National Parliaments' Scrutiny of the Principle of Subsidiarity: Reasoned Opinions 2014–2019

Tomasz Jaroszyński*

Principle of subsidiarity – Early Warning Mechanism – Protocol No. 2 on Proportionality and Subsidiarity – The scope of the principle of subsidiarity – The role of national parliaments in the EU – National parliaments' reasoned opinions – Principle of proportionality – Principle of conferral – National sovereignty in the EU – National identity in the EU – Justification of draft legislation acts

Introduction

It has been oft-noted that the widespread interest in subsidiarity is not surprising. As a core constitutional principle of the EU legal order, subsidiarity stands at the crossroads of questions about the ends and means of European integration through law.[1] The academic debate so far has predominantly concentrated on explaining the institutional adaptation of member states and EU institutions to the subsidiarity scrutiny. This focus needs to be complemented by presenting not only the mechanism for national parliaments' activities,[2] but the content of their contribution in this domain as well.[3] Furthermore, since the entry into force of the Treaty of Lisbon, the Early Warning Mechanism has been primarily regarded as a tool of collective action on the part of national parliaments in issuing

*Assistant Professor at the Faculty of Administration and Social Sciences, the Warsaw University of Technology; email: tjaroszynski@ans.pw.edu.pl. I would like to thank Justyna Łacny and two peer reviewers for their insightful comments. The data supporting the findings of this study are openly available in the Online Appendix.

[1]F. Fabbrini, 'The principle of subsidiarity', in R. Schütze and T. Tridimas (eds.), *Oxford Principles of European Union Law* (Oxford University Press 2014) p. 221 at p. 221.

[2]Cf. K. Auel et al., 'To Scrutinise or Not To Scrutinise? Explaining Variation in European Activities Within National Parliaments', 38 *West European Politics* (2015) p. 282 at p. 282.

[3]In this context the article contributes an update to earlier publications, in particular K. Granat, *The Principle of Subsidiarity and its Enforcement in the EU Legal Order. The Role of National Parliaments in the Early Warning System* (Hart Publishing 2018).

European Constitutional Law Review, 16: 91–119, 2020
 doi:10.1017/S1574019620000048

reasoned opinions,[4] while the input of legislative chambers as individual actors seems to have been insufficiently taken into consideration.[5]

The participation of national parliaments in the Early Warning Mechanism is underpinned by and conditioned on diverse factors: their institutional capacity;[6] political or policy motivations;[7] internal[8] and international[9] conditions; and finally the grounds for declaring the non-compliance of draft legislative acts with the principle of subsidiarity. Leaving aside the question of the circumstances in which national parliaments have decided to deliver a reasoned opinion in each particular case, this article aims to present and classify the reasons (arguments) given in these opinions.[10] To do this, an empirical review of all reasoned opinions issued in the last five years has been performed.[11] This review reveals that national parliaments' involvement in the Early Warning Mechanism covers a variety of topics, extending beyond the mere scrutiny of subsidiarity, and that individual voices of national parliaments are meaningful even without reaching the threshold for a 'yellow card'. This leads to the conclusion that the underestimated significance of the Early Warning Mechanism lies in its giving the floor to each national

[4]Cf. C. Neuhold and J. Smith, 'Conclusion: From "Latecomers" to "Policy Shapers"? – The Role of National Parliaments in the 'Post-Lisbon' Union', in C. Hefftler et al., *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave Macmillan 2015) p. 668 at p. 684.

[5]To be clear, the subsidiarity scrutiny performed by national parliaments can also be an element of the so-called 'political dialogue' established by the Commission presided over by José Manuel Barroso. *See* D. Jančić, 'The Barroso Initiative: Window Dressing or Democracy Boost?', 8 *Utrecht Law Review* (2012) p. 78. However, as this political dialogue is separate from the Early Warning Mechanism, it is not covered by this contribution. For a comparative analysis of these two tools, *see* D. Jančić, 'The Game of Cards: National Parliaments in the EU and the Future of the Early Warning Mechanism and the Political Dialogue', 52 *CMLRev* (2015) p. 939.

[6]Cf. R. Bellamy and S. Kröger, 'Domesticating the Democratic Deficit? The Role of National Parliaments and Parties in the EU's System of Governance', 67 *Parliamentary Affairs* (2014) p. 437 at p. 448.

[7]Cf. K. Gattermann and C. Hefftler, 'Beyond Institutional Capacity: Political Motivation and Parliamentary Behaviour in the Early Warning System', 38 *West European Politics* (2015) p. 305 at p. 306.

[8]Cf. M. Huysmans, 'Euroscepticism and the Early Warning System', 57 *Journal of Common Market Studies* (2019) p. 431 at p. 434 and M.T. Paulo, 'National Parliaments in the EU: after Lisboa and beyond Subsidiarity. The (positive) side-effects and (unintended) achievements of the Treaty provisions', 5 *OPAL Online Paper* (2012) p. 11.

[9]Cf. A. Pintz, 'Parliamentary Collective Action under the Early Warning Mechanism. The Cases of Monti II and EPPO', 3 *Politique européenne* (2015) p. 84 at p. 90.

[10]It ought to be clarified that this review has been performed on the basis of the English versions of reasoned opinions. These are available on the platform for EU Interparliamentary Exchange (IPEX) or on the databases of the Commission and the European Parliament. For more details *see* the Online Appendix referred to at the beginning of this article.

[11]As for my motivations behind choosing this period of time, *see* the below section: 'Reasoned opinions (2014-2019) – state of play'.

parliament, and it cannot be boiled down to the triggering of the 'cards' procedure. What is also important is that this view is firmly based on Article 7(1) of Protocol No. 2, according to which the European Parliament, the Council and the Commission are obliged to take into account the reasoned opinions issued by national parliaments or by a chamber of a national parliament. In other words, within the Early Warning Mechanism national parliaments can 'sing' not only in a choir, but also as soloists.

Additionally, this article may serve as a springboard for more developed research regarding the role of national parliaments in shaping the EU legal order, as well as on the approach of the Commission to the Early Warning Mechanism.[12]

The EU dimension of the principle of subsidiarity

The concept of subsidiarity has long roots and has been used by both politicians and political theorists.[13] However, the view expressed 25 years ago that 'subsidiarity is a fashionable idea today, although its meaning remains unclear'[14] remains pertinent. In the broad sense, we define subsidiarity as a principle organising the relations between groups, in its essence defining the structures of both the state and society.[15] More precisely, the principle of subsidiarity regulates the allocation or use of authority within a political or legal order, typically in those orders that disperse authority between a centre and various member units.[16] At its heart, subsidiarity remains a principle about how state and society should be structured. While its precise content and implications in a range of contexts can be rather vague and are often contested, at its core the principle requires higher levels to aid lower levels rather than to obliterate or subsume them.[17] In other words, subsidiarity is typically understood as a presumption in favour of lower level decision-making, and one which allows for the centralisation of powers only

[12]To this end the Online Appendix referred to at the beginning of this article may also be helpful.

[13]E. Carbonara et al., 'Self-Defeating Subsidiarity', 5 *Review of Law and Economics* (2009) p. 741 at p. 744.

[14]A. Delcamp, 'Definition and Limits of the Principle of Subsidiarity', *55 Report for the Steering Committee on Local and Regional Authorities* (1994) p. 2, ⟨rm.coe.int/1680747fda⟩, visited 25 February 2020.

[15]N.W. Barber and R. Ekinst, 'Situating Subsidiarity', 61 *The American Journal of Jurisprudence* (2016) p. 5 at p. 5.

[16]A. Follesdal, 'The Principle of Subsidiarity as a Constitutional Principle in International Law', 12 *Jean Monnet Working Paper* (2011) p. 6. Cf. S. Besson, 'Subsidiarity in International Human Rights Law – What is Subsidiary about Human Rights?', 61 *The American Journal of Jurisprudence* (2016) p. 69 at 69.

[17]Barber and Ekinst, *supra* n. 15, p. 5.

for particularly good reasons.[18] Because of the confusion surrounding its meaning, there is a rather hapless consensus that subsidiarity is about allocating decision-making authority between 'higher' and 'lower' levels on the basis of technical criteria, as if subsidiarity itself is indifferent to where that authority should lie.[19]

The distribution of powers between 'Brussels' and the member states has been one of the most contentious points throughout the history of the European integration project. Since the initial years of the European Economic Community, member states have resisted the expansion of activities and the progressive centralisation of competences at the Community level. Although the original intention was that the Community could obtain a transfer of competences from member states to itself only on the basis of the member states' authorisation, in practice the real location of competences was determined on a political basis via a broad interpretation of the Treaties.[20] The resistance of member states to legislative centralisation grew stronger after the Single European Act, which strengthened the powers of Community institutions and opened up new fields of their activity.[21] In the process of consolidation of the Union as a self-standing political organisation, the question inevitably arose as to the role of member states. In this context, the principle of subsidiarity serves to explain why certain competences should be a matter of national concern and others a matter of concern for the Union.[22] With the Treaty of Maastricht, the principle of subsidiarity explicitly found its way into a constitutional text (the TEU),[23] and since that time it has served as a corrective tool for deficiencies in the allocation of competences.[24]

The principle of subsidiarity as laid out later in the Treaty of Lisbon holds that in areas which do not fall within the EU's exclusive competence, the member states should decide, unless central action will ensure a higher comparative effectiveness in achieving the specified objective(s).[25] The principle of subsidiarity

[18]M. Jachtenfuchs and N. Krisch, 'Subsidiarity in Global Governance', 79 *Law and Contemporary Problems* (2016) p. 1 at p. 1.

[19]M. Cahill, 'Theorizing Subsidiarity: Towards an Ontology-sensitive Approach', 15 *International Journal of Constitutional Law* (2017) p. 201 at p. 223.

[20]Carbonara et al., *supra* n. 13, p. 745.

[21]Ibid., p. 746.

[22]D. Cools, 'A European Account of Justice: Under Pressure of Subsidiarity?', 45 *Netherlands Journal of Legal Philosophy* (2016) p. 60 at p. 70.

[23]Fabbrini, *supra* n. 1, p. 223. *See also* D.Z. Cass, 'The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community', 29 *CMLRev* (1992) p. 1107.

[24]F. Sander, 'Subsidiarity Infringement before the European Court of Justice: Futile Interference with Politics or a Substantial Step towards EU Federalism', 12 *Columbia Journal of European Law* (2006) p. 517 at p. 527.

[25]Follesdal, *supra* n. 16, p. 6.

was introduced into the EU legal order to counter the expansion of the powers of the EU, and it supports the citizens' desire for decision-making on a more decentralised level.[26] To put it differently, this principle is meant to protect the autonomy of member states and of the sub-national authorities from unnecessary Union actions.[27] Consequently, the principle of subsidiarity has been mostly read as a 'competence valve', determining whether the EU or member states should exercise competence over a particular issue. At the same time, it also bears an extraordinary potential with regard to preserving the constitutional identities of the member states.[28]

Within the EU, the principle of subsidiarity is recognised as a general principle of EU law,[29] or even as 'one of the key constitutional principles that serve to set the character of the EU'.[30] It has been postulated that it would reduce 'the democratic deficit'[31] and allow decisions to be taken 'as close to the citizen as possible'.[32] However, there has also been some criticism as regards the principle of subsidiarity in the EU legal order. According to some authors, it does not fully accord with the specificity of the EU.[33] In the most extreme view the principle is considered as totally alien to and in contradiction to the logic, structure, and wording of the Treaties.[34]

In my estimation, the most characteristic feature of the EU's recognition of the principle of subsidiarity is that its impact is limited to the level of member states. The preamble to the TEU provides that in 'the process of creating an ever closer union' . . . 'decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity'. While this suggests that the general concept of

[26]J. Peters, 'National Parliaments and Subsidiarity: Think Twice', 1 *EuConst* (2005) p. 68 at p. 69.

[27]C. Panara, 'The Enforceability of Subsidiarity in the EU and the Ethos of Cooperative Federalism: A Comparative Law Perspective', 22 *European Public Law* (2016) p. 305 at p. 305.

[28]P. Faraguna, 'Taking Constitutional Identities Away from the Courts', 41 *Brooklyn Journal of International Law* (2016) p. 492 at p. 568.

[29]*See* for example K. Lenaerts and J.A. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law', 47 *CMLRev* (2010) p. 1629.

[30]N.W. Barber, 'The Limited Modesty of Subsidiarity', 11 *European Law Journal* (2005) p. 308 at p. 324.

[31]M. Goldoni, 'The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation', 10 *EuConst* (2014) p. 90 at p. 91.

[32]Panara, *supra* n. 27, p. 305.

[33]G. Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time', 43 *CMLRev* (2006) p. 63 at p. 63. The response to this provocative title was that 'the subsidiarity principle is the right rule, in the right place, and at the right time': A. Portuese, 'The Principle of Subsidiarity as a Principle of Economic Efficiency', 17 *Columbia Journal of European Law* (2012) p. 231 at p. 261.

[34]G. Toth, 'The Principle of Subsidiarity in the Maastricht Treaty', 29 *CMLRev* (1992) p. 1079 at p. 1079.

subsidiarity requires that decision-making is situated at the lowest possible level, the reality of the way the EU functions results in the 'subsidiarity game' being played out just between the EU and member states. To put it another way, with the help of subsidiarity in its EU dimension we can ensure that decisions are taken more closely to the citizen, but the final choice on just how close lies within the member states' competences.[35] Paradoxically, the failure to fulfil the promise of proximity as an element of the principle of subsidiarity[36] is not the worst case scenario, taking into account that the attempts to interfere in the internal policy of member states via EU law are strongly (though not always justifiably) opposed by national parliaments.[37]

National parliaments as watchdogs of the principle of subsidiarity

Since it was generally believed that subsidiarity was necessary for the EU's democratic legitimacy, when it comes to its application it seemed right to entrust the role of watchdog to national parliaments.[38] The need to more closely involve national parliaments in EU actions was a corollary idea that has received increasing support since the Treaty of Maastricht, especially as a compensation for the loss of some of their legislative powers.[39] Thus national parliaments were brought into the process of scrutiny because they have an institutional interest in restraining EU actions that might encroach upon their own spheres of activity.[40] Furthermore, national parliaments provide a major space for public debate and were perceived to be the ideal forums for deliberations over important European issues and their domestic implications, as well as being capable of effectively contributing to making EU policy processes more transparent.[41] Nonetheless, some commentators have

[35]Basically, from the EU perspective it does not matter whether a member state legislates at the central, regional, or local level. *See* M. Finck, 'Challenging the Subnational Dimension of the Principle of Subsidiarity', 8 *European Journal of Legal Studies* (2015) p. 5 at p. 11.

[36]Cf. H.-J. Blanke, 'Article 1 TEU', in H.-J. Blanke and S. Mangiameli (eds.), *The Treaty on European Union (TEU): A Commentary* (Springer 2013) para. 54.

[37]*See* the section below: 'Principle of conferral – in defence of national sovereignty or national identity?'.

[38]Peters, *supra* n. 26, p. 69.

[39]J.-V. Louis, 'The Lisbon Treaty: The Irish No: National Parliaments and the Principle of Subsidiarity – Legal Options and Practical Limits', 4 *EuConst* (2008) p. 429 at p. 434.

[40]I. Cooper, 'A "Virtual Third Chamber" for the European Union? National Parliaments after the Treaty of Lisbon', 7 *ARENA Working Paper* (2011) p. 22. *See also* T. Raunio, 'National Parliaments and European Integration. What We Know and What We Should Know', 2 *ARENA Working Paper* (2009) p. 15.

[41]K. Auel, 'Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs', 13 *European Law Journal* (2007) p. 487 at p. 498.

questioned whether a system which attributes the role of primary guardian to national parliaments is the best solution.[42] Likewise, it has been pointed out that MPs have their hands full even without engaging in EU affairs, so the in-depth scrutiny of European proposals may not be very attractive to them.[43]

The Early Warning Mechanism, introduced by the Treaty of Lisbon, charged national parliaments with monitoring the compliance of draft EU legislative acts with the principle of subsidiarity in areas which do not fall within the EU's exclusive competence.[44] As Cooper observed, national parliaments were previously seen as institutions that enjoyed democratic legitimacy but had little or no collective influence in EU politics.[45] The Early Warning Mechanism appeared as a compromise solution because its merits were dual in nature: offering a technical response to the question of subsidiarity control; and increasing the role of national parliaments without further complicating the institutional structure and burdening the legislative procedure.[46]

The role of national parliaments in the Early Warning Mechanism has been the subject of both academic and policy debates.[47] One question of great importance concerns the scope of their scrutiny: should national parliaments only review at what level (national or EU) the legislative measure should be taken, or should they also consider the principle of proportionality, whether the correct legal basis is applied, and the substance of the proposal? There is no consensus, either among national parliaments or among scholars, concerning this multi-pronged question.[48] A narrow reading of the Early Warning Mechanism, as promoted by Fabbrini and Granat, would state that it should be limited to the material and procedural dimensions of subsidiarity review. Consequently, this mechanism should not address the content of a legislative

[42]Peters, *supra* n. 26, p. 71.

[43]T. Jans and S. Piedrafita, 'The Role of National Parliaments in European Decision-Making', 1 *EIPASCOPE* (2009) p. 25.

[44]*See*, inter alia, R. Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?', 68 *Cambridge Law Journal* (2009) p. 525; I. Cooper, 'The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU', 44 *Journal of Common Market Studies* (2006) p. 281; P. Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality* (Routledge 2012).

[45]I. Cooper, 'National Parliaments in the Democratic Politics of the EU: the Subsidiarity Early Warning Mechanism, 2009-2017', 17 *Comparative European Politics* (2019) p. 919 at p. 920, ⟨doi.org/10.1057/s41295-018-0137-y⟩, visited 25 February 2020.

[46]Louis, *supra* n. 39, p. 434. *See also* Goldoni, *supra* n. 31, p. 91.

[47]A. Jonsson Cornell, 'The Swedish Riksdag as Scrutiniser of the Principle of Subsidiarity', 12 *EuConst* (2016) p. 294 at p. 295.

[48]Ibid., p. 298.

draft, its proportionality, or the correctness of its legal basis.[49] According to this formalist interpretation, the subsidiarity review revolves more around checking whether the Commission proposal ticks all the right procedural boxes rather than engaging in a political evaluation of the principle of subsidiarity.[50] In contrast, other authors take as their starting point the member states' perspective on the scope of the scrutiny of subsidiarity. Goldoni offers a bottom-up approach to the purpose of the Early Warning Mechanism, with its main purpose being to safeguard a representative political space on the national level and national constitutional identities.[51] Jančić advocates for a broad scope of the review, including an evaluation of the principle of conferral and the substance of the legislative proposal, and argues that by so doing the legitimacy of the EU legislative process could be improved and the democratic deficit alleviated.[52] Likewise, Kiiver suggests that subsidiarity should be understood broadly, even if it means a certain overlap with other criteria that national parliaments find relevant to the subsidiarity review, namely competence and proportionality.[53]

In view of all the above considerations I would opt for a moderate, pragmatic approach, assuming that although the subsidiarity scrutiny should be based on Article 5(3) TEU, its wider understanding may bring about positive 'side effects'.[54] As has been rightly asserted, national parliaments are obviously bound to observe the EU Treaties but – as political organs – remain free to interpret them differently.[55] If one perceives the Early Warning Mechanism to be open to a variety of purposes, it seems to be particularly inclusive in terms of raising concerns over member states' national identities within the meaning of Article 4(2) TEU.[56] This connection between the concepts of subsidiarity and respect

[49]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 *CMLRev* (2013) p. 115 at pp. 120-125.

[50]Goldoni, *supra* n. 31, p. 101.

[51]Ibid., p. 101.

[52]Jančić, *supra* n. 5, p. 942.

[53]Kiiver, *supra* n. 44, p. 102. *See also* Jonsson Cornell, *supra* n. 47, p. 298.

[54]Cf. C. Fasone, 'Competing Concepts of Subsidiarity in the Early Warning Mechanism', 4 *LUISS Guido Carli School of Government Working Paper* (2013) p. 24.

[55]*See* N. Lupo, 'National Parliaments in the European Integration Process: Re-aligning Politics and Policies', in M. Cartabia et al. (eds.), *Democracy and Subsidiarity in the EU* (Il Mulino 2013) p. 107 at p. 127.

[56]Faraguna, *supra* n. 28, p. 571. *See also* D. Jančić, 'Representative democracy across levels? National parliaments and EU constitutionalism', 8 *Croatian Yearbook of European Law and Policy* (2012) p. 227 at p. 264.

for national identities has already been noted by commentators as well as national parliaments.[57]

Reasoned opinions (2014–2019) – state of play

Since 1 December 2009 national parliaments have issued 479 reasoned opinions. This is too a high number to be profoundly discussed in a single article, hence the following review puts the spotlight on the second half of this 10-year period; i.e. it covers the reasoned opinions submitted between November 2014 and October 2019.[58] To start with, some statistics relating to these reasoned opinions are presented in order to demonstrate the scope, the structure, and main actors within the Early Warning Mechanism, also against the background of the previous five years of its functioning (between 1 December 2009 and October 2014), which should be helpful in observing the dynamics of using this tool. This is followed by introductory remarks on the content of the reasoned opinions, and is subsequently developed later in the text.

During the reference period, national parliaments delivered 185 reasoned opinions on 78 draft legislative acts, while in the years 2009–2014 there were 294 reasoned opinions on 115 draft legislative acts. This means that in the second period reasoned opinions concerned 19.5% of all draft legislative acts, while in the first period the level was about 23.5%.[59] In addition, by comparing the number of reasoned opinions delivered in last five years with the maximum number of

[57]*See* B. Guastaferro, 'Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions', 21 *Maastricht Journal of European and Comparative Law* (2014) p. 320 at p. 321; E. Cloots, 'National Identity, Constitutional Identity, and Sovereignty in the EU', 45 *Netherlands Journal of Legal Philosophy* (2016) p. 82 at p. 97.

[58]The given period covers the term of office of the Commission presided over by Jean-Claude Juncker, which at the beginning of its term expressed its willingness to cooperate more closely with national parliaments. In 2017 the Commission established a Taskforce on Subsidiarity, Proportionality and Doing Less More Efficiently, which presented a report including nine recommendations for more active and efficient usage of the principle of subsidiarity. To be clear, this issue falls outside the remit of this paper, which concentrates on the activities of national parliaments. This, however, does not alter the fact that the further studies on the interdependence between the Juncker Commission and national parliaments in the Early Warning Mechanism are welcome, since it has been rightly observed that 'it takes two to tango' in order to make this procedure function as intended. See I. Cooper, 'Is the Early Warning Mechanism a Legal or a Political Procedure? Three Questions and a Typology' in A. Jonsson Cornell and M. Goldoni (eds.), *National and Regional Parliaments in the EU-legislative Procedure Post-Lisbon* (Hart Publishing 2017) p. 17 at p. 47.

[59]In total 396 draft legislative acts were sent to national parliaments in the second period, and 491 draft legislative acts in the first period. These data have been inferred from the State of Play on reasoned opinions and contributions submitted by National Parliaments under Protocol 2 of the Lisbon Treaty, Brussels, respectively: 11 December 2019 and 18 November 2014.

reasoned opinions which could have been issued within the same period, we obtain a result of 0.5%,[60] which can be called the actual 'participation factor' in the Early Warning Mechanism. Obviously this does not mean that in the remaining 99.5% of cases national parliaments tacitly accepted the compliance of the draft legislative acts with the principle of subsidiarity, as their silence could have been the result of various factors.[61]

It should be noted that there were large disparities among national parliaments in terms of their activity in the Early Warning Mechanism, with the Swedish Riksdag (32 reasoned opinions) at the top of the list, while six national parliamentary chambers (in five countries) did not submit any reasoned opinions at all.[62] During the first period the Riksdag was also the leader, and the rest of the chambers demonstrated varied degrees of commitment to this mechanism.[63] It should be stressed that in the most recent five years the 'yellow card' procedure was launched only once,[64] when 14 chambers (equal to 22 votes) submitted reasoned opinions on the draft directive on the posting of workers within the framework of the provision of services.[65] By comparison, in the first five-year period two 'yellow cards' were triggered.[66]

With regard to the distribution of reasoned opinions, the most striking fact is that 44 out of 78 scrutinised draft legislative acts (56%) were the subject of a single reasoned opinion. Adding to this number those cases where two or three reasoned opinions were submitted, it follows that these types of opinions cover

[60]The EU-28 counts 41 parliamentary chambers, but in Spain and Ireland reasoned opinions are issued jointly by two chambers, so for the above calculation the relevant number was 39. Thus, 39 chambers x 396 draft legislative acts = 15,444 possible submissions; and 78 is therefore 0.5% of the total number of possible submissions.

[61]Cf. for example O. Pimenova, 'Subsidiarity as a "Regulation Principle' in the EU', 4 *The Theory and Practice of Legislation* (2016) p. 381 at p. 393. To be fair, as noted above, national parliaments also express their concerns relating to the observance of the principle of subsidiarity within the framework of the political dialogue, so their real level of engagement in the subsidiarity scrutiny is higher than that resulting solely from the Early Warning Mechanism. Cf. C. Fasone, 'Competing Concepts of Subsidiarity in the Early Warning Mechanism', in Cartabia, *supra* n. 55, p. 157 at p. 185.

[62]National parliaments from Belgium, Cyprus, Finland, Greece and Slovenia. As regards the most active chambers, *see* Table 1.

[63]Cf. for example Granat *supra* n. 3, p. 118.

[64]It is noteworthy that, apart from this case, only in four cases were at least 10 votes collected (for more details *see* Table 2).

[65]COM (2016) 128. Nonetheless the draft was supported by the Commission and finally adopted. *See* Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

[66]In 2012 on the proposal concerning the right to take collective action within the context of the freedom of establishment and the freedom to provide services and in 2013 on the proposal for the establishment of the European Public Prosecutor's Office.

Table 1. number of reasoned opinions per national chambers

National parliament/chamber	Number of reasoned opinions
Swedish Riksdag	32
French Senate	17
Austrian Budesrat	14
Irish Oireachtas	11
Czech Poslanecká sněmovna	10
Dutch Tweede Kamer	9
German Bundestag	8
Maltese Kamra tad-Deputati	7
Dutch Senate	6
Danish Folketing	6

Table 2. legislative acts with the most reasoned opinions

Draft legislative act	Number of reasoned opinions	Number of votes
COM (2016) 128	14	22
COM (2016) 861	11	13
COM (2016) 683	8	13
COM (2016) 685	8	13
COM (2016) 270	8	10
APP (2015) 907	6	8
COM (2015) 450	5	7
COM (2018) 147	4	7
COM (2018) 148	4	7

around 80% of the whole activity of national parliaments in the Early Warning Mechanism.[67] Moreover, it is worth mentioning that reasoned opinions predominantly concerned draft legislative acts in the areas related to the internal market, followed by the areas of energy and transport.[68]

As regards the contents of the reasoned opinions in the most recent five years, it should be stressed that national parliaments gave very diverse reasons for offering their opinions, referring not only to the subject matter of draft legislative acts but also to formal issues.[69] What is most surprising is that some parliamentary

[67]For more details *see* Table 3.

[68]In the case of 25 among 78 draft legislative acts (32%) Art. 114 TFEU was determined as the legal basis. For more details *see* Table 4.

[69]In this regard, the reviews of reasoned opinions submitted in the first five years of the functioning the Early Warning Mechanism depicted a similar picture. Cf. for example Granat *supra* n. 3, p. 165-184.

https://doi.org/10.1017/S1574019620000048 Published online by Cambridge University Press

Table 3. Reasoned opinions per legislative act (percentage)

Number of reasoned opinions per draft legislative act	Number of draft legislative acts	Percentage (out of 78)
1	44	56%
2	12	15%
3	6	8%
4	8	10%
5	2	2.5%
6	1	1.25%
8	3	4%
11	1	1.25%
14	1	1.25%

Table 4. legal basis for the reasoned opinions

Legal basis (Article of TFEU)	Area (in the meaning of Article 4 TFEU)	Number of draft legislative acts	Percentage (out of 78)
Art. 114	internal market	25	32%
Art. 115	internal market	8	10%
Art. 53	internal market	8	10%
Art. 91	transport	7	9%
Art. 194	energy	7	9%
Art. 62	internal market	6	7.5%
Art. 78	internal market	5	6.5%
Art. 43	internal market	3	4%

chambers submitted reasoned opinions even when they did not find a clear breach of the principle of subsidiarity. In order to classify the reasons given in the reasoned opinions, we can divide them into five main categories. The first group – the most obvious but intriguingly not encompassing all reasoned opinions – consists of those which indicate a breach of the principle of subsidiarity within the literal meaning of Article 5(3) TEU, although the alleged breaches were grounded on various concerns. Second, reasoned opinions discussing infringements of the principle of conferral should be regarded as a common category. The main factor underpinning this set of reasoned opinions is a strong link between the principles of conferral and subsidiarity, apparent especially in relation to the scope of member states' competences. Thirdly, diversified arguments with respect to proportionality were presented in a considerable number of reasoned opinions. The fourth category is comprised of reasoned opinions which contained remarks of a legislative nature, pointing out alleged infringement of EU Treaties,

https://doi.org/10.1017/S1574019620000048 Published online by Cambridge University Press

Table 5. reasons for issuing reasoned opinions

Reason for issuing a reasoned opinion	Number of reasoned opinions	Percentage (out of 185)
subsidiarity *sensu stricto*	151	82%
justification of a draft legislative act	79	43%
proportionality	63	34%
sovereignty / constitution	37	20%
legal basis	35	19%
excessive burden	31	17%
principle of conferral	30	16%
delegated acts	17	9%

even if there is no connection with the principle of subsidiarity. Finally, in numerous cases the shortcomings in the justification of draft legislative acts made the subsidiarity scrutiny more difficult or impossible to carry out, leading national parliaments to the conclusion that Protocol No. 2 had been infringed. Table 5 shows the number of reasoned opinions in which reasons falling within these categories were delivered, with the caveat that most opinions cumulatively invoked arguments of different kinds.

The principle of subsidiarity *sensu stricto*

It is generally acknowledged that the material dimension of the principle of subsidiarity is connected to the two tests delineated in Article 5(3) TEU. First, the 'national insufficiency test' indicates that the EU can act only when the member states are unable to achieve a specific EU policy goal. Second, the 'comparative efficiency test' indicates that the EU should act only if its action is better able to achieve this goal than that of the member states.[70] Both tests must be met cumulatively, which implies that even if national action is deemed insufficient to achieve a specific goal, the EU should refrain from acting if the exercise of its powers at the supranational level is unable to attain the prescribed goal better than the states' actions.[71] According to the Irish Oireachtas, in consequence two questions must be answered: whether the action by the EU is necessary to achieve the objective of the proposal; and whether the EU action provides greater benefits than an action at the member state level.[72]

[70]It has been postulated that 'efficiency' is an empty word, because until we know the goals that ought to pursued, we cannot begin to assess whether or not it is efficient. *See* Barber and Ekinst, *supra* n. 15, p. 11.

[71]Fabbrini, *supra* n. 1, p. 226. Cf. Cahill, *supra* n. 19, p. 220.

[72]*See* the reasoned opinion on COM (2016) 683 and 685.

https://doi.org/10.1017/S1574019620000048 Published online by Cambridge University Press

Overall, national parliaments delivered arguments relating more or less directly to the principle of subsidiarity within the meaning of Article 5(3) TEU in 151 (out of 185) reasoned opinions. It should be underlined that the reasoned opinions drew attention to various aspects of the principle of subsidiarity, and they differ significantly in terms of the specificity of their justification. Some reasoned opinions were limited to a general statement that the objectives of the planned measures can be 'better achieved by member states';[73] or are 'satisfactorily achieved by member states and cannot be achieved by the proposed actions of the EU';[74] or that 'the proposal does not concern a subject that could not be resolved by member states'.[75] At this point it is worth noting that national parliaments sometimes revealed totally different attitudes towards the very same provisions of a given draft legislative act.[76] In other cases, more in-depth reasoning was provided, usually based on references to provisions of national law and an assessment that the transfer of decision-making powers to the EU level was not needed. Hence it was maintained that, e.g., 'national practices are inherently better able to take into account the technical, economic and environmental context';[77] that 'the varied practice of member states and their differing political and electoral circumstances suggest that this is a matter best decided at national level';[78] and that 'the current national/regional implementation is sufficient to achieve the objectives'.[79] Thus, national parliaments are eager to counteract the first test and prove that a member state is capable of achieving a specific goal, which from their perspective may be called a 'national sufficiency test'. In this context, in assessing the compliance of an EU legislative act with the principle of subsidiarity the fact that a member state can sufficiently achieve an objective is relevant.[80] In my view, national parliaments cannot compare the efficiency of the EU level with the national level 'as such',[81] because their competence does not encompass the obligation to determine this abstract level. On the contrary, they are authorised to construct reasoned opinions taking into account their national circumstances.

[73]The Portugal Assembleia da República on COM (2016) 53, the Swedish Riksdag on APP(2015) 907 and the Polish Senate on COM (2017) 278.

[74]The Czech Senate on COM (2016) 378.

[75]The Dutch Tweede Kamer and the Dutch Senate on COM (2017) 253.

[76]*See* for example the reasoned opinions of the Polish Sejm and the Italian Senate on COM (2016) 270, in which they presented contradictory views on asylum system measures.

[77]The French Senate on COM (2015) 593, 594, 595 and 596.

[78]The British House of Commons on APP(2015) 907.

[79]The Czech Poslanecká sněmovna on COM (2016) 671.

[80]*See*, contrary to this, ECJ 4 May 2016, Case C-358/14, *Poland* v *European Parliament and Council*, para. 119.

[81]*See* Granat, *supra* n. 3, p. 96.

Additionally, it should be highlighted that national parliaments are not very keen on concentrating on the regional and local dimensions of the principle of subsidiarity, although they have incidentally maintained that 'the Commission did not take into account the regional and local impacts of the proposal';[82] or that 'the objectives can be achieved satisfactorily at the central, regional and local level'.[83] In this context, it must be mentioned that under Article 6 of Protocol No. 2 it is for each national parliament or its chamber to consult, where appropriate, their regional parliaments with legislative powers. After all, only eight member states have regional parliaments with such powers,[84] and reasoned opinions delivered by national parliaments very rarely reveal whether regional bodies scrutinised a given draft legislative act.[85] This rather clearly shows that the real impact of the principle of subsidiarity within the EU is, as a rule, reduced to the level of a member state. As has been rightly maintained, while subsidiarity seemed to bear the promise of recognising local and regional authorities as regulators in EU law, Article 5(3) TEU currently limits this promise to pure rhetoric rather than having an actual substantive effect.[86]

More rarely, national parliaments have performed the 'comparative efficiency test'. When doing so they have asserted that, e.g., 'it is doubtful whether the scale or the effects of the proposed actions make them better achievable at the Union level';[87] 'it is unpersuasive that action taken by the EU proposal offers any clear advantages over action taken at a national level by member states';[88] or that 'the proposal does not provide tangible added value, when compared to national legislation'.[89] Even less frequent were situations when a reasoned opinion combined the results of both tests, indicating that the 'proposed actions can be taken more effectively at the member state level and there is no sufficient added value in terms of attaining the objectives'.[90] As the subsidiarity principle is founded on the

[82]The Hungarian Országgyűlés on COM (2014) 128. *See also* the Spanish Cortes Generales on COM (2017) 647 and the Irish Oireachtas on COM (2017) 753 and COM (2018) 277.

[83]The Czech Poslanecká sněmovna on COM (2017) 753. *See also* the Austrian Bundesrat on COM (2017) 278.

[84]Austria, Belgium, Finland, Germany, Italy, Portugal, Spain and the United Kingdom (until 31 January 2020).

[85]*See* e.g. the Spanish Cortes Generales on COM (2016) 861. As regards the participation of regional parliaments in the Early Warning Mechanism *see especially* D. Fromage, 'Regional Parliaments and the Early Warning System: An Assessment and Some Suggestions for Reform' in Jonsson Cornell and Goldoni, *supra* n. 58, p. 117.

[86]Finck, *supra* n. 35, p. 17.

[87]The Estonian Riigikogu on COM (2016) 128.

[88]The Dutch Tweede Kamer on COM (2016) 683 and 685.

[89]The Italian Senate on COM (2015) 613. *See also* the Romanian Camera Deputaților on COM (2016) 128 and the Austrian Bundesrat on COM (2016) 823.

[90]The Romanian Camera Deputaților on COM (2016) 861. *See also* the Spanish Cortes Generales on COM (2017) 647.

assumption that the proclaimed aims can be best achieved at the lowest possible level, it seems rather confusing that in a couple of reasoned opinions we find statements discussing the international level as more preferable to the EU level,[91] which can be called 'subsidiarity *a rebours*'. Most of these cases contained allegations that in a given area the OECD provisions are effective and in consequence there was no need to transfer the legislative competence to the EU[92] or to go further than the OECD provisions.[93] Similarly, it was indicated that the proposals address global problems (e.g. tax avoidance) which could be resolved more effectively beyond the EU level,[94] or that due to international law some matters (e.g. civil aviation safety) cannot be transferred to EU institutions.[95]

In addition, several reasoned opinions mentioned the fact that the Commission 'has not demonstrated that the goal cannot be sufficiently achieved by member states';[96] 'has not provided convincing evidence that the purpose of its action cannot be sufficiently achieved by member states';[97] or 'has failed to provide sufficient evidence that the EU objectives can be better achieved at the Union level'.[98] Such formulations pose the question whether the national parliaments treated these reasons as substantive arguments, inclining them to issue a reasoned opinion, or rather as a procedural failure, comparable to, for example, the lack of a sufficient justification for the proposal (see below).

What is more, 31 (out of 185) reasoned opinions referred to Article 5 of Protocol No. 2, stating for instance that a breach of the principle of subsidiarity stemmed from the excessive financial or administrative burden imposed on member states,[99] economic operators,[100] or citizens. These reasoned opinions also included allegations that the proposal would impose on national authorities

[91]The question arises: When is it appropriate to concede that decision-making must take place within the framework set by international entities? *See* G. de Búrca, 'Reappraising Subsidiarity's Significance after Amsterdam', 7 *Harvard Jean Monnet Working Paper* (1999) p. 6.

[92]The Dutch Senate on COM (2016) 683 and the Dutch Tweede Kamer on COM (2018) 147 and 148.

[93]The Dutch Senate on COM (2016) 685 and 687 and the Luxembourg Chambre des Députés on COM (2016) 683 and 685.

[94]The British House of Commons on COM (2016) 683 and 685, the Maltese Kamra tad-Deputati and the Irish Oireachtas on COM (2018) 147 and 148.

[95]The Maltese Kamra tad-Deputati on COM (2015) 613.

[96]The Polish Sejm on COM (2016) 128.

[97]The Bulgarian Narodno Sabrania on COM (2016) 128.

[98]The Polish Sejm and the Polish Senate on COM (2017) 253 and the Spanish Cortes Generales on COM (2016) 861.

[99]The Slovak Národná rada on COM (2016) 270.

[100]The Austrian Bundesrat on COM (2016) 289.

'an increased administrative burden',[101] or 'considerable additional costs'.[102] Presumably, national parliaments invoked these statements as auxiliary arguments, strengthening the assessment of non-compliance of the draft legislative act with the principle of subsidiarity.

Principle of conferral – in defence of national sovereignty or national identity?

Article 5(2) TEU provides that under the principle of conferral the Union shall act only within the limits of the competences conferred upon it by the member states in the Treaties to attain the objectives set out therein; and that competences not conferred upon the Union in the Treaties remain with the member states. Whereas the principle of conferral deals with the existence of EU powers to regulate within a particular field, the principle of subsidiarity regulates the exercise of powers shared by the EU and the member states, setting up a functional criteria to decide whether the EU – or rather the member states – should act within a given field.[103] Some scholars underline the close relationship between the principles of conferral and subsidiarity, and assume that national parliaments should exercise scrutiny over both.[104] As Goldoni claims, it seems logical to check whether a proposal for a legislative act is compatible with the principle of conferral, since subsidiarity emerges as an issue only when the principle of conferral has been respected.[105] In contrast, there are voices against the admissibility of such a broad review, primarily on account of the wording of Article 5 TEU and Protocol No. 2, which limit the scrutiny to the principle of subsidiarity.[106]

National parliaments have explicitly invoked the principle of conferral in 30 (out of 185) reasoned opinions. Some of them stressed that the scrutiny of compliance with the principle of subsidiarity should necessarily include an examination of EU competences. The words of the German Bundesrat were particularly strong: 'Scrutiny of compliance with the principle of subsidiarity necessarily encompasses scrutiny of EU powers and responsibilities in the policy area in question'.[107] Other

[101]The Austrian Bundesrat on COM (2017) 753 and the Bulgarian Narodno Sabrania on COM (2016) 128.

[102]The Austrian Bundesrat on COM (2016) 824.

[103]Fabbrini, *supra* n. 1, p. 224.

[104]D. Jančić, 'EU Law's Grand Scheme on National Parliaments: The Third Yellow Card on Posted Workers and the Way Forward', in D. Jančić (ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?* (Oxford University Press 2017) p. 299 at p. 306.

[105]Goldoni, *supra* n. 31, p. 102. *See also* European Parliament resolution of 19 April 2018 on the implementation of the Treaty provisions concerning national parliaments (2016/2149(INI)).

[106]Granat, *supra* n. 3, p. 168.

[107]Reasoned opinion on COM (2016) 861.

reasoned opinions did not directly address the links between the principles of conferral and subsidiarity, but simply stated that in the case of the given proposal a particular area (e.g. taxation policy) or a matter falls outside EU competences. In some instances it is rather difficult to distinguish references to member states' competences in the context of the principle of conferral from the reasons given why member states could exercise a competence better than the EU. The most common phrases used by national parliaments embraced statements such as that a proposal 'encroaches upon national competences of member states';[108] 'constitutes a clear restriction of national decision-making powers';[109] 'unnecessarily interferes with the competence of member states';[110] or 'goes beyond the powers (*ultra vires*) of what is permitted by the Treaties'.[111] Likewise, the principle of conferral may be implicitly linked to the problem of determining the correct legal basis for a legislative act. To put it another way, the indication of the legal basis is regarded as a positive dimension of this principle.[112] Such cases may be illustrated by the following wording: 'the principle of subsidiarity is infringed if the Union possesses no competence; accordingly, the subsidiarity check must examine whether the proposal's legal basis is such as required for the EU to take action'.[113]

Another subcategory consists of arguments related to the sovereignty of member states (37 out of 185 reasoned opinions), which in many situations appears to be regarded as a synonym for member states' competences. Hence, these reasoned opinions alleged that the encroachment upon a given regulatory area 'violates',[114] 'undermines'[115] or 'has a direct impact on'[116] the sovereignty of a member state. It is striking in this regard that the issuance of a reasoned opinion may be built on the

[108]The Spanish Cortes Generales on COM (2017) 647 (public transport services). *See also* the Swedish Riksdag on COM (2018) 373 and on COM (2018) 380 (labour market policy and tax policies), the German Bundestag on COM (2018) 51 (health policy and services) and on COM (2016) 822 (regulated professions), the Polish Senate on COM (2016) 270 (security policy and social rights), on COM (2016) 861 and on COM (2016) 864 (energy security policy).

[109]The Austrian Bundesrat on COM (2016) 861 and on COM (2016) 864. *See also* the German Bundestag on COM (2016) 861 and the French Assemblée nationale on COM (2016) 822.

[110]The Austrian Bundesrat on COM (2016) 289. *See also* the French Senate on COM (2017) 660 (international agreements on infrastructure) and the Irish Oireachtas on COM (2016) 198 (tax policy).

[111]The Maltese Kamra tad-Deputati on COM (2016) 26. *See also* the Danish Folketing on COM (2016) 683. Occasionally, the reservations of national parliaments seem clearly to go too far, for instance in the position that the procedure of notification of member state's measures causes non-compliance with the principle of subsidiarity. *See* the French Senate on COM (2016) 821.

[112]Granat, *supra* n. 3, p. 169.

[113]The German Bundesrat on COM (2016) 821.

[114]The Austrian Bundesrat on COM (2016) 53 (intergovernmental agreements with third countries).

[115]The Swedish Riksdag on COM (2016) 26.

[116]The Luxembourg Chambre des Députés on COM (2016) 683 and 685 (tax policy).

allegation that the draft legislative act is incompatible with the member state's constitution, national legal order, or even just national law. Thus, reasoned opinions encompassed concerns as regards the compliance of a given proposal with the 'member state's constitutional law'[117] or 'provisions of the member state's Constitution'.[118] National parliaments also held that a given proposal 'unnecessarily encroaches into the legal systems of member states';[119] 'is incompatible with the member state's system of law';[120] or 'has insufficiently taken into account the legal traditions of the member states and issues relating to the uniformity and consistency of their legal systems'.[121] Moreover, some reasoned opinions embraced phrases claiming that a proposal 'represents interference in the member state's labour market model';[122] 'may violate the budgetary autonomy of member states';[123] 'undermines the member state's taxation system';[124] 'may have adverse effects on the member state's economy';[125] 'is a radical encroachment on national enforcement systems';[126] or 'should not interfere with national legal measures that ensure an appropriate level of family protection'.[127] This shows that many of the substantive arguments endorsed by national parliaments do not aim at protecting national competences vis-à-vis EU competences per se, but instead at protecting or promoting, for example, sectoral economic interests.[128]

At first glance, the above examples may indicate that the principle of the primacy of EU law over national law[129] is not necessarily present in the 'consciousness' of national parliaments. They seem to ignore the fact that domestic law cannot be invoked as a justification for a breach of EU law.[130] Nevertheless, it

[117]The Swedish Riksdag on COM (2016) 283 and the Czech Senate on COM (2016) 270 (rights of applicants for international protection).

[118]The Swedish Riksdag on APP(2015) 907 (freedoms of the press and of expression), the Dutch Tweede Kamer on APP(2015) 907 (autonomy of political parties and freedom of association) and the Irish Oireachtas on COM (2016) 723 (independence of the judiciary).

[119]The Polish Senate on COM (2017) 253.

[120]The Austrian Bundesrat on COM (2017) 753 (protection of water quality).

[121]The Czech Poslanecká sněmovna on COM (2016) 283.

[122]The Swedish Riksdag on COM (2017) 797.

[123]The Hungarian Országgyűlés on COM (2016) 270.

[124]The Dutch Senate on COM (2016) 687.

[125]The Dutch Tweede Kamer on COM (2016) 683 and 685.

[126]The Austrian Bundesrat on COM (2018) 185.

[127]The Polish Sejm on COM (2017) 253.

[128]Cf. B. Guastaferro, 'Reframing Subsidiarity Inquiry from an "EU Value-added" to an "EU Non-encroachment" Test?', in Cartabia, *supra* n. 55, p. 151.

[129]*See* for example M. Claes, 'The Primacy of EU Law in European and National Law', in D. Chalmers and A. Arnull (eds.), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) p. 178.

[130]The ECJ has consistently held that a member state cannot plead provisions prevailing in its domestic legal system, even its constitutional system, to justify a failure to observe obligations arising under EU law. *See* e.g. ECJ 8 April 2014, Case C-288/12, *Commission* v *Hungary*, para. 35.

should be noted that the Early Warning Mechanism pertains to draft legislative acts, and thus the signalling of internal constitutional doubts in a reasoned opinion is not equivalent to making the same assertion in relation to binding EU law before the European Court of Justice. Furthermore, it is not surprising that national parliaments have seized the opportunity to use reasoned opinions as a reaction against proposals which infringe upon the essence of member states' constitutions.[131]

Keeping the above in mind, it can be assumed that a hidden argumentative potential in this regard lies in the concept of member states' national identities under Article 4(2) TEU.[132] As has been observed, a possible limitation to the 'expansive nature' of the principle of subsidiarity in favour of the EU could come from the interpretation of Article 5(3) TEU, together with Article 4(2) TEU.[133] It has also been suggested that Article 4(2) TEU endorses the trend to reframe the subsidiarity inquiry from a 'value-added test' to a 'non-encroachment test', and helps to broaden the scope of this inquiry by connecting the principle of subsidiarity with the principle of conferral and the principle of proportionality.[134] Arguably, the identity clause – along with the principles of conferral, loyal cooperation, subsidiarity, and proportionality – should be read jointly as setting the boundaries of EU actions.[135] This may be specifically perceived as a constitutional device to defuse clashes generated by the apparent collision between, on the one hand, the need to ensure the autonomy and the *effet utile* of EU law, and on the other hand the need to protect the fundamental structures and essential functions of member states.[136] What is of importance here is that Article 4(2) TEU may be invoked by a national parliament in the context of member state's national identity,[137] but not its constitutional identity[138] or sovereignty. To be precise, in order to decide whether a feature of a particular member state deserves protection under

[131]Cf. Goldoni, *supra* n. 31, p. 97.

[132]Art. 4(2) of TEU requires the EU to respect member states' national identities 'inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. It also requires the EU to respect member states' 'essential state functions, including ensuring the territorial integrity of the state, maintaining law and order and safeguarding national security'.

[133]Cf. Fasone, *supra* n. 54, p. 13.

[134]*See* Guastaferro, *supra* n. 57, p. 339.

[135]G. Di Federico, 'The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards', 25 *European Public Law* (2019) p. 347 at p. 355.

[136]Ibid., p. 379.

[137]*See* M. Dobbs, 'The Shifting Battleground of Article 4(2) TEU: Evolving National Identities and the Corresponding Need for EU Management?', 21 *European Journal of Current Legal Issues* (2015).

[138]*See* F. Fabbrini and A. Sajó, 'The Dangers of Constitutional Identity', 25 *European Law Journal* (2019) p. 457 at p. 466.

Article 4(2) TEU, this feature must be seen as a part of the constitutional and political structure of the member state in question; must be fundamental to these structures; and must be unique in that no other member state exhibits such a feature.[139] Applying this logic, the above-cited reasons given by national parliaments are too vague to be approved as a relevant way of utilising the tool provided for under Article 4(2) TEU. However, a proper reference to national identity in a reasoned opinion may serve as a preventive measure to avoid disputes in this matter between national courts and the European Court of Justice.[140]

The various faces of proportionality

Article 5(4) TEU provides that under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The principle of proportionality addresses the intensity of EU action once it has been established that the EU enjoys the power to act.[141] More precisely, this principle requires that a measure must be appropriate and necessary to achieve its objectives. To determine whether a provision is compatible with the principle of proportionality, it is necessary to verify whether the means it employs to achieve the aim correspond to the importance of the aim ('a test of suitability'), and whether they are necessary for its achievement ('a test of necessity').[142] The literature highlights the tight connections between the principles of subsidiarity and proportionality, even calling them 'sister principles'.[143] Some authors demonstrate the flaws of the existing solution and call for reforming the Early Warning Mechanism to include (at least to a certain extent) a proportionality check,[144] while others argue for maintaining the exclusion of proportionality from the scrutiny of national parliaments.[145]

National parliaments raised arguments as regards proportionality in 63 (out of 185) reasoned opinions during the period scrutinised. Generally speaking, there

[139]A. Kaczorowska, 'What Is the European Union Required to Respect under Article 4(2) TEU?: The Uniqueness Approach', 25 *European Public Law* (2019) p. 57 at p. 59. *See also* Cloots, *supra* n. 57, p. 86.

[140]Cf. T. Konstadinides, 'Dealing with Parallel Universes: Antinomies of Sovereignty and the Protection of National Identity in European Judicial Discourse', 34 *Yearbook of European Law* (2015) p. 127 at p. 129.

[141]Fabbrini, *supra* n. 1, p. 224.

[142]T. Tridimas, 'The principle of proportionality', in Schütze and Tridimas, *supra* n. 1, p. 246.

[143]Cooper, *supra* n. 58, p. 31.

[144]J. Hettne, 'Reconstructing the EWS?' in Jonsson Cornell and Goldoni, *supra* n. 58, p. 62. *See also* J. Öberg, 'National Parliaments and Political Control of EU Competences: A Sufficient Safeguard of Federalism?', 24 *European Public Law* (2018) p. 700.

[145]Louis, *supra* n. 39, p. 437.

were three ways of referring to this matter: (1) as an element of monitoring compliance with the principle of subsidiarity; (2) as a separate principle; and (3) as an additional reason.

The first subcategory is well exemplified by the statement of the Swedish Riksdag, according to which the words 'only if and in so far as' in Article 5(3) TEU mean that the subsidiarity check includes a proportionality criterion, and that consequently the proposed action may not go beyond what is necessary to achieve the desired objective(s).[146]

In the second subcategory of reasoned opinions it was emphasised that the principle of subsidiarity is closely related to the principle of proportionality,[147] but the infringement of the latter is evaluated separately. Certain reasoned opinions merely concentrated on the assessment of the proposal in light of Article 5(4) TEU, which led to conclusions such as 'the proposal goes beyond what is necessary to achieve the stated objectives and therefore conflicts with the principle of proportionality';[148] 'the proposal is at variance with the principle of proportionality since the measures contained in the proposal are not proportional to the objectives to be achieved';[149] and 'the proposal violates the principle of proportionality because it greatly exceeds what is necessary to achieve the objective pursued by the Commission'.[150] In one case it was interestingly expressed that Article 5(4) TEU seeks to safeguard member states' regulatory powers, which implies that the draft act 'should be adopted in the form that least encroaches on member state autonomy in terms of both its scope and the degree of regulation it involves'.[151] Moreover, we can identify a category of reasoned opinions which posit that a proposal which goes beyond the extent necessary to achieve the objective violates both the principles of subsidiarity and proportionality.[152]

Finally, reasoned opinions in which proportionality was mentioned without specifying the precise context may be observed. For instance, national parliaments have argued that the proposed provisions are 'not proportionate to the objectives of the proposal';[153] or used phrases based on the issue of proportionality but

[146]The Swedish Riksdag on COM (2016) 551 and on COM (2017) 795. *See also* the Irish Oireachtas on COM (2016) 723.

[147]The British House of Lords on COM (2018) 639.

[148]The Swedish Riksdag on COM (2018) 184.

[149]The Czech Poslanecká sněmovna on COM (2016) 861. *See also* the Irish Oireachtas on COM (2017) 647 and on COM (2018) 478.

[150]The German Bundestag on COM (2016) 864. *See also* the Bulgarian Narodno Sabrania on COM (2016) 283 and on COM (2016) 378.

[151]The German Bundestag on COM (2018) 277.

[152]The Romanian Camera Deputaților and the Slovak Národná rada on COM (2016) 270.

[153]The Irish Oireachtas on COM (2018) 478 and 480. *See also* the Czech Poslanecká sněmovna on COM (2016) 283 and the Spanish Cortes Generales on COM (2016) 861.

without naming the principle, e.g. 'the proposal goes beyond what is necessary to achieve the objective pursued'.[154]

Despite the ambiguity of national parliaments' usage of the proportionality principle, it seems that their approach, and in particular their reliance on the links between the principles of subsidiarity and proportionality fosters the inclusion of the proportionality test in the scrutiny performed within the Early Warning Mechanism.

National parliaments as 'legislative advisors'

In numerous reasoned opinions national parliaments pointed out topics which cannot be easily classified into one particular and consistent category. Their common feature is the fact that they are linked to EU Treaty provisions which have a distant, if any, connection with the principle of subsidiarity, and overall they touch on matters of a legislative nature.

All told, 35 (out of 185) reasoned opinions commented on the legal basis of the draft legislative act. Apart from above-mentioned problem of the legal basis as a part of the conferral scrutiny, some reasoned opinions have accentuated that 'the legal basis is not completely equivalent to the content of the proposal';[155] 'there is a mismatch between the legal basis of the proposal and the aims of the proposed measures';[156] 'the proposal goes beyond the legal basis';[157] or 'the legal basis is not appropriate'.[158] It seems that in situations wherein national parliaments do not contend that the Union has no competence in a given matter, but claim that an incorrect legal basis has been invoked, the problem lies in infringement of the principle of legality, not the principle of conferral.

Sporadically, national parliaments have indicated that draft legislative acts breach other Treaty provisions of a material nature in a specific area, by declaring that, e.g., the proposal 'would violate the principle of "equal pay for equal work" as laid down in Article 157 TFEU';[159] 'interferes with member states' responsibility for medical care and management of health services provided for in Article 168(7) TFEU';[160] 'gives rise to concerns in terms of its compatibility with the principle of democracy, which is included among the

[154]The Bulgarian Narodno Sabrania on COM (2016) 52. *See also* the Swedish Riksdag on COM (2018) 218 and the Italian Senate on COM (2015) 613.

[155]The Slovak Národná rada on COM (2016) 128. Cf. Sander, *supra* n. 24, p. 536.

[156]The Romanian Senate and the Romanian Camera Deputaților on COM (2016) 128.

[157]The Dutch Tweede Kamer on APP(2015) 907.

[158]The Dutch Tweede Kamer on COM (2018) 147 and 148.

[159]The Bulgarian Narodno Sabrania on COM (2016) 378. *See also* the French Senate on COM (2016) 822 and the Polish Senate on COM (2016) 861.

[160]The Czech Poslanecká sněmovna on COM (2018) 51.

fundamental values of the EU pursuant to Article 2 TEU';[161] 'is not compatible with the principle of subsidiarity with regard to the Treaty right of member states to freely shape their own energy mix, technological neutrality and sovereign national energy (Article 194(2) TFEU)';[162] or 'clashes with the spirit and purpose of Article 78 TFEU and the European policy aimed at supporting the action of member states facing immigration pressure at their borders'.[163] Besides, national parliaments several times adopted positions in defence of the common market, arguing that a given proposal may contravene its principles or the objectives of its functioning.[164]

In 17 (out of 185) reasoned opinions national parliaments raised concerns over the empowerment of the Commission to adopt delegated acts. In a few cases they simply took the view that Article 290 TFEU[165] has been breached because 'the proposed scope and extent of delegated acts significantly exceed the mandate issued in Article 290 TFEU';[166] or the 'powers delegated to the Commission go beyond the limits laid down in Article 290 TFEU'.[167] Other national parliaments observed that an excessive use of delegated acts can violate the principle of subsidiarity because they do not have the power to adopt reasoned opinions with regard to 'draft delegated acts'.[168] Furthermore, national parliaments have occasionally criticised provisions conferring implementing powers on the Commission. These reservations have generally relied on the fact that implementing acts are not submitted to the subsidiarity scrutiny.[169]

[161]The German Bundesrat on COM (2016) 821.

[162]The Polish Senate on COM (2016) 861 and on COM (2016) 864. *See also* the Hungarian Országgyűlés on COM (2016) 861.

[163]The Italian Senate on COM (2018) 633.

[164]The Croatian Sabor and the Estonian Riigikogu on COM (2016) 128 and the Polish Senate on COM (2017) 278.

[165]Art. 290 TFEU states that 'a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act (. . .)'. The observed increase in the number of delegated acts has been criticised in the doctrine for, inter alia, limiting the scope of control exercised by national parliaments. Cf. R. Lopatka, 'Subsidiarity: Bridging the Gap between the Ideal and Reality', 18 *European View* (2019) p. 26 at p. 32.

[166]The Maltese Kamra tad-Deputati on COM (2015) 613.

[167]The Hungarian Országgyűlés on COM (2015) 450. *See also* the Bulgarian Narodno Sabrania on COM (2016) 52.

[168]The Italian Senate on COM (2015) 613. *See also* the German Bundestag on COM (2016) 861, the Swedish Riksdag on COM (2016) 551.

[169]*See* the French Senate on COM (2016) 815. In this context, *see* G. Barrett, 'Mind the Gap! The Implications of Comitology and the Open Method of Coordination for National Parliaments', in Jančić, *supra* n. 104, p. 97.

Last but not least, national parliaments have relatively often expressed a negative assessment of draft legislative acts, but without a clear indication how their assessment was associated with a breach of the principle of subsidiarity. For example, they contended that given proposals seem to be unnecessary,[170] unclear,[171] or harmful to the member state.[172]

All the above examples demonstrate that national parliaments are willing to improve the quality of EU provisions, in both their material and formal dimensions. While this is not the place to analyse whether their input in this regard is of a significant value, nevertheless pragmatically speaking there is no cause for not benefiting from their expertise in the field of legislation.[173]

Insufficient justification of draft legislative acts

Under Article 5 of Protocol No. 2, any draft legislative act should contain a detailed statement making it possible to appraise its compliance with the principles of subsidiarity and proportionality.[174] While in the legal doctrine the correct justification – in the context of national parliaments' prerogatives in the Early Warning Mechanism – is mainly seen as a point of reference for assessing compliance with the principle of subsidiarity,[175] shortcomings in the justification as such are generally not considered to give rise to a need to adopt a reasoned opinion.[176] Nevertheless, Kiiver argues that an inadequate justification in itself constitutes a breach of the subsidiarity principle because there are formal obligations on the part of the Commission to justify a draft.[177]

Reasons regarding the justification of proposals were given in 79 (out of 185) reasoned opinions. National parliaments stated, e.g., that 'the Commission failed to fulfil its obligations to inform and duly justify the proposal with regards to its

[170]The Dutch Senate on APP(2015) 907.

[171]The Swedish Riksdag on COM (2016) 687 and on COM (2016) 683.

[172]The Dutch Senate on COM (2016) 683, the Maltese Kamra tad-Deputati on COM (2016) 685, the French Senate on COM (2015) 635.

[173]Cf. D. Jančić, 'Better Regulation and Post-Legislative Scrutiny in the European Union', 21 *European Journal of Law Reform* (2019) p. 137.

[174]*See* Opinion of AG Kokott, 23 December 2015, Case C-547/14, *Philip Morris Brands SARL*, para. 298.

[175]Fabbrini and Granat, *supra* n. 49, p. 125.

[176]This view has been consistently upheld by the Commission. *See* Communication on the proposal for a Directive amending the Posting of Workers Directive as regards the principle of subsidiarity as set out in Protocol No 2 (COM (2016) 505).

[177]Kiiver, *supra* n. 44, p. 100. *See also* L. Di Donato, 'Impact Assessment and Control of the Compliance with the Principle of Subsidiarity in the EU', in Cartabia *supra* n. 55, p. 414.

compliance with the principle of subsidiarity'.[178] Many reasoned opinions specified that the lack of a justification which meets the requirements set out in Article 5 of Protocol No. 2 made it difficult or even impossible to assess the compliance of a proposal with the principle of subsidiarity,[179] or with the principles of subsidiarity and proportionality.[180] As a consequence, such a lack 'undermines national parliaments' right to objections, which in the long term would weaken the democratic decision-making processes in the EU'.[181] It was also observed that shortcomings in the justification of a draft act may breach the principle of sincere cooperation of Article 4(3) TEU,[182] and may constitute grounds for judicial review under EU law.[183]

Several reasoned opinions presented more nuanced reservations as regards the content of the justification, e.g. by claiming that 'the Commission has not adequately met the procedural requirements to provide a detailed statement with sufficient quantitative and qualitative indicators'.[184] In other cases, national parliaments argued that the Commission did not carry out an impact assessment of the proposed legislation,[185] or that the assessment was founded on unrealistic assumptions.[186] Furthermore, in a couple of reasoned opinions national parliaments criticised the lack of consultations or their insufficiency.[187] The most frequently cited reason for reservations was the breach of Article 2 of Protocol No. 2, according to which the Commission shall conduct a broad consultation before proposing a legislative act.[188] In this context it is worth noting that according to some experts, the failure to conduct broad consultations may justify an allegation of infringement of the procedural requirements of Protocol No. 2, although it is not sufficient to simply maintain that the results of consultations were unsatisfactory.[189]

[178]The Czech Poslanecká sněmovna on COM (2016) 128.

[179]The British House of Commons on APP(205) 907. *See also* the Swedish Riksdag on COM (2015) 750, the Polish Sejm and the Latvian Saeima on COM (2016) 128.

[180]The Croatian Sabor on COM (2016) 128, the Czech Senate on COM (2018) 277 and the Danish Folketing on COM (2016) 683 and 685.

[181]The Swedish Riksdag on APP(2015) 907.

[182]The Polish Sejm on COM (2016) 861 and on COM (2016) 128.

[183]The British House of Lords on APP(2015) 907.

[184]The Irish Oireachtas on COM (2018) 478 and 480. *See also* the Bulgarian Narodno Sabrania and the Slovak Národná rada on COM (2016) 128.

[185]The Swedish Riksdag on COM (2016) 589. *See also* the Irish Oireachtas on COM (2018) 147 and 148 and the French Senate on COM (2017) 495. It is not explicitly required by Art. 5 of Protocol No. 2, however, as noted in the doctrine, an impact assessment has become a necessary method to analyse whether the Union objective can be better achieved at Union level. *See* Di Donato, *supra* n. 177, p. 424.

[186]*See* the Dutch Senate on COM (2016) 270 and on COM (2016) 683.

[187]The British House of Commons on COM (2018) 639.

[188]*See* the Romanian Senate, the Czech Senate and the Latvian Saiema on COM (2016) 128.

[189]Öberg, *supra* n. 144, p. 725.

To sum up, strictly speaking flaws in the justification of a draft legislative act are not sufficient to constitute the sole reason to deliver a reasoned opinion. That said, it must be added that the expectations of national parliaments regarding the accuracy of such justifications have solid grounds under, inter alia, Article 4(3) TEU. Besides, the high number of reasoned opinions discussing deficiencies in justifications of legislative proposals indicates that the declarations of the Commission as to its commitment to duly act in this regard have not yet been fulfilled.[190]

Conclusions

Pursuant to Article 6 of Protocol No. 2, a reasoned opinion issued by a national parliament must state why it considers that the proposal in question does not comply with the principle of subsidiarity. The above empirical review demonstrates that national parliaments' reasoned opinions rely on diverse reasons, sometimes only slightly connected to the meaning of this principle under Article 5(3) TEU. To my mind, each reasoned opinion should provide at least one reason indicating a direct breach of the principle of subsidiarity *sensu stricto*, which anchors such opinion in the Early Warning Mechanism. Consequently, so long as the EU Treaties are not amended it is insufficient to construct reasoned opinions solely on the grounds of an alleged infringement of the principles of conferral or proportionality. This does not diminish the value of addressing problems related to these principles or other topics in reasoned opinions, since it may trigger a fruitful discussion during the course of the legislative procedure.[191] Despite the fact that a variety of these topics, including remarks on the merits of the draft legislative acts, are also brought up within the framework of the political dialogue,[192] it should be emphasised that the Early Warning Mechanism, which is established in the Treaty, still has an advantage over the Barroso initiative, the informality of which allows the Commission to abolish it on any occasion.[193]

In this field, one should particularly take into account the potential contributions of national parliaments as regards matters of a constitutional and/or legislative nature. First, this concerns the concept of national identity, since

[190] *See* e.g. the Commission's Annual Report 2015 on Subsidiarity and Proportionality, COM (2016) 469, p. 2.

[191] Cf. Goldoni, *supra* n. 31, p. 97, and Lupo, *supra* n. 55, p. 128. To evaluate the real impact of the Early Warning Mechanism profound research regarding the influence of reasoned opinions throughout the legislative procedure ought to be conducted.

[192] *See* e.g. the Commission's Annual Report 2018 on Subsidiarity and Proportionality, COM (2019) 333, p. 17.

[193] Jančić (2012), *supra* n. 5, p. 83.

parliaments can here play a substantial role as bodies regularly engaged in operating in constitutionally sensitive areas. In this context it should be highlighted that so far reasoned opinions have been principally focused on problems considered as significant from the individual perspective of a member state. This practice is understandable, because the issues of sovereignty, constitutional law, or national competences are far more deeply inscribed in the *modus operandi* of national legislatures than dealing with the nuances of a pan-European overview. Insofar as this attitude does not obscure the core of the principle of subsidiarity, it should be accepted, unless we wish national parliaments to retreat from the Early Warning Mechanism. In practice, this mechanism consists of a sum of individual arguments based on internal (national) premises, not a common view of national parliaments on a given problem.[194] Thus, it seems naïve to believe that national parliaments will function as 'objective' scrutinisers which compare the effectiveness of the EU with that of member states 'as such'. That said, it has to be underlined that reasoned opinions are not designed to cover any and all constitutional concerns on the part of a member state, but only those which can be meaningfully voiced on the basis of the national identity clause found in Article 4(2) TEU. Additionally, inasmuch as national parliaments are willing to share their concerns over matters like the (in)adequacy of a legal basis or the legislative quality of a proposal, their concerns should not be disregarded. Since legislating is at the core of national parliaments' domestic competence, their scrutiny over EU draft legislative acts may 'accidently on purpose' bring positive effects with respect to the quality of EU law.

In addition, we should stop perceiving the Early Warning Mechanism solely through the prism of whether the threshold has been reached that allows 'cards' to be triggered. If the significance of the Early Warning Mechanism were limited to issuing a yellow card, this would mean that in the last five years the voice of national parliaments mattered only in one out of nearly 400 draft legislative acts delivered to them. According to the statistics, in most cases draft legislative acts are subject to reasoned opinions submitted by up to three chambers, although, as has been described above, even in these situations national parliaments may contribute to adopting better EU laws. Since the collective feature of the Early Warning Mechanism is emphasised,[195] every so often proposals are submitted to strengthen the cooperation between national parliaments, as well as to amend the procedure for delivering their reasoned opinions. In my view, these issues are not of primary importance, since under the current legal framework there are no procedural

[194]Cf. otherwise ECJ 4 May 2016, Case C-358/14, *Poland* v. *European Parliament and Council*, para. 119.

[195]*See* Goldoni, *supra* n. 31, p. 106, and Pintz, *supra* n. 9, p. 90.

obstacles which hinder national parliaments from participating in the Early Warning Mechanism. At the same time, some national parliaments simply do not appear to be interested in becoming significantly involved in EU matters.[196] Hence voices in favour of reforming the procedural dimension of the Early Warning Mechanism would seem to be a 'forward escape strategy' and are not promising with respect to strengthening the overall involvement of national parliaments.

To conclude, no matter how serious the criticism is over the outstretched interpretation of the principle of subsidiarity, it is national parliaments' right to give reasons via their reasoned opinions. Thus, instead of rebuking the parliamentarians for not acting strictly in line with the letter of the Treaty, a more benevolent attitude should be adopted so as not to miss the chance to profit from the expertise of each chamber. In other words, in the case of the Early Warning Mechanism the safety should not be not in numbers, but in the value of the input provided individually by national parliaments. This could be profitable for the functioning of the EU – being a legal as well as political project – in the delicate area of striking a balance between acting on the level of the Union and/or on the level of its member states.

Supplementary material. To view supplementary material for this article, please visit https://doi.org/10.1017/S1574019620000048

[196]For example, in 2017 only 19 out of 41 chambers of national parliaments submitted reasoned opinions. Cf. P. De Wilde, 'Why the Early Warning Mechanism does not Alleviate the Democratic Deficit', 6 *OPAL Online Paper* (2012) p. 19.