

National Parliaments' Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive

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NATIONAL PARLIAMENTS' THIRD YELLOW CARD AND THE STRUGGLE OVER THE REVISION OF THE POSTED WORKERS DIRECTIVE

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The Treaty of Lisbon strengthened the role of national parliaments in the EU legislative process by creating the Early Warning System. This procedure offers them the possibility to send reasoned opinions to the European Commission if they have subsidiarity concerns about a legislative proposal. Since 2009 the necessary threshold (i.e. one third of the total number of votes) has only been reached three times. The most recent of these 'yellow cards' was triggered by the Commission's proposal to revise the Posted Workers Directive, an event that allows us to shed some light on how national parliaments use this mechanism and how the European Commission has reacted. The subsidiarity concerns were rejected by the Commission and the legislative process continues despite deep divisions between old and new Member States over the controversial policy issue of revising the Posted Workers Directive.

Keywords: National parliaments, subsidiarity, posting of workers

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I. INTRODUCTION

In 2016, the Early Warning System (EWS) for the control of the respect of the principle of subsidiarity by national parliaments was activated for the third time. 14 parliamentary chambers¹ totalling 22 votes had informed the European Commission (the Commission) by 10 May 2016 that they considered its Proposal for a Directive concerning the posting of workers in the framework of the provision of services² (hereafter: the PWD or the Directive) to be in breach of the principle of subsidiarity.

The right for national parliaments to control the respect of the principle of subsidiarity of new European Union (EU) legislative proposals,³ when the EU has no exclusive competence, was granted to them by the Lisbon Treaty. Since 2009, national parliaments each have two votes in the framework of the EWS; in bicameral systems, each chamber has one vote.⁴ If the reasoned opinions forwarded by national parliaments to the European Commission

¹ With the number of votes in brackets: Romanian Chamber of Deputies (1), Romanian Senate (1), Czech Chamber of Deputies (1), Czech Senate (1), Polish Sejm (1), Polish Senate (1), Seimas of the Republic of Lithuania (2), Danish Parliament (2), Croatian Parliament (2), Latvian Saeima (2) Bulgarian National Assembly (2), Hungarian National Assembly (2), Estonian Parliament (2) and the National Council of the Slovak Republic (2).

² Proposal for Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final.

³ This means that national parliaments cannot review existing legislation unless a proposal for its amendment is presented.

⁴ Articles 6 and 7 Protocol No. 2 annexed to the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C 202/C1 ('the Treaties')

within the eight weeks following the transmission of an EU legislative proposal amount to one third of the total number of votes – one fourth in the Area of Freedom, Security and Justice – this triggers a 'yellow card'.⁵ If this total amounts to half of the total number of votes, it is an 'orange card'.⁶ The Commission has not received an orange card yet.

This article aims at analysing the third yellow card triggered in 2016. In particular, it highlights the dynamics of interparliamentary cooperation which allowed the threshold to be reached. Special attention is further devoted to the East-West divide that came up in relation to the issue of Posting Workers. We contend that the Juncker Commission's attitude is similar to the one adopted by the Barroso Commission after national parliaments had triggered the second yellow card. The Barroso Commission did not want to change its proposal for political reasons and unless it concludes to have committed a subsidiarity breach, the Commission's hands are tied by the letter of the Treaty and the Commission may not modify a legislative proposal for other reasons after the EWS has been activated.

This article is structured as follows. The next section provides an analysis of the previous two yellow cards (II). Then the background and the content of the proposal for a revision of the PWD (III), as well as the dynamics of interparliamentary cooperation between national parliaments to activate the EWS are examined (IV). Building on this assessment, this article looks at the actual content of the reasoned opinions (V). Subsequently, the ongoing legislative process, i.e. what has happened since the yellow card was triggered, is described (VI). The final part draws some conclusions and discusses the effects that the third yellow card may have on the future role of national parliaments in the EU (VII).

⁵ Article 7(1) Protocol No. 2 annexed to the Treaties.

⁶ Article 7(3) Protocol No. 2 annexed to the Treaties.

II. COMPARISON WITH THE PREVIOUS YELLOW CARDS

The third yellow card, on the PWD, was preceded by two other yellow cards: in 2012 on the 'Monti II' proposal⁷ and in 2013 on the European Public Prosecutor's Office proposal (EPPO).⁸

The first yellow card, triggered in 2012, concerned the 'Monti II' Proposal for a Council Regulation. The proposal aimed at 'lay[ing] down the general principles and rules applicable at Union level with respect to the exercise of the fundamental right to take collective action within the context of the freedom of establishment and the freedom to provide services' (Article 1(1)). This proposal was particularly short (five articles only) and it was heavily criticised by national parliaments for failing to demonstrate the existence of any added value of action at EU level, for lacking proper justification, and for the choice of the legal basis that supposedly allowed the Commission to take action in this domain – although national parliaments mentioned other arguments unrelated to subsidiarity, their main points of criticism strictly focused on subsidiarity.⁹

⁷ Proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130.

⁸ Proposal for a Council Regulation on the European Public Prosecutor's Office, COM(2013) 534.

⁹ Indeed, if the Commission has no competence to act in the first place, there cannot be any question of subsidiarity, as this principle applies in the domain of non-exclusive EU competences. See for more details on the arguments raised by national parliaments, the context and content of this proposal: Federico Fabbrini and Katarzyna 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' (2013) 50 *Common Market Law Review* 115; Diane Fromage, *Les Parlements dans l'Union Européenne après le Traité de Lisbonne. La participation des Parlements Allemands, Britanniques, Espagnols Français et Italiens* (L'Harmattan 2015) 359f; and Marco Goldoni, 'The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation' (2014) 10 *European Constitutional Law Review* 90. All reasoned opinions are available on the Platform for EU interparliamentary exchange (IPEX) <<http://www.ipex.eu>> accessed 2 April 2017.

The proposal was made on the basis of the flexibility clause (Article 352 Treaty on the Functioning of the European Union (TFEU)) whose usage the Commission justified as follows: 'Article 352 TFEU (reserved for cases where the Treaties do not provide the necessary powers to implement actions necessary, under the policies defined in the Treaties, to attain one of the objectives of the Treaties) is the appropriate legal basis for the proposed measure'.¹⁰ The Commission did not see any contradiction with the clear prohibition contained in Article 153(5) TFEU which reads: 'The provisions of this Article [Art. 153] shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs'. In its view, the fact that the Court has issued rulings on this matter shows that collective actions cannot be deemed to remain outside of the scope of EU law.¹¹ The *Viking Line* and *Laval* rulings¹² had indeed already encroached upon the prohibition contained in Article 153(5) TFEU. In *Laval*, the Court of Justice of the European Union (CJEU) was asked to answer the question whether a strike that violated the freedom of services was allowed; the Court replied that this was not the case since the object of the strike was to demand acceptance of wages higher than set by the systems allowed in the PWD. Hence, the Court in this judgment adopted a new approach by considering, among other things, the minimum pay level in the host State as a ceiling, thus implying that host States could not apply higher terms and conditions of employment to workers than the minimum levels.¹³ This decision gave rise to significant criticism and critical comments, in particular by trade unions and academics.¹⁴ In an attempt to

¹⁰ Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130, 10.

¹¹ *Ibid* 11.

¹² Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* EU:C:2007:772 and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* EU:C:2007:809, respectively.

¹³ Claire Kilpatrick, 'Laval's Regulatory Conundrum: Collective Standard-Setting and the Court's New Approach to Posted Workers' (2009) 34 *European Law Review* 6, 844 and 848.

¹⁴ Among these many sources, for instance: Anne Davies, 'One Step Forward, Two Steps Back? *Laval* and *Viking* at the ECJ' (2008) 37 *Industrial Law Journal* 126; Mark

respond, in 2012 the Commission proposed an Enforcement Directive¹⁵ and a Regulation on the exercise of the right to take collective action in the context of the freedom of establishment and the freedom to provide services (the 'Monti II' Regulation object of the second yellow card). Despite the *Laval* and *Viking* judgements, it is still hard to imagine that the Commission may be authorised to propose measures such as the Regulation in question on the basis of this sole justification. As a matter of fact, 7 (out of 12) parliamentary chambers/parliaments¹⁶ were of the opinion either that the Commission lacked the competence to make the proposal at stake, or that Article 352 TFEU was not an appropriate legal basis. For what concerns the respect of the principle of subsidiarity more specifically, the justification the Commission provided is particularly short, as it simply contended that 'the objective of the Regulation, to clarify the general principles and EU rules applicable to the exercise of the fundamental right to take industrial 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, *requires action at European Union level and cannot be achieved by the Member States alone*'.¹⁷

The Commission undoubtedly failed to fulfil its obligation to justify its respect of the principle of subsidiarity in a detailed statement as prescribed

Freeland and Jeremias Prassl, *Viking, Laval and Beyond* (Hart 2014); Kilpatrick (n 13); Norbert Reich, 'Free Movement v Social Rights in an Enlarged Union – the *Laval* and *Viking* Cases Before the ECJ' (2008) German Law Journal 125; Also, many press releases by the European Trade Union Confederation (ETUC) available at: <https://www.etuc.org/issue/posting-workers?type=All&field_document_type_tid=All> accessed 2 April 2017.

¹⁵ Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [2014] OJ L159/57.

¹⁶ Dutch House of Representatives, Portuguese Assembly, Luxembourgish Chamber of Deputies, Latvian Parliament, French Senate, German Bundesrat, Belgian House of Representatives.

¹⁷ Proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130, 11 (emphasis added).

by Article 5 Protocol No. 2.¹⁸ It also clearly did not show how it took into due consideration the two criteria laid down by Article 5(2) Treaty of the European Union (TEU) to assess the respect of the principle of subsidiarity: the fact that the proposed action cannot be sufficiently achieved at Member State level while simultaneously being better achieved at Union level. Almost 4 months after 12 national parliaments amounting to a total of 19 votes had raised the first yellow card ever, on 12 September 2012 the Commission announced its intention to withdraw its proposal, although it still did not consider that there had been any breach of the subsidiarity principle.¹⁹

After the second yellow card had been triggered in 2013, the Commission decided to maintain its proposal in its original form.²⁰ This second yellow card concerned the Proposal for a Council Regulation on the European Public Prosecutor's Office and it was raised following the issuance of reasoned opinions by 14 national parliaments representing a total of 18 votes.²¹ In this case, there was no doubt that the Commission had the competence to make such a proposal since Article 86(1) TFEU reads: 'In order to combat crimes affecting the financial interests of the Union, the Council [...] may establish a European Public Prosecutor's Office from Eurojust'. However, as was also the case when the first yellow card was

¹⁸ Art 5 Protocol 2 annexed to the Treaties: 'Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a *detailed statement* making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level *shall be substantiated by qualitative and, wherever possible, quantitative indicators*' (emphasis added).

¹⁹ European Commission, Commission Decision to withdraw the Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130.

²⁰ See on this second yellow card: Diane Fromage, 'The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member States Parliaments?' (2015) 35 Yearbook of European Law 1, 5.

²¹ As stated above, in the Area of Freedom, Security and Justice, the threshold to trigger a yellow card has been lowered to one fourth of the total number of votes.

triggered as described above, the justification provided by the Commission fell short of showing clearly why it considered that the principle of subsidiarity had been duly respected. Whereas the impact assessment was very detailed, the justification contained in the proposal itself did not go into much detail as it was limited to the following statements: 'There is a need for the Union to act because the foreseen action has an intrinsic Union dimension'²² and 'this objective can only be achieved at Union level by reason of its scale and effects [given that ..] the present situation, in which the prosecution of offences against the Union's financial interests is exclusively in the hands of the authorities of the Member States is not satisfactory and does not sufficiently achieve the objective of fighting effectively against offences affecting the Union budget'.²³ Consequently, in this case there also appears to have been a breach by the Commission of its obligation of justification contained in Article 5 Protocol No. 2; this breach is visible in the fact that alternative scenarios, such as the possible reinforcement of OLAF, were not considered.²⁴

With the exception of the French Senate and the Irish *Oireachtas*, all parliamentary chambers raised subsidiarity-related issues in their reasoned opinions, i.e. they did not make improper use of the EWS to show their overall opposition, even if some of them also raised non-subsidiarity related matters. Still, some chambers (Cypriot House of Representatives, Swedish Parliament) considered both proportionality and subsidiarity in their assessments, even if the EWS solely encompasses the latter. In any case, on that occasion the effects of the yellow card were different: in the outcome of the Commission's review in itself and in the speed with which it was produced, but also in the way in which the relationship between the Commission and national parliaments evolved.

The Commission's decision to maintain its proposal in its original form was published only three weeks after the yellow card had been triggered. Later on, differently from what it had done when the first yellow card was triggered, it wrote individual replies to each chamber that had submitted a reasoned

²² Proposal for a Council Regulation on the European Public Prosecutor's Office, COM(2013) 534, 4.

²³ Ibid.

²⁴ Fromage (n 20).

opinion.²⁵ Interestingly, some of the national parliaments and the Commission subsequently entered into a sort of dialogue and some national parliaments submitted a second and even a third contribution. It may therefore be said that the Commission's attitude vis-à-vis national parliaments was more open in that it showed a certain readiness to thoroughly consider parliaments' opinions and to discuss the issue with them.

Against this background, it appears that the circumstances under which these two first cards were shown to the Commission are very different from the third card analysed here. The differences between the three yellow cards are not necessarily visible in the outcome of the procedure, since, in the present case as in that of the EPPO proposal, the Commission decided to maintain its proposal as it had presented it initially. By contrast, on the first occasion it decided to simply withdraw its proposal. The third yellow card is also different because in 2014, when it entered into office, the new Commission (the addressee of the yellow card) had made a clearer commitment to taking into account national parliaments' views than its predecessor: Jean-Claude Juncker promised to forge a 'new partnership'²⁶ with national parliaments. In addition, the constellation that triggered the third yellow card highlights an East-West divide: ten out of the eleven Member States whose parliamentary chambers issued reasoned opinions are located in Central and Eastern Europe.²⁷ Finally, the division goes beyond the question of respecting the subsidiarity principle which, as shown below, was used as an instrument to express an overall opposition to the 'Social Europe' agenda that the Juncker Commission has presented. Interestingly, both the first and the third yellow card relate to the question of social rights in the European Union and were issued on legislative proposals submitted after the controversial *Laval* case.²⁸

²⁵ All these replies are available on the Commission's website: <http://ec.europa.eu/dgs/secretariat_general/relation/relation_other/npo/index_en.htm> accessed 2 April 2017.

²⁶ Jean-Claude Juncker, Mission Letter to First Vice-President Frans Timmermans (European Commission, 1 November 2014, <http://ec.europa.eu/archives/juncker-commission/docs/timmermans_en.pdf> accessed 2 April 2017.

²⁷ Only Denmark is an exception.

²⁸ Case C-341/05 *Laval* (n 12).

III. BACKGROUND AND CONTENT OF THE COMMISSION'S PROPOSAL FOR THE REVISION OF THE PWD

This section deals more specifically with the third yellow card: it examines the highly controversial issue of the Posting of Workers (despite a marginal importance in numerical terms) and it considers the content of the Commission's proposal in detail.

1. A Highly Controversial Issue Despite Its Marginal (Numerical) Significance

Contrary to the legislative proposals which gave rise to the first and second yellow cards, the PWD aims at amending an existing directive and therefore is not a new piece of legislation. The issue of posted workers 'plays an essential role in the Internal Market'²⁹ and allows companies to (temporarily) post workers in another Member State to provide a service. In the case of posted workers, to whom the norms relating to the provision of services and not those to the free movement of workers apply, it is necessary to determine which of the host State labour laws applies.

The Directive covers three different forms of posting: 'the direct provision of services between two companies under a service contract, posting in the context of an establishment or company belonging to the same group ('intra-group posting'), and posting through hiring out a worker via a temporary work agency established in another Member State'.³⁰ Actually, the issue of posted workers has been controversial for a long time,³¹ and more acutely so

²⁹ European Commission, Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD(2016) 53 final, 5.

³⁰ Ibid 5-6.

³¹ Controversies were already visible when the Directive was adopted in 1996. Werner Eichhorst, 'European social policy between national and supranational regulation: Posted workers in the framework of liberalised services provision' [1998] MPIfG discussion paper 98/6, 5f. Also, previous attempts at adopting rules in this field at EU level had failed in the past, notably in the 1970s. On this historical development and how some issues that arose at the time can still be recognized in the PWD: Stein Evju, 'Revisiting the Posted Workers Directive: Conflict of Law and Laws in Contrast' (2009-2010) 12 Cambridge Yearbook of European Legal Studies 151.

since the 2004 EU enlargement which increased the gap between the highest and the lowest wages among Member States,³² and numerous academic articles and studies have echoed this controversy.³³ As stated above, the CJEU's *Laval*³⁴ decision constituted a clear illustration of the difficult reconciliation between the two objectives pursued by the Directive, namely that of the encouragement of the provision of services within the internal market and that of the protection of the rights of workers.³⁵ *Laval* also represented the turning point towards a strict interpretation of the Directive by the CJEU subsequently visible in the cases that followed – *Commission v. Luxembourg* and *Rüffert*.³⁶ This concern additionally arose again in a similar case, *Sähköalojen ammattiliitto ry*³⁷ in 2015, where some Polish workers posted in Finland had not received the minimum pay established by the Finnish

³² On this gap, which grew from 1:3 to 1:10 between 1996 and 2016: European Commission, Impact Assessment (n 29), 13. On the other hand, France for instance has long been advocating a stricter regime and was actively involved in the debate on the previous revision of the Directive launched in 2012 by the Commission. Cécile Barbière, 'La France part en guerre contre les travailleurs low cost' (*Euractiv.fr*, 5 November 2013) <<http://www.euractiv.fr/section/europe-sociale-emploi/news/la-france-part-en-guerre-contre-les-travailleurs-europeens-low-cost/>> accessed 2 April 2017; French Senate, Résolution européenne sur les normes européennes en matière de détachement des travailleurs, 16.10.2013 and French National Assembly, Résolution européenne sur la proposition de directive relative à l'exécution de la directive sur le détachement des travailleurs, 11 July 2013.

³³ See n 14.

³⁴ Claire Dhéret and Andreia Ghimis, 'The revision of the Posted Workers Directive: towards a sufficient policy adjustment?' European Policy Centre discussion paper, 20 April 2016, 6-7 <http://www.epc.eu/pub_details.php?cat_id=17&pub_id=6475> accessed 2 April 2017.

³⁵ The choice of the legal basis for this Directive, namely Articles 53 and 62 TFEU on the provision of services and the right to establishment, nevertheless shows that this is the primary aim of the Directive, ie not in the social protection of workers. On this predominance of the economic over the social dimension, also: Evju (n 31) 154.

³⁶ Case C-319/06 *Commission v Luxembourg* EU:C:2008:350 and Case C-346/06 *Dirk Rüffert v Land Niedersachsen* EU:C:2008:189. On this development in case law: Kilpatrick (n 13) 848-850.

³⁷ Case C-396/13 *Sähköalojen ammattiliitto ry contre Elektrobudowa Spółka Akcyjna* EU:C:2015:86.

collective agreement.³⁸ The issue of posted workers has therefore recurrently and frequently been examined by the CJEU in the past ten years. It is unsurprising that such controversies arise, as the text of the Directive finally adopted in 1996 after five years of hard intergovernmental negotiations constituted an "umbrella" regulation which w[ould] safeguard national autonomy, but w[ould] not put an end to regime competition in the Single European Market'.³⁹ In addition, some have argued that 'clear(er) definitions of posting and posted worker are necessary'.⁴⁰

Evidence shows that the number of posted workers has increased sharply in recent years⁴¹ – by 44.4% between 2010 and 2014 – which explains why the European Commission and some Member States felt the need to revise the existing legislation. Numerous abuses in the form of, among other things, false self-employment or 'letter box companies' also called for a revision of the PWD.⁴² The countries that have the highest numbers of workers posted to other EU Member States in absolute terms are France, Germany and Poland.⁴³ Taking into account the actual size of the Member States' labour markets, the Member States that proportionally have the largest number of posted workers are Luxembourg, Slovenia and Slovakia.⁴⁴

Despite its highly controversial character, as illustrated not only by the yellow card but also by France's threat to suspend EU legislation on posted workers in July 2016⁴⁵ and by the introduction of the '*clause Molière*' that requires

³⁸ On this case: Rebecca Zahn, 'Revision of the Posted Workers' Directive: Equality at Last?' [2016] Working Paper Centre of European and Transnational Legal Studies Belfast 6 <http://strathprints.strath.ac.uk/58911/1/Zahn_CETLS_2016_Revision_of_the_posted_workers_directive.pdf> accessed 2 April 2017.

³⁹ Eichhorst (n 31) 30.

⁴⁰ Aukje van Hoek and Mijke Houwerzijl, 'Posting' and 'Posted Workers': The Need for Clear Definitions of Two Key Concepts of the Posting of Workers Directive' (2011-2012) 14 Cambridge Yearbook of European Legal Studies 419, 439.

⁴¹ European Commission, Impact Assessment (n 29) 6.

⁴² On these instances of abuse: Dhéret and Ghimis (n 34) 6-7.

⁴³ European Commission, Impact Assessment (n 29) 7.

⁴⁴ Ibid.

⁴⁵ 'La France pourrait ne plus appliquer la directive sur les travailleurs détachés' (*Euractiv.fr*, 4 July 2016) <<http://www.euractiv.fr/section/justice-affaires-interieures/news/la-france-pourrait-ne-plus-appliquer-la-directive-sur-les-travailleurs-detaches/>> accessed 2 April 2017.

French to be the language spoken on construction sites financed by the State in some French regions,⁴⁶ the phenomenon of posted workers is actually very limited in scale. It only concerns 0.7% of the total of EU workers, 0.4% of whom are unique posted workers,⁴⁷ which means that only 0.3% of the EU workforce is recurrently posted. Yet, these figures hide important differences between sectors, as the construction sector for instance heavily relies on posted workers – hence the introduction of the '*clause Molière*' in France – whereas other sectors are much less affected. But then again, the impression is often conveyed that posted workers are unskilled workers whereas actually 10.3 % of them are highly skilled.⁴⁸ It is also commonly assumed that posted workers come from 'new' Member States whereas in France and Belgium for example the majority of posted workers come from 'old' Member States.⁴⁹ As stated by the Commission, 'strong data limitations on posting of workers remain an on-going problem'.⁵⁰ In any event, it is certainly not true that all posted workers are Romanian builders or Polish plumbers. The wage gap observable for labour-intensive jobs, such as in the construction sector or in road transport, is much higher than that existing in high-end services sectors though.⁵¹ This is because the difference in costs between a local and a posted worker plays a more important role in the labour-intensive sectors and often constitutes a key incentive in the decision to post workers, whereas in the high-end services sector the cost has a more

⁴⁶ For example, in the Hauts-de-France and Normandy regions. 'Marchés publics: la Normandie exige le français sur les chantiers', *Le Parisien* (Paris, 23 November 2016) and Valerie Sauvage, 'Une «clause Molière» pour faire parler français sur les chantiers du conseil régional', *La Voix du Nord* (27 May 2016). Introducing this clause in the construction sector was not a random decision, as according to the European Builders Confederation's estimate, around 8% of French employees of the building construction sector lost their jobs between 2011 and 2014 due to the posting of foreign workers. European Builders Confederation, Press Release 'Posting of Workers: European Small Construction Entrepreneurs Welcome Revision', 8 March 2016 available at: <http://www.ebc-construction.eu/fileadmin/Publications/Press_releases/2016/2016_03_08_EBC_on_EC_PWD_revision_EN.pdf> accessed 2 April 2017.

⁴⁷ European Commission, Impact Assessment (n 29) 8.

⁴⁸ *Ibid* 6.

⁴⁹ Dhéret and Ghimis (n 34).

⁵⁰ European Commission, Impact Assessment (n 29) 8.

⁵¹ *Ibid* 13.

residual effect. This means that 'unequal wage treatment particularly affects workers posted from low- to high-wage countries'.⁵²

The Commission duly notes that this situation could be improved by the effective implementation of the 2014 Enforcement Directive⁵³ due on 18 June 2016,⁵⁴ and by the envisaged revision of the Regulation on social security coordination.⁵⁵ It also clearly establishes that the revision it envisages will not affect the Enforcement Directive or the measures adopted to transpose it. Rather 'it focuses on issues which were not addressed by it and pertain to the EU regulatory framework set by the original 1996 Directive. Therefore, the revised Posting of Workers Directive and the Enforcement Directive are complementary to each other and mutually reinforcing'.⁵⁶ In the Commission's eyes, this argument justifies its action.

Interestingly, right before the Commission published its proposal in March 2016, the European Trade Unions Confederation (ETUC), *Businesseurope*, the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME) and the European Centre of Employers and Enterprises (CEEP) – i.e. both employer organisations and trade unions at the EU level – jointly regretted that the Commission did not comply with their request to organise a social partner consultation.⁵⁷ This lack of consultation was later strongly criticised by parliaments as illustrated below (V).

⁵² European Commission, Impact Assessment (n 29) 14.

⁵³ Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [2014] OJ L159/57.

⁵⁴ European Commission, Impact Assessment (n 29) 8.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* 9.

⁵⁷ ETUC, *Businesseurope*, UEAPME and CEEP, Letter to President Juncker of 2 March 2016, <https://www.etuc.org/sites/www.etuc.org/files/document/files/02.03.16_letter_president_juncker_posting.pdf> accessed 2 April 2017; see also: ETUC, Press release, 'Posted workers – Revision must deliver equal pay – Lack of consultation 'big mistake'', 4 March 2016 <<https://www.etuc.org/press/posted-workers-revision-must-deliver-equal-pay-lack-consultation-big-mistake>> accessed 2 April 2017.

2. Content of the Commission's Proposal

The proposed Directive corresponds to President Juncker's promise to revise the legislation on posted workers to avoid social dumping made on 15 July 2014 in his opening statement⁵⁸ and reiterated in his State of the Union 2015 speech.⁵⁹ Despite the adoption of the Enforcement Directive in 2014, an acute need for a revision of Directive 96/71/CE was still there to turn Jean-Claude Juncker's wish to ensure that 'the same work at the same place should be remunerated in the same manner'⁶⁰ into reality.⁶¹ As identified by the Commission itself in the impact assessment, the currently observable wage differentiation is based on three mechanisms contained in the PWD. First, there is 'an in-built structural wage gap between posted and local workers'⁶² as it defines strict criteria for the application of the salaries agreed in sectoral collective agreements and hence leaves the possibility for the statutory minimum wage established in the Member State in question to apply. Second, the PWD fails to clearly define what the minimum rate of pay is composed of, although case law and in particular the recent case *Sähköalojen ammattiliittoa ry* have provided some indications in this regard.

It is true of course that Article 153(5) TFEU defines that '[t]he provisions of this Article *shall not apply to pay*, the right of association, the right to strike or the right to impose lock-outs'.⁶³ Yet, this does not mean that the PWD cannot define any uniform criteria of application at all, especially as – and this is the third mechanism identified by the Commission – in Denmark and in

⁵⁸ Jean-Claude Juncker, 'A new start for Europe', Opening statement in the European Parliament plenary session, 15 July 2015 <http://europa.eu/rapid/press-release_SPEECH-14-567_en.htm> accessed 2 April 2017.

⁵⁹ Jean-Claude Juncker, 'State of the Union 2015' (European Commission, 9 September 2015), 10 <http://europa.eu/rapid/press-release_SPEECH-15-5614_en.pdf> accessed 2 April 2017.

⁶⁰ Juncker (n 58).

⁶¹ See in this line the European Builders Confederation's call for a targeted review of the Directive in its letter to Commissioner Thyssen of 5 October 2015, <http://www.ebc-construction.eu/fileadmin/Policies/Social_Affairs/Posting_of_workers/EBC_Open_Letter_to_Comm_Thyssen__Posting_of_workers__October_2015.pdf> accessed 2 April 2017.

⁶² European Commission, Impact Assessment (n 29), 11.

⁶³ Emphasis added.

Sweden minimum rates of pay are set by collective agreements applicable on their whole territory while still leaving ample margin for the conclusion of company-level agreements. In addition, Article 57 TFEU also sets out a principle of equality in the cross-border provision of services as it states that '[w]ithout prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, *under the same conditions as are imposed by that State on its own nationals*'.⁶⁴

Further to this, in the impact assessment, the Commission highlights the difficulties resulting from the 'one-size-fits-all' approach adopted in the original PWD.⁶⁵ These difficulties arise in the context of subcontracting, temporary agency workers, and intra-corporate posting, and are caused by the lack of a time limit for the posting of workers despite the fact that the Directive does consider posting as something that is limited in time. To tackle these issues, the proposed revision of the Directive foresees that after 24 months the posted worker will be considered as working in the host Member State (preamble, 8). Additionally, in the new Article 2bis the proposal adds safeguards if a posted worker is replaced by another posted worker performing the same task. It is further requested that Member States publish the constituent elements of remuneration online, and it is established in which documents the terms and conditions of employment may be contained to serve as a benchmark (Article 3(1) amended). Note that the term 'remuneration' has replaced 'minimum rates of pay' and that whereas previously only the construction sector was concerned, now all sectors of the economy are subjected to these rules, the transport sector being an exception. However, the definition of remuneration used in the proposed revision is still quite vague, as it deems remuneration to be

all the elements of remuneration rendered mandatory by national law, regulation or administrative provision, collective agreement or arbitration awards which have been declared universally applicable and/or, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, other collective agreements or arbitration

⁶⁴ Emphasis added.

⁶⁵ European Commission, Impact Assessment (n 29), 14f.

awards within the meaning of paragraph 8 second subparagraph [which defines the invocable collective agreements and arbitration awards], in the Member State to whose territory the worker is posted (Art. 3(i) amended).

The provision regarding subcontracting, however, leaves the Member States ample margin, as it reads:

If undertakings established in the territory of a Member State are obliged by law, regulation, administrative provision or collective agreement, to subcontract in the context of their contractual obligations only to undertakings that guarantee certain terms and conditions of employment covering remuneration, the Member State *may*, on a non-discriminatory and proportionate basis, provide that such undertakings shall be under the same obligation regarding subcontracts with undertakings referred to in Article 1(i) [i.e. 'undertakings established in a Member State which, in the framework of the transnational provision of services, post workers [...] to the territory of Member State'] posting workers to its territory [emphasis added] (paragraph 1a added).

The use of the verb 'may' implies that Member States are under no obligation whatsoever to adopt norms in this sense. Temporary agency workers also see their status better defined and protected (paragraph 1b, added).

As regards subsidiarity, the Commission's justification is particularly brief as it simply reads without any further justification: 'An amendment to an existing Directive can only be achieved by adopting a new Directive'.⁶⁶ In fact, the European Scrutiny Committee of the House of Commons was very critical of this lack of justification, as it concluded during its meeting held on 13 April 2016: 'Of particular concern is the failure to offer any analysis of the proposal's compliance with the principle of subsidiarity. It is *unacceptable* to simply repeat the Commission's logic which, in this instance, amounts to the factual statement that EU legislation can only be amended through a further piece of EU legislation. This is not in itself a satisfactory subsidiarity justification'.⁶⁷ Such criticism is indeed greatly justified. Admittedly, a directive can only be amended by a directive but this does not automatically mean that the objective set for the revision of said directive can automatically

⁶⁶ European Commission, Explanatory Memorandum to the Proposal for a revision of the PWD, point 2.2.

⁶⁷ House of Commons, European Scrutiny Committee, Documents considered on 13 April 2016, point 6 bis (emphasis added).

be achieved by this means only. In this regard, the impact assessment also fails to shed much light on the matter: despite being fairly detailed and 103 pages long, the justification for the respect of the subsidiarity principle is quite succinct. The part dedicated to 'EU right to act' that includes the justification is a little more than one paragraph long, and the wording on subsidiarity is as follows:

The Directive currently provides for a uniform and EU-wide regulative framework setting a hard core of protective rules of the host Member State which need to be applied to posted workers, irrespective of their substance. Therefore, in full respect of the principle of subsidiarity, the Member States and the social partners at the appropriate level remain responsible for establishing their labour legislation, organising wage-setting systems and determining the level of remuneration and its constituent elements, in accordance with national law and practices. *The envisaged initiative does not change this approach. It thus respects the principles of subsidiarity and proportionality and does not interfere with the competence of national authorities and social partners.*⁶⁸

It is true that the posting of workers has a cross-border dimension and that Member States would not be able to regulate the issue on their own. The Commission correctly recalls that a directive already exists in this field and that it proves insufficient to prevent the current problems from developing. Against this background, a thorough justification may appear to be less urgently needed than in other cases. But it is nonetheless surprising that the Commission provided such a limited justification.⁶⁹ First, the obligation to provide a detailed assessment is contained in Article 5 Protocol No. 2. Second, Advocate General Kokott recently issued a clear warning in this regard to the Commission in her opinion on the case C-547/14 *Philip Morris Brands SARL*: Although she did not find any breach of the subsidiarity principle, she very clearly stated that 'it is strongly advisable that in future the Union legislature avoids set formulas like the one contained in recital 60 in

⁶⁸ European Commission, Impact Assessment (n 29), 19-20 (emphasis added).

⁶⁹ As rightly pointed out by Davor Jancic, this lack of justification would be sufficient for national parliaments to take the matter before the CJEU. National parliaments have in fact not used this possibility opened to them so far. Davor Jancic, 'EU Law's Grand Scheme on National Parliaments. The Third Yellow Card on Posted Workers and the Way Forward' in Davor Jancic (ed), *National Parliaments After the Lisbon Treaty and the Euro Crisis* (Oxford University Press 2017) 304.

the preamble to the Directive and instead enhances the preamble to the EU measure in question with sufficiently substantial statements regarding the principle of subsidiarity which are tailored to the measures in question'.⁷⁰ And third, the question of justification was already an issue when the previous yellow cards were triggered and it could therefore be somewhat disappointing for national parliaments to realise that even after they had managed to reach the high threshold to trigger the EWS, the Commission not only maintained its proposal unchanged but it also failed to improve its respect of the duty of justifying EU action.

Be this as it may, the proposal has been welcomed by many, particularly the ETUC, although it still considered it to be insufficient on the ground that, in some Member States, it excludes most sectoral collective agreements in addition to excluding all company-level agreements.⁷¹ Additionally, it regretted that trade unions were not given the right to collectively bargain for posted workers and that main contractors were not made jointly liable with their subcontractors with respect to terms and conditions of employment.⁷² Also, another issue lies in the fact that the Directive foresees a maximum duration of 24 months, which ETUC deems to be too long, especially as the average duration of posting is four months at present.⁷³ Even if these arguments are arguably well-founded, given the controversy the current proposal has already created, it is hard to imagine how a proposal could have been more protective of posted workers. Perhaps this step in the right direction, however small it is, should be praised, especially as it will provide greater clarity and represents an improvement in comparison to the current situation as resulting from the CJEU's case law.

⁷⁰ Opinion of Advocate General Kokott in Case C-547/14 *Philip Morris Brands SARL* EU:C:2015:853, para 188.

⁷¹ The European Trade Union Confederation's Press release, 'Posted workers revision – equal pay for some', published 8 March 2016 <<https://www.etuc.org/press/posted-workers-revision-%E2%80%93-equal-pay-some>> accessed 3 April 2017.

⁷² Ibid.

⁷³ Ibid.

IV. DYNAMICS OF INTERPARLIAMENTARY COORDINATION FOR THE THIRD YELLOW CARD

The European Commission presented the proposal for a revision of the PWD on 8 March 2016, which meant that the deadline for reasoned opinions was 10 May 2016. Before turning to the timing and sequence of the reasoned opinions adopted by national parliaments – leading to the gradual emergence of a 'regional block' of Central and Eastern European national parliaments –, it is important to briefly review the factors that have a positive influence on the likelihood of a national parliament to submit a reasoned opinion, as they have been identified in the literature on the role of national parliaments in the EWS.

The EWS gives national parliaments a collective role and it was expected to enhance interparliamentary coordination which would be indispensable to reach the threshold for triggering a yellow card.⁷⁴ The first assessments of the EWS identified the short time period of eight weeks, a lack of resources, and the division between majority and opposition parties in national parliaments as the main challenges, but more recent studies have shown that stronger political contestation over EU integration in national parliaments as well as salient or urgent draft legislative acts increase the likelihood of issuing a reasoned opinion.⁷⁵ In the case of the PWD, the period for scrutiny and institutional capacity of a national parliament were identical to other legislative proposals, but national parliaments and national governments of Central and Eastern European countries agreed on subsidiarity concerns about the revision of the PWD. Thus, national parliaments did not turn against their governments, they expressed their support by adopting reasoned opinions. The salience of the issue is beyond doubt, as was shown

⁷⁴ Philipp Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality* (Routledge 2012), Ch 3 and Ch 7; Ben Crum, 'The EU as Multilevel Democracy: Conceptual and Practical Challenges', PADEMIA Online Papers on Parliamentary Democracy 4/2016, 15 <<http://www.pademia.eu/publications/online-papers-on-parliamentary-democracy/online-papers-on-parliamentary-demcoracy-iv2016/>> accessed 3 April 2017.

⁷⁵ Katjana Gattermann and Claudia Heffler, 'Beyond Institutional Capacity: Political Motivation and Parliamentary Behaviour in the Early Warning System' (2015) 38 *West European Politics* 305.

above. Finally, the interparliamentary coordination that helped to trigger the first and second yellow card⁷⁶ also seems to have played a role in this case.

To analyse the timing and sequencing of the reasoned opinions that ultimately triggered the third yellow card, it is necessary to recall that each national parliament has different procedures for adopting a reasoned opinion⁷⁷ and that some of the parliaments that became active in the case of the PWD had only adopted very few reasoned opinions since 2010. In the run-up to 10 May 2016, however, a dynamic emerged that saw nine national parliaments/chambers adopt their reasoned opinions in the seven final days before the deadline.

The first chamber to adopt a reasoned opinion, after the Commission had transmitted its revision proposal on 8 March, was the Czech Chamber of Deputies on 31 March. Its European Affairs Committee had decided on 17 March to deliberate on the document and appointed a rapporteur.⁷⁸ With its early decision and adoption of the reasoned opinion the Czech lower chamber was able to set the stage for further reasoned opinions. The Polish *Sejm* (13 April) and the Romanian Chamber of Deputies (also 13 April) followed. Similar to the two previous cases of yellow cards, the 'vote count' for expressing reasoned opinions stood at only three votes (out of the 19 votes required) about four weeks before the deadline. On 20 April the Bulgarian National Assembly adopted its reasoned opinion; the Czech Senate followed on 27 April. However, on 1 May reasoned opinions that would represent 13

⁷⁶ Ian Cooper, 'A Yellow Card for the Striker: National Parliaments and the Defeat of EU Legislation on the Right to Strike' (2015) 22 *Journal of European Public Policy* 1406; Mette Buskjaer Christensen, 'The Danish Folketing and EU Affairs: Is the Danish Model of Parliamentary Scrutiny Still Best Practice?' in Claudia Hefftlar et al (eds), *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave 2015) 283; Christine Neuhold and Anna-Lena Högenauer, 'An Information Network of Officials? Dissecting the Role and Nature of the Network of Parliamentary Representatives in the European Parliament' (2016) 22 *The Journal of Legislative Studies* 237, 251.

⁷⁷ All procedures are detailed on COSAC's website <<http://www.cosac.eu/subsidiarity-control-in-nation/>> accessed 2 April 2017.

⁷⁸ Information retrieved from the IPEX website: COD/2016/0070 – Czech Chamber of Deputies, <<http://www.ipex.eu/IPEXL-WEB/scrutiny/COD20160070/czpos.do>> accessed 2 April 2017.

votes were still lacking to reach the 19-vote threshold for a yellow card by 10 May. A series of reasoned opinions adopted by the Lithuanian *Seimas* (3 May), the Romanian Senate (3 May), the Danish Parliament (4 May), as well as three reasoned opinions on 5 May (by the Croatian Parliament, the Latvian *Saeima* and the Polish Senate) increased the number of votes to 16. On the final day, 10 May, when there were still three votes lacking to activate the EWS, the unicameral parliaments of Estonia, Hungary and Slovakia (each of them with two votes) adopted reasoned opinions. The number of votes rose to 22 and the yellow card was triggered.

13 out of 14 chambers that submitted reasoned opinions on the revision of the PWD came from Central and Eastern Europe. As suggested by Cooper, a yellow card should be taken as 'a kind of 'alarm bell' triggered in unusual circumstances'.⁷⁹ It is noteworthy that ten out of these 14 chambers had submitted less than one reasoned opinion per year between 2010 and May 2016.⁸⁰ The fact that these national parliaments, generally not very active in the EWS, used this tool on this occasion shows that they have the capacity and willingness to use it if necessary. Furthermore, the sequence of the opinions' approval indicates a probable coordination in a 'regional block' of national parliaments that managed to establish closer coordination around one specific topic with shared preferences. In fact, given that their respective governments, with the exception of Croatia and Denmark, had submitted a joint letter to the Commission during the consultation phase (see details below), it is most likely that coordination of some sort also took place among these national parliaments.

⁷⁹ Cooper (n 76).

⁸⁰ Their total numbers of reasoned opinions are the following: Bulgarian National Assembly: 4; Croatian Parliament: 1; Czech Chamber of Deputies: 4; Czech Senate: 5; Estonian Parliament: 1; Hungarian National Assembly: 2; Latvian Parliament: 2; Romanian Chamber of Deputies: 6; Romania Senate: 3; Slovakian National Assembly: 6. Data retrieved from Agata Gostynska-Jakubowska, 'The Role of National Parliaments in the EU: Building or Stumbling Blocks?' (2016) Policy Brief, Centre for European Reform.

V. CONTENT OF THE REASONED OPINIONS AND CONTRIBUTIONS SUBMITTED BY NATIONAL PARLIAMENTS

Before embarking on the analysis of the reasoned opinions, it is interesting to note that in the preparation phase the Commission had conducted consultations abiding by its obligation contained in Article 10(3) TEU as well as in Article 2 Protocol No. 2. In this framework, 16 Member States expressed their views⁸¹ in the form of two letters: the first one sent on 18 June 2015 by Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden and the second one on 31 August 2015 submitted by Bulgaria, the Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Slovakia and Romania. Whereas the first letter was supportive of the modernisation of the PWD,⁸² the second letter considered that 'a review of the 1996 Directive [was] premature and should be postponed after the deadline for the transposition of the Enforcement Directive ha[d] elapsed and its effects carefully evaluated and assessed'.⁸³ Except for Croatia and Denmark, the signatories of this letter are the same Member States whose parliaments adopted reasoned opinions.

The proposal did not only attract the attention of these 14 national parliaments/chambers that submitted reasoned opinions, but another six⁸⁴ submitted mere contributions in the framework of the Political Dialogue, i.e. opinions that do not address the issue of subsidiarity and are forwarded to the Commission.⁸⁵ Of course, as is usually the case, the parliaments/chambers

⁸¹ European Commission, Impact Assessment (n 29), 4.

⁸² European Commission, Explanatory Memorandum to the Proposal for a Revision of the PWD, SWD(2016)53 final, point 3.1.

⁸³ Ibid.

⁸⁴ Both French Chambers, the Italian Chamber of Deputies, the Portuguese Parliament, the Spanish Parliament and the UK House of Commons. It seems slightly surprising that neither of the German chambers issued any opinion given how deeply Germany is affected by the phenomenon of posted workers.

⁸⁵ Reasoned opinions and contributions available on the Platform for interparliamentary information exchange (IPEX): <http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npou/united_kingdom/2016_en.htm>, accessed 2 April 2017.

that submitted reasoned opinions also added other remarks not related to subsidiarity.

For what concerns the parliaments/chambers that did find a subsidiarity breach, all of them (except Denmark) considered in some way that the Commission had violated its obligation contained in Article 5 Protocol No. 2 to justify its action and especially its added value. Many considered that the EU should refrain from acting to reach the objectives set by this Directive, i.e. ending the existence of unfair practices and ensuring that the principle of equal pay for equal work applies. Instead, they suggested that time, development of the low-wage markets, and the possibilities of introducing more restrictive rules at national level would be sufficient to achieve these goals.

National parliaments' reasoning on the lack of justification, as explained above, is perfectly in line with the principle as it is defined in the Treaty and its protocol and may indeed amount to a breach of its obligations by the Commission. Another argument that could potentially be acceptable is that related to the fact that the proposal intervenes prematurely (Czech Senate, Estonian Parliament, Latvian Parliament, Lithuanian Parliament, Romanian Chambers and Slovak National Council). As we recalled, the deadline for the transposition of the Enforcement Directive only expired on 18 June 2016, i.e. after the proposal for a revision of the PWD had been presented. It is true that the Commission explicitly declared both norms to be complementary and as not addressing the same issues. However, given the fact that the subsidiarity assessment indeed has an EU added-value dimension, the Commission's revision initiative might have been more convincing for reluctant parliaments if it had been possible to evaluate the effects of the Enforcement Directive. This raises the question as to why the Commission decided to make this proposal at this point in time. In this regard, three possible reasons can be formulated. First, the Brexit referendum was approaching and the question of migrant EU workers had played a very important role in the debates about the UK's EU membership. Second, the Juncker Commission had made a commitment to create a more social Europe. Third, as the number of posted workers has continued to grow sharply, it is likely that the Commission did not want to wait much longer to

launch the debate on a revision, especially given the fact that the adoption of the PWD had taken six years in the 1990s.

Other arguments used by parliaments to substantiate the existence of a subsidiarity breach are, however, beyond the scope of the subsidiarity test. The Lithuanian Parliament for example declared in its reasoned opinion that 'the legal regulation proposed might be contrary to the principle of subsidiarity enshrined in Article 5(3) of the Treaty of the European Union and Protocol No 2 on the Application of the Principle of Subsidiarity and Proportionality *by unreasonably restricting the opportunities and incentives for businesses to provide cross-border services, thus possibly working against consumers' interests*'.⁸⁶ Clearly, this assessment is not in line with what national parliaments are expected to assess, i.e. whether an objective cannot be sufficiently achieved at Member States' level while at the same time being better achieved at Union level. What this opinion appears to be doing is expressing criticism on the *content* of the proposal and its *aim* instead of an assessing the respect of the principle of subsidiarity. Similarly, the Romanian Chamber of Deputies concluded that 'the Directive proposal does not have enough added value and consequently, it decided that the principle of subsidiarity is infringed, *mainly from the perspective of the usefulness of the regulation*'.⁸⁷ This opinion is based on the Commission's failure to introduce full clarity concerning the definition of what the remuneration entails and on the already existing possibility for Member States to impose stricter norms than those contained in the PWD. However, this argument is only partially related to subsidiarity. The lack of full clarification in the definition of remuneration is indeed likely to hamper the full attainment of the goal set for the revision but the possibility for Member States to introduce restrictions is not in line with subsidiarity because it amounts to calling into question the goal of the revision itself, i.e. whether a revision is needed at all in the first place. In other words, the EU's need to act is not questioned, what is doubted is whether it should take stronger action than at present or whether the *status*

⁸⁶ Opinion issued by the Lithuanian Parliament on 20 April 2016, (emphasis added). Note also the use of the verb 'might' in relationship to the subsidiarity, also used in the concluding statement of this reasoned opinion. Of course, this opinion is a translation from Lithuanian, which triggered the use of an inappropriate verb, but this use of 'might' conveys some uncertainty in this Parliament's opinion.

⁸⁷ Opinion issued by the Romanian Chamber of Deputies on 13 April 2016.

quo in this field is best. In the same vein, many parliaments considered that the differences in labour costs are 'a legitimate element of companies' competitiveness in the EU internal market'.⁸⁸ The Danish Parliament interestingly enough supported the Commission's initiative to foster the application of the principle of equal pay for equal work. Yet, it did still find a breach of subsidiarity since, in its opinion, some parts of the proposed revision cause lacks of clarity as to the remaining national competence in this field.⁸⁹

In sum, it appears that the reasoned opinions rightfully claimed that a breach of the principle of subsidiarity had occurred, but solely on the basis of procedural grounds. Actually, the Commission could easily have justified the proposal in an appropriate manner. Then it would have been impossible for parliaments to use the EWS for their political disagreement or, if they had still used the EWS for that (unlawful) purpose, the reasoned opinions would not have resisted a thorough legal assessment.

Not all of the arguments unrelated to subsidiarity can be considered here. They were linked to the legal basis for example, i.e. whether it was still appropriate (Romanian Chamber of Deputies).⁹⁰ Seven parliaments/chambers further noted that the consultations carried out by the Commission were insufficient (Czech Senate, Hungarian Parliament, Latvian Parliament, Lithuanian Parliament, Romanian Chambers and Slovak National Council). This certainly amounts to a breach by the Commission of its obligations contained in Article 10(3) TEU and in Article 2 Protocol No. 2 but it does not automatically amount to a breach of subsidiarity. This would only be the case if it could be proven beyond any doubt that the premises of the Commission's proposal were terribly inaccurate due to the absence of adequate consultation. The marginal importance of the phenomenon of the posting of workers and its consequent limited impact on the internal market was raised by the Latvian Parliament and the Romanian Chamber of Deputies.⁹¹ Admittedly this argument does hold. However, as indicated

⁸⁸ Opinion issued by the Croatian Parliament on 6 May 2016.

⁸⁹ Opinion issued by the Danish Parliament on 6 May 2016.

⁹⁰ Romanian Chamber of Deputies (n 87).

⁹¹ Romanian Chamber of Deputies (n 87), and opinion issued by the Latvian Parliament on 5 May 2016.

above, the numerical importance of this phenomenon is certainly underestimated. It has had additional consequences in certain sectors, e.g. in the Belgian and French construction sectors. Both arguments can certainly justify the Commission's action.

In addition to these reasoned opinions, six parliaments/chambers also submitted contributions to the Commission in the framework of the Political Dialogue. Some of them did so within the eight-week period available for the control of the respect of the principle of subsidiarity, whereas others, such as the House of Commons, did so after 10 May 2016.⁹² It is noteworthy that some were clearly conceived as contributions in the framework of the Political Dialogue and labelled as such (French Senate) whereas others (French National Assembly and UK House of Commons) simply reused a document prepared at domestic level and forwarded it to the Commission (respectively a resolution and a letter between Committee chairs). The other contributions focused specifically on subsidiarity, finding that no breach had occurred, although they did occasionally touch upon other issues, too. Interestingly the Portuguese Parliament, despite being supportive of the Commission's initiative, noted that said initiative might have been tabled prematurely.

VI. WHAT HAS HAPPENED SINCE AND WHAT CAN WE EXPECT NEXT?

The European Commission replied to national parliaments' reasoned opinions on 20 July 2016, more than two months after the yellow card had been triggered. The time span corresponds to the period needed after the first yellow card, but is longer than it was for the second yellow card (three weeks). As the Commission maintained its proposal in its original form, the legislative process continues. Recent months have shown, however, that the split between East and West, between 'old' and 'new' Member States, has not only divided parliaments and led to the emergence of a regional block of reasoned opinions from national parliaments in Central and Eastern Europe (plus Denmark), but also that the East-West split has divided government representatives in the Council and even Members of the European Parliament.

⁹² Opinion issued by the UK House of Commons on 25 May 2016.

1. The Response of the European Commission to the Yellow Card

In its Communication of 20 July 2016 (hereinafter: Communication),⁹³ the Commission justified its proposal, rejected the subsidiarity concerns and other concerns raised by national parliaments, and announced that the revision of the Directive was still going to be pursued: a withdrawal or an amendment was not required.⁹⁴ The Communication only addressed the arguments related to the principle of subsidiarity in line with Article 6 of Protocol No 2. Other arguments were addressed in the Commission's individual replies to national parliaments, as in the case of the second yellow card.⁹⁵

Regarding the argument by several national parliaments that the current Directive was sufficient and adequate as it gives Member States the possibility to go beyond the general rules, the Commission stated that only an obligation, but not the option, to apply such rules in sectors other than the construction sector allows to fully achieve the objective 'to provide a more level playing field between national and cross-border service providers and to ensure that workers carrying out work at the same location are protected by the same mandatory rules'.⁹⁶ In contrast to what eight parliamentary chambers argued, the objective of revising the Directive was not to align wages across Member States, but to ensure that 'mandatory rules on remuneration in the host Member State are applicable also to workers posted to that Member State'.⁹⁷

With respect to concerns (by all national parliaments except the Danish Parliament) that the adequate level of action was not the Union level, but the Member State level, or that it had not been sufficiently proven why the aim

⁹³ Communication from the Commission to the European Parliament, the Council, and the National Parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2 of 20 July 2016, COM(2016) 505 final.

⁹⁴ Ibid 9.

⁹⁵ All these replies are available on the Commission's website: <http://ec.europa.eu/dgs/secretariat_general/relation/relation_other/npo/index_en.htm> accessed 2 April 2017.

⁹⁶ Communication (n 93) 6.

⁹⁷ Ibid.

of the revision should be achieved at the Union level, the Commission responded that national actions 'could lead to a fragmentation of the Internal Market as regards the freedom to provide services'.⁹⁸ It referred to the 'inherent cross-border nature of the posting of workers'⁹⁹, the facilitation of exercising the rights enshrined in Article 57 TFEU, and difficulties in bringing legal consistency throughout the Internal Market by individual actions of Member States.

The Commission continued with the comment made by the Danish Parliament that the proposal failed to make an explicit reference to Member States' competences on remuneration and conditions of employment. According to the Commission, the proposal merely provided that rules, as set by Member States, 'should apply in a non-discriminatory manner to local and cross-border service providers and to local and posted workers'.¹⁰⁰ The provision that 'cross-border temporary agency workers are given the same rights as [...] national temporary agency workers'¹⁰¹ was also adequate and would leave the competence of each Member State to determine these rights intact.

Finally, concerning the argument that the justification in the proposal with regard to the subsidiarity principle was 'too succinct' and failed to comply with Article 5 of Protocol No 2 to the Treaty (raised in a total of nine reasoned opinions), the Communication cites the case law of the CJEU with case C-233/94 *Germany v Parliament and Council*,¹⁰² accepting 'an implicit and rather limited reasoning as sufficient to justify compliance with the principle of subsidiarity'¹⁰³, and more recently case C-547/14 *Philip Morris*,¹⁰⁴ demanding an evaluation 'not only by reference to the wording of the contested act, but also by reference to its context and the circumstances of the individual case'.¹⁰⁵ The Commission acknowledged that the phrase in the explanatory memorandum '[a]n amendment to an existing Directive can only be achieved

⁹⁸ Communication (n 93) 7.

⁹⁹ Ibid.

¹⁰⁰ Ibid 8.

¹⁰¹ Ibid.

¹⁰² Case C-233/94 *Germany v Parliament and Council* EU:C:1997:231.

¹⁰³ Ibid.

¹⁰⁴ Case C-547/14 *Philip Morris* EU:C:2016:325.

¹⁰⁵ Ibid.

by adopting a new Directive¹⁰⁶ was succinct, but also referred to the recitals of the draft Directive and the Impact Assessment Report and considered that 'that information is sufficient to allow both the Union legislature and national Parliaments to determine whether the draft legislative act at issue complies with the principle of subsidiarity'.¹⁰⁷

The Commission promised that it would 'pursue its political dialogue with all national Parliaments' and that it was 'ready to engage in discussions with the European Parliament and the Council in order to adopt the proposed directive'.¹⁰⁸ Here, the difference with the second yellow card is noteworthy: At the time, it had promised that 'during the legislative process the Commission will [...] take due account of the reasoned opinions'.¹⁰⁹

2. The On-Going Legislative Process and the East-West Divide

Legislative work on the revision of the Directive has continued. The dossier falls under the ordinary legislative procedure. To enter into force, the revision of the Directive will therefore need the support of a majority in the European Parliament and of a qualified majority in the Council. Although national parliaments/chambers from eleven Member States issued a yellow card and the European Commission decided to still pursue the revision of the Directive, the dialogue between the European Parliament, the Commission and national parliaments from all 28 Member States has continued: on 12 October 2016 the Employment and Social Affairs Committee of the

¹⁰⁶ European Commission, Proposal for a Directive of the European Parliament and of the Council, amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final, Explanatory Memorandum, point 2.2.

¹⁰⁷ Communication from the Commission to the European Parliament, the Council, and the National Parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity COM(2016) 505 final, 9.

¹⁰⁸ Ibid 9-10.

¹⁰⁹ Communication from the Commission to the European Parliament, the Council, and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2 of 27 November 2013, COM(2013) 851 final.

European Parliament (EMPL) organised an interparliamentary committee meeting on the draft revision of the PWD.¹¹⁰ Such an involvement of national parliaments' sectoral committees is particularly welcome as the experts on specific policies are better able to discuss detailed questions related to legislative dossiers than members of European affairs committees of national parliaments who generally deal with a wide range of policies.¹¹¹ The co-rapporteurs of the European Parliament welcomed the meeting 'as an opportunity to learn more about the views from across Member States, as well as a forum to share information', but they also stressed that 'it was important [...] not to focus on the Reasoned Opinions and the arguments behind them.'¹¹² Commissioner Thyssen took part in the meeting and the exchange of views with and between national Members of Parliament and MEPs heard comments from both those in favour and those against the proposal. Another discussion between Commissioner Thyssen and European affairs committees of national parliaments had taken place at the COSAC chairpersons' meeting in Bratislava on 11 July 2016,¹¹³ before the European Commission adopted its response to the yellow card. With respect to the overall progress on the dossier, the Commissioner acknowledged in December 2016 that it 'has slowly trudged through negotiations'¹¹⁴. The vote of the European Parliament's draft report, for example, will probably take place in the EMPL committee in July 2017. The decision by the Legal affairs

¹¹⁰ Posting of workers in the framework of the provision of services (*European Parliament*, 11 November 2016), <<http://www.europarl.europa.eu/committees/fr/empl/events-other.html?id=20161012CHE00091>> accessed 10 April 2017.

¹¹¹ Diane Fromage, 'Increasing Inter-Parliamentary Cooperation in the European Union: Current Trends and Challenges' (2016) 22 *European Public Law* 749.

¹¹² Brussels Bulletin No 519: 14 October 2016, 10, <<https://www.parliament.uk/documents/commons-committees/european-scrutiny/Brussels-Bulletin/519-14-October-2016.pdf>> accessed 11 September 2017.

¹¹³ Marianne Thyssen, Speech on the social dimension of the European Union at the Meeting of National Parliaments (COSAC), (European Commission, 11 July 2016) <https://ec.europa.eu/commission/2014-2019/thyssen/announcements/speech-social-dimension-european-union-meeting-national-parliaments-cosac-bratislava_en> accessed 2 April 2017.

¹¹⁴ Catherine Stupp, 'Thyssen proposes rules to fight 'populist' charges of welfare tourism', (*Euractiv.com*, 13 December 2016), <<https://www.euractiv.com/section/social-europe-jobs/news/thyssen-proposes-rules-to-fight-populist-charges-of-welfare-tourism/>> accessed 2 April 2017.

committee to give the directive a double legal basis by adding a social dimension to it might delay the negotiations even further.

In any case, negotiations promise to be tough as the opposition from Central and Eastern European Member States that triggered the third yellow card is not limited to their national parliaments. Central and Eastern European governments in the Council and many MEPs from these countries also reject the Commission's proposal. The 'regional block' against the revision of the PWD transcends the levels of the EU's multi-level system and the boundaries between the different institutions. At the same time, many 'old' Member States are pushing hard for changes: Employment ministers from Belgium, France, Germany, Luxembourg, the Netherlands, Austria and Sweden have publicly called for an ambitious reform of the current Directive.¹¹⁵ This means that a real split between East and West, between 'old' and 'new' Member States, threatens the consensus-oriented political system of the EU.

Under the surface, the split indicates the opposition between those who are in favour of more EU regulation (to protect workers, often from Central and Eastern Europe who are posted to 'old' Member States, and to avoid social dumping) and those who are against tighter EU regulation in this area. In the case of posted workers, trade unions belong to the former group and employer associations belong to the latter group. While such divisions have often been observed in the process of European integration, it is striking to see that in this case the left-right cleavage exists, but some political actors seem to take their positions according to nationality (rather than to their affiliation to Pan-European political parties), including in the European Parliament, while other actors have aligned themselves along the 'capital versus worker' dimension.¹¹⁶

¹¹⁵ 'Travailleurs détachés : « La liberté de circuler ne doit pas être celle d'exploiter »' *Le Monde*, 12 December 2016, <http://www.lemonde.fr/idees/article/2016/12/12/la-liberte-de-circuler-ne-doit-pas-etre-celle-d-exploiter_5047228_3232.html#1GwbokzAaifuVeBv.99> accessed 2 April 2017.

¹¹⁶ Simon Hix, Abdul G Noury and Gérard Roland, *Democratic Politics in the European Parliament* (Cambridge University Press 2007) 180f; Alexander Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' (2012) 18 *European Law Journal*, 711.

Irrespective of what the reasons are, the current conflict line is clear and despite promises to find a compromise,¹¹⁷ it seems difficult to reconcile the different positions. The Juncker Commission is committed to a more 'social' Europe and sees itself as a 'political' Commission that pushes its policy priorities. In his State of the Union speech of September 2016, Jean-Claude Juncker emphasised that '[w]orkers should get the same pay for the same work in the same place. Europe is not the Wild West, but a social market economy.'¹¹⁸

One would therefore currently assume that the 11 Member States whose national parliaments objected to the revision of the PWD by issuing reasoned opinions will also oppose the proposal in the Council and vote against it. However, they do not carry enough weight to stop it: if these 11 Member States vote against it (and all other 17 Member States in favour of the proposal), the 'double majority' will be reached, as more than 55% (16) of the EU's Member States representing 79.1% of the population (requirement: 65%) will have voted for the revision of the Directive. Only under the transitional provision of Protocol No 36 annexed to the EU Treaties, Title II, Article 3(2), according to which between 1 November 2014 and 31 March 2017 a member of the Council may request to calculate the majority following the (old) voting rules of the Treaty of Nice, the situation would have been different: The proposal would not reach the necessary 260 votes, but only 241 votes (if we assume 111 votes against it – constituting a blocking majority of weighted votes in the Council).¹¹⁹ The proposal, however, had not been tabled and voted in the Council before 31 March 2017 as it proved impossible to reach a political agreement in the Council.¹²⁰ The proposal has also been

¹¹⁷ Cécile Barbière, 'Le Parlement veut réconcilier l'Est et l'Ouest sur les travailleurs détachés' (*Euractiv.fr*, 1 December 2016) <<http://www.euractiv.fr/section/europe-sociale-emploi/news/le-parlement-veut-reconcilier-lest-et-ouest-sur-les-travailleurs-detaches/>> accessed 2 April 2017.

¹¹⁸ Jean-Claude Juncker, 'The State of the Union 2016' (European Commission, 14 September 2016), <http://europa.eu/rapid/press-release_IP-16-3042_en.htm> accessed 2 April 2017.

¹¹⁹ All calculations were made in January 2017 using the Voting Calculator of the Council of the European Union, <<http://www.consilium.europa.eu/en/council-eu/voting-system/voting-calculator/>> accessed 6 January 2017.

¹²⁰ Catherine Stupp, 'Divides deepen between member states over posted workers bill' (*Euractiv.com*, 24 March 2017), <<http://www.euractiv.com/section/economy->

subject to parliamentary scrutiny reserves expressed by several national parliaments.¹²¹

The Member States that objected to the proposal when their parliaments submitted reasoned opinions will be unable to stop it in the Council. The same applies to MEPs from these countries in the European Parliament where the institutional position is usually determined by the two major political groups EPP and S&D, which support the proposal. It would be even more difficult for the opponents of the revision of the Posted Workers Directive to mobilise enough MEPs to block it.

VII. CONCLUSION

At this stage, the success of the reform of the Posted Workers Directive is uncertain. Whether it will be possible to bridge diverging preferences, in particular between France and Poland, remains unclear, despite the European Parliament's efforts searching for a compromise. Perhaps this reform will also take several years, as was the case for the PWD itself: The Commission presented its proposal in 1991 and it was finally adopted in 1996.¹²² What is beyond any doubt however, as the preceding analysis has shown, is the fact that the current deadlock was not provoked by the third yellow card; it merely revealed conflicting positions among Member States and made them more visible. The EWS and the possibility for national parliaments to issue reasoned opinions served as the vehicle for Central and Eastern European Member States to express opposition beyond mere subsidiarity concerns.

If we compare this third yellow card with the two previous ones, the key difference is this 'regional block'. The Juncker Commission's attitude and response were different, but not as different as one would have expected if one considers the rhetoric Jean-Claude Juncker used at the start of its term in 2014 when he promised to 'forge a new partnership' with national

jobs/news/divides-deepen-between-member-states-over-posted-workers-bill/>, accessed 2 April 2017.

¹²¹ Harry Cooper, 'Worker protection rules trigger East-West battle' *POLITICO Europe*, 14 December 2016, <<http://www.politico.eu/article/worker-protection-rules-trigger-east-west-battle/>> accessed 2 April 2017.

¹²² On this adoption procedure: Zahn (n 38) 2-3.

parliaments. If this pledge had been taken seriously, the justification regarding subsidiarity could have been expected to be in line with the obligation contained in Article 5 Protocol No. 2. Nevertheless, the Juncker Commission followed the 'good practice' that the Barroso Commission had established when it wrote individual replies to national parliaments regarding the second yellow card.

With respect to the overall role of national parliaments in the European Union, the question arises whether the EWS can be considered an efficient tool. Seven years after the Lisbon Treaty put it in place, the three yellow cards triggered so far are not in themselves a sign of the system's efficiency or inefficiency. National parliaments are dedicating significant time and resources to a procedure that has not yet had any direct impact: They have only reached the threshold three times and the Commission either retracted its proposal for other reasons (Monti II) or carried on its legislative initiative (EPPO, PWD). This has led to proposals to introduce a 'red card' in whose framework national parliaments could block legislation and bypass the Commission, possibly even beyond subsidiarity.¹²³ What should not be underestimated however, is the indirect effect of the EWS: The Commission has started to adapt incrementally and the Juncker Commission's focus on priority dossiers that 'make a difference' is a sign of this change, as is the improvement in the replies that it provides to national parliaments.¹²⁴

Taking a broader perspective, EU policy makers must take into account that many national parliaments wish to have policy influence.¹²⁵ They used a provision that merely provides for subsidiarity control to try and change the content of the proposed revision of the PWD. Whether this effort will be

¹²³ Even though the agreement (European Council, Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union. EUCO 4/16 [Section C]) has now become obsolete since on 23 June 2016 the British referendum saw a majority vote to leave the EU, the topic has not disappeared from the political agenda. The 'red card' was mentioned for instance in a background note for the COSAC plenary in November 2016 that had been prepared by the Slovak Presidency Parliament.

¹²⁴ COSAC, 26th bi-annual report, 23 <<http://www.cosac.eu/documents/bi-annual-reports-of-cosac/>> accessed 2 April 2017.

¹²⁵ See also Jancic (n 69) 306.

successful remains to be seen. What this third yellow card has highlighted, is the deep division when it comes to the objective to create a 'Social Europe'. While this featured prominently in Jean-Claude Juncker's manifesto and is shared by citizens in Western European Member States, many Central and Eastern Europeans do not perceive this as necessary and largely see it as an attempt at protectionism. The struggle about the revision of the Posted Workers Directive has emerged for exactly these reasons and is far from over yet.