well as Parliament following the conclusion of new cooperation agreements in 2024. Support for Treaty reforms as envisaged by Parliament was also expressed, in particular as regards the introduction of a green card, the revision of the EWS and a greater role for the CoR in the ex ante phase of EU policy making.[129]

As a follow up to the work conducted by the Task Force on subsidiarity, proportionality and 'doing less more efficiently', the CoR also introduced a pilot project for regional hubs to assess the implementation of the EU's legislation, an initiative later confirmed in the form of RegHub 2.0 (Network of Regional Hubs for EU Policy Implementation Review).[130] This network counted 46 members from local and regional authorities, 10 observers and one associated body whose task it was to 'monitor the implementation of EU policies on the ground and make sure that the voices of hundreds of regional and local stakeholders are taken into account when these policies are evaluated at European level'.[131] RegHub was a sub-group of the Commission's Fit for Future Platform between 2021 and 2024, and several consultations were launched during that time with a view to contributing to Platform Opinions. These included consultations on the evaluation of the European Regional Development Fund and the Just Transition Fund, or the evaluation of the European Social Fund Plus. A new phase of RegHub was launched by the CoR in April 2025.

Finally, as noted previously, **with the entry into force of the Lisbon Treaty, the CoR was guaranteed a right to launch an action for annulment before the Court of Justice on the ground that a legislative act breaches the principle of subsidiarity**. It gained this right thanks to its tendency to stretch its institutional power.[132] The internal procedure to this end is defined in the CoR's Rules of procedure (Article 59). Accordingly, the President of the CoR or the commission responsible for drawing up the draft opinion may propose bringing an action or an application to intervene. A majority of the votes cast may confirm this decision. Where this is the case, the President of the CoR shall bring the action before the Court of Justice. If the plenary cannot come to an agreement within the established deadline of two

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[127] For more information on the nine conferences organised to date: https://portal.cor.europa.eu/subsidiarity/Activities/Pages/SubsidiarityConferenceAssises.aspx.
It also used to organise Thematic Subsidiarity Workshops, but these have been discontinued since 2014. https://portal.cor.europa.eu/subsidiarity/activities/Pages/SubsidiarityWorkshops.aspx.
No Conference was organised during the pandemic (2019-2022).

[128] Committee of the Regions, 9th Subsidiarity Conference – Active Subsidiarity: Creating EU added value together, https://portal.cor.europa.eu/subsidiarity/news/Pages/9th-Subsidiarity-Conference-Rome-22-November-2019.aspx.

[129] Committee of the Regions, Conclusions of the 11th Subsidiarity Conference, p. 2.

[130] Committee of the Regions, Subsidiarity Annual Report 2020, 2021, p. 4.

[131] Committee of the Regions, Network of Regional Hubs, Network of Regional Hubs | European Committee of the Regions.

[132] J. Schönlau, 'Beyond mere 'consultation': Expanding the European Committee of the Regions' role', *Journal of Contemporary European Research*, 2017, pp. 1166-1184 (pp. 1171-1172 on the subsidiarity aspect specifically).

months, the Bureau may decide on the President's or the commission's proposal by a majority of the votes cast. Thereafter, the President shall bring the action before the Court of Justice, but the plenary will have to confirm it on the occasion of its next session.

The CoR considered using this power in 2012 for the first time regarding the Monti II proposal, which triggered the first yellow card ever, except that it did so after the Commission had already withdrawn its proposal.[133] In 2018, it threatened to use this prerogative if the regulation amending the rules governing EU regional funds for the period 2014-2020 were agreed upon as proposed by the Commission, as it considered that a subsidiarity breach existed.[134] Moreover, it updated its 'Practical guide on monitoring compliance with the subsidiarity principle and contesting its infringements' in October 2024.

The reasons for which the CoR is yet to use its possibility to bring a case before the Court of Justice are certainly identical to those of the national parliaments, but there is also the fact that '**it considers itself as a political body** – not a legal one – whose main interest is being part of the political negotiations with the EU'.[135] Furthermore, this is likely related to the fact that 'the Committee feels that it is important to avoid reaching this stage, which would come down to acknowledging failure of the law-making process, and instead to strengthen cooperation with the other EU institutions to achieve the best possible legislation'.[136]Because of this, **the CoR actually demanded that it, too, be involved in the EWS alongside national parliaments**, as opposed to only being able to bring a case before the Court of Justice ex-post.[137]

3.2.3. Balance of the participation of local and regional entities since 2009

Considering that, as recalled in the introduction to this study, the German *Länder* had been instrumental in the introduction of the principle of subsidiarity within the EU prior to the Treaty on European Union and, most importantly, considering the essence of that principle itself, it is unsurprising that the local and regional dimensions have become so salient in recent years. It is also the case that local and regional entities by and large lack the possibility open to lower national parliamentary chambers to make their voice heard via the national representative sitting in the Council. This is why these entities may seek to directly engage with the EU institutions, and especially the Commission.

However, **the keen interest in subsidiarity shown by regional parliaments with legislative powers when the Lisbon Treaty first entered into force has faded over time**, or at least in some Member States. In contrast to this, **the local and regional levels of governance, and especially regional parliaments with legislative powers, have been subject to an extraordinary amount of attention in the discussions that have taken place at the EU level** over the past years. For instance, the Task Force on subsidiarity, proportionality and 'doing less more efficiently' mentions local and regional entities, as well as those regional parliaments on numerous occasions in its concluding report. It devotes great

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[133] S. F. Nicolosi and L. Mustert, 'The European Committee of the regions as a watchdog of the principle of subsidiarity', *Maastricht Journal of European and Comparative Law*, 2020, pp. 284-301, p. 296 and S. Pazos Vidal, *Subsidiarity and EU multilevel governance. Actors, Networks and Agenda*, Routledge, 2019, p. 196.

[134] Committee of the Regions, Resolution of 1 February 2018 on changing the ESI funds Common Provisions Regulation to support structural reforms, RESOL-VI/29.

[135] Interview with Dr. Gsodam, Head of Cabinet of the Secretary-General of the CoR and formerly expert in the Task Force as reported by S.F. Nicolosi and L. Mustert in S. F. Nicolosi and L. Mustert, 'The European Committee of the regions as a watchdog of the principle of subsidiarity', *Maastricht Journal of European and Comparative Law*, 2020, pp. 284-301, p. 297.

[136] Committee of the Regions, Subsidiarity Annual Report 2011, 2012, p. 2.

[137] Contribution on 'procedures and subsidiarity' by Apostolos Tzitzikostas, President of the European Committee of the Regions, to the Working Group on European Democracy of the Conference on the Future of Europe, 2022, p. 5.

attention to these entities in its 'Active subsidiarity scheme' and insists for example on the necessity for them to be consulted by their national parliaments.[138] The Task Force's Recommendation no. 4 is also specifically devoted to the 'Better involvement of national, regional and local authorities in policymaking'.[139]

For many years, the direct interaction between the Commission and regional parliaments with legislative powers remained vague, as it was not mentioned on the Commission's website dedicated to relations with national parliaments – where the reasoned opinions and the contributions submitted by those national institutions are included. However, as a response to the recommendations adopted by the Task Force, the Commission committed to give more visibility to the feedback it directly receives from regional parliaments,[140] allowing for more information to be included in its annual reports on its relations with national parliaments.[141] An additional change introduced in response to the reflection conducted by the Task Force has been the Commission's reinforced commitment to engage more actively with local and regional entities, in particular regional parliaments, especially during the consultation phase.[142]

This **evolution towards more transparency regarding the interaction between the Commission and regional parliaments** is welcome because it sheds light on a dialogue that could have otherwise easily gone unnoticed and contributes to more transparency. However, this direct interaction between the Commission and regional parliaments may only develop with caution, so as not to 'affect[…] the primary role of national Parliaments in the operation of the subsidiarity control mechanism'.[143] In addition to this, this direct interaction can be considered to be positive, as it is a channel for regional parliaments to raise their concerns, it contributes to improving the quality and the legitimacy of the Union's action, and it constitutes an incentive for regional parliaments to engage with European matters. However, considering how numerous they are (71), a **danger exists for the Commission to receive too much input directly from the regional parliaments** (in particular if their input includes both reasoned opinions and contributions). Furthermore, this direct interaction should not be used to bypass the national level and to compensate shortcomings inherent to the mechanisms devised for the participation of regional parliaments at the national level. This would be contrary to the procedure foreseen in the framework of the EWS, and it could unduly disturb interinstitutional balances established at the national level. Hence why the Commission (rightfully) 'encourage(s) national Parliaments to consult regional Parliaments and to cooperate on EU matters'.[144]

3.3. The judicial review performed by the Court of Justice and its evolution

Since its introduction as a general principle, **the principle of subsidiarity has not been subject to intense judicial review** and the CJEU's approach was found to be 'lenient, generous, prudent,

[138] Report of the Task Force on Subsidiarity, Proportionality and 'Doing Less More Efficiently', 2018, pp. 8-9 and 13, respectively.

[139] Report of the Task Force on Subsidiarity, Proportionality and 'Doing Less More Efficiently', 2018, p. 14f.

[140] European Commission, Communication on 'The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymarking', COM(2018) 703 final, p. 8.

[141] For instance, this was the case in 2020. European Commission, Annual Report 2020 on the application of the principles of subsidiarity and proportionality and relations with national parliaments, July 2021.

[142] European Commission, Communication on 'The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking', COM(2018) 703 final, p. 9.

[143] As underlined by the European Commission itself, which came to this conclusion in its reaction to the report adopted by the Task Force. European Commission, Communication on 'The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking', COM(2018) 703 final, p. 8.

[144] European Commission, Communication on 'The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking', COM(2018) 703 final, p. 8.

restrained, deferential'.[145] **Only very few cases have dealt with that principle so far, and no breach has ever been found by the Court of Justice**.[146] As noted above, the definition of the subsidiarity principle remained blurred for a long time and although the subsidiarity grid clearly contributes to a common definition, it remains that this principle is political in nature,[147] and thus bound to be difficult for the Court of Justice to adjudicate. [148] The burden of proof does not necessarily always lie with the applicant,[149] contrary to what is the case with the principle of proportionality (see sub-section 4.5. below).

Although national parliaments' capacity to ask their government to launch a case on the ground of a subsidiarity breach was explicitly recognised in the Lisbon Treaty,[150] so far only the French National Assembly has made use of this prerogative.[151] **This reinforces the hypothesis mentioned earlier that there may well not have been any case of subsidiarity breach at all** before this year that would have demanded from parliaments that they launch a case. However, the fact that the Court of Justice has never found any subsidiarity breach to date, and that it has refrained from conducting an in-depth control, may also have been a deterring factor for parliaments.

The first important case when examining the judicial control of the principle of subsidiarity is the *Vodafone* case.[152] It marks a turn in the CJEU's interpretation as it is the first case in which the Court

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145 P. Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality*, Routledge, 2012, p. 75.

146 See further on the case law : K. Granat, *The Principle of Subsidiarity and its Enforcement in the EU Legal Order. The Role of National Parliaments in the Early Warning System* , Hart, 2018, p. 30f and M. Huysmans, T. van den Brink and P. van Gruisen, 'Subsidiarity Ex Ante and Ex Post: From the Early Warning System to the Court of Justice of the European Union', *Journal of Common Market Studies*, 2024, pp. 744-759. A search on the Court's website reveals that the principle of subsidiarity has only ever been considered in 28 cases since the entry into force of the Lisbon Treaty.

147 This was recalled by the Juncker Commission in the Communication adopted following up on the recommendation of the Task Force in which it noted that '[t]he check on compliance with the principle [of subsidiarity] is essentially a political question entrusted to the EU's political institutions and the national Parliaments'. European Commission, Communication on 'The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking', COM(2018) 703 final, p. 2. As mentioned, some also advocate the further definition of the principle even after the grid has been adopted.

148 The Committee of the Regions very clearly states: 'Although the subsidiarity principle has been part of the Union's institutional life for over 15 years, Court of Justice case-law on this subject is quite small. It is unusual for the legality or validity of a Community legislative act to be brought before the Court for failure to comply with the subsidiarity principle, and to date the Court has never had occasion to annul a legislative act on these grounds. This state of affairs is largely due to self-discipline on the part of the legislator, as well as to the fact that this principle does not really lend itself to judicial supervision'. Committee of the Regions, Subsidiarity in the EU legislative process, https://portal.cor.europa.eu/subsidiarity/whatis/Pages/SubsidiarityintheEUlegislativeprocess.aspx.
Parliament also demands that the definition of the principle of subsidiarity be further refined. European Parliament, Resolution of 17 January 2024 on the implementation of the Treaty provisions on national parliaments (2023/2084(INI)) point 14.

149 See further on this: J. Öberg, Subsidiarity as a limit to the exercise of EU competences, Yearbook of European Law, 2016, pp. 391-420, Judgement of the Court of First Instance (Seventh Chamber) of 23 September 2009, *Republic of Estonia v Commission of the European Communities*, Case T-263/07, EU:T:2009:351, par. 51-52, and Judgment of the General Court (Second Chamber) of 3 April 2017, *Federal Republic of Germany v European Commission*, Case T-28/16, EU:T:2017:242, par. 112.

150 The way in which this possibility had been articulated at the national level varies across Member States. For example, in Spain, the government may decide to abide by Parliament's request, whilst in Germany this right has been guaranteed to the parliamentary minority. D. Fromage, *Les Parlements dans l'Union Européenne après le Traité de Lisbonne. La Participation des Parlements allemands, britanniques, espagnols, français et italiens*, L'Harmattan, 2015.

151 This possibility was envisaged by the German Bundestag on three occasions, but all of these requests were rejected by the plenary. COSAC, 37th bi-annual report, 2022, p.6 and Case C-553/24 *Assemblée nationale de la République française v European Parliament and Council of the European Union*.

152 Judgment of the Court (Grand Chamber) of 8 June 2010, The Queen, on the application of *Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform*, C-58/08, EU:C:2010:321 (*Vodafone* judgement).

considered the impact assessment in its evaluation of the respect of the principle of proportionality.[153] This trend was later followed in the *Luxembourg airports* case.[154] Although this inclusion by the Court of impact assessments as a parameter of review should be assessed positively, it is still problematic in so far as the impact assessment is not translated in all official languages. Therefore, it is not possible to assume that MPs have access to all the necessary information for assessing the compliance of a specific legislative proposal with the principle of subsidiarity. Furthermore, MPs only have eight weeks to conduct their subsidiarity check, and impact assessments are often lengthy documents; it can thus not be expected that they will have the time and the resources necessary to examine the detail of the impact assessment. Against this background, it is welcome that the Commission has committed to include detailed justifications in the explanatory memoranda.

The *Vodafone* case is also significant because it is on that occasion that Advocate General Maduro devised his cross-border test, after examining the compliance of the principle of subsidiarity in much depth (as opposed to limiting himself to considering the intent of the Commission, for example). However, this test was not adopted by the Court. The cross-border dimension is, though, one of the elements included in the subsidiarity grid. According to Advocate General Maduro,[155] '[i]t is the cross-border nature of the economic activity itself that renders the Community legislator potentially more apt than national authorities to regulate it'. National regulatory authorities may not have given as much importance to the Community-wide issue as the Community legislator did. As such, the existence of a cross-border element may be an indicator in favour of the respect of the principle of subsidiarity of a given EU action.

Advocate General Poiares Maduro was also called upon to assess the respect of the principle of proportionality. In this regard, he recalled that: 'As the jurisprudence of this Court has made clear on many occasions, in assessing the proportionality of decisions made by the legislature, the Court is required to accord a margin of discretion to the legislature. Accordingly, in principle and in these domains, 'judicial review of the exercise of [the legislature's] powers must be limited to examining whether it has been vitiated by a manifest error of assessment or a misuse of powers or whether the legislature has manifestly exceeded the limits of its discretion.''[156] This deferential approach was followed by the Court, which stated that 'the Court has accepted that in the exercise of the powers conferred on it the Community legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. Thus the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue'.[157] The Court went on to consider that the legislature must base itself on objective criteria, which it then examined.

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153 K. Granat, *The Principle of Subsidiarity and its Enforcement in the EU Legal Order. The Role of National Parliaments in the Early Warning System* , Hart, 2018, p. 34. The justification contained in the impact assessment was considered by the Court implicitly in Judgment of the Court (Second Chamber) of 18 June 2015, *Republic of Estonia v European Parliament and Council of the European Union*, Case C-508/13, EU:C:2015:403, (hereinafter: *Estonia v European Parliament and Council*) par. 51 and explicitly in Judgment of the Court (Second Chamber) of 4 May 2016, *Republic of Poland v European Parliament and Council of the European Union*, C-358/14, EU:C:2016:323 (hereinafter *Poland v EP & Council* judgement), par. 123.

154 Judgement of the Court (Third Chamber) of 12 May 2011, *Luxembourg v Parliament and Council*, C-176/09, EU:C:2011:290 (Luxembourg airports), par. 65.

155 Opinion of Advocate General Poiares Maduro, 1 October 2009, par. 33f.

156 Opinion of Advocate General Poiares Maduro, 1 October 2009, par. 38 referring to C-127/95 Norbrook Laboratories [1998] ECR 1531, par. 89-90.

157 *Vodafone* judgment, par. 52.

Post-Lisbon, the principle of subsidiarity and the principle of proportionality have been subject to closer judicial review than had previously been the case. (the judicial review of the principle of proportionality is examined in more depth in sub-section 4.5. below). Five cases in particular have shed light on the interpretation of the principle of subsidiarity. These cases are: the *Estonia v Parliament and Council* case, the *Philip Morris* case, the *Pillox 38* case, the *Poland v Parliament and Council* case, and the *Swedish Match* case.[158] The *Philip Morris* case is especially relevant for several reasons. First, contrary to the *Vodafone* case, it was judged on the basis of the legal framework existing since the entry into force of the Lisbon Treaty. Second, the Court of Justice detailed further the conditions under which the obligation to state reasons contained in Article 5 of Protocol No 2 is respected: departing from its previous general assumption, the Court of Justice went on to consider that 'it should be borne in mind that, according to the Court's case-law, observance of the obligation to state reasons must be evaluated not only by reference to the wording of the contested act, but *also by reference to its context and the circumstances of the individual case*'.[159] It is on that basis that it found that 'it is undisputed that the European Commission's proposal for a directive and its impact assessment include sufficient information showing clearly and unequivocally the advantages of taking action at EU level rather than at Member State level.'[160]

It is worth noting in this regard that even if the Court of Justice has not found any violation of the principle of subsidiarity by the EU legislature on the ground of the lack of a correct justification, the Advocate General Kokott has now repeatedly warned it against the use of empty formulas.[161] Her subsidiarity analysis in the *Republic of Poland v European Parliament and Council of the European Union* case was more detailed than previous analyses.[162] She devised a detailed subsidiarity test whereby she makes a distinction between 'the substantive compatibility of EU measures with the principle of subsidiarity', and the 'statement of reasons in the light of the principle of subsidiarity.'[163] She additionally stressed the political character of the subsidiarity assessment, and the limited scope for judicial review that derives from it; in doing so, she also emphasises the importance of the EWS.[164] This statement should not be overestimated though, as she also found that a certain number of reasoned opinions are no proof of a subsidiarity breach because 'such objections are based less on a legal assessment than on a political assessment of the draft legislation submitted by the European Commission, with the result that they are less meaningful for the purposes of the judicial review'.[165] She found that 'hardly any of the reasoned opinions actually contained any substantive statements

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158 *Estonia v European Parliament and Council* judgment, Judgment of the Court (Second Chamber) of 4 May 2016, *Philip Morris Brands SARL and Others v Secretary of State for Health*, C-547/14, EU:C:2016:325 (hereinafter *Philip Morris* judgement), Judgment of the Court (Second Chamber) of 4 May 2016, *Pillbox 38 (UK) Limited, trading as Totally Wicked v Secretary of State for* Health, C-477/14. EU:C:2016:324 (hereinafter *Pillbox 38* judgement), *Poland v EP & Council* judgement, and Judgment of the Court (First Chamber) of 22 November 2018, *Swedish Match AB v Secretary of State for Health*, C-151/17, EU:C:2018:938 (hereinafter *Swedish Match* case). See generally on this issue: C. Panara, 'Subsidiarity v. Autonomy in the EU', *European Public Law*, 2022, pp. 269-296.

159 *Philip Morris* judgement, par. 225, emphasis added.

160 *Philip Morris* judgement, par. 226.

161 *Inter alia* Opinion of Advocate General Kokott in *Poland v EP & Council* case, EU:C:2015:848, par. 188.

162 Further on this : K. Granat, 'Cases C-547/14 Philip Morris, C-477/14 Pillbox 38 and C-358/14 Poland v EP & Council – Subsidiarity Scrutiny: Comments on the Opinion of Advocate General Kokott, *DELI Blog*, 16 February 2016, https://delilawblog.wordpress.com/2016/02/16/katarzyna-granat-cases-c-54714-philip-morris-c-47714-pillbox-38-and-c-35814-poland-v-ep-council-subsidiarity-scrutiny-comments-on-the-opinion-of-advocate-general-kokott/.

163 Opinion of Advocate General Kokott of 23 December 2015 in *Poland v EP & Council* case, EU:C:2015:848, par. 140f.

164 Opinion of Advocate General Kokott of 23 December 2015 in *Poland v EP & Council* case, EU:C:2015:848, par. 146.

165 Opinion of Advocate General Kokott of 23 December 2015 in *Pillbox 38* case, EU:C:2015:854, par. 161.

regarding the point at issue here'.[166] As underlined by K. Granat,[167] the Advocate General seems to imply that the fact that no yellow card was triggered points to an absence of subsidiarity breach.[168] Yet, as explained above, there could be numerous reasons why national parliaments would not succeed in triggering a yellow card on time, or why they may not be willing to trigger one despite there being a breach. On the contrary, they could trigger a yellow card for reasons unrelated to subsidiarity and have in fact already done so in the past on the occasion of the third yellow card on posted workers.

The cases that concern the principle of subsidiarity are also illustrative because they highlight once again how subsidiarity and proportionality may be difficult to disentangle. For example, when the Court argues in the case *Swedish Match* that 'it must be recalled that the authors of the Treaty intended to confer on the EU legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features. It was thus open to the EU legislature, in the exercise of that discretion, to proceed towards harmonisation only in stages and to require only the gradual abolition of unilateral measures adopted by the Member State',[169] it seems to be rather referring to proportionality (that is: the intensity of the Union's action) than to subsidiarity stricto sensu.[170]

The four cases in which the Court of Justice was led to evaluate the respect of the principle of subsidiarity are peculiar in that all four of them included the objective to improve the functioning of the internal market on the basis of Article 114 TFEU while also guaranteeing high standards of health protection. Even if the EU does not have any exclusive competence in this domain, its action is arguably required in most cases to ensure the proper functioning of the internal market because of the intrinsic EU-wide nature of the actions needed. It is interesting to note how the Court of Justice – rightfully – shows how the only way to both improve the functioning of the internal market while ensuring a high level of health protection is by means of an EU action,[171] even if the second objective (i.e. health protection) could arguably be better guaranteed at national level. In those cases, the Court of Justice also examines the quality of the subsidiarity justification and even if it refrains from examining the detailed content of such justification, it does find the reasons contained for instance in the proposal and in its impact assessment as well as the context and the circumstances of the individual case[172] to be sufficient.

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166 Opinion of Advocate General Kokott of 23 December 2015 in *Pillbox 38* case, EU:C:2015:854, par. 161.

167 K. Granat, 'Cases C-547/14 Philip Morris, C-477/14 Pillbox 38 and C-358/14 Poland v EP & Council – Subsidiarity Scrutiny: Comments on the Opinion of Advocate General Kokott, *DELI Blog*, 16 February 2016, https://delilawblog.wordpress.com/2016/02/16/katarzyna-granat-cases-c-54714-philip-morris-c-47714-pillbox-38-and-c-35814-poland-v-ep-council-subsidiarity-scrutiny-comments-on-the-opinion-of-advocate-general-kokott/.

168 The Advocate General indeed notes 'there is a suggestion in the order for reference that the principle of subsidiarity might be infringed because a number of national parliaments filed reasoned opinions in accordance with Article 6 of the Protocol on the application of the principles of subsidiarity and proportionality during the legislative procedure. […] This argument is not very convincing. There was an insufficient number of objections regarding subsidiarity in those opinions to trigger the 'yellow card' procedure under Article 7(2) of Protocol No 2. Opinion of Advocate General Kokott of 23 December 2015 in *Pillbox 38* case, EU:C:2015:854, par. 160-161. It is interesting to recall however that when the EWS was first introduced, the question of the relationship between the launch of an action for annulment and the necessity that a reasoned opinion or a yellow had first been raised was indeed debated. P. Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality*, Routledge, 2012, p. 43.

169 Case *Swedish Match*, par. 71.

170 C. Panara had already noted that a proportionality reasoning arises on occasion in cases concerned with subsidiarity. C. Panara, 'Subsidiarity v. Autonomy in the EU', *European Public Law*, 2022, pp. 269-296, p. 285f.

171 For instance: *Poland v EP & Council* judgement, par. 117f.

172 *Poland v EP & Council* judgement, par. 123.

The action brought on 14 August 2024 by the French National Assembly against the European Parliament and the Council of the European Union is still pending at the time of concluding this report,[173] hence any assessment is necessarily preliminary. This procedure was launched by a parliamentary minority in accordance with the right attributed to a group of a minimum of 60 deputies or 60 senators to request from the French government that it launches an action for annulment. That is: a parliamentary minority may launch this procedure as the French National Assembly counts 577 MPs while the Senate counts 348 senators. As per Art. 88(6) of the French Constitution, the government has no choice but to bring an action for annulment before the Court of Justice (contrary to the rule in place in other Member States, such as Spain, where the government remains free to accede to its parliament's request (or not)).[174]

The MPs who exercised their possibility to request the government to launch an action for annulment on the ground of a breach of subsidiarity consider that Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management exceeds the competences of the institutions of the Union while being in breach of the principle of subsidiarity as guaranteed by Articles 4 and 5 TEU.

The measures contained in said Regulation involve relocating third-country nationals or stateless persons seeking international protection within the EU. The applicant argues that these measures foreseen in Article 56(2), Article 63(5), and Articles 67 and 68 of the Regulation disregard Member States' sovereignty, national identity, the integrity of their constitutional structures, and their security by compelling Member States to accept third-country nationals subject to relocation between Member States. In the applicant's view, Article 72 TFEU contains a '"national security reservation" which constitutes an essential component of the principle of subsidiarity. Any infringement of that clause therefore constitutes a breach of that principle'. Article 72 TFEU reads as follows: 'This Title [on the Area of Freedom, Security and Justice] shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'. The link between Article 72 TFEU and the principle of subsidiarity is, however, unclear, considering that the principle of subsidiarity consists in assessing whether a specific goal cannot be sufficiently achieved at the national level while being better achieved at the EU level as examined previously.

Moreover, the applicant argues that due to the relocation scheme, Member States would no longer be able to ensure their essential State functions as defined in Article 4 TEU, particularly their duty to maintain law and order and safeguard national security. Consequently, they would likely no longer be able to rely on the 'national security clause' contained in Article 72 TFEU. In this respect as well, the link with the principle of subsidiarity is not obvious. This is problematic because the Treaties only guarantee national parliaments' right to bring an action for annulment on the ground of a subsidiarity breach. Hence, issues of admissibility could potentially arise.

From a legal standpoint, the argument of an excess of competence in conjunction with a breach of subsidiarity could in principle be raised since subsidiarity is automatically breached if the Union lacks competence to act. On the other hand, the subsidiarity justification contained in the original proposal by the Commission does comply with the requirements contained in Article 5 Protocol no. 2 such that, while justification had been an issue in the past, it does not seem to be an issue here. In any event, only

[173] Case C-553/24 *Assemblée nationale de la République française v European Parliament and Council of the European Union*. The analysis presented here builds upon D. Fromage, Op-Ed: 'Is Subsidiarity (Unexpectedly) alive and kicking, and should it be?', *EU Law Live*, 21 November 2024.

[174] The French Assemblée Nationale had not adopted any reasoned opinion in the framework of the EWS, and neither had the French Sénat.

a decision by the Court will allow for a substantive appraisal of the respect of the principle of subsidiarity.

Two other cases on subsidiarity-related issues are pending before the Court and could give it the opportunity to decide on substance and to further refine its understanding of the principle of subsidiarity. The first case[175] concerns the application of the Commission's Notice on cooperation within the Network of Competition Authorities. The applicant, the Crown Holdings, Inc., Crown Cork & Seal Deutschland Holdings GmbH, appealed a decision by the General Court, which regarded the question whether the Commission had acted in breach of the Commission Notice on cooperation within the Network of Competition Authorities (ECN Notice) in so far as the case at hand was relocated after the two months commonly provided for by par. 18 ECN Notice. As regards subsidiarity specifically, the appellant contends that the General Court erred in law in considering that there was no subsidiarity breach in cases in which the Commission decides to depart from the ECN Notice simply because the system set-up by Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now: Art. 101 and 102 TFEU) is itself compliant with subsidiarity. It will have to be seen how the Court rules on this matter. However, the EU has exercised its competence (in the respect of the principle of subsidiarity). Hence, if anything, the exercise of the discretion conferred upon the Commission under the Treaties and under Regulation 1/2003 should be assessed.

The second case relates to the regulation of media services.[176] Hungary seeks the annulment of Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market (or of parts thereof) as it considers that the legal basis chosen (Art. 114 TFEU) is inappropriate, that the regulation is contrary to Article 4(1) and (2) TEU and, in conjunction therewith, to Article 5 TEU and the principles of subsidiarity and proportionality, and that the principles of legal certainty and legislative clarity have been breached. As regards proportionality and subsidiarity in particular, the applicant contends that '[t] he regulation legislates on matters which may be regulated and which are even already adequately regulated at central, regional or local level in the Member States, so that those matters cannot be given effect to at EU level by reason of the scale or effects of the proposed action.' As such, it could appear that the outcome of the first prong of the subsidiarity test (insufficiency test) is negative, and therefore that the principle of subsidiarity is breached. However, it is settled case law that it is not sufficient for one Member State to have the capacity to reach the goal set for the principle of subsidiarity to be breached.[177] One would hence have to check whether it is indeed generally the case that measures adopted at the national level may achieve the objective defined or whether, on the contrary, only one or a few Member States are in a position to do so. To this end, the subsidiarity justification provided by the Commission should be analysed.

The applicant also contends that the principle of proportionality is breached, but the information available fails to convey why that is the case. Next to the claim that specific provisions are not in line with the principle of proportionality, it is stated that 'unlike the legal form of a directive, the legal form of a regulation removes the possibility of regulation by the Member States and only allows the adoption

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[175] Case C-855/24 P: Appeal brought on 11 December 2024 by Crown Holdings, Inc. and Crown Cork & Seal Deutschland Holdings GmbH against the judgment of the General Court (Second Chamber, Extended Composition) delivered on 2 October 2024 in Case T-587/22, Crown Holdings et Crown Cork & Seal Deutschland v Commission, OJ C, C/2025/711, 10.2.2025.

[176] Case C-486/24: Action brought on 10 July 2024 – *Hungary v European Parliament and Council of the European Union*, OJ C, C/2024/5616, 30.9.2024.

[177] *Estonia v European Parliament and Council* par. 52-54. The same applies to the principle of proportionality. Judgment of the Court (Sixth Chamber) of 13 March 2019, Republic of Poland v European Parliament and Council of the European Union, Case C-128/17, EU:C:2019:194, par. 106.

of more stringent rules, thereby breaching the principles of subsidiarity and proportionality'. Nevertheless, the principle of proportionality implies that the EU action should be the least intensive possible, not that the adoption of regulations is not permitted. In other words, if achieving the defined objective requires that a regulation be adopted (and the legal basis so allows), a regulation may and should be adopted.

At any rate, it will have to be observed whether the Court of Justice confirms these preliminary assessments made based on the information publicly available at the time of completing this Study.

3.4. The Council and the principle of subsidiarity in recent years

As an EU institution, the Council is bound to respect the principle of subsidiarity (Art. 5(3) TEU). It monitors for instance how the Conclusions of the Council and of the European Council that affect subsidiarity and proportionality are implemented. The General Secretariat of the Council also distributes the reasoned opinions and the contributions adopted by national parliaments on Commission proposals to the Member States.[178]

[178] European Commission, Annual report 2021 on the application of the principles of subsidiarity and proportionality and on relations with national parliaments, COM(2022) 366 final, pp. 4–5.

4. THE EU INSTITUTIONS AND THE PRINCIPLE OF PROPORTIONALITY

As mentioned in previous sections, the principle of subsidiarity and the principle of proportionality, though different, are closely related and often intertwined. Even though the principle of proportionality had been protected for a longer period by the Court of Justice, they were introduced together in Article 3b of the Treaty of Maastricht, and they became the subject of the same protocol of the Treaty of Amsterdam. Though now separated from each other, they are both contained in Article 5 TEU. Both principles are addressed together in Protocol no. 2, they are often examined together by national parliaments, they are considered together in the Commission's annual reports, they are now both contained in the subsidiarity grid, and they have often been considered together by the Court of Justice.[179] As a consequence, some of the elements analysed here have already been addressed as part of the preceding sections on subsidiarity, to which reference is made as well. Additionally, since only subsidiarity concerns may be raised in the framework of the EWS, more attention has generally been devoted to subsidiarity than to proportionality. Also, proportionality-related arguments contained in reasoned opinions and contributions have yet to be analysed in depth either in the doctrine or by Commission and Parliament.

This section starts with a brief analysis of the relationship between Commission, Parliament, CoR and Council on the one hand, and proportionality on the other (4.1.-4.4.). It then builds up on the analysis of the judicial review of the principle of subsidiarity to focus especially on the case law of the Court regarding proportionality (4.5.).

4.1. The Commission and the principle of proportionality

The Commission commonly examines subsidiarity and proportionality together.[180] As mentioned in section 1, it is under the obligation to justify its legislative proposals both in terms of subsidiarity and in terms of proportionality (Article 5 Protocol no. 2). The introduction of the subsidiarity grid, which considers both principles, certainly has led to improvements in this regard. However, **further improvements still appear to be necessary** as Parliament has emphasized the need for better justification as has also the Regulatory Scrutiny Board. For example, in 2023, proportionality was again pointed out as one of the weakest aspects in the Board's quality assessment of impact assessments.[181] Even if assessing proportionality in totally new initiatives may prove challenging, **the Commission should continue to try to improve its justification**.

Moreover, the Commission examines proportionality (and subsidiarity) when it conducts evaluations and fitness checks.

4.2. Parliament and the principle of proportionality

As noted, Parliament has underlined the need for the Commission to sufficiently substantiate its legislative proposals both in terms of subsidiarity and in terms of proportionality.[182] It has also examined

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[179] For example, in Judgment of the Court of 12 November 1996, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, Case C-84/94, EU:C:1996:431, par. 57 (hereinafter: Case *Working time directive*). par. 50f, *Vodafone* judgment.

[180] This becomes visible from its annual reports on relations with national parliaments for example.

[181] Annual Report 2023, May 2024, p. 19.

[182] For instance, European Parliament, Resolution of 24 June 2021 on European Union regulatory fitness and subsidiarity and proportionality – report on Better Law Making covering the years 2017, 2018 and 2019 (2020/2262(INI)), point 21.

the report issued by the Regulatory Scrutiny Board (see sub-sections 3.1.3. and 4.1.),[183] and advocated for its reinforcement.

When it organized an Interparliamentary Committee Meeting on 'The EU's subsidiarity mechanism' in 2022, proportionality was also debated.[184] However, generally, proportionality is not devoted much attention by Parliament: its annual reports on relations with national parliaments do not contemplate this principle and focus instead – as is logical – on subsidiarity and the EWS.[185]

4.3. The Council and the principle of proportionality

Similarly to what happens as regards the principle of subsidiarity (see sub-section 3.4.), the Council also monitors the effective implementation of conclusions adopted by Council and the European Council from the perspective of the principle of proportionality.[186]

4.4. The CoR and the principle of proportionality

Like the Council, at present, the CoR largely examines the compliance of the principle of proportionality at the same time as it considers compliance with the principle of subsidiarity.[187] It has also advocated the upgrade of the principle of proportionality to the same legal status as the principle of subsidiarity in the event of a Treaty reform.[188]

4.5. The Court of Justice and the principle of proportionality

The principle of proportionality could be recognized within the European legal order by the Court of Justice thanks to it having stated that constitutional traditions common to the Member States must be protected by it (see sub-section 1.3.). Present in numerous pieces of primary and secondary legislation, the principle of proportionality is commonly subject to judicial review by the Court, as it was already the case prior to the entry into force of the Lisbon Treaty.[189]

The Court generally shows deference towards the Union's legislature:[190] as expressed by B. Pirker, 'In reviewing the exercise of EU competences by EU institutions based on the principle of proportionality, the Court has chosen a very deferent standard of review, in effect finding violations only in cases where it becomes virtually impossible to assess the reasons that led to the conclusion of legislation.'[191] The

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183 Also European Parliament, Resolution of 23 November 2023 on European Union regulatory fitness and subsidiarity and proportionality – report on Better Law-Making covering 2020, 2021 and 2022 (2023/2079(INI)), point 18.

184 European Parliament, Annual Report on the Relations between the European Parliament and EU national parliaments 2022, p. 38.

185 Proportionality may still be considered when Parliament scrutinizes the Commission's reports on subsidiarity and proportionality.

186 For instance, European Commission, Annual report 2023 on the application of the principles of subsidiarity and proportionality and on relations with national parliaments, COM(2024) 493 final, p. 6.

187 For instance, European Commission, Annual report 2023 on the application of the principles of subsidiarity and proportionality and on relations with national parliaments, COM(2024) 493 final, pp. 7-8.

188 European Commission, Annual report 2022 on the application of the principles of subsidiarity and proportionality and on relations with national parliaments, COM(2023) 640 final, p. 6.

189 Given the scope of the present study, the analysis included here only focuses on the cases in which the Court was led to rule on the exercise of their discretion by EU institutions. Cases related to fundamental rights or to penalties are therefore not examined here.

190 This is in line with what Advocate General Maduro had suggested in the Vodafone case (see sub-section 3.3. above). Opinion of Advocate General Poiares Maduro, 1 October 2009.

191 B. Pirker, *Proportionality Analysis and Models of Judicial Review A Theoretical and Comparative Study*, Europa Law Publishing, 2013, p. 250.

Court's approach towards proportionality and towards subsidiarity is similar in this regard. The Court has also stated that it is for the claimant to show that a measure is disproportionate.[192]

It is indeed settled case law that the legislator 'must be allowed a wide discretion in an area [...] which requires it to carry out complex assessments. Judicial review of the exercise of that discretion must therefore be limited to examining whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion'.[193] Also, this discretion extends to the finding of the basic facts.[194] However, the Court has emphasized that '[e]ven where it has broad discretion, the EU legislature must base its choice on objective criteria and examine whether the aims pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators' and it has recalled the duty for draft legislative acts to 'take account of the need for any burden falling upon economic operators to be minimised and commensurate with the objective to be achieved'.[195] EU institutions are expected to base their judgement on the information available at the time, but they must consider 'all the relevant factors and circumstances of the situation' in exercising their discretion.[196]

In applying those criteria, the Court has found on occasions that the principle of proportionality was breached: in this regard, proportionality differs from subsidiarity. This notably happened in the *Spain v Council* case,[197] where the Court found that the Council had not 'actually exercised its discretion, involving the taking into consideration of all the relevant factors and circumstances of the case'[198] Hence, '[d]espite its seeming deference, the 'manifestly inappropriate' standard of review [developed by the Court] possesses some teeth'.[199] It will be interesting to observe whether this applies to the regulation of media services attacked by Hungary, as mentioned in sub-section 3.3.

[192] This is not necessarily the case when subsidiarity is being reviewed.

[193] Case *Working time directive*, par. 58.

[194] Judgment of the Court (Full Court) of 16 February 2022, Republic of Poland v European Parliament and Council of the European Union, Case C-157/21, EU:C:2022:98, par. 354.

[195] Judgment of the Court (Grand Chamber) of 3 December 2019. Czech Republic v European Parliament and Council of the European Union, C-482/17, EU:C:2019:1035, par. 79. (hereinafter: Case *Czech Republic v European Parliament and Council*).

[196] Case *Czech Republic v European Parliament and Council*, par. 80-81.

[197] Judgment of the Court (Second Chamber) of 7 September 2006, *Kingdom of Spain v Council of the European Union*, Case C-310/04, EU:C:2006:521 (hereinafter: Case *Spain v Council*).

[198] Case *Spain v Council*, par. 133.

[199] B. Pirker, *Proportionality Analysis and Models of Judicial Review A Theoretical and Comparative Study*, Europa Law Publishing, 2013, p. 250.

5. IMPROVING THE CONTROL OF THE PRINCIPLE OF SUBSIDIARITY AND RE-SITUATING IT IN THE EU'S MULTILEVEL GOVERNANCE SYSTEM

5.1. Main findings

An analysis of the first 15 years of subsidiarity control by national (and regional) parliaments shows that the **EWS has not been used much**, **nor has it been unduly used to block legislation** as some may have feared when it was first introduced in the Lisbon Treaty. **National parliaments have indeed used it to channel their view that a subsidiarity breach has occurred, and they have resorted to the more open Political Dialogue to participate in EU affairs, and to engage with the Commission (and Parliament)**. Against this background, **the fact that only three yellow cards have been triggered to date may not automatically be viewed as evidence that the EWS has failed; rather the opposite is the case**. **This does not, however, mean that the EWS (or the Political Dialogue) is flawless** and may not or should not be improved. Several initiatives from the various actors involved in these procedures, among which especially the Task Force on subsidiarity, proportionality and 'doing less more efficiency' and the COSAC working group set up in 2022, show that **improvements were dearly necessary and have partially been introduced** with a view to guaranteeing that the EWS and the Political Dialogue remain efficient and attractive, and that national parliaments as well as local and regional entities contribute to ensuring that the EU's multilevel governance works in the best manner possible. Some recommendations as to how this could be achieved are made in Sub-section 5.2. below.

To date, **only one national parliament has used the capacity national parliaments now have to launch an action for annulment before the Court of Justice on the ground of a breach of the principle of subsidiarity**. As noted in this study, several reasons may account for this, among which is the fact that subsidiarity may indeed have been observed, or that this principle is ill-suited for judicial control for it calls for a control of political nature instead. But it remains in any event that using this power just because it has been attributed to national parliaments and to the CoR[200] would be at odds with its purpose, and could send a negative, anti-European signal, in addition to likely reducing the credibility of the institution that would use this power without a truly justified reason for it.

Finally, **the importance attributed to local and regional authorities in the control of subsidiarity has grown significantly over time, but regional participation in the EWS has simultaneously decreased**.

5.2. Recommendations

Improving the mechanisms in place continues to be important at this point in time to ensure that representative democracy within the EU functions adequately, that interest for European matters is kept alive and beyond this, that citizens' concerns and demands do not remain unaddressed.[201]

To this end, reforms could be considered in the three following areas:

1. Regarding the EWS itself:

[200] This possibility has been discussed in the framework of the information mission on the judicialisation of public life launched by the French Senate in 2021. https://www.senat.fr/commission/missions/2021_judiciarisation_de_la_vie_publique.html.

[201] As most recently expressed in the framework of the Conference on the Future of Europe. One of the four European Citizens' Panel focuses on 'European democracy/Values and rights, rule of law, security' and has considered the issue of European democracy in its debates.

- The **existing thresholds should continue to be applied in a flexible manner**, for instance by means of aggregated answers by the Commission where at least 4 reasoned opinions representing at least 7 votes have been approved. Moreover, the **established eight-week deadline should be applied in the most flexible manner possible**, even though **an extension to a twelve-week period would likely not make a significant difference** if parliamentary scrutiny has not started before a given proposal is published. For this reason, it is strongly advisable that national parliaments start coordinating their priorities again based on the Commission's Annual Work Programme. This should also provide an opportunity for national parliaments and the Commission to debate, either in the context of COSAC or better yet, the Commission could invite parliament representatives for a yearly dialogue in Brussels.[202]
- In the same vein, considering that the limited number of yellow cards does not appear to be predominantly caused by too high thresholds, **lowering the number of reasoned opinions necessary to trigger a yellow card would be unlikely to make a significant difference**. The risks that the EWS be abused for reasons unrelated to subsidiarity should also be avoided.
- In any event, it is desirable that the Commission **provide detailed and individual answers to all the reasoned opinions it receives**, and that it, along with the EU legislator, **continues to outline the impact of reasoned opinions (and contributions) on a given legislative proposal.**
- **Efforts made by Parliament to assess the impact of its amendments in terms of subsidiarity should be continued**, and **the Council should introduce a similar practice**.

2. As to the **measures designed to encourage parliaments to play a more active role within the EU**, this objective could be reached by:

- Attributing a **more positive and proactive role** to them by, for instance, **creating a green card** that would operate with thresholds that are both reachable and not so low as to trigger very numerous green cards. In any case, the Commission **should consider all the input** it receives as potential ideas to take on board its policy agenda, regardless of the number of chambers supporting it and should acknowledge how the input received impacts policies designed or reformed;
- Making sure that they **always provide an English translation of the contributions** they submit in the framework of the Political Dialogue;
- **Using IPEX as the sole platform of interparliamentary exchange** and improving the Platform even further by, for instance, setting up automatic notifications also for regional parliaments where a certain number of parliaments/chambers (for instance: 4) indicate that they are scrutinizing a specific proposal and by improving the alert system in general;
- **Encouraging parliaments to participate at an earlier stage**, more specifically, when consultations take place;
- **Supporting their participation in the 'Fit for future' initiatives** of the Commission as they are the best placed to identify the existing shortcomings and resulting needs;
- **Recognising their specific importance as (national) organs of democratic representation** and thus attributing an enhanced status to them in the revised Interinstitutional Agreement on Better Law-Making.

[202] This initiative could be merged with the idea of a subsidiarity conference supported by 18 parliaments/chambers. COSAC, 38th bi-annual report, p. 24.

3. An **enhancement of the participation of local and regional authorities** could be achieved by,

- **Improving the links between the IPEX and the REGPEX Platforms**;
- Beyond this, **creating a single 'subsidiarity hub'** based on IPEX where reasoned opinions as well as contributions, CoR opinions, answers by the Commission, resolutions of Parliament etc. would be collected.[203] In this way, a true dialogue among local, regional, national and European authorities would be fostered as opposed to the current situation where exchanges stop after a single interaction (e.g. following a reasoned opinion or contribution and answer) in most cases.

Beyond the possible solutions to currently existing shortcomings, **it is necessary for institutions at all levels of governance within the EU, as well as citizens, to engage in a broader reflection on the relationship between, on the one hand, the EU and, on the other, national institutions, including local and regional entities and national parliaments.**

The current standing of national parliaments within the EU is illustrated by ambiguity. The EU has progressively departed from its original stance which had been characterised by 'institutional blindness' that is the EU had largely left it to the Member States (governments) to decide if and how to involve national parliaments, as well as regional parliaments and local and regional authorities. With time, national parliaments (and national institutions) saw their existence and their importance within the EU recognized, but the instruments they were attributed directly in the EU Treaties to 'contribute actively to the good functioning of the EU' of which the EWS is the most important are not truly suitable for that purpose. This is so for a variety of reasons. For example, the control of subsidiarity is too restrictive as it only covers legislative acts whereas the number of non-legislative acts adopted keeps increasing.[204] The recognition of the importance of national parliaments in pieces of secondary legislation is also scarce as noted in the introduction and this should and could be improved in the respect of Member States' constitutional identities.

[203] COSAC Working Group on the role of the national parliaments within the EU supported the fact that all information on subsidiarity be made available on the IPEX platform including information from the European institutions. Conclusions of the working group of the conference of parliamentary bodies specialised in European Union affairs, June 2022, p. 14. This proposal was supported by 17 parliaments/chambers while 18 had not approved any official position on this matter. COSAC, 38th bi-annual report, p. 24.

[204] COSAC Working Group on the role of the national parliaments within the EU, Minutes of the meeting of 8 February 2022, p. 2.

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ANNEX

Reasoned opinions (RO) and Contributions (C) submitted by each Chamber (2010-2023)

		2010		2011		2012		2013		2014		2015		2016		2017		2018		2019		2020
Member State	Chamber	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO
Austria	Bundesrat	2	11	1	2	3	9	6	3	3	7	0	7	4	11	6	14	3	10	0	0	1
	Nationalrat	1	11	0	7	1	2	0	2	1	3	0	0	0	1	0	1	0	0	0	0	0
Belgium	Chamber of Deputies	0	1	1	3	3	6	1	2	0	1	0	2	0	0	0	2	0	1	0	0	0
	Senate	0	0	1	1	0	0	1	*	0	0	0	0	0	0	0	1	0	1	0	1	0
Bulgaria	National Assembly	0	0	2	17	0	13	0	1	0	0	0	2	3	6	0	1	0	0	0	0	0
Croatia	Parliament (Hrvatski sabor)						since 01/07 /13	0		1	3	0	5	1	2	0	2	0	1	0	0	0
Cyprus	Chamber of Deputies	0	1	1	*	1	1	1	*	0	1	0	4	0	4	0	4	0	0	0	0	0
Czech Republic	Senate	1	28	0	43	0	46	2	62	1	40	1	24	3	46	0	53	1	81	0	21	0
	Chamber of Deputies	1	2	0	5	0	10	2	6	0	5	1	9	4	19	1	17	4	37	0	13	1
Denmark	Folketinget	2	9	1	13	3	5	1	3	1	2	0	2	2	7	0	6	2	2	0	0	1

		2010		2011		2012		2013		2014		2015		2016		2017		2018		2019		2020
Member State	Chamber	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO
Estonia	**Parliament (Riigikogu)**	0	0	0	0	0	2	1	1	0	0	0	0	1	1	0	0	0	0	0	0	0
Finland	**Parliament (Eduskunta)**	0	1	1	1	1	*	1	1	0	0	0	1	0	0	0	0	0	0	0	0	0
France	**Sénat**	3	*	1	3	7	12	4	4	2	4	0	8	0	0	7	29	2	24	0	12	1
	Nat. Assembly	0	0	1	1	0	0	1	39	1	34	0	23	0	33	2	16	1	11	0	0	0
Germany	**Bundesrat**	1	22	1	32	5	54	3	37	0	24	0	20	0	47	3	43	0	52	0	11	0
	Bundestag	1	5	1	5	1	1	0	0	0	2	0	2	0	5	3	43	2	2	0	0	0
Greece	**Vouli ton Ellinon**	0	4	0	4	0	6	3	1	0	0	0	0	0	1	0	3	0	0	0	0	0
Hungary	**National Assembly**	0	0	0	0	0	0	1	1	0	1	1	4	2	6	2	8	0	3	0	0	1
Ireland	**Both Chambers**	0	3					3	9	0	8	0	9	0	3	1	6	4	12	0	0	0
	Seanad Éireann													1	1	1	2					
	Dail Eireann			1	*	0	0							2	2	1	1	0	0	0	0	0
Italy	**Senate**	1	70	3	74	1	95	2	34	1	62	0	25	3	81	1	56	1	18	0	7	0
	Chamber of Deputies	0	25	2	26	0	15	0	6	0	15	0	7	0	0	0	45	0	0	0	0	0
Latvia	**Parliament (Saeima)**	0	1	0	1	1	*	1	*	0	2	0	1	1	4	0	0	0	0	0	0	0

		2010		2011		2012		2013		2014		2015		2016		2017		2018		2019		2020
Member State	Chamber	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO
Lithuania	**Seimas**	2	2	0	4	1	*	6	*	1	4	0	4	1	7	0	2	0	2	0	3	0
Luxembourg	**Chamber of Deputies**	3	4	7	7	3	3	2	3	1	2	0	2	2	6	0	1	0	0	0	0	0
Malta	**Chamber of Deputies**	0	0	2	*	1	1	5	2	0	3	0	1	5	6	0	1	1	1	0	2	1
The Netherlands	**Eerste Kamer**	0	3	0	6	2	5	3	7	0	6	0	2	1	7	2	6	0	2	0	0	1
	Both Chambers	2	*	2	1	1	*															
	Tweede Kamer	0	1	1	*	3	*	5	2	2	7	1	5	3	8	2	5	1	3	0	2	0
Poland	**Senate**	4	1	4	*	1	10	2	6	0	6	0	3	2	17	4	14	0	6	0	2	0
	Sejm	2	*	5	*	3	*	2	4	0	6	0	0	2	4	2	6	0	7	0	2	0
Portugal	**Parliament (Parlamento)**	0	106	1	183	1	226	1	191	0	118	0	55	1	57	0	64	0	99	0	14	0
Romania	**Senate**	0	9	2	31	0	2	3	23	0	3	0	14	1	43	2	33	0	45	0	0	0
	Chamber of Deputies	0	0	2	38	0	26	2	36	0	30	1	46	2	70	1	41	0	48	0	15	0
	Both Chambers	0	2	/	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Slovakia	**Parliament (Národná rada)**	0	0	2	*	1	*	0	1	0	1	1	6	2	7	0	6	0	4	0	3	0

		2010		2011		2012		2013		2014		2015		2016		2017		2018		2019		2020
Member State	Chamber	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO	C	RO
Slovenia	**National Council (Državni svet)**	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0
	National Assembly	0	0	0	0	0	0	1	4	0	2	0	0	0	0	0	0	0	0	0	0	0
Spain	**Both Chambers**	0	4	2	*	2	5	5	12	1	44	1	10	0	13	2	38	0	53	0	8	0
Sweden	**Riksdag**	3	17	11	31	20	13	9	13	2	8	1	9	12	23	4	17	0	0	0	0	2

Source: Personal compilation based on the European Commission's Annual reports.

NB: The number of contributions incudes the number of reasoned opinions.

Since the entry into force of the Lisbon Treaty (2009), the EU national parliaments have had the right to control the principle of subsidiarity through the Early Warning System (EWS). This study, commissioned by the European Parliament's Policy Department for Justice, Civil Liberties and Institutional Affairs at the request of the AFCO Committee, examines how the EWS has worked over the past 15 years. It also looks into the interaction of Parliament, the European Commission, local and regional entities, the Committee of the Regions, the Court of Justice of the EU and the Council with national parliaments to this end. Moreover, it considers the principle of proportionality and the EU institutions' relationship with it.

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