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The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation

Marco Goldoni*

The Early Warning System – Protocol on Subsidiarity and Proportionality – Monti II regulation – Fundamental freedoms vs right to strike – National parliaments' reasoned opinions – Politicising subsidiarity – Political constitutionalism – Representativity – A political interpretation of the Early Warning System – National parliaments as guardians of national constitutional essentials

INTRODUCTION

The first Yellow Card issued against the Commission's proposal for a Council regulation of the right to collective action¹ and the following decision to withdraw the proposal might represent the first steps toward a more nuanced view of the Early Warning System (EWS). This case helps to shed a clearer light on the EWS. This article suggests that there could be a link between the protection of certain tenets of national social policies and the role of parliaments. National parliaments may be using the EWS also as a way to contain the social deficit caused by European integration, echoing what some national constitutional courts did for the protection of fundamental rights when they had to confront the case-law of the Court of Justice of the European Union.

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THE EARLY WARNING SYSTEM AND ITS USE

The EWS has been introduced by Protocol No. 2 of the Lisbon Treaty with the hope of killing two birds with one stone. On the one hand, the idea was to cope with the weak (*rectius*, almost non-existent) enforcement of the principle of subsidiarity² by attributing to the most affected institutions the task of checking the Commission's compliance to this principle. On the other hand, the involvement of national parliaments in the European lawmaking process had been deemed necessary as a way to cope with the infamous democratic deficit. The hope of the drafters of, first, the Constitutional Treaty and then the Lisbon Treaty was to inject some representativity in the ascending phase of European lawmaking by coopting the most representative (at least from a political perspective) institutions at the national level. Much has already been written on the functioning of the EWS,³ so a brief outline of its functioning will suffice here.

The core of the EWS is regulated by Articles 6 and 7. If there is a suspicion of a breach of the subsidiarity principle, each national parliament or each chamber of a national parliament has eight weeks⁴ (in the Constitutional Treaty the period was six weeks) in which to communicate to the presidents of the European Commission, the European Council and the Council the reasons why it considers that a given legislative draft does not respect the principle of subsidiarity. Two procedures can emerge from this reaction. The first one is known as the 'yellow card' and is regulated by Article 7(2) of the Protocol: if a third of national parliaments (two votes per country, one vote per chamber in bicameral systems) find a breach of the principle of subsidiarity, then the legislative draft needs to be reviewed. This threshold goes down to one quarter in the former justice, freedom and security area. With the EU at 27 Member States, the one-third threshold equals 18 votes, that are brought down to 13 if the issue concerns the area of justice, freedom and security.⁵ The Commission does not have to formally withdraw its proposal and can keep the original proposal in place. But it still needs to explain its decision in the form of a communication. This is supposed to enhance the dialogue between the Commission and the national parliaments and to enrich this institu-

² A. Estella, *The EU Principle of Subsidiarity and Its Critique* (Oxford University Press 2002); G. Martinico, 'Dating Cinderella: On Subsidiarity as a Political Safeguard of Federalism in the European Union', 12 *European Public Law* (2011) p. 649; A. Biondi, 'Subsidiarity in the Courtroom', in A. Biondi et al. (eds.), *EU Law after Lisbon* (Oxford University Press 2012), p. 213-227.

³ See now the monograph by P. Kiiver, *The Early Warning System for the Principle of Subsidiarity* (Routledge 2012).

⁴ Since the entry into force of the Lisbon Treaty, the month of August is not counted in the eight weeks deadline.

⁵ Obviously, after the accession of Croatia, Member States are 28 and therefore the threshold has changed. But when the first yellow card was triggered, these were the relevant thresholds.

tional conversation with further reasons in support of the contested (or then modified) proposal.

The second procedure is known as the 'orange card' and is regulated by Article 7(3) of the Protocol. If, for what concerns the ordinary legislative procedure, more than half of the national parliaments find a breach of the subsidiarity principle and the Commission still wants to proceed with the text unchanged, then the national parliaments' opinions and the Commission's reasoned opinion are transmitted to the Union legislators. The text of the relevant alinea states that '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 1, the proposal must be reviewed'. This alinea requires absolute majority counted against all votes allocated to the national parliaments.⁶ In light of this clarification, the number of votes necessary to reach the majority is 28 (out of 54). The Parliament and the Council have to decide on the existence (or not) of the subsidiarity breach before dealing with the proposal itself. The European Parliament decides by a majority of votes cast on the issue. The Council requires a 55% majority of votes to decide if there is a subsidiarity breach. If any of these institutions shares the doubts expressed by national parliaments then the legislative process will be blocked.

Before the entry into force of the Lisbon Treaty, the EWS had obviously not produced concrete results if one excludes an increase of awareness of (some of) the national parliaments of what is happening in terms of legislative projects in Brussels. COSAC (the body that gathers the representatives of the European Affairs Committees of the Member States) performed eight try-outs on the way to the entry into force of the Lisbon Treaty. The outcomes, in terms of participation and substantive control of subsidiarity, were mixed to say the least. Nonetheless, COSAC provided a useful platform for national representatives for exchanging information and sharing points of view on the Commission's proposals under scrutiny. Therefore, it was surprising and disappointing to see that after the Lisbon Treaty became effective, national parliaments decided to discard COSAC as the forum for performing the subsidiarity check and they retreated to their own national realms. The only instrument, at this stage, for exchanging information and best practices, apart from informal exchanges among the permanent representations in Brussels, remains IPEX, a website where the European activities of national parliaments are uploaded or documented.

In the first couple of years, that is, in 2010 and 2011, no yellow or red card has been issued. Nonetheless, there has been an increase in the number of reasoned

⁶'The Role of National Parliaments in the EU', *FIDE proceedings*, Madrid 2010, vol. 1, p. 23.

opinions and votes cast against the Commission proposals,⁷ with large disparities among different national parliaments.⁸ Some legislative drafts of the Commission have generated a discreet amount of reasoned opinions, but the Commission has never formally recognised any point stressed in one of those opinions. It is not surprising, then, that the EWS had been considered less effective than the other informal channel of communication between parliaments and the Commission, the political initiative (known also as the Barroso initiative).⁹ However, at the end of May 2012, the Commission announced that the threshold for the yellow card had been met on a proposal concerning the management of the conflict between economic freedoms and labour rights.¹⁰

THE COMMISSION'S PROPOSAL AND ITS BACKGROUND

As is well known, a series of cases decided by the Court of Justice of the European Union between the end of 2007 and 2008 stirred a lot of controversy on the place of the right to collective action (and in particular on the right to strike) within European Union law.¹¹ By reverting its previous case-law,¹² this line of cases recognized that the right to collective action is part and parcel of EU law (a fundamental right), despite the explicit exclusion of the right to strike in Article 153(5) TFEU.¹³ Among the elements that caused debate there was the decision by the

⁷The Commission's figures show that in 2010 were cast 46 votes (Luxembourg and Sweden the more active parliaments with 6 votes) while in 2011 the votes amounted to 82 (with Sweden being the most active with 16 votes).

⁸The difference in activity among national parliaments confirms the observation about comparative parliamentary involvement in EU affairs: cf. J. O'Brennan and T. Raunio (eds.), *National Parliaments within the Enlarged European Union: From 'Victims' of Integration to Competitive Actors?* (Routledge 2007).

⁹D. Jancic, 'The Barroso Initiative: Window-Dressing or Democracy Boost?', 8 *Utrecht Law Review* (2012) p. 78.

¹⁰For an introduction to the terms of the conflict see D. Novitz and P. Syrpis, 'Economic and Social Rights in Contrast: Political and Judicial Approaches to Their Reconciliation', 33 *European Law Review* (2008) p. 411-426.

¹¹See, at least, *Viking* (C-438/05) and *Laval* (C-341/05). The debate generated by these cases has produced a huge amount of literature which cannot be mentioned here. For a general overview and an assessment of how these cases impacted upon each national system see A. Bücker and W. Warnek (eds.), *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert* (Nomos 2011), p. 159-168. Cf. A. Asteriti, 'Social Dialogue, Laval Style', 6 *European Journal of Legal Studies* (2012) p. 59. See also, the excellent overview in F. Fabbrini, 'Europe in Need of a New Deal', 43 *Georgetown Journal of International Law* (2011) p. 1175.

¹²ECJ 21 Sept. 1999, Case C-67/96, *Albany International v. Stichting Textielindustrie*.

¹³However, it must be reminded that the right to collective action is explicitly recognised in Art. 28 of the Charter of Fundamental Rights.

Court of Justice of the European Union (CJEU),¹⁴ in order to ensure the functioning of the common market, to design a standard of protection for the right to strike in cases of transnational industrial actions which is more restrictive than that prevailing in many Member States¹⁵ and the case-law of the European Court of Human Rights (ECtHR).¹⁶

The Commission, after consultations with social partners,¹⁷ and drawing from the report of 9 May 2010 by Mario Monti (this is why the proposal is called Monti II),¹⁸ proposed a Council regulation as ‘the most effective and efficient solution to address the specific objective of reducing tensions between national industrial relation systems and the freedom to provide services’.¹⁹ Therefore, the Commission deemed necessary to step in and clarify the status of the right to collective action in cross-border contexts. In the explanatory memorandum, the Commission affirms that the ‘present proposal aims to clarify the general principles and applicable rules at EU level with respect to the exercise of the fundamental right to take collective action within the context of the freedom to provide services and the freedom of establishment, including the need to reconcile them in practice in cross-border situations. Its scope covers not only the temporary posting of workers to another Member State for the cross-border provision of services but also any envisaged restructuring and/or relocation involving more than one Member State’.²⁰ The Commission decided to ground its proposal on the so-called flexibility clause (Article 352 TFEU), which states that the Commission can propose a Council regulation when no powers have been provided by the Treaties in order to realise one of the essential tasks.²¹ Presumably, the task here is to avoid legal uncertainty in the single market by regulating cross-border conflicts between

¹⁴In the more recent case of ECJ 15 July 2010, Case C-271/08, *Commission v. Germany*, the Court has confirmed the doctrine established in *Laval* and *Viking*.

¹⁵See, e.g., N. Bruun et al., ‘Consequences and Policy Perspectives in the Nordic Countries as a Result of Certain Important Decisions of the Court of Justice of the EU’, in Bückner and Warnek (eds.), *supra* n. 11, p. 19.

¹⁶K. Ewing and J. Hendy, ‘The Dramatic Implications of *Demir and Baykara*’, 39 *Industrial Law Journal* (2010) p. 2.

¹⁷The reactions of the social partners to the case-law of the Court have been different but European trade unions and employers have either asked for modifications or clarifications. See *Report on Joint Work of the European Social Partners on the ECJ Rulings in the Viking, Laval, Rüffert and Luxembourg Cases*, 19 March 2010.

¹⁸M. Monti, ‘A New Strategy for the Single Market’, 9 May 2010.

¹⁹Commission explanatory memorandum, p. 9.

²⁰Explanatory memorandum, *supra* n. 19, p. 10.

²¹Art. 352 states that ‘if action by the [EU] should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the [EU] Parliament, shall adopt the appropriate measures’.

fundamental freedoms and the right to collective action. In order to support this claim, the Commission makes reference to the Impact Assessment, which ‘identified negative economic and social impacts of the baseline scenario. Continuing legal uncertainty could lead to a loss of support for the single market by an important part of the stakeholders and create an unfriendly business environment including possibly protectionist behaviour’.²² But the Commission also states that in order to ‘avoid ambiguity and prevent solutions being unilaterally sought at national level, it is necessary to clarify a number of aspects relating in particular to the right to take collective action, including the right or freedom to strike, as well as the extent to which trade unions may defend and protect workers’ rights in cross-border situations’. In other words, a Council regulation of this issue would block any national pretension to find a ‘unilateral’ solution.

As for what concerns its competence to act, it is important to bear in mind that the Commission is still committed to the subsidiarity test suggested by the protocol attached to the Amsterdam Treaty:

Subsidiarity cannot be easily validated by operational criteria. The Protocol, as revised by the Lisbon Treaty, no longer mentions conformity tests, such as ‘necessity’ and ‘EU value added’. Instead it has shifted the application mode towards the procedural aspects ensuring that all key actors can have their say. The Commission has continued to use ‘necessity’ and ‘EU value added’ tests as part of its analytical framework and recommends the other actors to do likewise.²³

EU added value of the proposal would reside in the danger of the rise of protectionist behaviour which would unduly limit the fundamental freedoms and, on the side of the right to strike, ‘the risk of damage claims and doubts regarding the role of national courts could prevent trade unions from exercising their right to strike’.²⁴

The Commission’s reasoning basically accepts the starting point of the CJEU,²⁵ that is, it begins by accepting the application of the principle of proportionality in case of conflict between fundamental freedoms and fundamental rights. In fact, the core provision of the proposed regulation is Article 2 which states that ‘the exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the

²² Explanatory memorandum, *supra* n. 19, p. 14.

²³ European Commission, Report on Subsidiarity and Proportionality, 2011, p. 3.

²⁴ Explanatory Memorandum, *supra* n. 19, p. 2.

²⁵ See the analysis focused on Arts. 1 and 2 of the proposal by M. Rocca, ‘The Proposal for a (So-called) Monti II Regulation on the Exercise to Take Collective Action within the Context of the Freedom of Movement and Freedom of Establishment’, 3 *European Journal of Labour Law* (2012) p. 19.

fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms'.²⁶ This is affirmed as part of a rather 'irenic' conception of the relation between economic freedom and right to collective action, as it is affirmed in the explanatory memorandum: 'while reiterating that there is no inherent conflict between the exercise of the fundamental right to take collective action and the freedom of establishment and the freedom to provide services enshrined in and protected by the Treaty, with no primacy of one over the other, Article 2 recognizes that situations may arise where their exercise may have to be reconciled in cases of conflict, in accordance with the principle of proportionality in line with standard practice by courts and EU case law'.²⁷ One is left wondering how the consolidation of the Court's case-law into EU law would enhance the level of protection of the right to strike in Member States.²⁸ As we shall see in the next section, it is not surprising that some national parliaments reacted against the codification of the Court's case-law, given that enshrining this standard of protection in EU law means, for certain countries, to lower the bar of protection for labour rights.

The most 'innovative' provision of the regulation foresees a new role for the social partners at the EU level, in particular in the definition of alternative dispute resolution mechanisms to resolve labour disputes. Article 3(2) states that 'management and labour at European level may, acting within the scope of their rights, competences and roles established by the Treaty, conclude agreements at Union level or establish guidelines with respect to the modalities and procedures for mediation, conciliation or other mechanisms [...] with a cross-border character'. As it has been noted, it is unclear 'to what extent these procedures would have been uniformly available throughout the EU until the social partners had agreed on a proper contractual regime of alternative dispute resolutions in transnational labour disputes'.²⁹ Finally, and rather revealingly for understanding where the Commission puts the accent, Article 4 of the proposed regulation imposes an

²⁶ While it is true that this article introduces a cross-proportionality test (which means that it has to be applied to the limitation of both economic freedoms and social rights), Catherine Barnard has heavily criticized this provision for not securing that at least the essence of the right under protection should not be undermined by proportionality analysis: C. Barnard, 'A Proportionate Response to Proportionality in the Field of Collective Action', 37 *European Law Review* (2012) p. 117.

²⁷ Explanatory Memorandum, *supra* n. 19, p. 12.

²⁸ For an explanation (followed by a strong criticism) of how this article entrenches the primacy of economic freedoms in proportionality analysis see K. Ewing, 'The Draft Monti II Regulation: An Inadequate Response to Viking and Laval', Institute for Employment Rights, 2012, <www.lcdtu.org/the-draft-monti-ii-regulation-an-inadequate-response-to-viking-and-laval/>, visited 10 March 2013.

²⁹ 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', 50 *Common Market Law Review* (2013) p. 20.

obligation upon each Member State, to inform other affected Member States and the Commission in those cases where ‘serious acts or circumstances affecting the effective exercise of the freedom of establishment or the freedom to provide services which could cause grave disruption to the proper functioning of the internal market and/or which may cause serious damage to its industrial relations system or create serious social unrest in its territory or in the territory of other Member States’. It is a rather vague statement and it is not clear why the Commission should be informed so that it can ensure that a restriction of the economic freedoms does not go beyond what is permitted. Overall, Article 4 does not enhance legal certainty and opens up a space for further intrusion of the Commission in the national labour market.

REASONED OPINIONS BY NATIONAL PARLIAMENTS

An analysis of the reactions of the national parliaments shows that some parliaments actually stretched the letter of the EWS in order to be able to put forward a considered opinion. In fact, if the system were to be interpreted literally, the aspirations of national parliaments to voice their concerns would probably be frustrated and national parliaments’ role would be reduced to a formal and thin control on the exercise of European powers. This is a self-defeating logic because it attributes to quintessentially political institutions a competence on subsidiarity which is a-political in nature. In light of this consideration, it is not surprising, then, that parliaments have tried to seize the opportunity of using reasoned opinions as a reaction against a Commission’s proposal touching upon one of the national constitutional essentials. If this is indeed the real incentive for the parliaments to oppose the Commission proposal, more yellow cards should be expected in the future.³⁰

In the case of the Monti II regulation, before the deadline of 8 weeks had expired, 12 national parliaments issued negative reasoned opinions: 7 from unicameral parliaments (14 votes) and 5 bicameral (5 votes). Other parliaments sent reasoned opinions after the deadline. The Czech Senate, for example, issued a negative reasoned opinion beyond the deadline; the German Bundesrat and the Slovenian parliaments issued a negative opinion but they did not declare the proposal contrary to the principle of subsidiarity.³¹ These parliamentary chambers reacted simply against the Commission’s project of regulating the right to collec-

³⁰ Another yellow card was triggered in October 2013 on the Commission proposal for the institution of the European Public Procurator Office: Com(2013) 534. In this case, the Commission reviewed its proposal and decided to keep it in its original formulation.

³¹ To be fair, they all declare that their scrutiny was not focussed on subsidiarity review, but on the content of the proposal.

tive action at the European level by declaring their opposition.³² The Polish Senate too sent a reasoned opinion when the deadline had already expired, but it found a breach only of the principle of proportionality, but not of subsidiarity.

Even a quick reading of the reasoned opinions shows that the majority of parliamentary chambers have reacted in a rather negative way even when they have not found a clear breach of the principle of subsidiarity. In fact, the main concern expressed by national parliaments was that this proposal ‘might destroy well-functioning national arrangements in the area of labour law’.³³ The main fear here comes across as evident: as underlined by the Belgian *Chambre des Représentants*, labour law is a national question *par excellence* and cannot be transferred to the European Union.³⁴ National parliaments are directly stating their worries about the centrifugal effect for their national labour laws caused by a European intervention with an instrument like a Council regulation. The problem here is twofold. First, the decision to regulate the right to collective action is perceived as a threat to constitutional essentials by many Member States.³⁵ For example, the Portuguese *Assembleia da República* has clearly stated that ‘reconciling social rights and economic rights in the context of fundamental rights conflict with Portuguese constitutional tradition and with the interpretation followed by the jurisprudence of the Portuguese Constitutional Court and in legal theory generally’.³⁶ The French Senate has even proposed a reformulation of Article 2 of the regulation in order to make it compatible with the principle of subsidiarity.³⁷ Second, the use of a Council regulation, which will be directly applicable in every Member States, does not seem to be the best instrument to ensure that the proposal respects ‘not only the autonomy of the social partners, but also the different social models and the diversity of industrial relation systems in the Member States’.³⁸ As aptly noted by

³² Kiiver has rightly proposed that all reasoned opinions should contain a clear statement on the respect or violation of subsidiarity: *The Early Warning System for the Principle of Subsidiarity*, *supra* n. 3, p. 198-199.

³³ Reasoned opinion of the Finnish Folketinget, 3 May 2012, p. 2.

³⁴ Avis de subsidiarité, *Chambre des Représentants de Belgique*, 30 May, DOC 53 2221/001.

³⁵ Note that the Lisbon Treaty has introduced a clause that protects national and constitutional identity. On the controversial interpretation of this clause see T. Kostadinides, ‘Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement’, 13 *Cambridge Yearbook of European Legal Studies* (2012) p. 195.

³⁶ Reasoned opinion of the *Assembleia do Republica*, 18 May 2013.

³⁷ This is the wording proposed, in French, by the French higher chamber: ‘L’exercice de la liberté d’établissement et de la libre prestation des services énoncées par le traité respecte le droit fondamental de mener des actions collectives, y compris le droit ou la liberté de faire grève’. This is a quite interesting move because Protocol No. 2 does not say anything about potential contribution to the content of the Commission’s proposal expressed in reasoned opinions. Note also, that the French Senate is usually considered one of the most active parliamentary chambers in the European Union.

³⁸ Explanatory Memorandum, *supra* n. 19, p. 11.

Malta's parliament, the instrument of regulation is highly invasive and, given the content of the proposal, may disrupt the autonomy of the national social partners and more generally of national labour law. Article 3 of the proposal is also seen by some parliaments as a threat to national autonomy in regulating the labour market. The Swedish Riksdag, in its reasoned opinion, stresses that 'the proposed dispute resolution mechanisms could interfere with the well-functioning domestic models for dispute resolution [...] arrangements for the settlement of disputes of this nature must be considered part of national labour market models that should not be regulated at EU level'.³⁹ The Danish Folketing considered the change of the existing national mechanisms of dispute settlement unnecessary, as the national provisions worked correctly. Concerning this article, the French Senate has noted that the only provision that would be compatible with the principle of subsidiarity would be one along the lines of the 'Monti Clause', that is, a provision that would immunise the right to strike from the direct and indirect effects of European legislation.⁴⁰

It was also predictable that the vast majority of reasoned opinions would focus on the legal basis of the proposed regulation. Given that Article 153(5) TFEU introduces a categorical exclusion of the right to strike from the jurisdiction of the European Union, the Commission needed to find a way to circumvent this legal hurdle. The Commission based its argument on two points: the first is that the case-law of the CJEU has changed the interpretation of the Treaty by recognising that the right to strike is a European fundamental right; second, and as a consequence, Article 153(5) has to be read as a prohibition to harmonize labour law and not as a categorical exclusion of the right to strike. Therefore, Article 352 (flexibility clause) is proposed as the legal basis for this proposal. However, many reasoned opinions contain a criticism of the lack of a clear objective for the proposal. The House of Commons contested the necessity of acting and also added that there was no evidence of the urgency and necessity of EU intervention. The perception of the need for the Commission to 'express a more committed political approach'⁴¹ should not be considered, according to the House of Commons, as a replacement of evidence of necessity for the EU to act.⁴² And obviously, if the

³⁹ Riksdag Committee on the Labour Market, Statement 2011/12.

⁴⁰ The original Monti Clause was introduced into the so-called 'Monti Regulation' on the free movement of goods in 1998. Art. 2 of the Regulation reads: 'This Directive may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to take other actions covered by the specific industrial relations systems in Member States': Council Regulation 2679/1998 on the functioning of the internal market in relation to the free movement of goods among Member States.

⁴¹ Explanatory memorandum, *supra* n. 19, p. 5.

⁴² The House of Commons' reasoned opinion also contains a quote from the Impact Assessment Board, which, in its report of 21 Dec. 2011, judged the Commission's proposal as unnecessary:

proposal's aim is to clarify the legal situation after the controversy stirred by the case-law of the CJEU, then many parliaments rightly believe that this regulation would not achieve this result. In fact, if the controversy and the lack of certainty surrounding the labour law cases was generated by the application of proportionality to arbitrate between economic freedoms and fundamental rights, then how it is possible to clarify the legal situation by simply ratifying in Article 2 the case-law of the Court (with a language directly taken from *Viking*). The Finnish *Eduskunta*, for example, states that the criteria set out by Article 352 TFEU were 'manifestly not fulfilled' by the regulation.⁴³ Following the same line of reasoning, the Luxembourg *Chambre des Députés* and the Portuguese *Assembleia da República* opined that Article 352 TFEU was not a justified legal basis for the proposed regulation.⁴⁴

REPRESENTATIVITY AND THE SUBSTANTIVE USE OF THE EARLY WARNING SYSTEM

In an accurate and insightful review of the first yellow card case, Federico Fabbrini and Katarzina Granat criticize national parliaments for their activism.⁴⁵ In their view, the Commission's proposal did not contain any violation of the principle of subsidiarity; therefore, national parliaments acted, so to say, *ultra vires*. The national legislatures basically misunderstood the spirit and the letter of the EWS. Contrary to non-formalist interpretations of the subsidiarity review,⁴⁶ Fabbrini and Granat put forward a narrow reading of the EWS: according to them, this kind of instrument should be limited to the material and procedural dimensions of subsidiarity review. The material aspect of subsidiarity can be verified

'While the [Commission's] revised report presents the problem relating to the right of collective bargaining and action separately, and designs alternative policy options, it does not fully separate the set of corresponding objectives for the issue. The Report still does not clarify why this problem is being addressed at the same time as revising the Directive on posting of workers, and fails clearly to demonstrate the necessity and proportionality of legislative EU action in this matter.'

⁴³ Reasoned opinion of the *Eduskunta*, 16 May 2012. In the same reasoned opinion, the Finnish parliament stated that the proposal 'overlooks the regulation's correspondence with the provisions on the right of collective industrial action guaranteed in fundamental rights instruments approved by the United Nations, the International Labour Organization and the Council of Europe'. The Latvian *Saeima* also emphasized possible conflicts with the Council of Europe's framework of social rights protection.

⁴⁴ Reasoned opinion of the Luxembourg *Chambre des Députés*, 15 May 2012.

⁴⁵ F. Fabbrini and K. Granat, "Yellow Card, But No Foul", *supra* n. 29, p. 28.

⁴⁶ By providing persuasive reasons, Kiiver argues that in practice it is impossible to detach the principle of subsidiarity from the other two principles (of conferral and of proportionality) stated in Art. 5 TEU: Kiiver, *The Early Warning System for the Principle of Subsidiarity. Constitutional Theory and Empirical Reality*, *supra* n. 3, p. 98-100.

through an assessment of the 'national insufficiency test' and the 'comparative efficiency test' as stated by Article 5(3) TEU. According to the first test, the EU can act only when the objectives of the proposed action cannot be achieved by the Member States alone.⁴⁷ The second test indicates that 'the EU should not act unless it could better achieve the objectives of the proposed action'.⁴⁸ The procedural dimension concerns the duty of the Commission to justify its proposals by supporting them with reasons and indicators which should be contained in explanatory memorandums, impact assessments and recitals of the proposal's preamble.⁴⁹ Fabbrini and Granat propose that 'national parliaments could take these assessments into account as a benchmark to assess the conformity of the proposal with the procedural aspect of the principle of subsidiarity'.⁵⁰ But by containing the intervention of national parliaments to these material and procedural dimensions of subsidiarity review, they state that the EWS should not address 'the content of a legislative draft, its proportionality or the correctness of its legal basis'.⁵¹ In fact, by interpreting the scope of the EWS in this narrow sense, one is left with a feeling that an opportunity to politicise the dialogue between the Commission and national parliaments is missed. According to this reading of the EWS, the subsidiarity review revolves more around checking whether the Commission proposal ticks all the right procedural boxes rather than engaging in the political evaluation of the principle of subsidiarity. From a strictly formalist reading of Protocol No. 2 this is a correct interpretation. But then, what would be the point (and the added value) of investing the time and resources of a political institution in such a narrow and legalistic review?

A more charitable and productive reading of the EWS can be adopted by understanding it as part of a larger picture. This reading interprets the EWS in the wider context of the Lisbon Treaty and as part and parcel of a commitment to enhance representative democracy within the Union. Article 10 TEU makes an explicit reference to the importance of representative democracy. As reminded at the outset of this article, the protocol on the role of national parliaments and the protocol on subsidiarity and proportionality have to be read against the background of Article 10 TEU. Note also that Article 4(2) TEU explicitly protects national and constitutional essentials. It is not yet clear how this article has to be interpreted. While national constitutional courts may be well placed as protector of constitutional essentials, nothing prevents national parliaments from exercising this role too. This would be even more appropriate in countries which do not have

⁴⁷ R. Schütze, *From Dual to Cooperative Federalism* (Oxford University Press 2009), p. 250.

⁴⁸ R. Schütze, *supra* n. 47,

⁴⁹ 19th Report from the Commission on Subsidiarity and Proportionality, July 2012, COM(2012) 373, final, p. 3.

⁵⁰ Fabbrini, Granat, *supra* n. 29, p. 11.

⁵¹ Fabbrini, Granat, *supra* n. 29, p. 9.

a strong and rich tradition of constitutional justice. Furthermore, it is also coherent for national parliaments to check whether the proposal of the Commission is compatible with the principle of conferral or not. Since as a question, subsidiarity emerges once the principle of conferral has been respected, it is reasonable to leave to parliaments the possibility of expressing their concerns on the legality of the Commission's proposal.

A final consideration concerning the nature of subsidiarity review is in order. While analytically it remains possible to distinguish between narrow and wider readings of the principle of subsidiarity, in practice this delimitation trivializes subsidiarity review. This is because if understood in a thin fashion as simply a question of which level should decide on what, subsidiarity is reduced to a technical exercise of competence review and it betrays, by institutional design, a pro-European centripetal prejudice. Furthermore, it is often the case that subsidiarity review does not raise the question of the legitimacy of the objective stated in the Commission's proposal. Under this guise, subsidiarity check begins at a later stage and asks simply what is best suited to reach the unquestioned objective. Therefore, once established that an objective related to the realisation of the common market has to be reached at the European level, by definition the European Union will be better placed to achieve this task. Last but not least, the only check on the respect of the principle of subsidiarity is left to the CJEU: not only this institution has a pro-European bias, but one could reasonably argue that this kind of ex post review comes in when it is too late, in particular for concerns related to social issues.⁵²

A political interpretation of subsidiarity review⁵³ would provide a potential antidote to Member States to react against the centripetal proposals coming from the Commission. Social policies are among the most salient political issues and they have often been the sources of conflict when they have threatened social rights.⁵⁴ Particularly instructive has been the case of what has been aptly defined as the 'infiltration of competition law into national labour law'.⁵⁵ Note that the conflict between economic freedoms and labour law is exacerbated by the peculiarity of the material European constitution. This is based on an original split between market integration and social protection, that is, between the economic and the social constitution. It is the outcome of a shaky compromise in an area in which

⁵² On the limits of ex post and judicial control of subsidiarity see D. Chalmers et al., *European Union Law* (Cambridge University Press 2010), p. 364-369.

⁵³ Note that this interpretation, as reminded in the previous section, can be supported on the legal basis provided by the Treaties.

⁵⁴ The reasons that make a European social market impossible have been pinpointed by F. Scharpf, 'The Asymmetries of European Integration, or Why the EU Cannot Be a Social Market Economy', 8 *Socio-economic Review* (2010) p. 211.

⁵⁵ S. Giubboni, *Social Rights and Market Freedom from the European Perspective* (Oxford University Press 2006), p. 155.

the process of integration has been mainly negative (that is: it has interpreted national regulation as an obstacle). As Christodoulidis phrases it, the risk for 'the national systems of employment regulation [is to be] undercut, their viability threatened by the unblinking focus on freedom of goods and services, capital and labour. As a direct result of the separating off of the economic from the means to redress political and social deficits, legitimisation questions are divorced from the effects of economic performance and its distributional outcomes'.⁵⁶

The reaction of national parliaments against the proposed Monti II regulation is an instantiation of a major concern about the integrity (already affected) of their labour markets. Many of them, though not all, to be fair, note the risk of a 'race to the bottom' affecting wages and conditions of work. Hence, the claim by parliaments that the regulation of the right to collective action (and one must add, the regulation of collective bargaining), given the current circumstances, ought to remain within national jurisdictions. In order to understand why the role played by national parliaments in this case is to be appreciated as a defence of the national labour law system it is opportune to stress the social preconditions under which parliamentary political representation has developed.⁵⁷

In the tradition of European modern politics, political representation has been organised mainly around the division of labour; the social arrangements created by conflict between different social interests have shaped the political constitution and provided the material pre-condition for its democratic legitimacy.⁵⁸ This feature of modern European constitutionalism had an impact both on the idea of lawmaking as mainly legislation and as parliaments being the main forum for political accountability. Political constitutionalists have convincingly stressed the priority of one or the other function.⁵⁹ However, they have not fully explored the link between political representation and the social context.⁶⁰ In fact, they both take political equality as the core of the political constitution, but their understand-

⁵⁶ E. Christodoulidis, 'Minefield of Misreckonings: European Constitutional Pluralism', 14 *Cambridge Yearbook of European Law* (2012) p. 131. The disarticulation between the economic and the political constitution is potentially destructive for the national welfare systems precisely because 'the social question becomes categorically distinct: a matter that can and should be dealt with at an appropriate level, even if the disarticulation is precisely what so substantially undercuts the possibilities of redress, offering too little, too late'.

⁵⁷ One caveat has to be introduced at this stage: the argument proposed in this section is based on the premise that certain representative mechanisms are not available at the European level.

⁵⁸ J. Habermas, *The Postnational Constellation* (Cambridge University Press 2006), p. 80.

⁵⁹ One is represented by R. Bellamy, *Political Constitutionalism* (Cambridge University Press 2007); the other one by A. Tomkins, *Public Law* (Clarendon 2003).

⁶⁰ To be fair, the social question is almost invisible in the writings of political constitutionalists. This is reflected in the rather formalistic understanding of political equality that they are keen to protect. For an exception, see J. Griffith, 'The Political Constitution', 45 *Modern Law Review* (1979) p. 1.

ing of it is rather thin and formal.⁶¹ It basically amounts to the recognition of the equal right to vote. Obviously, even political constitutionalists have to admit that this right needs to be embedded in a larger institutional structure which is comprised, predictably, by majority rule and fair electoral competition among political parties.⁶² In this way, political representation is understood mainly as a process of authorisation⁶³ which shows, also, by being a fair procedure, equal respect to citizens. However, political representation, while clearly also a procedure of authorisation, involves a more complex relationship between the rulers and the ruled, which includes not only the political system, but also civil society.⁶⁴ Political representation can be defined as the transmission belt between civil society and the political system.⁶⁵ A political understanding of representation does not collapse either in complete adhesion or in an unbridgeable gap,⁶⁶ but representativity emerges as a 'continuing and mediated relation between situated citizens and representatives'.⁶⁷

The social question has often been central to political conflict and since at least the rise of the distinction between left and right, it has been the main axis upon which the spectrum of many European political systems has spanned.⁶⁸ In this sense, representativity prevents the distance between social and political systems from becoming unbearable. This is realised by opening up channels of communication of the two systems which allows the formation and expression of judgments by the actors involved in the political process.⁶⁹ With all their limits, these chan-

⁶¹ For the purposes of this article, I will therefore stick to a more descriptive understanding of political constitutionalism, one which is more attentive to the material dimension of the political constitution. See, in the European context, M. Wilkinson, 'Political Constitutionalism and the European Union', 76 *Modern Law Review* (2013) p. 191.

⁶² This view is also advocated by J. Waldron, *Law and Disagreement* (Oxford University Press 1999), p. 98-100.

⁶³ Note that political constitutionalists understand the political process in an instrumental way as the most valuable device for addressing disagreement and political conflict. For a classic statement of this view see B. Crick, *In Defence of Politics* (Continuum 2008) (new edn.).

⁶⁴ This complex bundle of relationships has been explored by J. Mansbridge, 'Rethinking Representation', 97 *American Political Science Review* (2003) p. 515.

⁶⁵ Cf., I. Marion Young, *Inclusion and Democracy* (Oxford University Press 1990), p. 136-141 (it contains an interesting analysis of the 'social perspective').

⁶⁶ For an analysis of these two poles see C. Mortati, *La costituzione in senso materiale* (The Material Conception of the Constitution) (Giuffrè 1998), p. 115-120. For an understanding of political representation as 'aesthetic gap' (and not mimetic identity) which demarcates the distinction between representatives and represented, see F. Ankersmit, *Aesthetic Politics* (Stanford University Press 1997), p. 46-47.

⁶⁷ N. Urbinati, *Representative Democracy* (Chicago University Press 2006), p. 50.

⁶⁸ See, among many contributions, N. Bobbio, *Destra e sinistra* (Right and Left) (Donzelli 1993).

⁶⁹ N. Urbinati, *supra* n. 67, p. 51.

nels of communication have been put in place by European States, at least after WWII, through their own political systems.⁷⁰ These were based on a socio-political compromise which provided, either by collective *laissez-faire* or through State intervention, the possibility for staging a social and political conflict between management and labour.⁷¹ The decoupling of the economic and the social constitution exercises a centrifugal force which is detrimental to those constitutional essentials concerning the Welfare State.

In light of what has been noted in this section, it is possible to envisage a role for national parliaments as the main guarantor of certain tenets (mainly, social rights) of their own social systems. These tenets are an essential part of the national constitutional culture and they are usually the outcomes of social and political struggles. As long as no equivalent stage for organising a political conflict around social questions at the European level will be available,⁷² it is up to the most representative national political institutions to provide a communicative channel between conflicts in the social sphere and the political system. Too many necessary features are missing at the European level in order to get a proper forum for tackling with social questions: no authentic European trade unions, huge disparities in the political economies within the European Union and no European political representative system. Finally, a caveat needs to be made here, before moving to the next section, just in order to avoid any misunderstanding. It is necessary to stress that this reading of the role of national parliaments is not part the debate on which kind of institution better protect social rights, whether courts or legislatures.⁷³

THE POLITICS OF THE EARLY WARNING SYSTEM

Despite the recognition of the role national parliaments might be playing in protecting national constitutional essentials through the subsidiarity check, a final cautionary remark is in order with a view to understanding the nature of the EWS and its impact on the system of inter-institutional relations within the European Union.⁷⁴ While overall the previous paragraphs have promoted a rather ‘expansion-

⁷⁰T. Judt, *Post-War* (Vintage 2005), p. 345-360.

⁷¹A. Somek, *Engineering Equality* (Oxford University Press 2011), p. 11-15.

⁷²For more skepticism on this point see P. Mair, *Ruling the Void* (Verso 2013); W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso 2014). I would like to thank an anonymous reviewer for having brought this question to my attention.

⁷³This topic would obviously deserve a separate treatment. See, most recently, the penetrating analysis by J. King, *Judging Social Rights* (Cambridge University Press 2012) and K. Young, *Constituting Economic and Social Rights* (Oxford University Press 2012).

⁷⁴I hereby refer to the idea of constitutional system as developed by J. Dickson, ‘Towards a Theory of European Legal Systems’, in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of EU Law* (Oxford University Press 2012), p. 25-53.

ist' reading of the first yellow card, it has to be noted that the kind of politics that the EWS generates is still far from being satisfactory from the normative perspective of political constitutionalism. How shall we interpret the EWS in light of this first yellow card? The EWS should be read as an invitation to national parliaments, and to their EACs in particular, to investigate, judge, influence and censure the legislative proposals of the Commission. It is a form of power: as the case of the Monti II regulation shows, parliaments can influence the legislative process by making dissatisfaction with the Commission's proposal visible. They have a channel for staging their dissent. However, this power remains, so to say, negative in nature because of two reasons, one legal, the other political: first, the yellow and the orange cards do not amount to a formal veto power; second, and more importantly, national parliaments do not act as a collective agent, that is, they do not represent a separate third chamber.⁷⁵

This means that the triggering of a yellow card is not the outcome of a coordinated and collective effort by national parliaments, but of the mere aggregation of their individual preferences. It is probable that negative reasoned opinions against the proposals of the Commission will be motivated by different or even conflicting reasons. In this way, while the EWS provides a system of influence on the Commission's legislative drafts, this does not represent a way for parliaments to influence the substance. The EWS can be interpreted as a way to contribute to a common understanding of subsidiarity based on national political preferences on issues that ought to be treated carefully by the Commission.

A confirmation of the negative character of the EWS can be found by looking at the interaction between the Commission and national parliaments in this case study. As rightly noted by Fabbrini and Granat,⁷⁶ from a constitutional perspective, it is regrettable that the Commission withdrew its proposal without engaging with the parliaments' opinions. But the regret is not due to the fact that the Commission withdrew the proposal even though it did not consider the principle of subsidiarity violated. It is that the opportunity was missed to have an institutional exchange between the Commission and national parliaments on a matter of substance like the right to strike.⁷⁷ Had the Commission decided to review the draft of the Council regulation, as a matter of fact, it would have been possible to evaluate the substantive contribution of national parliaments to the modification

⁷⁵ See, for an argument in this direction, I. Cooper, 'A Virtual Third Chamber for the European Union? National Parliaments after the Treaty of Lisbon', 35 *West European Politics* (2012) p. 441.

⁷⁶ Fabbrini and Granat, *supra* n. 29, p. 28.

⁷⁷ Gavin Barrett has noted that the Commission had by that time realised that there was no support in the Council for any intervention on the right to collective action: G. Barrett, 'Monti II: The Subsidiarity Review Process Comes of Age', 19 *Maastricht Journal of European and Comparative Law* (2012) p. 599.

of the proposal and how this would have been synthesised by the Commission.⁷⁸ The decision to abandon the proposal was based on the acknowledgement of support for *this* proposal. So, the European Commission did not even try to modify its draft in order to obtain a different and more acceptable outcome, by for example declaring that the balance between the right to strike and the economic freedoms ought to be reversed. It is a missed chance both for the content of the proposal and also as a way to politicise the subsidiarity check performed by parliaments. Instead, the Commission stated in its reply to the parliaments, sent on 12 September 2012, that it was not convinced of any violation of subsidiarity, but given that Article 352 TFEU requires unanimity, the opposition from national parliaments had made clear that this was an impossible requirement to obtain.⁷⁹ In this sense, the EWS was understood as a metric for expressing the discontent toward an already unpopular proposal.⁸⁰

In conclusion, the first case of yellow card confirms that it is difficult to think of the EWS as a means for coping effectively with the democratic deficit. In a recent article, Pieter De Wilde has shown that even in the case of the Monti II regulation, which was able to antagonize many of the social forces involved in the process, the larger public, even at the national level, was left unaware.⁸¹ Nonetheless, the EWS may introduce some limit to the emptying of the national political constitutions. *Rebus sic stantibus*, the most charitable interpretation of the EWS sees it as a political instrument (based on legal provisions) for national parliaments to use the subsidiarity check as a way (a) to contain the unwarranted expansion of EU competences;⁸² and (b) avoid negative effects of EU competences upon

⁷⁸Think, for example, at the many references to international law (ILO, ECHR) that were contained in the reasoned opinions. The Commission could have redrafted its proposal by taking into account the standards set by these international sources.

⁷⁹In the letter sent to national parliaments, the Commission confirms that it 'has taken careful note of the views expressed as well as the current state of play of the discussions on the draft Regulation among relevant stakeholders, in particular the European Parliament and Council. Against this background, the Commission recognises that its proposal is unlikely to gather the necessary political support within the European Parliament and Council to enable its adoption. In view of this, the Commission would hereby like to inform you of its intention to withdraw its proposal for a Regulation.'

⁸⁰It was quite evident that the proposal would not have obtained unanimity in the Council, particularly after the election of the new French President in April 2012.

⁸¹P. De Wilde, 'Why the Early Warning Mechanism Does Not Alleviate the Democratic Deficit', *OPAL Paper Online* (2012) p. 17. The author draws a negative conclusion on the EWS, affirming that it obfuscates representative democracy and it strengthens the wrong kind of involvement from national parliaments.

⁸²Cf. the three challenging proposals put forward by S. Gerben, 'The Competence Conundrum', on file with author.

national constitutional essentials.⁸³ It is, in other terms, an instrument which may serve to preserve a truly representative political space of action at the national level.



⁸³In this way, the EWS could be also read as a means to avoid the creation of national social deficits: see C. Joerges and F. Rödl, 'Informal Politics, Formal Law and the Social Deficit of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*', 36 *European Law Review* (2011) p. 1.