National Parliaments in the Democratic Politics of the EU:  
The Subsidiarity Early Warning Mechanism, 2009-2017

Ian Cooper  
Dublin City University

Abstract: With the Early Warning Mechanism (EWM), the Treaty of Lisbon empowered national parliaments to collectively intervene in the EU’s legislative process. Yet at first glance their impact seems to have been minimal. Between 2009-2017, national parliaments only formally triggered the EWM on three occasions (with a “yellow card”), and in two of those cases they were overruled. However, if we broaden the analysis to include many other cases where national parliaments came close to triggering the EWM (but fell short), and expand the timeline to look at their long-term influence on the legislative process, a more nuanced picture emerges. National parliaments have not had much success in using the EWM to block unwanted legislation – i.e. causing it to be rejected, withdrawn, or permanently deferred. However, they have had some success in using the EWM to engage in policy dialogue with EU institutions. In a few cases, national parliaments’ interventions had a discernable, yet unheralded, impact on the final legislative outcome – in part by influencing their respective governments’ negotiating positions. More generally, the EWM has legitimized the role of national parliaments, individually and collectively, as EU-level actors, and in so doing has enhanced the democratic legitimacy of the EU.

I. Introduction: Has the EWM Enhanced the Democratic Legitimacy of the EU?

One of the most important democratic innovations of the Treaty of Lisbon (2009) was the Early Warning Mechanism (EWM), which for the first time gave national parliaments a direct role in the legislative process of the European Union (EU). The EWM has always had a dual purpose. On the one hand, national parliaments were given the seemingly technical task of reviewing new EU legislative proposals for their compliance with “subsidarity” – the principle that the EU should only take action when it is appropriate to act at the EU level rather than the member state level; any national parliament/chamber may issue a “reasoned opinion” (RO) stating its subsidiarity-based objections to a legislative proposal. On the other hand, the EWM also has the broader purpose of enhancing the democratic legitimacy of the EU by increasing the involvement of national parliaments in its legislative process. National parliaments were hitherto seen as institutions that enjoyed democratic legitimacy but little or no collective influence in EU politics. It was hoped that in this way the EWM would have a positive effect on the EU’s democratic legitimacy. Now that it has been in operation for several years, it is time to ask, has it worked?

This is a fraught question, because the nature and purpose of the EWM remains essentially contested. It is contested not only among academic observers, including legal scholars and political scientists, but even among the national parliamentarians themselves, who disagree over whether they are meant to be “veto players” in the EU legislative process or participants in a policy dialogue with EU institutions (Cooper 2017). In seeking to determine whether the EWM has enhanced the democratic legitimacy of the EU, it is difficult even to find a commonly accepted standard by which
such an enhancement might be measured, let alone concrete evidence of its achievement. Nevertheless, this article sets out to answer this question in empirical terms, based on a review of the experience of the first eight years of the EWM in operation. The working assumption employed here is that the democratic legitimacy of the EU has been enhanced if the EWM has increased the influence of national parliaments within the EU’s legislative process. Even if there is more than one way to measure “influence” – as discussed below – this nevertheless gives a practical means to assess whether the new role bestowed on national parliaments by the Treaty of Lisbon has had an appreciable impact on the democratic politics of the EU.

This article begins (Section II) with a description of the EWM and an overview of how it has functioned and evolved over its first eight years from early 2010 up to the end of 2017. Overall, its impact seems to have been minimal, given that the number of reasoned opinions was less than the number of EU legislative proposals subject to the EWM over the same period. However, a closer look shows that most of the reasoned opinions were concentrated on a relatively small number of legislative proposals, including the three cases in which the threshold was reached to formally trigger the EWM (a “yellow card”). In fact, nearly one third of the reasoned opinions were directed at just sixteen legislative proposals (2% of the total), which will be the target of closer scrutiny below. This overview is followed by a theoretical discussion (Section III) of how to assess the effect of the EWM on the EU’s democratic legitimacy – as measured according to whether and how it has enhanced the influence of national parliaments in the EU’s legislative process. It is posited that national parliaments could influence this process in two ways: they could act together to try to block unwanted legislation (Political
Bargaining), or they could engage in a policy dialogue with the EU institutions so as to influence the substance of the final legislation (Policy Arguing).

This two-pronged analysis is then applied (Section IV) to the sixteen proposals that received the most reasoned opinions between 2010-2017, in order to assess whether – and, if so, how – the interventions of national parliaments influenced the final legislative outcome in each case. The finding is that the EWM has been largely unsuccessful from a Political Bargaining perspective, as there is only one case where it can be said with some certainty that national parliaments contributed to the ultimate demise of a proposal – the Monti II Regulation, which was withdrawn in 2012 after receiving the first “yellow card.” All the remaining fifteen, with one partial exception (the 2011 CCCTB proposal), had at the time of writing either completed the legislative process (eight proposals) or were still under active consideration (six proposals). Even the other two proposals that had received a yellow card were either completed (EPPO) or still under active discussion (Posted Workers Directive). However, from a Policy Arguing perspective, there is some evidence that national parliaments have had an influence. Close analysis reveals that in five of the eight completed proposals, at least some of the concerns initially raised by national parliaments at the beginning of the legislative process were reflected in the final legislative outcome. Finally, there is a brief conclusion (Section V).

II. Historical Overview of the EWM, 2010-2017

Protocol 2 of the Treaty of Lisbon set out the procedure formally giving national parliaments the option to intervene at an early stage in the EU legislative process. Each
national parliamentary chamber can issue a Reasoned Opinion (RO) formally stating its subsidiarity-based objections to an EU legislative proposal in areas of shared competence in the first eight weeks after it is received. Each national parliament is allotted two “votes” for a total of 56 in EU-28; each reasoned opinion counts as one vote (from a single chamber of a bicameral parliament) or two votes (from a unicameral chamber) against the measure. If one third of parliamentary chambers raise such objections (19 votes), then this counts as a “yellow card,” requiring the proposing institution (usually the Commission) to review the proposal, after which it may be maintained, amended or withdrawn. If a simple majority of parliamentary chambers raise objections (29 votes), this is an “orange card” triggering an immediate vote in the two chambers of the European legislator, either of which may reject the proposal (by a majority of votes cast in the European Parliament, or by 55% of the members of the Council of Ministers). In the first eight years of the EWM, there have been no orange cards and just three yellow cards. In the case of the first yellow card, the targeted proposal – the 2012 “Monti II” Regulation on the right to strike – was withdrawn by the Commission. However, in the second and third cases – the 2013 proposal for a European Public Prosecutor’s Office (EPPO) and the 2016 revision of the Posted Workers Directive – the Commission maintained the proposal and the legislative process continued.

1 The yellow card threshold is lowered to one quarter (14 votes) in the fields of police and judicial
2 In EU-27, prior to the accession of Croatia on 1 July 2013, the yellow card threshold was 18 votes and the orange card threshold was 28 votes.
Between 2010-2017, the 41 chambers of the national parliaments of the EU issued 443 ROs, about eleven ROs per chamber. In context, 443 ROs is not a large number, as it is less than the number of legislative proposals subject to the EWM over the same period (716), making for an average of less than one RO per proposal. An analysis of the annual output of ROs shows a variable pattern (see Table 1). Whereas the EWM officially started on 1 December 2009 (the day the Treaty of Lisbon entered into force), the first ROs began to be issued in April 2010. As national parliaments adapted to the new system, the annual output of ROs increased steadily over the first four years, up to 2013. Then, the number of ROs fell sharply in 2014 and 2015. While some at the time interpreted this fall as evidence that the national parliaments had lost interest in the EWM, it proved to be a temporary lull, as the number of ROs rose again in 2016-2017. So in reality there are two waves in the output of ROs, the first between 2010-2013 and the second starting in 2016, with a lull in between (2014-2015). The most likely explanation for the lull is that there was a fall in the output of new legislative proposals subject to the EWM in 2014-2015 (also visible in Table 1). This was in part due to the EP elections and the appointment of a new Commission in 2014, and in part because the new Commission made a commitment to not to introduce too much new legislation early in its mandate. Since there were few new proposals, there was little to which the national parliaments could object. It will also be seen that there was also a falling-off, albeit less dramatic, in the number of Political Dialogue contributions sent in 2014-2015 (see below).  

---

3 There were 40 chambers prior to Croatia accession on 1 July 2013.  
4 Although the Political Dialogue was begun in 2006, the number of contributions increased dramatically after 2010, which arguably shows that it is complementary to the EWM rather than an alternative method of scrutiny.
Table 1. National parliament submissions and EU legislative proposals under the EWM, 2010-2017.5

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>NP Submissions</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reasoned Opinions</td>
<td>36</td>
<td>71</td>
<td>84</td>
<td>99</td>
<td>22</td>
<td>8</td>
<td>72</td>
<td>51</td>
<td>443</td>
</tr>
<tr>
<td>Political Dialogue Contributions</td>
<td>299</td>
<td>524</td>
<td>221</td>
<td>206</td>
<td>133</td>
<td>172</td>
<td>198</td>
<td>197</td>
<td>1950</td>
</tr>
<tr>
<td>EU Legislative Proposals</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Props. Subject to EWM</td>
<td>66</td>
<td>115</td>
<td>147</td>
<td>122</td>
<td>63</td>
<td>21</td>
<td>95</td>
<td>87</td>
<td>716</td>
</tr>
<tr>
<td>Props. Receiving at Least 1 RO</td>
<td>12</td>
<td>28</td>
<td>34</td>
<td>36</td>
<td>15</td>
<td>3</td>
<td>26</td>
<td>25</td>
<td>156</td>
</tr>
<tr>
<td>Props. Receiving 9 or more Votes</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>7</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>3</td>
<td>16</td>
</tr>
<tr>
<td>Props. Receiving Yellow Card</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>3</td>
</tr>
</tbody>
</table>

The number of ROs is also small in comparison to the number of “contributions” under the Political Dialogue (Rasmussen and Dionigi 2018), which is more than four times as large (1950). These are letters sent from national parliaments to the Commission outside the EWM framework – raising non-subsidiarity-related concerns about legislation (e.g. policy, proportionality, etc.), concerns about legislation not subject to the EWM (e.g. in areas of EU exclusive competence), positive comments about legislation, or matters

5 These figures are compiled from three sources: the European Commission (Annual Reports On Subsidiarity and Proportionality and On Relations Between the European Commission and National Parliaments), the European Parliament (available at <http://www.europarl.europa.eu/relnatparl/en/about/subsidiarity.html>), and the IPEX (Inter-Parliamentary Exchange) website (available at <http://www.ipex.eu/IPEXL-WEB/home/home.do>). The sources sometimes disagree as to how to count and date legislative proposals, ROs and Political Dialogue contributions, so the overall figures should be treated as approximate. The indicated calendar year of a particular legislative proposal does not always correspond to the year an RO was issued in response to it, due to delays in the transmission of proposals and the eight-week deadline.
unconcerned with legislation. The Commission endeavours to respond individually to each of these letters, although it is under no legal obligation to do so; by contrast, the Commission is obliged to “take account” of the ROs it receives under the EWM. It is difficult to find evidence of circumstances in which Political Dialogue contributions affected EU policy. For the purposes of this paper, the Political Dialogue is treated as an adjunct of the EWM, a supplemental source of national parliaments’ opinions that may influence final legislative outcomes (e.g. in the case of the Seasonal Workers Directive, noted below).

Yet just because total number of ROs has been relatively small does not prove that the EWM has had no effect. Arguably, the yellow and orange cards were intended to be relatively rare occurrences, a kind of “alarm bell” that only goes off when opposition to a proposal has reached such a high threshold that the normal legislative process should be disrupted. A closer look at the distribution of ROs shows that they are concentrated on a relatively small number of proposals. In fact, all the ROs were issued in response to just 22% of the proposals (156), meaning that the other 78% received no ROs at all. As noted above, only three legislative proposals received a yellow card. But we may infer that as the group of national parliaments/chambers raising concerns grows larger, the more they ought to be able to exert some influence over the legislative process, even if they do not reach the yellow card threshold (Kiiver 2012: 143). For this reason, it makes sense to undertake an empirical analysis that finds a middle way between examining, on the one hand, the hundreds of proposals subject to the EWM between 2010-2017 and, on the other hand, the three proposals that received a yellow card.
The innovation of this paper is to expand the inquiry to include all those legislative proposals which received at least half the votes necessary to receive a yellow card, which gives us sixteen cases. This simple numerical method of case selection indicates the proposals that generated the greatest opposition among national parliaments without applying an a priori test of their salience. It also focuses on cases where the actions of national parliaments/chambers are likely to have influenced one another, assuming that there is a dynamic of social interaction within the EWM. Taken together, these 16 proposals received 143 ROs, nearly one-third (32%) of all the ROs submitted in the eight-year history of the EWM, even though they only represent about 2% of the total legislative proposals subject to the EWM over that period. For these proposals there is a year-on-year historical trend similar to that noted above for the overall output of ROs, in that there is a first wave (11 cases) in 2010-2013, a falling-off (zero cases) in 2014-2015, and then a second wave (5 cases) starting in 2016. These sixteen cases will be examined in greater detail below (Section IV). But first we need to detour into a discussion of how to assess the effect of the EWM on the democratic legitimacy of the EU.

III. The Democratic Impact of the EWM: Political Bargaining vs. Policy Arguing

The EWM should be seen as the most important element of a broader package of reforms within the Treaty of Lisbon intended to increase the role of national parliaments in the EU and thereby to enhance its democratic legitimacy. National parliaments had ceased to play a direct role in EU politics in 1979, when the EP began to be directly elected. One task of the treaty reform mandate was to reconsider “the role of national parliaments in

---

6 Nine votes were half those necessary for a yellow card prior to 1 July 2013; after that date, it was ten votes.
The European architecture.” The Treaty of Lisbon recognized national parliaments as an integral part of a Union “founded on representative democracy” (Art. 10 TEU). More specifically, the treaty enumerated (Art. 12 TEU) a number of ways in which the NPs “contribute actively to the good functioning of the Union.” They do so not only by participating in the EWM, but also in the evaluation mechanisms for policies in the area of freedom, security and justice, revision of the treaties, and inter-parliamentary cooperation with the EP.

The creation of the EWM sparked an inconclusive theoretical debate over whether it would enhance the democratic legitimacy of the EU. One optimistic view of the EWM was that it would make national parliaments a “virtual third chamber” within the EU’s system of representative democracy alongside the Council and the EP, performing the functions of an EU-level chamber without meeting in the same physical location (Cooper 2012). In this way the EWM could enhance the democratic legitimacy of the EU by providing a third channel of representation linking the citizen to the EU, which would in effect have a “tricameral” system for the representation of the EU’s governments (Council), citizens (EP) and peoples (national parliaments) (Cooper 2013a). This picture is broadly in accordance with notions of the EU as a multilevel democracy or a “demoi-

...
independent position on EU affairs (Raunio 2007). Another line of critique focused on practical obstacles: national parliaments lacked the incentive, the expertise, or the logistical capacity to make effective use of the EWM. In addition, some have argued that the EWM is a distraction for national parliaments, whose attention should be focused on their more important role of scrutinizing their governments’ conduct of EU affairs (De Wilde and Raunio 2016; Winzen 2017); against this view, others have argued that no such trade-off exists, because national parliaments’ early engagement in the EWM prompts them to devote greater attention and resources to EU issues, making them more effective in overseeing EU affairs beyond subsidiarity questions (Miklin 2016). Winzen (2017) has argued at length that the national parliaments have been much more successful in adapting their domestic scrutiny than in developing a collective role in EU affairs through mechanisms such as the EWM. But the question at issue in this paper is not whether democracy has been improved at the national level but whether the democratic legitimacy of the EU – as an institution – has been enhanced by the EWM.

Over the years, there have been numerous proposals to reform the EWM to overcome its perceived shortcomings – such as that it is weak, time-limited, negative in character or narrow in scope. It has been variously proposed that the EWM could be enhanced with the addition of a “red card” to give national parliaments the power to veto a proposal (see below), a “late card” to allow them a second chance to scrutinize proposals towards the end of the legislative process, or a “green card” that would empower them to positively initiate new legislation by requesting that the Commission formally bring forth a proposal. It has also been proposed that the scope of the EWM should be expanded to allow objections to be raised on grounds other than subsidiarity,
such as proportionality, legal basis or policy substance. Another suggestion is that the review period should be extended, e.g. from eight to twelve weeks. Proposals like these have been widely discussed – for example, at special COSAC working group meetings in 2015 and 2018\(^7\) – but have not generally been adopted, as many require treaty change or, at a minimum, the cooperation of the Commission.

One key reform which came close to coming into effect was to add a “red card” option to the yellow and orange cards under the existing EWM, part of the February 2016 deal struck between the EU and the UK prior to the Brexit referendum (Cooper 2016). Under this proposal, a red card would be triggered if 55% of national parliaments/chambers (31 of 56 votes in EU-28) raised subsidiarity-based objections to a legislative measure within the first twelve weeks after it is proposed. In this circumstance, the Council would be required to discontinue consideration of the draft unless it is amended to address national parliaments’ concerns. This proposal fell short of giving national parliaments an outright veto, as it would still have been possible to amend the contested proposal, and the final act of discontinuing consideration of the proposal would have been in the hands of the Council. Moreover, it is somewhat doubtful that this proposal would have had much of an impact, given that the threshold of a red card, or even that of an orange card, has never been reached under the EWM. In any case, the red card was never instituted because the UK electorate rejected the EU-UK deal and opted instead for Brexit in the referendum of June 2016.

Empirical research on the how the EWM has worked in practice has not resolved the debate over its effect on the EU’s democratic legitimacy. There have been a few case

\(^7\) The minutes of these meetings and further information about them are available on the COSAC website, at [www.cosac.eu](http://www.cosac.eu).

11
studies of the three occasions in which a yellow card was raised (Cooper 2015; Fromage 2016; Fromage and Kreilinger 2017). Many authors have taken a comparative approach to the EWM, attempting to identify the factors that explain the quantitative variation between national parliaments’ participation in the EWM, most notably the great differences in the number of ROs they produce (Auel et al 2015). This variation has been explained with reference to, for example, Euroscepticism within member states (Williams 2016), political motivation (Gattermann and Hefftler 2015) and network effects (Leifeld and Malang 2014). Yet these studies tend to focus solely on the actual production of ROs within the brief eight-week window of the EWM and the initial reaction of the Commission, rather than on the long-term impact of the EWM on actual legislative outcomes in the EU. Certainly, there is ample evidence that the EWM has prompted national parliaments to take a direct and active role in EU politics: every national parliamentary chamber, with the sole exception of the Slovenian upper house, has sent at least one RO to the Commission. This fact alone could be taken as evidence that the EWM has enhanced, at least to a minimal degree, the EU’s democratic legitimacy. Yet this immediately raises the further question, did the actions of national parliaments actually influence EU politics?

Broadly, we may conceive of two ways with which national parliaments could employ the EWM to try to influence legislative outcomes in the EU, labelled here as “Political Bargaining” and “Policy Arguing.” The first option (Political Bargaining) would be for national parliaments to act collectively as “veto players,” using the EWM to build a coalition with the aim of blocking unwanted legislation from becoming law. Their efforts would be successful in the short term if they force the Commission to withdraw
the targeted legislative proposal (in the case of a yellow or orange card) or prompting its early rejection either by the Council or the EP (in the case of an orange card). Even in the absence of a yellow or orange card, their efforts may still be considered successful if their continued opposition contributes, over the long term, to the targeted legislation being withdrawn, rejected or permanently deferred. The second option (Policy Arguing) would be for national parliaments to act as participants in a non-adversarial policy dialogue with EU institutions, using the EWM to raise concerns about proposed EU legislation. Their efforts would be successful if, in the short term, the Commission were to amend the targeted legislative proposal (in the case of a yellow or orange card) or, over the long term, if the final version at the end of the legislative process has been amended in a way that reflects some of the concerns raised by national parliaments.

It should be said that these two options are not mutually exclusive – national parliaments may employ either, or both at the same time – but it is useful to separate them for heuristic purposes. The EWM has aspects of each, both as it is defined in the treaty and as it has been worked out in practice. The fact that the ROs count as “votes” against a legislative proposal and there are voting thresholds lends itself to a Political Bargaining logic, even if national parliaments do not have by themselves have the collective power of veto. In addition, if national parliaments only raise subsidiarity-based objections in their ROs, then they are in effect arguing that the EU should not legislate at all in a given field, and that therefore the proposal in question must only be withdrawn, not amended. Also, the fact that national parliaments only get one chance to formally

---

8 I am grateful to an anonymous reviewer for helping to clarify this point.
9 The Commission appeared to endorse a narrow understanding of the EWM in its response to the EPPO yellow card, in which it only considered the subsidiarity-based arguments in the ROs and set aside those that raised other concerns, such as legal basis, proportionality or policy substance (Cooper 2017: 23, 43).
intervene, right at the beginning of the legislative process (i.e. there is no “late card”), limits their ability to engage in a policy dialogue. On the other hand, certain elements of the EWM also have a Policy Arguing logic: national parliaments cannot actually veto a legislative proposal (there is no “red card”), which circumscribes their role as “veto players”; the EWM is structured as a reasoned exchange between the Commission and national parliaments, in which each must present arguments to justify their respective positions; and the EWM also includes the possibility that the Commission could *amend* a proposal in response to a yellow card, which implies that national parliaments are not just expressing their blunt opposition to a proposal but also making suggestions as to how the legislation could be improved, for example on proportionality or policy grounds (Cooper 2006).

Nevertheless this analysis suggests that it is reasonable to present Political Bargaining and Policy Arguing as two separate ways that national parliaments could use the EWM to influence EU legislation, and thereby enhance the democratic legitimacy of the EU. National parliaments could collectively act as a “policy-influencing” body using their leverage as a “veto player” to contribute to the rejection of unwanted EU legislative proposals, or they could engage in a deliberative exchange with the EU institutions over the merits of the proposed legislation. In both cases, the influence of the EWM would have a measurable influence on the legislative output of the EU, but in different ways. It may be measured according to whether the EWM, on one hand, leads to unwanted legislative proposals being withdrawn, defeated, or permanently shelved or, on the other hand, amended in a manner that reflects the concerns raised by national parliaments. With these concepts in hand, we can now turn to a more detailed examination of the
sixteen cases which have received the largest number of ROs in the first eight years of the EWM.

IV. Assessing and Comparing the Cases with the Largest Number of ROs

In the first eight years of the EWM, there were sixteen cases in which a legislative proposal received at least half the votes needed for a yellow card (see Table 2). For each proposal, it is indicated the number of ROs it received (and in parenthesis the number of votes these represent) in the eight weeks prior to the subsidiarity deadline, as well as the number of contributions separately received by the Commission under the Political Dialogue (PD) in relation to it. It is also indicated whether the proposal is subject to the ordinary legislative procedure (see article by Roederer-Rynning in this issue) or by a special legislative procedure, which included “consultation” (CCCTB, CCCTB II, CCTB), the “flexibility clause” (Monti II), and a special case of enhanced cooperation (EPPO). For each proposal, it is indicated how and on what date the legislative procedure was resolved, or whether it was still pending (i.e. actively under discussion) at the end of 2017. Finally, for the first twelve proposals, it is indicated whether there is any evidence that national parliaments had some influence over the final outcome, whether from the perspective of Political Bargaining (PB) or Policy Arguing (PA) – defined as “good evidence”, “some evidence” or “no evidence”. No such determination is made for the last four proposals on the list, as in these cases it is too soon to tell. Thus only the first twelve proposals are subject to a detailed analysis below.
Table 2. Proposals Receiving at least 50% of Votes Needed for a Yellow Card under the EWM, 2010-2017

<table>
<thead>
<tr>
<th>Proposal</th>
<th>ROs (votes)</th>
<th>Subsidiarity Deadline</th>
<th>PD</th>
<th>Legislative Procedure</th>
<th>Status/ Date Resolved</th>
<th>Evidence of NP’s Influence?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Seasonal Workers Directive</td>
<td>9 (9)</td>
<td>2010-10-15</td>
<td>8</td>
<td>Ordinary</td>
<td>Completed 2014-03-28</td>
<td>PA: Some evidence</td>
</tr>
<tr>
<td>CCCTB</td>
<td>9 (14)</td>
<td>2011-05-18</td>
<td>8</td>
<td>Special</td>
<td>Withdrawn 2017-02-28</td>
<td>PB: No evidence</td>
</tr>
<tr>
<td>Border Controls</td>
<td>7 (10)</td>
<td>2011-11-14</td>
<td>6</td>
<td>Ordinary</td>
<td>Completed 2013-11-06</td>
<td>PA: Some evidence</td>
</tr>
<tr>
<td>Monti II</td>
<td>12 (19)</td>
<td>2012-05-22</td>
<td>5</td>
<td>Special</td>
<td>Withdrawn 2013-01-10</td>
<td>PB: Good evidence</td>
</tr>
<tr>
<td>Women on Boards</td>
<td>9 (11)</td>
<td>2013-01-15</td>
<td>3</td>
<td>Ordinary</td>
<td>Pending (end 2017)</td>
<td>PB: No evidence</td>
</tr>
<tr>
<td>4th Rail. Pkg. (PSO Regulation)</td>
<td>6 (9)</td>
<td>2013-04-03</td>
<td>7</td>
<td>Ordinary</td>
<td>Completed 2016-12-23</td>
<td>PA: Some evidence</td>
</tr>
<tr>
<td>4th Rail. Pkg. (Governance Dir.)</td>
<td>6 (9)</td>
<td>2013-04-03</td>
<td>5</td>
<td>Ordinary</td>
<td>Completed 2016-12-23</td>
<td>PA: Some evidence</td>
</tr>
<tr>
<td>Port Services Regulation</td>
<td>7 (11)</td>
<td>2013-07-30</td>
<td>3</td>
<td>Ordinary</td>
<td>Completed 2017-03-03</td>
<td>PA: No evidence</td>
</tr>
<tr>
<td>EPPO</td>
<td>13 (18)</td>
<td>2013-10-28</td>
<td>10</td>
<td>Special</td>
<td>Completed 2017-10-31</td>
<td>PA: Good evidence</td>
</tr>
<tr>
<td>Posted Workers Directive</td>
<td>14 (22)</td>
<td>2016-05-10</td>
<td>9</td>
<td>Ordinary</td>
<td>In Trilogue (end 2017)</td>
<td>PB: No evidence</td>
</tr>
<tr>
<td>Review of Dublin Regulation</td>
<td>8 (10)</td>
<td>2016-10-27</td>
<td>6</td>
<td>Ordinary</td>
<td>Pending (end 2017)</td>
<td>N/A</td>
</tr>
<tr>
<td>CCCTB II</td>
<td>7 (12)</td>
<td>2017-01-03</td>
<td>8</td>
<td>Special</td>
<td>Pending (end 2017)</td>
<td>N/A</td>
</tr>
<tr>
<td>CCTB</td>
<td>7 (12)</td>
<td>2017-01-03</td>
<td>8</td>
<td>Special</td>
<td>Pending (end 2017)</td>
<td>N/A</td>
</tr>
<tr>
<td>Internal Market for Electricity</td>
<td>11 (13)</td>
<td>2017-05-17</td>
<td>5</td>
<td>Ordinary</td>
<td>Pending (end 2017)</td>
<td>N/A</td>
</tr>
<tr>
<td>Total ROs</td>
<td>143</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Most of these proposals may be grouped into distinct policy areas, some quite salient and controversial, such as migration (Seasonal Workers Directive, Border Controls, Review of Dublin Regulation), workers’ rights (Monti II, Posted Workers Directive), and tax harmonization (CCCTB, CCCTB II, CCTB). Four proposals are concerned with the regulation of (and the introduction of cross-border competition in) state-dominated

---

10 Compiled by the author. The sources are the same as for Table 1, above, which are: European
Commission, EP, IPEX.
“network industries” such as transport and energy (Fourth Railway Package PSO Regulation and Governance Directive, Port Services Directive, Internal Market for Electricity). The other four proposals occupy separate policy fields of gender equality in the workplace (Women on Boards), health/internal market (Tobacco Products Directive), maritime policy (Maritime Spatial Planning) and judicial cooperation in criminal matters (EPPO).

The twelve proposals are examined in greater detail below to assess whether the actions of national parliaments under the EWM influenced the final outcome. First, it is determined whether, from a Political Bargaining perspective, there is any evidence that the actions of national parliaments under the EWM contributed to the failure of the four proposals that were either withdrawn or still pending at the time of writing. And second, it is determined whether, from a Policy Arguing perspective, there is any evidence that their actions contributed to a substantive change in the eight completed proposals.

**Political Bargaining: Withdrawn and Pending Proposals**

From the Political Bargaining perspective described above, the EWM is primarily understood as a system that empowers national parliaments to organize opposition to unwanted EU legislative proposals, in order to block them. The objecting national parliaments may be said to have succeeded if they have caused the proposal to be (a) rejected, (b) withdrawn, or (c) delayed indefinitely; if the proposal becomes law, they have failed. In the case of a yellow card, the proposal should be withdrawn in the short term; but even if that threshold is not reached, a substantial organized opposition to a proposal under the EWM (e.g. half the votes needed for a yellow card) should make it
more likely that the proposal will, in the long term, fail to become law. On the whole, from this perspective, the EWM has been a disappointment. Of the eleven cases from the first wave (2010-2013), none have been rejected, two were withdrawn (Monti II and CCCTB), and only one has suffered a long delay (Women on Boards), whereas eight have been seen through to completion. Four of those eight were completed in 2016-2017, 3-4 years after they were first proposed, which attests to the surprising tenacity of the EU legislative process. The “pending” Women on Boards proposal could still be revived, as it was still under active discussion in 2017. And the CCCTB proposal, while technically “withdrawn,” would more accurately classified as “pending” because it was repackaged as two new proposals in 2016. As for the five proposals of the second wave (2016-2017), none have yet been withdrawn or rejected, and it is too soon to tell if they have been significantly delayed. And the Posted Workers Directive, despite the yellow card, had advanced to the trilogue stage. And so of the sixteen most contentious cases under the EWM in its first eight years, the objections of national parliaments at best could be said to have contributed to just one of them being withdrawn (Monti II) and two significantly delayed (CCCTB, Women on Boards).

CCCTB (Common Consolidated Corporate Tax Base) (2011-2017)
In early 2011, the Commission proposed the CCCTB directive, which would establish a common system for calculating the tax base of businesses operating in the EU. As a tax measure, it was subject to a special legislative procedure (“Consultation”) in which the Council must decide by unanimity after consulting the EP; this meant that, in direct
contrast to the OLP, each individual member state would have a veto over the legislation, but the EP would not. The legislation received the approval of the EP in 2012, but thereafter it stalled in the Council until 2016. At that point, the Commission formally withdrew the measure, but at the same time proposed two new measures (CCCTB II and CCTB, also in Table 2) that were essentially a repackaging of the original proposal split into two parts; thus in substantive terms it has not been withdrawn but is still under active consideration.

_Monti II (2012-2013)_

This legislative proposal, an attempt to reconcile the right to strike with the freedoms of cross-border business in the internal market, was the target of the first yellow card under the EWM in May 2012 and was subsequently withdrawn by the Commission (Adoptive Parents 2014; Cooper 2015; Fabbrini and Granat 2013; Goldoni 2014). However, the Commission insisted that the proposal was actually in compliance with subsidiarity, and was being withdrawn not because of the yellow card but due to political opposition in the Council and the EP. The proposal was based on Article 352 TFEU (the “flexibility clause”) which requires unanimous agreement in the Council and the consent of the EP; given the level of opposition to the measure it was very unlikely to become law even in there had been no yellow card. Even so, the yellow card required the Commission to make a positive decision to maintain, amend, or withdraw the proposal; it chose to withdraw. For this reason, the yellow card should at least be considered to be the proximate cause of the demise of the legislation, insofar as it precipitated its withdrawal.
This example offers the clearest case in which national parliaments used the EWM to exert some influence in the EU’s legislative process.

Women on Boards (2012-)

This is the only one of the 11 proposals that received at least 9 votes under the EWM between 2010-2013 that is still pending, i.e. it has neither been completed, withdrawn or defeated. In late 2012, the Commission proposed this directive, aimed at improving “gender balance among non-executive directors of companies listed on stock exchanges,” which would set a quota requiring that women should occupy at least 40% of such positions by 2020. In response, nine national parliamentary chambers issued ROs (11 votes) arguing that action at the EU level is unnecessary and that member states are in a better position to act to ensure gender equality. It is notable that the ROs came from a group of member states – the Czech Republic, Denmark, the Netherlands, Poland, Sweden, and the UK – that mostly had relatively high representation of women on boards but with corporate governance codes rather than legal quotas (Granat 2014: 306). The EP adopted a position on the proposal in November 2013 that would extend its scope and tighten its sanctions. Since that time the proposal has been stalled in the Council (Leszczyńska 2017), but it still pending rather that permanently deferred, as there have been attempts to move the legislation forward, most recently under the Maltese presidency in early 2017.

Posted Workers Directive (2016-)
This proposal would strengthen the rules of a previous directive regarding workers employed by a firm in one member state and posted temporarily in another. The proposal received 14 ROs (22 votes) under the EWM, making it the recipient of the third yellow card (Fromage and Kreilinger 2017). The proposal exposed an East-West divide in EU politics because, with one exception (the Danish parliament), all the ROs came from Central and Eastern Europe; in Western Europe, by contrast, the proposal had broad support as a measure to prevent “social dumping.” In response to the yellow card, the Commission decided to maintain the proposal. While negotiations were ongoing, the newly elected French president, Emmanuel Macron, seized upon the issue and pushed for a legislative compromise in the Council, which was agreed in October 2017.11 At the end of 2017, the proposal was in “trilogue” – the three-way negotiations between the Commission, the Council and the EP – and it was uncertain what the final legislative outcome would be. However, from a Political Bargaining perspective, if the yellow card is seen purely as an attempt to block the legislation, then the participating national parliaments failed to influence the outcome.

**Policy Arguing: Completed Legislation**

From the Policy Arguing perspective described above, the EWM may be understood as a system providing a public forum for national parliaments to contest EU legislative proposals, although not necessarily to block them. The objecting national parliaments may be said to have succeeded if they have exerted some influence over the legislative process either by persuading the Commission to amend the proposal, or by influencing

---

11 “Posted workers: Macron’s first victory in reforming the EU,” Euractiv, 24 October 2017.
the position of the Council or the EP in a way that affects the final version of the completed legislation. Each of the three – Commission, Council and EP – interacts in a different way with national parliaments (Cooper 2013b: 65-67). The Commission is the most responsive procedurally, in that it replies in writing to every RO (and political dialogue contribution), but the least responsive substantively, in that it generally refuses to give any credence to their subsidiarity arguments. The Council is the reverse: it is the most responsive substantively, in that the concerns of national parliaments will often be reflected in Council debates and the final Council position, but the least responsive procedurally, in that the Council as a body does not communicate with national parliaments and its internal deliberations are largely opaque. Finally, the EP is fairly responsive in procedural terms to national parliaments, engaging with them in the form of interparliamentary dialogue, but in substantive terms is generally unreceptive to their subsidiarity arguments as it is often more favourable to EU action. Therefore the most likely conduit for the influence of national parliaments on EU legislation (and where the researcher should look for it) is to influence their respective governments’ positions in the Council, which may be subsequently reflected in Council debates, the final Council position in inter-institutional negotiations, and ultimately, the final legislation. While it is very difficult to say with certainty, there is some evidence that, of the eight cases in which the legislation was seen through to completion, national parliaments had an influence over the outcome in five (Seasonal Workers Directive, Border Controls, PSO Regulation, Governance Directive, EPPO) but not in the other three (Tobacco Products Directive, Maritime Spatial Planning, Port Services Regulation).
Seasonal Workers Directive (2010-2014)

This 2010 proposal to regulate “the conditions of entry and residence of third country nationals for the purposes of seasonal employment” was the first to receive a large number of ROs (nine) under the EWM. The proposal also received eight PD contributions raising policy or proportionality concerns, generally arguing for a more flexible Directive that would increase the discretion of, and decrease the administrative burdens on, national authorities. Many of the national parliaments’ concerns were reflected in Council debates on the measure. The legislation finally approved in 2014 was significantly altered by the EP, which pushed for amendments that would protect migrant workers from exploitation (Fudge and Herzfeld Olssen 2014). Even so, it also reflected a number of concerns raised by national parliaments with respect to duration of stay, application response time, grounds for rejection and family reunification (Cooper 2013b: 64).

Border Controls (2011-2013)

In September 2011, the Commission proposed an amendment to a 2006 Regulation “to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances” within the normally border-control-free Schengen area. The previous law essentially left member states the power to decide whether to reintroduce border controls in exceptional circumstances. The Commission proposal would have changed the rules to shift most of the power over that decision from the member state to the EU-level, and specifically to the Commission itself. Seven chambers
of national parliaments issued ROs, voicing the core subsidiarity-based argument that such decisions are essential to national sovereignty and ought to be left to the member states; in response, the Commission made no substantive changes. Yet the final version adopted in 2013 after a difficult negotiation between the EP and the Council essentially restored this power to the national level, albeit subject to somewhat more stringent conditions and EU-level oversight (Peers 2013: 30-47).

*Tobacco Products Directive (2012-2014)*

This Commission proposal regarding the manufacturing, presentation and sale of tobacco products in the EU, received nine ROs (14 votes) and 8 PD contributions. The most common complaint of the national parliaments in this case was that this one measure would empower the Commission to adopt a variety of “delegated acts” using a rule-making power that is technically non-legislative and therefore not subject to later scrutiny by national parliaments under the EWM. The Treaty permits the adoption of “delegated acts,” but only with respect to the “non-essential” elements of the legislation; many national parliaments thought this legislation would empower the Commission to make rules regarding aspects that were “essential.” The excessive use of “delegated acts” and “implementing acts” has been a concern of national parliaments more generally since the passage of the Treaty of Lisbon, as it means that a great deal of EU rule-making can escape their direct scrutiny (Granat 2014). The final legislation did restrict the use of delegated acts to some extent, but a detailed process-tracing analysis found little evidence that the arguments of national parliaments were reflected in the final outcome (Héritier et al. 2016: 124).

This measure and the Governance Directive (see below) were part of a package of six legislative texts aimed at completing the single market in rail services, in order to introduce greater competition in a field long dominated by national companies that functioned as quasi-monopolies (Montero 2014). The PSO Regulation was aimed at allowing new operators to compete for contracts for passenger routes that have a recognized role as services of general interest (Public Service Obligation, or PSO); the default position would be that such routes should be awarded by competitive tendering, while direct award would be allowed in exceptional circumstances. The final legislation did have a much longer transition period for directly awarded contracts: whereas under the Commission proposal they would have been phased out by 2022, the final version allows them to last an additional ten years. This was a response in part to the ROs of the two Dutch chambers, both of which complained that the transition was too short.


The Governance Directive aimed to strengthen the governance of rail infrastructure management, with a view to maintain the separation of the management of rail infrastructure, considered to be a natural monopoly, from the provision of passenger rail services, where free competition should prevail (Montero 2014). The final version of the Governance Directive rejected the Commission’s original proposal for the mandatory unbundling of infrastructure and operations, allowing instead for different models of vertical separation. This change in fact reflected the concerns raised by the French
Senate, which had acknowledged in its RO that some harmonization of the governance of railway systems was necessary but objected to the Commission’s proposed solution, that would have imposed an identical framework on the member states – which is, strictly speaking, more a proportionality argument. The changes to make the measure more flexible in this regard were eventually supported not only by the Council but also the EP.\(^{12}\)

*Maritime Spatial Planning (2013-2014)*

The aim of this proposal was to oblige member states to create their own framework for “maritime spatial planning,” analysing and organizing human activities in marine areas, using a holistic approach that takes account of economic development and environmental sustainability. The proposal was a largely non-prescriptive “framework” directive insofar as it required member states to engage in such planning but did not dictate the content of the plans beyond certain minimum requirements. It was the target of nine ROs (13 votes) that raised the subsidiarity-based objection that the legislation was unnecessary and had no value-added compared with the actions of member states; several also raised the conferral question of whether the EU had the competence to legislate in this field. Its unintrusive content meant that it prompted fewer proportionality objections (e.g. from the German *Bundesrat*). Despite the concerns raised, the legislation was adopted relatively rapidly, with the interventions of national parliaments seeming to have little discernable impact on the negotiations or the final outcome (Jalvingh 2016).


The intention of this proposal was to liberalize the market in the provision of port services (pilotage, towage, cargo-handling), as well as to improve the financial transparency of ports and their coordination and consultation. Ports in most member states are publicly-owned, sometimes benefitting from untransparent public subsidies and with port services markets closed to competition. National parliaments issued seven ROs (11 votes) that mostly objected to the proposal’s imposition of what they saw as a rigid one-size-fits-all model for the organization of ports. Many also objected to the choice of a uniform and binding legislative instrument – a regulation – instead of a directive, which is more flexible and must be transposed into national law, or “soft law” instruments. When the final version of the legislation became law in early 2017, it had been considerably watered down. While the measure was still a regulation, much more flexibility had been incorporated into the document. However, it appears that many of the changes were introduced by the EP, which had voted against similar legislative initiatives regarding ports on two occasions in the past, in 2003 and 2006. It is difficult to find any direct evidence that the interventions of national parliaments had influenced the final outcome.


In 2013 the Commission proposed the creation of European Public Prosecutor’s Office (EPPO) to combat fraud in the use of EU funds. This proposal received the second

---

“yellow card” under the EWM, as it was the target of 13 ROs, representing 18 votes – well above the threshold of 14 votes (lowered from one third to one quarter because the proposal concerned judicial cooperation in criminal matters). While most national parliaments raised standard subsidiarity concerns, saying that the creation of the EPPO was unnecessary, some also raised proportionality concerns, such as the French Senate which argued that the EPPO should adopt a collegiate management structure that rotates among member states rather than a top-down structure as proposed by the Commission (Fromage 2016). Required to formally respond to the yellow card, the Commission decided to maintain (rather than amend or withdraw) the proposal. It justified this decision in part by pointing out that the creation of the EPPO is explicitly authorized in the Treaty of Lisbon; it dismissed the proportionality concerns as outside the scope of the EWM, which is only concerned with subsidiarity. The subsequent actions were ruled by a special legislative procedure (Art. 86 TFEU) which specifies that the Council may act unanimously after obtaining the consent of the EP; however, it also allows that if unanimity cannot be reached, a group of at least nine member states may proceed with the use of an enhanced cooperation mechanism. The EP approved of a resolution in relation to the proposal in 2014 and again in 2015, but the legislation was stalled in the Council until it was decided in April 2017 to initiate the enhanced cooperation procedure. When the legislation was finally adopted in October 2017, 20 member states, including France, participated. Substantively, the legislation opted for a collegiate management structure, as advocated by the French Senate, among others. Of the eight non-participating member states, the parliaments of six – Hungary, Ireland, Malta, the Netherlands (both chambers), Sweden, and the UK (both chambers) – were among those
that wielded the yellow card (the other two were Denmark and Poland). Four of the participating member states (Czech Republic, France, Romania, Slovenia) had bicameral parliaments in which one chamber had issued an RO, and just one (Cyprus) had a unicameral parliament that did so (Wolfstädter and Kreilinger 2017: 5). While the yellow card did not prevent the creation of the EPPO, the final legislative outcome differed materially from the Commission proposal in two important respects: the EPPO itself had a collegiate managerial structure; and only 20 of 28 member states took part in its creation. It is quite likely that the intervention of national parliaments had at least some influence on this final outcome.

V. Conclusion

This paper has provided a historic overview of how the EWM has functioned in the first eight years since the Treaty of Lisbon entered into force. In addition, it has investigated whether the EWM has enhanced the democratic legitimacy of the EU, by making an assessment of whether it has given national parliaments a newfound influence over the outcome of the EU’s legislative process. Focusing on the sixteen proposals that received the most ROs over the eight-year period (and in particular on the twelve that reached an advanced legislative stage), it is possible to conclude that national parliaments have been somewhat less successful at blocking legislation (Political Bargaining) than at influencing legislation through policy dialogue (Policy Arguing). Specifically, whereas it is only possible to identify with some certainty one instance in which national parliaments precipitated the withdrawal of a legislative proposal (Monti II), there are a further five cases of completed legislation in which there is some evidence that national parliaments
influenced the final outcome. However, it should be emphasized that these conclusions are tentative and that in many of these cases, more research will be needed in order to arrive at a definitive determination regarding national parliaments’ influence.

Even so, the reader may well ask whether the EWM is worth the trouble if it has only had a material effect on six legislative proposals in eight years, less than 1% of the proposals subject to the EWM over that period. In response, it should be noted that there may well be other cases in which national parliaments passed fewer ROs than half those needed for a yellow card but nevertheless influenced the final legislative outcome, which are outside the scope of this analysis. In addition, it cannot be discounted that the EWM may have deterred the Commission from making even more legislative proposals that potentially ran afoul of subsidiarity; indeed, the reduction in new legislative proposals in 2014-2015 occurred under a new Commission that presented itself as more respectful of national parliaments’ concerns (Cooper 2017: 48-49). Finally, it should be reiterated that there is no tradeoff between classic domestic scrutiny and EU-level engagement, and that in fact when national parliaments participate in the EWM they can also strengthen their ability to hold their own government to account in its conduct of EU affairs; therefore the EWM has positive side effects for democracy in the EU that go beyond the extant evidence of its empirical effectiveness.

In sum, the democratic impact of the EWM, as measured by its impact on legislative outcomes, is mixed. However, the extended analysis of a large body of cases presented here has also had a broader purpose: it has been to show in concrete terms the way in which national parliaments, after the Treaty of Lisbon, are now active participants in the day-to-day legislative politics of the EU. Groups of national parliaments have used
the EWM to intervene at EU-level, making their opinions known and their presence felt, on a wide variety of policy issues far more frequently than is generally realized. This is significant even if it is difficult to prove that they have made a material legislative difference. Of course, we should not exaggerate their importance: national parliaments are still peripheral players in EU politics. Even if the first yellow card in 2012 was the national parliaments’ “Isoglucose Moment” – i.e. the occasion when, as happened with the EP in 1980, EU institutions could no longer simply ignore them (Cooper 2015: 1420) – it is a moment that has not been repeated. But even in the absence of further dramatic events, national parliaments have gradually integrated themselves into the fabric of the EU’s democratic processes. Thus even if the legislative impact of the EWM has been modest, it has nevertheless enhanced the democratic legitimacy of the EU.
References


Cooper, Ian. 2013b. “Deliberation in the Multilevel Parliamentary Field: The Seasonal Workers Directive as a Test Case,” in Ben Crum and John Erik Fossum, eds., Practices of Inter-Parliamentary Coordination in International Politics: The


