

# The EPPO Draft Regulation Passes the First Subsidiarity Test: An Analysis and Interpretation of the European Commission's Hasty Approach to National Parliaments' Subsidiarity Arguments

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### Abstract

This contribution discusses National Parliaments' subsidiarity objections raised in the context of the Early Warning Mechanism (EWM) to the European Public Prosecutor Office proposal, and the European Commission response to them. It argues that National Parliaments raised important points, on how does subsidiarity apply respectively, when the wording of the Treaty grants the Council the *option* to act, as opposed to an obligation to act; on how to assess the inefficiency of the national level; on how does subsidiarity apply in a geographically fragmented context, and on the legitimacy for the EU to regulate non cross-border behaviors. It criticizes the Commission's hasty dismissal of all National Parliaments' objections, and its decision to leave the proposal's text untouched. It further argues that the Commission's interpreted the EWM as an arena where to test the political feasibility of the proposal, as it had occurred in the past, rather than as a proper subsidiarity policing mechanism. It finally provides some observation on how this interpretation of the EWM has negative implications to terms of subsidiarity policing, of understanding the substance of the principle, and of input legitimacy

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## A. Introduction

On 7 June 2013, the European Commission (hereinafter “the Commission”) published a Council regulation proposal to establish the European Public Prosecutor Office (EPPO), which is entrusted with investigative and prosecutorial tasks in the fight against offenses affecting EU financial interests.<sup>1</sup>

In accordance with Protocol No. 2 of the Lisbon Treaty “on the application of the principles of proportionality and subsidiarity,”<sup>2</sup> the proposal was sent to National Parliaments, within the framework of the Early Warning Mechanism (EWM).<sup>3</sup> The Lisbon Treaty introduced the EWM as a form of political control for the respect of subsidiarity. The procedure entrusts National Parliaments with the task of expressing their opinion on compliance with the subsidiarity of draft legislative texts, which they receive upon publication.<sup>4</sup> If the number of reasoned opinions that express concerns regarding the subsidiarity compliance of the text is above a certain threshold, the draft must be reviewed,<sup>5</sup> and one could say a “yellow card” is raised<sup>6</sup>. The Commission, or any other body from which the proposal originated,<sup>7</sup> can choose to withdraw, amend, or maintain the text as it stands. In each scenario, reasons must be stated.<sup>8</sup>

In the case of the EPPO, the before mentioned threshold was reached, and the Commission was therefore required to reconsider its proposal. In its response communication, the Commission dismissed all of the National Parliaments’ arguments on the non-compliance of the proposal with subsidiarity, and it left the original text unaltered.<sup>9</sup> Pursuant to this

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<sup>1</sup> *Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office*, COM (2013) 534 final (July 17, 2013) [hereinafter *EPPO Proposal*].

<sup>2</sup> Treaty of Lisbon on the Application of the Principles of Proportionality and Subsidiarity, Mar. 30, 2010, 2010 O.J. (C 83) 206 [hereinafter *Lisbon Treaty*].

<sup>3</sup> *Id.* art. 4.

<sup>4</sup> *Id.* art. 6.

<sup>5</sup> *Id.* art. 7.

<sup>6</sup> See Jean-Victor Louis, *The Lisbon Treaty: The Irish “No”: National Parliaments and the Principle of Subsidiarity—Legal Options and Practical Limits*, 4 EUR. CONST. L. REV. 438 (2008).

<sup>7</sup> See *Lisbon Treaty* art. 7(1). It can be European Parliament, the Council and the Commission, a group of Member States, the Court of Justice, the European Central Bank, or the European Investment Bank.

<sup>8</sup> *Id.* art. 7(2). On the functioning of the EWM in detail, see PHILIP KIVVER, *THE EARLY WARNING SYSTEM FOR THE PRINCIPLE OF SUBSIDIARITY: CONSTITUTIONAL THEORY AND EMPIRICAL REALITY* ch. 3–4 (2012).

<sup>9</sup> *Communication 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*, COM

decision by the Commission, the EPPO proposed regulation passed its first subsidiarity test.<sup>10</sup>

The current article contends that the Commission acted wrongly in hastily dismissing all arguments raised by National Parliaments. Indeed, in their reasoned opinions, the National Assemblies raised relevant points that deserved further discussion by the Commission. The next section of this article—Part B—presents the Commission’s proposal. The following five sections, Parts C through G, address the relevant subsidiarity arguments raised by National Parliaments, along with the Commission’s poor response to these arguments.

This article further argues that the Commission’s neglectful approach was caused by the determination to have the proposal approved as close as possible to the original text, and by a context in which approving the text through enhanced cooperation was an eased but also a mandate option, given that the unanimity requirement imposed by the relevant legal standard was not feasible. This article proposes that the Commission simply counted the votes to have sufficient Member States on board to approve the text and decided to stick to the proposal, leaving negotiations for possible amendments to the Council. This would confirm the hypothesis previously raised within scholarship that the Commission sees the EWM as a venue to test the political feasibility of proposed legislation, rather than a subsidiarity policing mechanism. This argument is further discussed in Part H.

Finally, this article contends that the Commission’s interpretation of the EWM as a “political thermometer,” rather than a forum to discuss subsidiarity compliance, has negative implications in terms of subsidiarity policing, understanding the substance of subsidiarity, and input legitimacy. Part I focuses on this contention.

## **B. The Commission Proposal on the EPPO**

### *I. Article 86 TFEU*

The project of establishing an EPPO is not a new one. An ad hoc provision for introducing an EU body entrusted with enforcing EU law on crimes against the EU financial interests is featured already in the failed Constitutional Treaty,<sup>11</sup> and a draft model for the establishment of an EPPO was developed in the *Corpus Juris* academic project requested

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(2013) 851 final (Nov. 27, 2013) [hereinafter *Communication on the Review of the Proposal*].

<sup>10</sup> Proposal P7\_TA-PROV(2014)0234 has now been approved within the Parliament. Note that the Greek Government submitted two alternative proposals for an EPPO that are currently under negotiations in the Council. See Doc. 9834/1/14 REV 1; Doc. DS 1154/14.

<sup>11</sup> See Draft Treaty Establishing a Constitution for Europe, art. 3–274, Jan. 13, 2005, 2004 O.J. (C 310) 121.

by the Commission.<sup>12</sup> After the failure of the Constitutional Treaty, the idea was then re-inserted in the Lisbon Treaty at Article 86 TFEU.

Article 86 TFEU does not *ipso jure* establish the EPPO but rather provides a legal basis for its subsequent establishment. The first paragraph of the provision states that the Council, acting unanimously and after having obtained the consent of the Parliament, *may* establish a European Public Prosecutor Office “from Eurojust” via a regulation. If the unanimity requirement is not met, Article 86 TFEU permits the regulation to be adopted through enhanced cooperation if at least nine Member States agree on a proposal. In that case, both procedural and substantial requirements normally imposed for enhanced cooperation at Article 20 TFEU and 329 TFEU are met.

The Article then lists a number of provisions which the legislative text establishing the EPPO should contain, including the material scope of application—for which offenses it will be responsible—the law applicable to the procedure, and so forth.<sup>13</sup>

Notably, Article 86 TFEU is featured within the Title on the Area of Freedom Security and Justice. The measures adopted within this title are not binding for Denmark by virtue of Protocol 22 to the Lisbon Treaty,<sup>14</sup> and for the United Kingdom and Ireland unless they decide to opt-in by virtue of Protocol 21 to the Lisbon Treaty.<sup>15</sup> This means that these countries will potentially be excluded from the EPPO system, if adopted.

## II. The Commission’s Proposal

The proposed regulation on the establishment of an EPPO (“the EPPO proposal”)<sup>16</sup> acknowledges in its preamble the insufficiency of a fragmented national prosecution level in combating fraud against the financial interests of the EU. It also underlines the need for a union-level prosecution service, which in turn justifies the need for establishing an EPPO.<sup>17</sup>

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<sup>12</sup> MIREILLE DELMAS-MARTY & JOHN A.E. VERVAELE, *THE IMPLEMENTATION OF THE CORPUS JURIS IN THE MEMBER STATES* 1–4 (Mireille Delmas-Marty & John A.E. Vervaele eds., 2000).

<sup>13</sup> See Treaty on the Functioning of the European Union, art. 86, Oct. 26, 2012, 2012 O.J. (C 326) 82 [hereinafter TFEU].

<sup>14</sup> 2012 O.J. (C 326) 299.

<sup>15</sup> 2012 O.J. (C 326) 295.

<sup>16</sup> *EPPO Proposal*, *supra* note 1. For an extensive comment on the proposal, see Katalin Ligeti & Anne Weyembergh, *The European Public Prosecutor’s Office: Certain Constitutional Issues*, in *THE EUROPEAN PUBLIC PROSECUTOR’S OFFICE* 53 (Leendert H. Erkelens et al. eds., 2014).

<sup>17</sup> *EPPO Proposal*, *supra* note 1, at preamble recital 5.

The EPPO structure is conceived as a single European office—not as a college or a team—organized in a decentralized fashion. European Delegated Prosecutors, an integral part of the EPPO, will be located in the Member States and will bring prosecution within national courts.

Under the proposal, the EPPO will have binding powers of opening an investigation,<sup>18</sup> launching a prosecution, and bringing a defendant to justice.<sup>19</sup> The decision to attribute binding powers to the EPPO would mark a difference between this institution and the existing ones, such as the European Commission Anti-Fraud Office (hereinafter OLAF) and Eurojust. OLAF is a branch of the Commission that carries out administrative investigations in Member States in cases of fraud against the EU, however, it cannot control the judicial follow-up of these investigations in Member States.<sup>20</sup> Eurojust is a judicial cooperation unit entrusted only with the role of facilitating Member States' judicial cooperation, without any decision-making power to open investigations, for example. A reform of Eurojust was proposed on the same day the EPPO proposal was published,<sup>21</sup> but this reform, even if implemented, will not grant binding powers to Eurojust, except under exceptional circumstances.<sup>22</sup>

Concerning the material scope of the EPPO's application, Article 12 of the proposed regulation refers to the offenses described in another piece of legislation<sup>23</sup>—a directive proposed in 2012 by the Commission for the protection of the European Union's financial interests (hereinafter "PIF Directive").<sup>24</sup> The offenses mentioned in the directive include

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<sup>18</sup> *Id.* art. 16.

<sup>19</sup> *Id.* art. 27.

<sup>20</sup> One of the main drawbacks of the current setting is that OLAF's investigations are not given follow up in Member States. See *The Commission Staff Working Paper of 26 May 2011*, at 7, SEC (2011) 621 final (May 26, 2011); see also *11th Operational Report of the European Anti-fraud Office (OLAF)*, Jan. 1–Dec. 31, 2010, [http://ec.europa.eu/anti\\_fraud/about-us/reports/olaf-report/index\\_en.htm](http://ec.europa.eu/anti_fraud/about-us/reports/olaf-report/index_en.htm) (last visited Mar. 21, 2014), <http://bookshop.europa.eu/en/eleveth-operational-report-of-the-european-anti-fraud-office-pbOBAC11001/>.

<sup>21</sup> *Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust)*, COM (2013) 535 final (July 17, 2013) [hereinafter *Proposal for a Regulation Of the European Parliament*].

<sup>22</sup> Article 85(1) TFEU applied to Eurojust would allow the attribution of some limited binding powers to Eurojust National Members. Yet in the reform for Eurojust, the Commission made a political choice not to implement this possibility and rather to opt to simply further approximate the powers of the national members of Eurojust. See Ligeti & Weyembergh, *supra* note 16, at 60.

<sup>23</sup> *EPPO Proposal*, *supra* note 1, at art. 12.

<sup>24</sup> *Proposal for a Directive of the European Parliament and of the Council on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law*, COM (2012) 363 final (Nov. 7, 2012). On the directive proposal, see

fraud that affects the Union's financial interests,<sup>25</sup> as well as other offenses committed in connection with the listed fraud offenses. These include public procurement fraud, active and passive corruption, and money laundering.<sup>26</sup> In addition to this "primary competence" identified by referral, Article 13 of the EPPO proposal also envisages an ancillary competence for the EPPO to investigate and prosecute all offenses inextricably linked with criminal offenses affecting the financial interests of the EU. The competence to prosecute these ancillary offenses is, however, granted under the condition that the joint investigation and prosecution are in the interest of the good administration of justice. The EPPO will have exclusive competence to investigate and prosecute these offenses in the territory of Member States,<sup>27</sup> which are conceived as a single European Legal Area.<sup>28</sup>

### C. National Parliaments' Opinions on the EPPO Proposal

According to the EWM Procedure, National Parliaments received the EPPO proposal upon publication,<sup>29</sup> and they had eight weeks to submit their reasoned opinions. Thirteen chambers of National Parliaments sent their reasoned opinions to the Commission within the deadline set in Protocol 2 of the Lisbon Treaty. These originated, in chronological order, from the the UK House of Lords (UK\_I), the House of Representative of the States in the Netherlands (NL\_I), the Senate of the French Republic (FR), the Senate of the States General in The Netherlands (NL\_II), the Senate of the Parliament of the Czech Republic (CZ), the Cyprus House of Representatives (CY), the Hungarian National Assembly (HU), the Irish House of the Oireachtas (IE), the Swedish Parliament (SE), the UK House of Commons (UK\_II), the Chambers of Deputies of Romania (RO), the Parliament of Malta (MT), and the National Assembly of Slovenia (SI).<sup>30</sup> Considering that more than one-quarter of the

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Lothar Kuhl, *The Initiative for a Directive on the Protection of the EU Financial Interests by Substantive Criminal Law*, EUCRIM 2, 63 (2012), [https://eucrim.mpicc.de/archiv/eucrim\\_12-02.pdf](https://eucrim.mpicc.de/archiv/eucrim_12-02.pdf).

<sup>25</sup> Fight Against Fraud to the European Union's Financial Interests by Means of Criminal Law, art. 3, COM (2012) 363 final [hereinafter *PIF Directive*].

<sup>26</sup> *Id.* art. 4.

<sup>27</sup> *EPPO Proposal*, *supra* note 1, at art. 11(4).

<sup>28</sup> *EPPO Proposal*, *supra* note 1, at art. 25.

<sup>29</sup> More specifically, the English version was available upon publication; however, it took quite long for the Commission to deliver its translation into all official EU languages; the lettre de saisine was only sent on August 21. See Note d'information au secretariat general du conseil application du principe de subsidiarite, D/13431, SG-GREFFE (2013), <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20130534.do> (last visited Sept. 22, 2014).

<sup>30</sup> All the reasoned opinions and the observations sent by National Parliaments in the framework of the Political consultation are available on IPEX, both in the original language and in English. IPEX, <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20130534.do#dossier-APP20130255> (last visited Sept. 22, 2014). Hereinafter all the National Parliaments reasoned opinion will be referred using the abbreviation indicating the relevant Member State. E.g. the reasoned opinion of the UK House of Lord will be indicated as "UK\_I", when relevant, the page or the point within the given reasoned opinion will also be indicated.

National Parliaments' reasoned opinions determined that the draft in question did not comply with the principle of subsidiarity—which is the threshold to trigger the yellow card mechanism for proposals in the Area of Freedom Security and Justice<sup>31</sup>—the Commission was required to reconsider its draft text. On 27 November 2013, it published its response Communication. The Commission announced that it did not take into account non-subsidiarity related arguments; it counter-argued all subsidiarity-related points raised by National Parliaments, and it finally concluded that the proposal would remain untouched.<sup>32</sup> As beforementioned, the Commission's response warrants criticism for not sufficiently elaborating on the important questions raised by the National Parliaments.

Various arguments that were non-subsidiarity related were also made by the National Parliaments. These dealt with proportionality,<sup>33</sup> the respect of fundamental rights,<sup>34</sup> the selected legal basis,<sup>35</sup> the need for judicial review of procedural measures taken by EPPO,<sup>36</sup>

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<sup>31</sup> Lisbon Treaty art. 7(2).

<sup>32</sup> *Communication on the Review of the Proposal*, *supra* note 9.

<sup>33</sup> Certain National Assemblies discuss the proportionality of the regulation, and they argue that the regulation is in general too far reaching, and it goes beyond what is necessary to achieve its objective (SE, 1 SI, 2). Aspects such as the integrated structure of the EPPO, as opposed to a collegial form (FR, 3 and PL) are considered disproportionate. Moreover, it is somehow oddly recalled how criminal law is a national competence and therefore the European Public Prosecutor's Office's powers are in general too far-reaching and should be reserved to national authorities (IE, pt. 5(a), HU, MT, pt. 2.2, NL I, 1 and NL II,1). Finally the Swedish Parliament pinpoints as a problem the fact that the EPPO establishment will have an important impact on national legislation, and national operations (SE, 1).

<sup>34</sup> The Czech Parliament (CZ, pt.6), the UK House of Common (UK II, pt.17), as well as the Cyprus Parliament (CY,4) raise the issue of the respect of fundamental rights by the EPPO, as enshrined in the Charter and in the Czech Constitutional Court.

<sup>35</sup> The Hungarian parliament argues that the Commission went beyond in its proposed regulation of what is permitted in the legal basis, as Article 86 TFEU did not mandate for establishing a European Public Prosecutor with an exclusive competence (HU).

<sup>36</sup> RO, pt. 10.

as well as some policy-related<sup>37</sup> and pragmatic aspects.<sup>38</sup> The Commission rightly decided not to acknowledge these non-subsidiarity arguments.<sup>39</sup>

Yet, National Parliaments also raised important points related both to procedural subsidiarity—a number of procedural steps, such as consultation, that the EU must undertake before taking action<sup>40</sup>—and material subsidiarity—a number of substantive conditions which must be present in order to answer the question of whether the EU intervention is appropriate.<sup>41</sup>

Concerning the procedural subsidiarity aspects, the Hungarian National Assembly claimed that the Commission did not sufficiently explain subsidiarity arguments in the proposed regulation.<sup>42</sup> More specifically, the UK House of Commons determined that the reasons given by the Commission were insufficient because the explanations were not contained in the explanatory memorandum, while they were contained in the Impact Assessment. The UK chamber based its reasoning on the fact that, contrary to the Impact Assessment, the explanatory memorandum is part of the legislation and is not translated in all languages.<sup>43</sup> The Commission responded to the UK argument by stating that inclusion of subsidiarity explanation in the explanatory memorandum and the Impact Assessment—which is by nature more elaborated—is compatible with the case law of the Court of Justice. In particular, it recalled that in *Vodafone Ltd*,<sup>44</sup> the Court of Justice relied on an impact assessment to justify respect for the principle of proportionality.<sup>45</sup>

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<sup>37</sup> The French Senate points out that it will be easier that a proposal including a non-collegiate structure will be approved, FR, 3.

<sup>38</sup> The Regulation would create disadvantages for Member States in that they lose the capacity to prioritize prosecution activities within their own criminal justice systems, and how to allocate resources (UK I, pt. 14, UK II, pt. 17, and NL I, 2 and NL II, 2) The Hungarian assemblies states that the exclusive right of instruction might be hard to coordinate with a system of delegated prosecutors, finally other Parliaments considers the double hat system for delegated prosecutors, working as both EPPO officials and national officials would be impractical (RO, pt. 9 and HU), and it is not clear how to deal with a possible conflict (NL I, 2).

<sup>39</sup> *Communication on the Review of the Proposal*, *supra* note 9, at 5.

<sup>40</sup> ANTONIO ESTELLA, THE EU PRINCIPLE OF SUBSIDIARITY AND ITS CRITIQUE 105 (2002).

<sup>41</sup> *Id.*

<sup>42</sup> HU.

<sup>43</sup> UK II, pt. 8.

<sup>44</sup> Case 58/08, *The Queen v. Sec'y of State for Bus., Enter. and Regulatory Reform*, 2010 E.C.R. I-04999.

<sup>45</sup> *Communication on the Review of the Proposal*, *supra* note 9, at 6.

Concerning the material subsidiarity aspects, the national assemblies raised points related to all three steps of the subsidiarity test, namely the efficiency of the national level to achieve a certain goal, the comparative efficiency of the European level to reach the same objective,<sup>46</sup> and the cross-border nature of the economic activity the EU aimed at regulating.<sup>47</sup>

The following paragraphs discuss the scope of application of the principle of subsidiarity as interpreted by National Parliaments and by the Commission. They also address the most interesting subsidiarity points raised by National Parliaments, which deal with aspects that are far from uncontroversial, and on which a more sophisticated response from the Commission was needed. Where relevant, this article draws a comparison with the arguments listed by the Commission in the Impact Assessment. It is important to stress that the focus of the following paragraphs is not to take a stance on whether the EPPO proposal complies with subsidiarity, but rather, the focus is on the interesting nature of National Parliaments' interrogatives and the poor quality of the Commission's subsidiarity assessment. Nonetheless, it is worth recalling, a poorly argued subsidiarity assessment can arguably in itself constitute a breach of subsidiarity.<sup>48</sup>

#### **D. The Scope of the Subsidiarity Test: EU Obligation Versus Option to Act**

The subsidiarity test's scope of application presents an interesting starting point. The Parliaments of Cyprus, the Czech Republic, Romania, and Sweden did not consider the establishment of the EPPO, in whatever form, compliant with subsidiarity.<sup>49</sup> Whereas the Maltese, Slovenian, and Romanian parliaments argued that the competence to establish a European Public Prosecutor is undisputed and that, under the subsidiarity test, the EU must only justify how the given competence is exercised.<sup>50</sup> In its response Communication,

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<sup>46</sup> On the first two steps of the subsidiarity test see explicitly Protocol (30) on the Application of the Principles of Subsidiarity and Proportionality, annexed to the Treaty on the European Community, art. 13, 1997 O.J. (C 340) 105 (introducing these steps in assessing whether EU was justified—complying with material subsidiarity). They were not included in the Lisbon Protocol on subsidiarity; however, the Commission stated it will continue to apply these guidelines also after the entry into force of the Lisbon Treaty. See *The Report from the Commission on Subsidiarity and Proportionality, 18th Report on Better Law-Making Covering the Year 2010*, at 2, COM (2011) 344 final (June 10, 2011).

<sup>47</sup> Advocate General Maduro advocated that the EU should be allowed to act whenever "the cross-border nature of the economic activity . . . renders the [EU] legislator potentially more apt than national authorities to regulate the field given the failure of the national political processes to protect these interstate activities" introducing, arguably, a third cross-border step within the subsidiarity test, in addition to the first two efficiency based ones. See Opinion of the Advocate General in case 58/08 (*supra* note 44) at para. 24.

<sup>48</sup> *KIVER*, *supra* note 8, at 100.

<sup>49</sup> CY, 2 CZ, pt.1 RO, pt. 10, SE, 1.

<sup>50</sup> RO pt. 8, MT pt. 2.3, SI, 1.

the Commission upheld the latter position and reiterated that the establishment of the Public Prosecutor Office cannot be considered a breach of subsidiarity *per se*. What the EU should justify are the various aspects of the proposal: for instance, the way in which the Public Prosecutor Office would be established and the rules and procedural powers that would frame it.<sup>51</sup> Interestingly, the Commission expressed a different view in the Impact Assessment. There, it stated that the legitimacy for the EU to establish a European Public Prosecutor was not automatic, but rather stemmed from a series of considerations on the inefficiency of the national prosecutorial level and the added value on the EU level in the fight against EU fraud.<sup>52</sup>

This seemingly contradictory position of the Commission is ripe for observation and comment. Such restrictive reading of the scope of application for the subsidiarity test sits at odds with the traditional understanding of subsidiarity, as well as with the wording of Article 86 TFEU.

The EU Treaty envisages Article 5 TEU subsidiarity as a test on the *exercise* of competence.<sup>53</sup> This means that, within the fields of shared competences, the EU has the option of not taking action, leaving the field to Member States, or taking action and preempting the exercise of the States' competence. The EU has, therefore, the burden of proof to justify why EU action is needed. Consequently, at least in principle, the mere exercise of the competence should be justified.<sup>54</sup>

Moreover, one could argue that the burden of proof to justify the need for EU action is additionally accentuated if the EU is only given an *option* to act, rather than an *obligation* to act—where “obligation” simply refers to how the provision is drafted and not an actual obligation to act, as we are still talking of a field of *shared* competence. The EU is given an option to act by those provisions, as the one on the EPPO, which states that the EU *may* take action, as opposed to other provisions which states that the EU *shall* take action. For instance, similarly to Article 86 TFEU, Article 85 TFEU on Eurojust states that new powers

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<sup>51</sup> *Communication on the Review of the Proposal*, *supra* note 9, at 4.

<sup>52</sup> See The Impact Assessment, Accompanying the Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office, at 27, COM (2013) 534 final, (July 17, 2013) (“Against this background, it is clear that the Union not only has the competence but also the obligation to act.”).

<sup>53</sup> See TFEU art. 5 (“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”).

<sup>54</sup> It is noteworthy that traditionally legislation Impact Assessment contains as a first option that of “taking no action,” and so does the Impact Assessment for the EPPO, making explicit that the presence of a legal basis does not entail *per se* an obligation to act. See *supra* at note 52.

attributed to the Agency *may* include the initiation of investigations. The Council and the Parliaments have decided, however, given the optional character of the legal provision, not to implement this part of Article 85 TFEU.<sup>55</sup>

Conversely, other provisions within the Area of Freedom Security and Justice use more compelling wording. Article 82 TFEU, for instance, establishes that the Council and the Parliament *shall* adopt measures to lay down rules and procedures for ensuring recognition throughout the EU of all forms of judgments and judicial decisions. Thus, it seems logical to argue that in the first case—the Council *may* act—there is a stronger burden for the EU to justify why it took action on the basis of the given provision. Acting otherwise would deprive the drafters' intention—to phrase the first provision as an option, and the second one as an obligation—of any useful effect.<sup>56</sup>

In conclusion, both the traditional understanding of subsidiarity and the wording of Article 86 TFEU call for justification of the mere establishment of an EPPO, in whichever form, under the subsidiarity test. Accordingly, the Commission position in the response Communication is hardly justifiable.

#### **E. The Insufficiency of the National Level: How Many Legal Systems Matter?**

In the framework of the first step of the subsidiarity test—the insufficiency of the national level—several National Parliaments argued that the Commission failed to prove why fostering an already existing cooperation and investigation mechanism, such as Eurojust or OLAF, was not a viable and less intrusive alternative to the EPPO, why intra-state mechanisms have not been considered, and even why the possibility of preventing EU fraud has not been investigated further.<sup>57</sup> The arguments raised by National legislatures on possible alternatives to the establishment of an EPPO relate more to a proportionality testing on the intensity of EU action than on which level should act.<sup>58</sup> Yet, the Commission

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<sup>55</sup> *Proposal for a Regulation of the European Parliament, supra note 21.*

<sup>56</sup> Interestingly, in its reaction to the Commission Response Communication, the European Scrutiny Committee of the UK House of Commons precisely points out that the Commission has failed to justify the mere fact of having taken action, and it points out that the provision is phrased as granting an option and not an obligation to act. See *Commission Communication on the Review of the Draft Regulation on the Establishment of the European Public Prosecutor's Office with Regard to the Principle of Subsidiarity in Accordance with Protocol No. 2*, pt. 8.34, COM (2013) 851 final (Nov. 27, 2013), <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xxviii/8312.htm> (last visited Sept. 22, 2014).

<sup>57</sup> IE 2, CZ pt. II-1, 4, SE 2, RO pt. 10, UK\_I, pt. 14, UK\_II, pt. 15.

<sup>58</sup> See Garreth Davies, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, 43 COMMON MKT. L. REV. 63–84 (2006) (marking a clear distinction between the two tests).

adopted a broad approach and considered these arguments regardless.<sup>59</sup> It dismissed each of the arguments by judging that the EPPO will address problems that are not solvable through mere cooperation instruments, or simple harmonization of crimes definitions, and that intra-state mechanisms are not relevant in subsidiarity assessments.<sup>60</sup>

Interestingly, the Slovenian National Assembly explicitly claimed that the level of Slovenian prosecution is sufficient.<sup>61</sup> Following a similar line of reasoning, the Swedish Parliament also claimed that the EU should concern itself only with the Member States where prosecution is not efficient.<sup>62</sup> In its Impact Assessment, the Commission did not touch on this point—the relevance of some efficient Member States in the fight against fraud—and in the response Communication it dismisses the objection quite quickly, stating that neither the situation in particular Member States is decisive in itself, nor the presence of regional intra-state mechanisms.<sup>63</sup> This answer from the Commission is unsophisticated, which is particularly regrettable because National Parliaments raised a very important question: How many Member States have to “do it wrong” to justify EU action?

Lenaerts argued that a *necessary condition* for EU action is that at least one Member State has inadequate means to achieve the envisaged objective. As to the *sufficient condition*, he claims that if there are discrepancies in the capacity of Member States to achieve the given objective, then a uniform harmonized action might not be justified, and the EU should differentiate its action.<sup>64</sup>

I contend that this argument acquires a special force when dealing with criminal matters, as in the current situation. Indeed, the tension between an overall European assessment of national inefficiency and that of a single Member State is even more concerning because there might be friction with the “last resort” principle. This principle establishes that criminal law should only be used as a last resort when other means fail. It is technically referred to only in criminalization contexts<sup>65</sup>—when a national legislator must decide what

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<sup>59</sup> On the merit of this approach, see KIIVER, *supra* note 8, at 99, who advocates a broad reading of the scope of application of the Early Warning Mechanism linking proportionality to subsidiarity.

<sup>60</sup> *Communication on the Review of the Proposal*, *supra* note 9, at 7–8.

<sup>61</sup> SI, 2

<sup>62</sup> SE, 2.

<sup>63</sup> *Communication on the Review of the Proposal*, *supra* note 9, at 6–7.

<sup>64</sup> Koen Lenaerts, *Subsidiarity and Community Competence in the Field of Education*, 1 COLUM. J. EUR. L. 1, 22 (1994).

<sup>65</sup> Panu Mikkinen, *If Taken in Earnest: Criminal Law Doctrine and the Last Resort*, 45 HOWARD J. CRIM. JUST. 521, 524 (2006).

sort of punishment a harmful conduct should deserve, criminal or administrative, for instance. Yet, the principle of last resort is an expression of a more generalized minimalist approach to criminal law that is applicable to all aspects of the criminal justice system, including enforcement—the phase of prosecution of crimes.<sup>66</sup>

In the case of the EPPO Member States were already under the obligation to criminalize offences against the financial interests of the EU, since the adoption of the Convention on the Protection of the Financial Interests of the EU.<sup>67</sup> Therefore, the *ultima ratio* argument does not specifically apply here. Yet, it is worth discussing the abstract potential clash between subsidiarity considerations and *ultima ratio* consideration, which might arise in the event the EU approves legislation imposing the introduction of new crimes. Requiring a Member State to introduce further crimes and further criminal enforcement mechanisms in its justice systems, which allegedly already functions effectively, puts the national legislator in the odd position of having to choose whether to comply with its EU obligation, on the one hand, or with the national principle of last resort on the other.<sup>68</sup> This possible friction between the principle of last resort and EU obligations can acquire a constitutional dimension when the Constitution of the State directly or indirectly recognizes the principle that criminal law must be a last resort.<sup>69</sup>

Unsurprisingly, in the EPPO case, the Commission takes a pragmatic perspective and opts for an overall assessment of national level insufficiency. One reason for this could have been the unanimity requirement in the Council. Indeed, Member States, who judge their prosecution level to be efficient, can vote against the proposal and halt its approval.<sup>70</sup> This point's, admittedly more theoretical than practical, relevance remains, however, and the Commission did not devote sufficient discussion to it.

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<sup>66</sup> ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 31 (7th ed. 2009).

<sup>67</sup> Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, OJ C 316, 27/11/1995 P. 0049-0057, Art. 1.

<sup>68</sup> See Massimo Donini, *Sussidiarietà penale e sussidiarietà comunitaria*, 1 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 141, 171 (2003).

<sup>69</sup> The principle of *ultima ratio* cannot be found as such in national constitutions; however, some constitutional courts have referred to it in their judgements. See Portuguese Constitutional Court, Case No. 179/12, 78 *Diário da República* (Official Gazette) 2206 (Apr. 19, 2012), [http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/por/por-2012-1-008?f=templates\\$fn=document-frame.htm\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/por/por-2012-1-008?f=templates$fn=document-frame.htm$3.0) (providing an English summary); [http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/por/por/por-2012-1-008?f=templates\\$fn=document-frame.htm\\$3.0#JD\\_Full\\_POR\\_POR-2012-1-008](http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/por/por/por-2012-1-008?f=templates$fn=document-frame.htm$3.0#JD_Full_POR_POR-2012-1-008) (providing a Portuguese summary); Lithuanian Constitutional Court, Case No. 01/04 (Nov. 10, 2005).

<sup>70</sup> See *supra* Part B.I.

### F. The Added Value of Acting at the European Level: Assessing the Efficiency of EU Action in a Geographically Fragmented Context

This article now turns to the second step of the subsidiarity test: the added value of the European level. Several parliaments question the efficiency of the supranational level prosecuting crimes against the financial interests of the EU.<sup>71</sup> Among the various arguments, the UK House of Lords criticized the application of subsidiarity within a geographical fragmented context.<sup>72</sup> Interestingly, in the political dialogue that normally precedes the publication of draft proposals,<sup>73</sup> the German Bundesrat raised a similar point.<sup>74</sup> When discussing the added value of the EPPO, both assemblies underlined that the EPPO will not in any case reach the objective of solving fragmentation of national law enforcement efforts, given that not everyone will participate in its establishment, especially Denmark, the United Kingdom, and Ireland.<sup>75</sup> Moreover, should additional Member States not want to participate and veto the proposal in the Council, one must bear in mind that Article 86 TFEU also allows for the text's approval via enhanced cooperation if at least nine Member States participate, in which case geographic fragmentation will be further accentuated. This situation begs the question of whether the establishment of the EPPO will still bring added value where its main objective—achieving uniform prosecution through out the EU<sup>76</sup>—cannot be reached. Admittedly, in all enhanced cooperation situations, the underlying question involves determining the most important goal—to seek a consensus on a proposal, entailing less integration but accepted by all Member States, or to go for a more far-reaching instrument that, however, only applies to a reduced number of legal systems. Yet, what makes the EPPO situation even more specific is that the very justification for having such a far-reaching EU institution, with binding powers and exclusive competence, is eliminating fragmentation and ensuring *uniform* prosecution throughout Europe.<sup>77</sup> If this objective is not reached, one could argue

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<sup>71</sup> CZ pt. 2, HU, RO pt. 10, NL\_I and NL\_II 1, UK\_II pt. 16, and UK\_I pt. 14. Remarkably, the Maltese House of Representatives identifies some benefits in establishing an EPPO, MT, pt. 2.3.

<sup>72</sup> UK\_I pt. 14.

<sup>73</sup> The political dialogue that includes consultation of National Parliaments before the publication of a legislative proposal was introduced by the Barroso Commission in 2006. See *A Citizens' Agenda—Delivering Results for Europe*, COM (2006) 211 final (Oct. 5, 2006).

<sup>74</sup> The German Bundesrat raised this point in the framework of the political dialogue that preceded the adoption of the proposal. For the text of the German Parliament see *supra* note 30.

<sup>75</sup> See *supra* notes 14–15.

<sup>76</sup> See *EPPO Proposal*, *supra* note 1, at preamble recital 5 (presenting fragmentation of prosecution as the main problem at the national level); *id.* at art. 25 (speaking of a single EU legal area).

<sup>77</sup> Ligeti & Weyembergh, *supra* note 16.

that the establishment of an EPPO, at least as it stands in the proposal, will not have a useful effect, and is consequently not justified.

In the Impact Assessment, the Commission acknowledged the possibility of geographic fragmentation, but it did not elaborate on its implication from a subsidiarity perspective. Similarly, in the response Communication, the Commission stated that the discussion on enhanced cooperation is premature, given that such a situation had not yet materialized.<sup>78</sup>

The Commission truly misses an occasion for debate on this point. The relationship between subsidiarity and geographic fragmentation is a theme that concerns the EPPO, but it is not limited to it. As mentioned in Section C, the United Kingdom, Denmark, and Ireland have opt-outs that can apply to any measure approved under the Area of Freedom Security and Justice.<sup>79</sup> Moreover, it is as possible to have enhanced cooperation in the approximation of national criminal law as it is with EPPO.<sup>80</sup> Therefore, there is a general interest in discussing whether subsidiarity applies differently in this context, and whether measures aimed at unification through regulation are still justified in a variable geometry context. It is interesting to notice that when discussing the structure for an EPPO, if centralized or decentralized, the Commission made the remark that choosing one structure or another might have an important impact on the effectivity of the EPPO, and therefore, the structural decision could hamper the higher efficiency on the supranational level to achieve the given objective.<sup>81</sup> The Commission, therefore, has made a clear connection between the effective functioning of the EPPO and the subsidiarity assessment. It could have easily carried out a parallel observation in the context of geographic fragmentation, connecting variable geometry to the effective functioning of the EPPO and the achievement of the goal of uniform EU wide prosecution, especially with the implication that this has for a subsidiarity assessment. The Commission, however, does not even engage in this discussion.

### **G. The “Third Subsidiarity” Step: Can the EU Legitimately Regulate Non-Cross-Border Matters?**

Another relevant point raised by National Parliaments is whether the EPPO has the authority to address non-cross-border offenses. Discussion on the cross-border or internal nature of offences against the interests of the EU relate to the third “implicit” cross-border step in the subsidiarity test—the EU is legitimate to act when the issue at stake has some

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<sup>78</sup> *Communication on the Review of the Proposal*, *supra* note 9, at 8–9.

<sup>79</sup> *See supra* notes 13–14.

<sup>80</sup> TFEU arts. 82(3) & 83(3).

<sup>81</sup> *See Communication on the Review of the Proposal*, *supra* note 9, at 10.

transnational implications. Given that the context is not a matter of regulating an economic activity, but rather, of fighting a criminal activity, the relevant question could arguably be whether the EU has a dog in the fight against *non cross-border* crime. Observations of the Czech and Cypriot Parliaments touch upon this exact issue. The Czech Parliament acknowledges the added value of establishing a EU Prosecutor to fight cross-border fraud offenses, but it contests its legitimacy to prosecute EU fraud cases occurring in one Member State only. The Commission, it concludes, has not provided sufficient data on a particularly high amount of cross-border cases which would justify the establishment of a supranational prosecutor.<sup>82</sup>

One should recall that the EU was traditionally attributed the competence to tackle cross-border criminality. The justification for attributing to the EU the competence to tackle crime which occurred in a transnational fashion can be found in the need to address the negative effect of the internal market project. Among the side effect of the introduction of free movements, there was for instance the growing cross-border of criminality which was eased by the elimination of frontiers, hence the need for the EU to address the fight against crime issue.<sup>83</sup> Yet, the EU began to concern itself with the protection of its own financial interests, especially with the corruption of EU officials, regardless of the cross-border character of the criminal conduct.<sup>84</sup> Recently, targeting also non-cross border crimes has come even more to the forefront of the EU criminal law agenda. Article 83(2) TFEU allows the EU to approximate national criminal law when this proves essential to ensure effective implementation of EU policies of any sort, not necessarily Justice or Home Affairs policies. Remarkably, Article 83(2) TFEU grants the EU to define criminal sanctions in policy areas in which the EU has already adopted harmonizing legislation, but it does not specify that the specific conduct to which criminal sanctions are attached need to be cross-border. Moreover, Article 325(4) TFEU envisages the competence for the Council and the Parliament to enact measures, arguably of a criminal nature,<sup>85</sup> to protect the EU's financial interests. The Article similarly does not impose any cross-border requirement for EU fraud offenses in order to deserve "EU criminal law attention."<sup>86</sup> Finally, Article 86 TFEU of the EPPO does not mention any cross-border requirement either. National Parliament's doubt of the EPPO's legitimacy to tackle non-cross-border crimes seems to run counter to the evolution of EU criminal law as an instrument addressing non-cross-border criminality.

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<sup>82</sup> CZ, p. 2. See also RO, p. 3. And NL Senate p. 1, where it states that fraud offenses against the financial interests of the EU mainly have a national and local dimension.

<sup>83</sup> DANIEL FLORE, *DROIT PÉNAL EUROPÉEN—LES ENJEUX D'UNE JUSTICE PÉNALE EUROPÉENNE* 31 (2009).

<sup>84</sup> See generally Treaty on European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, art. K.3(2)(c), May 26, 1997, 1997 O.J. (C 195) 2.

<sup>85</sup> See MITSILEGAS, *EU CRIMINAL LAW* 109 (2009).

<sup>86</sup> The PIF directive mentioned in Section B was proposed on the basis of this provision.

In its response Communication, the Commission defended its choice of granting the EPPO an exclusive competence on crimes against the financial interests of the EU and an ancillary competence for prosecuting those crimes that are inextricably linked to the crimes directly affecting the EU financial interests. The Commission particularly insists on the nature of the crimes in question, which have an intrinsic Union dimension. The Commission states that the EPPO should be entrusted with the steering and coordination of investigations and the prosecutions of these criminal offenses because they affect the EU's own financial interests.<sup>87</sup> As an outcome of this debate, EU criminal law is, therefore, confirmed as a branch of law also entrusted with the protection of EU interests and not just with the fight against transnational crime as a spill-over phenomenon from the construction of the internal market. Contrary to the discussion on previous steps of the subsidiarity test, the Commission provides a convincing and well-reasoned response to this concern.

In sum, despite the interesting sparks provided by National Parliaments, the Commission failed to engage in a constructive discussion of at least two out of the three material subsidiarity test steps—namely, national action insufficiency and EU action added value. The next section discusses a possible interpretation of the Commission's neglectful approach. In particular, it demonstrates how inherent features of the EWM allow it to be used as a "political thermometer," rather than as a subsidiarity policing mechanism, and it argues that this is also what happened in the EPPO case.

## H. The EWM as a "Political Thermometer" Rather Than a Subsidiarity Policing Mechanism

### *I. The Weaknesses of the EWM as a Subsidiarity Policing Mechanism: The Risk of the Commission Simply Counting Votes*

The EWM mechanism is conceived as a political safeguard for the principle of subsidiarity. Political actors, such as National Parliaments, are entrusted with the task of controlling whether proposals for EU legislation are legitimate ones, or if the national level should act instead. A political control mechanism for the respect of a key interest such as subsidiarity should, in principle, be welcomed. This is the result of practical reasons—the judicial control on subsidiarity carried out by the Court of Justice has traditionally been very lenient,<sup>88</sup> leaving the respect of subsidiarity by EU legislation more or less unchecked—and

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<sup>87</sup> See *Communication on the Review of the Proposal*, *supra* note 9, at 11.

<sup>88</sup> Less than twenty cases concerning compliance with subsidiarity of EU legislative instruments were referred to Luxembourg, and the Court has showed a considerable self-restraint in judging subsidiarity compliance in each of them. It has limited the control to assessing procedural subsidiarity aspects that is if all the procedural steps, for instance consultation steps have been complied with, while refraining from judging on the material aspects, that is if the substance of subsidiarity had been respected. See Paul Craig, *Subsidiarity: A Political and Legal Analysis*, 50 J. COMMON MKT. STUD. 72 (2012).

legitimacy reasons—political actors such as National assemblies are arguably more legitimate bodies to police a principle that has a strong political character, such as subsidiarity,<sup>89</sup> than a judicial body, such as the Court of Justice.<sup>90</sup>

Yet, there are reasons to believe that the mechanism is not going to be as effective as desired.

The most striking weakness of the EWM is that National Parliaments are not in the position to have a unilateral impact on the legislative process because they do not possess veto power. If the Commission does not agree with the assessment of Member States, it can maintain its current proposal.<sup>91</sup> This means that the body that conceives of the legislation and its ultimate judge are one in the same—the Commission. This alone questions whether the EWM can be really effective as a subsidiarity *policing* mechanism.<sup>92</sup>

If the Commission has this discretion, the risk perpetuates that it will misuse the EWM, turning it into a “political thermometer” in the framework of a law-making strategy, rather than as a subsidiarity policing mechanism. The fear is that the Commission will simply count votes and decide whether to carry on with the proposal based on the likelihood of obtaining future political support. If the relevant support is lacking, it might withdraw the proposal, even if it considers it compliant with subsidiarity. If, in the opposite situation, the Commission considers to have the sufficient political support, it might abuse of its discretion and stick to the proposal regardless of the soundness of the subsidiarity arguments.

Authors have previously warned against the risk of the Commission becoming more sensitive to the political background of the objections and failing to examine their actual

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<sup>89</sup> For the legal and political nature of subsidiarity, see generally Gráinne de Búrca, *Reappraising Subsidiarity's Significance After Amsterdam* (Harvard Jean Monnet Working Paper No. 7/99, 1999).

<sup>90</sup> On the lack of legitimacy for the Court of Justice to rule on subsidiarity questions, see Frederico Fabbrini, *The Principle of Subsidiarity*, in *THE OXFORD PRINCIPLES OF EU LAW* (Takis Tridimas & Reiner Schultze eds., 2015).

<sup>91</sup> See *supra* note 8 and accompanying text.

<sup>92</sup> See Patrick Birkinshaw, *A Constitution for the European Union—A Letter from Home*, 10 EPL 73 (2004) (showing the UK support for the introduction of a red card procedure when discussing the Draft Constitutional Treaty). Authors also pointed out other factors that contribute to weaken the efficiency of the system. These factors concern strict time constraints for the national parliaments to form an opinion and the information gap between the Parliaments and the Commission. See George Bermann, *National Parliaments and Subsidiarity: An Outsider's View*, in *CECI N'EST PAS UNE CONSTITUTION—CONSTITUTIONALISATION WITHOUT CONSTITUTION?* 155 (Ingolf Pernice et al. eds., 2008); George Bergmann, *The Lisbon Treaty: The Irish No*, 4 EUR. CONST. L. REV. 159 (2008); Jit Peters, *National Parliaments and Subsidiarity: Think Twice*, 1 EUR. CONST. L. REV. 66, 71 (2005); Philip Kiever, *Implementing the Early Warning Mechanism for Subsidiarity: National Parliaments Beyond the Constitutional Treaty* (June 13, 2007) (conference paper), [http://www.swp-berlin.org/de/common/get\\_document.php?asset\\_id=4123](http://www.swp-berlin.org/de/common/get_document.php?asset_id=4123).

substance during on-going discussions about the introduction of the EWM within the Constitutional Treaty.<sup>93</sup> This risk materialized the first time a yellow card was raised against proposed legislation. In a case concerning a regulation on the right to strike,<sup>94</sup> the relevant threshold number of reasoned opinions was met, and the Commission was forced to reconsider its text. Despite deeming the National Parliaments reasoning unsound, for being based on arguments that were not relevant to subsidiarity,<sup>95</sup> the Commission still decided to withdraw the proposal, openly stating that it feared lack of political support in future negotiations.<sup>96</sup> The Commission essentially counted votes. Scholars harshly criticized the Commission's decisions, claiming that it had misused the EWM as a political thermometer rather than as control mechanism for subsidiarity.<sup>97</sup> Interestingly, the same author has welcomed the bolder approach of the Commission in the EPPO case, implying that the EWM was correctly used here as a subsidiarity checking mechanism.<sup>98</sup>

Contrarily, this article poses that the Commission has unsatisfactorily dealt with this second yellow card regarding the EPPO draft proposal. Prior sections demonstrated that the Commission has disregarded relevant subsidiarity arguments put forth by National Parliaments. In doing so, the Commission has deprived the EWM of its useful function of subsidiarity checking. The next section illustrates why a plausible explanation for the Commission's approach is the political context in which the objections are raised, and that in this case, the Commission similarly counted votes.

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<sup>93</sup> With respect to the Early Warning Mechanism introduced with the Constitutional Treaty, Peters argued that the Commission would have been more sensitive to the political background of the objections rather than to their actual substance. See Peters, *supra* note 92, at 171. The assumption is of course that governments will vote in the Council in the same way that national Parliaments did in the framework of the Early Warning Mechanism. See, however, De Hert who highlights how in the past especially in the criminal fields, national governments reunited in the Council exploited the European level to have some delicate matters approved at EU level, bypassing in this way national parliaments that were faced with the *fait accompli* and the obligation to implement. Paul De Hert, *Division of Competencies Between National and European Levels with Regard to Justice & Home Affairs*, in JUSTICE AND HOME AFFAIRS IN THE EU-LIBERTY AND SECURITY ISSUES AFTER ENLARGEMENT 55, 65 (Joanna Apap ed., 2004); see also Ian Cooper, *Bicameral or Tricameral? National Parliaments and Representative Democracy in the European Union*, 35 J. EUR. INTEGRATION 531 (2013) (explaining why national Parliaments could have an independent position from the one of their government, due to the presence of minority parties).

<sup>94</sup> *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 final (March 21, 2012).

<sup>95</sup> See, e.g., The Letter from the Commission to the Italian Upper Chamber, Ares 1058907 (Sept. 12, 2012).

<sup>96</sup> See Letter by President Barroso to the President of the European Parliament, Mr. Martin Schultz, Memo 12/661 (Sept. 12, 2012).

<sup>97</sup> Federico Fabbrini & 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*, 50 COMMON MKT. L. REV. 115-44 (2013).

<sup>98</sup> Fabbrini, *supra* note 90, at Part V.

*II. The EPPO Case: The Commission Maintains Its Proposal for Certainty of Approval Through Enhanced Cooperation*

The crucial aspects as to why the political context played a role in the outcome of the EWM in the EPPO case are: (1) the unanimity requirement in the Council for the approval of the regulation; and (2) the possibility of easily resorting to enhanced cooperation.<sup>99</sup>

The EPPO is not a new idea. It was actually discussed during the Draft Constitutional Treaty.<sup>100</sup> The lack of a widespread support for the project from the Member States was not news either, given the negative reactions to the first proposal, which did not come to fruition due to the ill fate of the Constitutional Treaty, but nevertheless involved several consultations.<sup>101</sup> Consequently, the number of objections raised in the context of the EWM with respect to the new proposal simply confirmed this hostile political environment. Indeed, among the eleven Member States whose Parliaments submitted reasoned opinions, there were at least four that radically opposed the idea of establishing an EPPO in whatever form.<sup>102</sup> This alone made unanimity in the Council an unfeasible goal. In such a situation, one could argue that the Commission ironically had an easier task in deciding what to do with the yellow card raised by National Parliaments than with the Parliaments' responses in the previous case on the right to strike. As a matter of fact, as previously explained, the dilemma behind any decision to embark in enhanced cooperation is whether to stick to an ambitious proposal for a reduced number of participants, or to water down the political compromise in order to have enough Member States on board to adopt a binding. Given that the second option—achieving unanimity in the case of the EPPO—was not viable, the choice in favor of the first option—enhanced cooperation—was somewhat mandated. This is, of course, unless the Commission considered—as the UK and the German Parliaments seemed to suggest—that there was no rationale to have an EPPO at all if every Member State would not participate.

Admittedly, this reasoning would apply to any draft legislation whose approval requires unanimity in the Council, as Article 20 TFEU grants a general possibility to have legislation

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<sup>99</sup> See *supra* Part B.

<sup>100</sup> See *supra* note 10.

<sup>101</sup> See *Follow-Up Report on the Green Paper on Criminal-Law Protection of the Financial Interests of the Community and the Establishment of a European Prosecutor*, COM (2003) 128 final (Mar. 19, 2003).

<sup>102</sup> *Supra* note 46 and accompanying text. This is without counting UK and IE which, given their opting out position, are not counted for unanimity. To the objecting Member states also Finland should be added, which did not consider the proposal breaching subsidiarity, but it made clear in the framework of the political consultation that this does not necessarily imply that the Finnish government would not vote against the proposal in the Council. For the relevant documents, see *supra* note 37.

adopted through enhanced cooperation. Yet, in the EPPO case, Article 86 TFEU itself establishes a fast-track procedure for enhanced cooperation, where the important procedural and substantive requirements normally requested for enhanced cooperation do not apply. In other words, the solution for the impasse deriving from lack of unanimity was ready-made.

In this context, the Commission simply had to seek the numbers for enhanced cooperation in order to have the proposal approved, which amounts to nine Member States. Already two amongst the Parliaments that submitted reasoned opinions endorsed the EPPO project, at least in principle, while criticizing specific aspects of its structure and competence.<sup>103</sup> Moreover, in the course of the political dialogue, seven other parliaments explicitly or implicitly supported the establishment of an EPPO.<sup>104</sup> This would already make nine favorable votes. In addition to this, one could also consider those Member States that did not express themselves on the point, might but might also not vote against in the Council.<sup>105</sup> In light of this, there are good reasons to believe that the Commission decided to maintain its ambitious proposal, regardless of the subsidiarity objections, because it was confident it had the votes in the Council for an approval through enhanced cooperation, with the reasonable belief that other Member States might want to follow once the instrument is in place.

Remarkably, right after the EWM deadline expired and before the Commission issued its response Communication, the EU Observer reported that “EU sources predict that EPPO will sooner or later be launched using the EU’s ‘enhanced co-operation’ procedure by nine member states or more”<sup>106</sup>— evidence that the approval through enhanced cooperation was already considered likely. This would explain the very hasty Commission approach in addressing National Parliaments’ concerns and treating its duty to respond as a formality, rather than a conscientious review.<sup>107</sup>

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<sup>103</sup> FR, 2 MT, pt. 2.1.

<sup>104</sup> These included Germany, Italy, Lithuania, Poland, Portugal, and Spain. Austria did not explicitly endorse the EPPO project but when identifying four points that deserve special attention in future negotiations it implicitly did so, for the relevant documents, see *supra* note 37.

<sup>105</sup> In some cases, national parliaments did not submit opinion simply because they were busy with internal matters. For instance, in Estonia elections were running at the moment; therefore, their position on the matter is hard to guess.

<sup>106</sup> See the Parliamentary question to the Council on the outcome of the yellow card against the EPPO where the EUobserver is quoted:  
<http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2013-013913&language=EN> (last visited Sept. 22, 2014).

<sup>107</sup> The UK House of Commons raises this point, see the opinion of the European Scrutiny Committee of the UK House of Commons on the Response Communication, *supra* note 56, at pt. 8.30.

If this interpretation is correct, albeit the different outcome, then what the case at stake and the right to strike a regulation have in common is that the running of the EWM had little to do with subsidiarity checking and more to do with the political feasibility of the proposal. In the EPPO case, the Commission used the EWM as a political thermometer, rather than as a subsidiarity mechanism, and therefore misused it again.

### **I. Implications of Misusing the EWM as a Political Thermometer: Subsidiarity Policing, Subsidiarity Analysis, and the Legitimacy of EU Action**

Understanding the EWM as a “political thermometer,” rather than as a policing mechanism for subsidiarity, has important implications on several levels.

First, a misuse of the EWM implies a lack of policing on subsidiarity. Given the weaknesses of the legal review carried out by the Court,<sup>108</sup> a weak political control is not desirable if one does not wish to deprive subsidiarity compliance in any form of review.

Second, another negative implication of misusing the EWM is that it discounted an opportunity for discussion on the substance of subsidiarity. A striking consequence of the limited case law on subsidiarity, in addition to the evident little policing of the principle, is also that there has been little discussion on its substance, creating limited elaboration on the actual content and potentially diversified application in various policy areas. This is especially important regarding its application in the Area of Freedom Security and Justice, which has its own institutional and subject matter sensitivities,<sup>109</sup> and where the application of subsidiarity also has been rarely discussed by scholars.<sup>110</sup> Although not introduced especially with this aim, the EWM can also constitute a venue to foster discussion on the substance of the principle.<sup>111</sup> Yet, if subsidiarity is not the focus of the procedure, this added value of the EWM risks going unexploited.

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<sup>108</sup> See *supra* note 81.

<sup>109</sup> See *supra* Part F (discussing enhanced geographical fragmentation); *supra* Part E (discussing the special implications of dealing with criminal matters). On Subsidiarity and the AFSJ, see Ester Herlin-Karnell, *Subsidiarity in the Area of EU Justice and Home Affairs—A Lost Cause?*, 15 EUR. L. J. 351 (2009).

<sup>110</sup> On subsidiarity in the Area of Freedom Security and Justice, and On Subsidiarity and the AFSJ, see Herlin-Karnell, *supra* note 109; Paul De Hert & Irene Wiecek, *Testing the Principle of Subsidiarity in EU Criminal Policy—The Omitted Exercise in the Recent EU Documents on Principles for Substantive European Criminal Law*, 3 NEW J. EUR. CRIM. L. 393 (2012).

<sup>111</sup> Admittedly, discussion on various aspects of the proposal already takes place during the political dialogue, which is a framework for a spontaneous and voluntary-based exchange of views between the Parliaments and the Commission, and which takes place before the official proposal for legislation has already been published. Yet, the political dialogue broadly encompasses subsidiarity issues, as well as proportionality issues, conferral, and political accountability aspects. The advantage of the EWM is the special focus on the principle of subsidiarity and the actual obligation for the Commission to deliver its opinion on the point, which makes it a unique occasion to

The unfolding of the EWM in the case of the EPPO is a clear example of how the EWM was not utilized to its full potential to foster the understanding of how subsidiarity applies in the Area of Freedom Security and Justice. National Parliaments touched upon important aspects, such as the relevance of at least one Member State's effective justice or criminal justice system, the potential constitutional tensions with general criminal law principles, and geographic fragmentation and subsidiarity, which deserved further discussion, and which the Commission failed to properly address. Admittedly, points raised by National Parliaments are not lost, as other institutional actors can pick them up during and after the legislative process—such as the Council and the Parliament during the negotiation, or possibly even the Court of Justice in a future judgment. Yet, if the Commission does not engage in the discussion, half of the exercise is missing, and thus, the EWM's potential is not fully realized.

Third, the Commission's "goal oriented approach" risks sacrificing input legitimacy for EU action which could derive from the involvement of National Parliaments in the legislative process, to the altar of output legitimacy, that might derive from having the measure approved. Indeed, if the Commission only considers the relevant political background of National Parliaments' opinions, without considering their substance inputs, into account, this might ease and speed up the approval of the measure. Yet, this also sends the message to National Parliaments that they did not actually had a chance to provide their input in the procedures, and they might still consider the measure non legitimate for this reason.

The legitimacy of EU action traditionally relies on both parameters, input and output legitimacy.<sup>112</sup> The EWM was arguably introduced, however, or at least welcomed as a mechanism to boost the democratic character of EU law making process,<sup>113</sup> and as a consequence, it is not advisable to disregard this function of the procedure.

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have a clearer vision also on the position of the Commission on the substance of subsidiarity. For a discussion on the political dialogue and a comparison with the EWM, see Davor Jančić, *The Barroso Initiative: Window Dressing or Democracy Boost?*, 8 *UTRECHT L. REV.* 78, 82–83 (2012).

<sup>112</sup> The tension between input and output legitimacy is authoritatively elaborated in FRITZ SCHARPF, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* (1990). On the point, and specifically on the necessary equilibrium between the two for the overall legitimacy of the EU, see also Stephen Weatherill, *Competence and Legitimacy*, in *THE OUTER LIMITS OF EUROPEAN UNION LAW* (Catherine Barnard & Okeoghene Odudu eds., 2009).

<sup>113</sup> On the argument of enhancing Democratic legitimacy, see Ian Cooper, *Bicameral or Tricameral? National Parliaments and Representative Democracy in the European Union*, 35 *J. EUR. INTEGRATION* 531 (2013); Bermann, *supra* note 92, at 453; Karolina Boronoska-Hryniewcka, *Democratizing the European Multi-level Polity? A (Re)-Assessment of the Early Warning System*, 16 *YEARBOOK POLISH EUR. STUD.* 167, 181 (2013). *But see* Pieter De Wilde, *Why the Early Warning Mechanism Does Not Alleviate the Democratic Deficit*, 6 *OPAL ONLINE PAPER SERIES* 1 (2012).

## J. Conclusion

This article provides an analysis of how the EWM—procedure entrusted with the policing of the principle of subsidiarity—has unfolded with respect to the proposed legislation on the EPPO. It claims that National Parliaments raised important points with respect to the scope of application of subsidiarity, the national insufficiency level, the comparative efficiency of the EU level, and the cross-border character of the activity object of EU regulation. It shows how the European Commission has poorly discussed the first two aspects and only provided limited discussion on the third. It argues that the Commission's hasty approach and disregard for the actual subsidiarity question is due to a misuse of the EWM as an arena to test the political waters for future approval of draft text. This Article argues that, in the case of the EPPO, the Commission—confident in a future approval at least in an enhanced cooperation form—decided to not take a step back on the proposed text for subsidiarity reasons. This Article concludes that the Commission's approach to the EWM can obviously be detrimental to the actual policing of subsidiarity, and also to the deepening of the discussion on the substance of the principle and the input legitimacy of the EU decision-making process.

The reason for such exploitation of the EWM lies in one specific feature of the procedure. It prevents a National Parliament from unilaterally halting the adoption of a text that it does not judge as subsidiarity-compatible.<sup>114</sup> An obvious solution for this structural ineffectiveness would then be, from a *de jure condendo* perspective, to entrust National Parliaments with such a veto power. Nonetheless, the desirability of granting further powers to National Parliaments within the EU legislative process is debatable.<sup>115</sup>

Without expanding the debate to a normative discussion of National Parliaments' role in the EU institutional framework, which would be beyond the scope of this paper, the following conclusions that can be drawn at this stage. A more responsible attitude by the Commission would certainly contribute to the achievement of the constitutional objective the EWM was conceived for. If the Commission commits to consider the substance of the objections of Member States, where subsidiarity is of course relevant, and to act accordingly when deciding whether to carry on with the legislative procedure, this can certainly help ensure that EU legislation is adopted when constitutionally warranted, not only when there is political agreement within a sufficient number of Member States.<sup>116</sup>

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<sup>114</sup> See *supra* Part H.

<sup>115</sup> For an appraisal of the lack of red card procedure, see Stephen Weatherill, *Using National Parliaments to Improve Scrutiny of the Limits of EU Action*, 28 EUR. L. REV. 909, 912 (2003).

<sup>116</sup> See KIVVER, *supra* note 8, at 148, who recalls that the EWM is there for a reason, that is to ensure that EU legislation is not adopted at all costs but only when it is constitutionally justified to do so, and that is a objective one cannot neglect in a system, as the EU one, where the EU legislator cannot legislate in a cavalier manner on the basis of general competences as if it were in a unitary state.