

# **Like Two Peas in a Pod? The Functioning of the Early Warning Mechanism in the Czech Republic and Poland**

## **Introduction**

This chapter deals with the functioning of the Early Warning System in two EU member states belonging to the Visegrád Group: Poland and the Czech Republic. These member states are similar along many relevant dimensions but exhibit significant differences in their activities within the EWM. Along the model of studying ‘most similar cases’ a detailed comparison thus offers insights into what the cause behind these differences in their activity may be.<sup>1</sup> The similarities are extensive. Both member states acceded to the EU in 2004 and their parliamentary systems follow the same model of asymmetric bicameralism. Moreover, both apply to a large extent centralized scrutiny for the EWM with some role for standing committees. However, in terms of outcomes differences are stark. The Polish parliament belongs to the most active group of parliaments under the EWM and is much less involved in the Barroso initiative, whilst the Czech parliament has barely taken part in the EWM, but its Senát is one of the most active parliaments in the political dialogue process. The aim of this chapter is to analyze possible reasons for their different approaches to the subsidiarity scrutiny through careful study of the details of debates and votes on reasoned opinions and the text of those reasoned opinions themselves.

The chapter first describes the general position of the Polish and the Czech parliaments within their constitutional systems. The second section presents procedures implemented in Poland and the Czech Republic to accommodate the EWM. Next, the chapter explores the reasoned opinions and discusses the issues that the chambers criticize: subsidiarity, legal basis, proportionality, delegations to the Commission to adopt non-legislative acts, fundamental rights protection and contents of the proposals. Moreover, the chapter analyses the debates and votes taken under the EWM. The aim is to establish whether the parliamentary chambers gained some independence from their national government under the EWM and whether reasoned opinions integrate the whole political spectrum at the national level. The chapter concludes with an exploration to explain the differences in the functioning of the EWM in each of the member states under analysis.

## **Position of parliament in the constitutional system of Poland and the Czech Republic**

The Polish constitution vests legislative power in two chambers of the parliament: the Sejm and the Senat, both elected for a four-year term of office.<sup>2</sup> The Sejm is composed of 460 Deputies

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<sup>1</sup> R Hirschl, ‘The question of case selection in Comparative Constitutional Law’ 53 *American Journal of Comparative Law* (2005) 125, 134.

<sup>2</sup> Art 95(1) of the Polish Constitution.

who are elected in universal, equal, direct and proportional elections by secret ballot.<sup>3</sup> The Senat, re-established after the fall of communism in 1989, consists of 100 Senators who are chosen in universal and direct elections by secret ballot.<sup>4</sup> After a 2011 reform, Senators are chosen in majority elections, held in single-member constituencies.<sup>5</sup> Only the lower chamber, the Sejm, exercises control over the Council of Ministers, has the power to overturn by an absolute majority the Senat's rejection of a bill or amendments proposed to it and adopts the state's budget.<sup>6</sup> Moreover, the Sejm may overturn a presidential veto.<sup>7</sup> The Sejm and the Senat however share some functions such as initiating the legislative process and the constitutional amendment process.<sup>8</sup> The Polish bicameralism is hence described as unequal or incomplete, the Senat being regarded a chamber of reflection.<sup>9</sup>

Since 2007, in the period relevant for the EWM analysis, the governing coalition consisted of the liberal-conservative Civic Platform (PO) and the centrist Polish People's Party (PSL), a force reflected in the composition of the Sejm and Senat. The opposition included the conservative Law and Justice (PiS), liberal Palikot's Movement (RP), social-democratic Democratic Left Alliance (SLD) and right-wing United Poland (SP).<sup>10</sup>

Similarly to Poland, the Czech bicameral system consists of the Poslanecká sněmovna and the Senát which was established in 1992 after the dissolution of Czechoslovakia.<sup>11</sup> The Poslanecká sněmovna consists of 200 deputies chosen for a four year term in universal, equal, proportional and direct elections by secret ballot.<sup>12</sup> In the Senát 81 Senators are elected for a term of six years, with one third of the Senators renewed every two years in universal, equal and direct elections by secret ballot and under the principles of the majority system.<sup>13</sup> The Czech bicameralism is also an asymmetrical one: while both chambers may put forward legislative proposals,<sup>14</sup> the government is accountable only to the Poslanecká sněmovna, which also has a final say (by absolute majority) within the legislative procedure and with regard to the presidential veto of bills and it approves the state's budget.<sup>15</sup>

Although the Social Democrats (ČSSD) gained the largest number of seats in the 2010 elections to the Poslanecká sněmovna, between July 2010 October 2013 the conservative Civic Democratic Party (ODS), TOP 09 and populist Public Affairs (VV) formed the government.

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<sup>3</sup> Art 96 of the Polish Constitution.

<sup>4</sup> Art 97 of the Polish Constitution.

<sup>5</sup> Art 260 §1 Ustawa z 5 stycznia 2011 r. – Kodeks wyborczy, Dz.U. 2011 nr 21 poz. 112 (Election Code).

<sup>6</sup> Art 95(2), Art. 121(3) and Art. 219(1) of the Polish Constitution.

<sup>7</sup> Art 122(5) of the Polish Constitution.

<sup>8</sup> Art 119(1) and Art 235(1) of the Polish Constitution.

<sup>9</sup> L Garlicki, *Polskie Prawo Konstytucyjne: Zarys Wykady* (Liber 2006) at 199.

<sup>10</sup> Ruch Palikota and SLD have no representatives in the Senat, similar as in the period of 2007-2011.

<sup>11</sup> Art 15(2) of the Czech Constitution.

<sup>12</sup> Art 16(1) and Art 18(1) of the Czech Constitution.

<sup>13</sup> Art 16(2) and Art 18(2) of the Czech Constitution.

<sup>14</sup> Art 41(2) of the Czech Constitution.

<sup>15</sup> Art 68(1), Art 47(1), Art 50(2) and Art 42(1) of the Czech Constitution.

Since October 2013 elections the Social Democrats are in the center-left governing coalition together with populist ANO 2011 and centrist Christian and Democratic Union (KDU–ČSL). In October 2010 the Social Democrats gained a majority in the Senát, traditionally dominated by Civic Democrats. Subsequent elections in October 2012 and 2014 further enhanced the majority of Social Democrats in the Senát.

### **EWM procedures**

In this section, I explore the institutional design concerning subsidiarity scrutiny in Poland and the Czech Republic. The Lisbon Treaty by granting new competences to national parliaments has in fact equalised the unequal bicameralism in both member states, since both Senates gained equal rights under the EWM and this was also translated to national provisions.<sup>16</sup>

### **Poland**

Before the Lisbon Treaty, it was argued that despite its relatively strong position vis-à-vis the government in the constitutional system, in EU affairs the parliament was ‘more an accidental hero than an effective actor.’<sup>17</sup> The early involvement of the parliament in EU affairs related to the approximation of national law to EU law prior to Poland’s accession to the EU.<sup>18</sup> After EU accession, the parliament adopted the Act on Cooperation between the Council of Ministers and Parliament in EU affairs granting the parliament powers with regard to aspects such as cooperation in the EU legislative process, adoption of laws implementing EU law and appointments to EU institutions.<sup>19</sup> Also in 2005, whilst controlling the compatibility with the Constitution of the Act on Cooperation, the Constitutional Court underlined the necessity to ensure that both the Sejm and the Senat participate in the process of EU law drafting.<sup>20</sup>

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<sup>16</sup> On this conclusion for the Polish parliament see Z Witkowski, M Serowaniec, ‘Przesłanki naruszenia zasady pomocniczości przez akty ustawodawcze Unii Europejskiej w świetle uzasadnionych opinii przyjętych przez Sejm i Senat RP’ 31 *Gdańskie Studia Prawnicze* (2014) 997, 1001.

<sup>17</sup> A Łazowski, ‘The Polish Parliament and EU affairs. An effective actor or an accidental hero?’ in J O’Brennan and T Raunio (eds.) *National Parliaments within the enlarged European Union. From ‘victims’ of Integration to Competitive Actors* (Routledge 2007) at 203.

<sup>18</sup> *ibid* at 204ff.

<sup>19</sup> Ustawa z dnia 11 marca 2004 r. o współpracy Rady Ministrów z Sejmem i Senatem w sprawach związanych z członkostwem Rzeczypospolitej Polskiej w Unii Europejskiej, Dz.U. Nr 52, poz. 515 oraz z 2005 r. Nr 11, poz. 89 i Nr 160, poz. 1342.

<sup>20</sup> Trybunał Konstytucyjny, K 24/04 judgment of 12.01.2005, inequality in competences of Sejm and Senat committees in respect of European Union legislative proposal. The Court stated that influencing the position of the government is in fact a legislative function. As long as the bi-cameral parliament is to be maintained, both chambers should be guaranteed equal participation in activities concerning the shaping position of Poland in the field of adopting EU law. See A Łazowski, ‘The Polish parliament and EU affairs: an effective actor or an accidental hero?’ in J O’Brennan and T Raunio (eds), *National parliaments within the enlarged European Union: from ‘victims’ of integration to competitive actors?* (Routledge 2007) at 212-214.

The new powers of the parliament in EU affairs significantly strengthened its impact on the government's policy making.<sup>21</sup> Other activities of the Polish parliament in that period included debates of EU related issues and resolutions in this respect, as well as engagement in interparliamentary cooperation.<sup>22</sup> However, observers criticised the early years of the Polish parliament in the EU for the quite limited expertise and understanding of EU law by the deputies and the political reality of parliamentary work.<sup>23</sup> The position of parliament in EU affairs was described as 'modest' as understood in the categories developed by Maurer and Wessels and a 'cooperative model' in which the parliament's position cannot be forced on the government.<sup>24</sup>

In the judgment assessing the Lisbon Treaty the Polish Constitutional Court stressed the significance of national parliaments in issuing reasoned opinions on Commission proposals allowing the Polish parliament to shape the content of EU law 'to the extent (...) that it is possible to narrow down the scope of its "external character" in relation to the Polish state.'<sup>25</sup> In this respect, the Constitutional Court left it to the legislature to take the legal measures to accommodate the EWM and shape the cooperation of the government with the Sejm and the Senat in EU affairs.<sup>26</sup> With the entry into force of the Lisbon Treaty, the Polish parliament gained a number of new powers which are reflected in the Rules of Procedure of the Sejm<sup>27</sup> and the Senat<sup>28</sup> and in the new Cooperation Act (2010), however its role in EU affairs has not radically changed from the national perspective.<sup>29</sup>

The question of subsidiarity scrutiny of Commission proposals was not completely new for the Polish parliament because it assessed subsidiarity while opining Commission proposals for the Polish government.<sup>30</sup> Since the Lisbon Treaty, of course, the chambers may send a reasoned opinion to the Commission. In this regard, the lower chamber applies the centralized model in which the European Affairs Committee (EAC) remains the main actor,<sup>31</sup> whereas the upper

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<sup>21</sup> J Barcz and A Pudło, 'The Polish Parliament and EU Affairs' in C Heffler, Ch Neuhold, O Rozenberg, J Smith (eds) *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave 2015) at 605.

<sup>22</sup> Łazowski n 17 at 211.

<sup>23</sup> *ibid* at 215

<sup>24</sup> Barcz and Pudło n 21 at 608.

<sup>25</sup> Trybunał Konstytucyjny, K 32/09 judgment of 24 November 2010, p. 31. The Court, following the Polish doctrine, sees EU law as an order that is 'partially external' to Polish law meaning that although EU legal acts have a legal force in Poland it is not the Polish legislator who creates EU law.

<sup>26</sup> *ibid*.

<sup>27</sup> Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 30 lipca 1992 r., Regulamin Sejmu Rzeczypospolitej Polskiej, M.P. 1992 nr 26 poz. 185. (Sejm Rules of Procedure)

<sup>28</sup> Uchwała Senatu z dnia 23 listopada 1990 r., Regulamin Senatu, M.P. 1991 nr 2 poz. 11. For the description of new powers see also Barcz and Pudło n 21.

<sup>29</sup> Barcz and Pudło n 21 at 608.

<sup>30</sup> A Fuksiewicz, 'Sejm i Senat rok po wejściu w życie Traktatu Lizbońskiego-dostosowanie do reformy instytucjonalnej' <<http://www.isp.org.pl/uploads/pdf/1827766553.pdf>> at 11.

<sup>31</sup> However, see the written evidence from the EU Affairs Committee of the Polish Sejm to the House of Lords, which pointed out that the Sejm's standing committees are now more involved in scrutiny work and that joint meetings between the EU affairs committee and standing committees are sometimes held. House of Lords, European

chamber uses a mixed one, where the EAC and standing committees cooperate on expressing a reasoned opinion. This section hence presents the centralized subsidiarity scrutiny of the EAC of the Sejm and mixed system of the Senat.<sup>32</sup> The Cooperation Act and the Rules of Procedure of each of the chambers regulate the subsidiarity review in the Polish parliament.

In the Sejm, the Marshall forwards EU draft legislative acts to the EAC of the Sejm.<sup>33</sup> Usually once per week, the Presidium of the EAC, on the basis of the Sejm's Bureau of Research analysis, chooses proposals for further consideration and assigns rapporteurs to them.<sup>34</sup> Next, the EAC itself or a group of fifteen MPs can take a resolution with a reasoned opinion attached to a motion stating the grounds.<sup>35</sup> The first reading of this resolution takes place in the EAC while the second one at a plenary session of the Sejm.<sup>36</sup> If the Sejm adopts the reasoned opinion, the Marshall of the Sejm forwards the resolution to the Commission.<sup>37</sup>

In the Senat, the Marshall forwards all EU documents to the EAC and to the standing committees, if requested so by the chairman of the EAC.<sup>38</sup> In the EAC the chairman and the two Deputy Chairs sift the EU draft legislative acts prior to the committee sitting and assign rapporteurs for documents selected for debate in the committee.<sup>39</sup> If the EAC or any standing committee adopts an opinion that EU draft legislative act violates the subsidiarity principle, it next puts a motion to the Marshall of the Senat for a resolution of the Senat together with the draft opinion.<sup>40</sup> This draft opinion is forwarded to all relevant committees, including the EAC.<sup>41</sup> They should prepare a joint report that is later voted in the plenary sitting of the Senat.<sup>42</sup>

The Cooperation Act of 2010 compels the government to cooperate with the Sejm and the Senat in 'affairs connected to the membership in the EU'.<sup>43</sup> Specifically, the Council of Ministers must

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Affairs Committee, 9th Report of Session 2013–14, The Role of National Parliaments in the European Union, published 24 March 2014, <http://www.publications.parliament.uk/pa/ld201314/ldselect/ldeucom/151/151.pdf> at 13.

<sup>32</sup> The Senat's system represents a mixed system of the participation of the dominating EAC with a prior facultative consultation of the standing committees. For the possible constellations of the mixed systems see K Granat, National Parliaments and the Policing of the Subsidiarity Principle (EUI PhD 2014).

<sup>33</sup> Art 148b(1)(4) Sejm Rules of Procedure.

<sup>34</sup> See [http://oide.sejm.gov.pl/oide/en/images/files/badanie\\_pomocniczosci/subsidiarity\\_sejm\\_table\\_pl.pdf](http://oide.sejm.gov.pl/oide/en/images/files/badanie_pomocniczosci/subsidiarity_sejm_table_pl.pdf).

<sup>35</sup> Art 148cc(1)(2) Sejm Rules of Procedure.

<sup>36</sup> Art 148cc(3) Sejm Rules of Procedure.

<sup>37</sup> Art 148cc(5) Sejm Rules of Procedure.

<sup>38</sup> Art 75a Senat Rules of Procedure.

<sup>39</sup> See <http://www.ipex.eu/IPEXL-WEB/parliaments/institution/plsen.do>.

<sup>40</sup> Art 75d(1) Senat Rules of Procedure.

<sup>41</sup> Art 75d(2) Senat Rules of Procedure.

<sup>42</sup> See at <http://www.ipex.eu/IPEXL-WEB/parliaments/institution/plsen.do>. Also as pointed out by the Vice-Chair of the EAC of the Senat, in the recent years, the specialised committees are more involved in EU issues. See House of Lords, The Select Committee on the European Union Inquiry on the Role of National Parliaments in the EU, Unrevised Transcript of Evidence, Session No 4, 19.10.2013, Q52.

<sup>43</sup> Ustawa z dnia 8 października 2010 r. o współpracy Rady Ministrów z Sejmem i Senatem w sprawach związanych z członkostwem Rzeczypospolitej Polskiej w Unii Europejskiej, Dz. U. Nr 213 Poz. 1395 (Cooperation Act). See Art 1 and 2 Cooperation Act.

forward an opinion on EU draft legislative acts within fourteen days after receipt thereof.<sup>44</sup> This opinion should include an assessment whether the EU proposal is compatible with the subsidiarity principle.<sup>45</sup>

## The Czech Republic

Before the Czech Republic's accession to the EU, in 2001, the Czech Constitution was amended to incorporate provisions on the relationship between government and parliament in EU affairs, including the duty to inform parliament and the possibility to express its views by parliament.<sup>46</sup> The amendment together with new provisions in the Rules of Procedure of each of the chambers reflected the political willingness for more involvement of the Czech parliament in EU affairs after the Czech EU accession.<sup>47</sup> The position of the Poslanecká sněmovna at that time was assessed as being of a medium strength vis-à-vis the government, while the Senát was more modest since the government was not bound by Senát's opinions during the negotiations at EU level.<sup>48</sup>

The following changes in the Rules of Procedure of the Czech chambers were connected to the entry into force of the Lisbon Treaty.<sup>49</sup> They included the introduction of the EWM procedures and the 'mandating' rights of the parliament with regard to the flexibility clause, passerelle clauses and the simplified revision procedure.<sup>50</sup> The Czech Constitutional Court highlighted these changes in its Lisbon Treaty judgment and underlined that 'national parliaments of member states can play an important role in protecting the limits of competences which the member states conferred on the Union' since they were granted a role in this process in accordance with Protocol No 1 and No 2.<sup>51</sup>

The Rules of Procedure describe the practices applicable to subsidiarity review which are rather centralised systems of scrutiny in the EAC, with some characteristics of a mixed scrutiny since also the standing committees are consulted.<sup>52</sup> In the Poslanecká sněmovna, the Parliamentary

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<sup>44</sup> Art 7 (1) Cooperation Act.

<sup>45</sup> Art 7 (3)(3) Cooperation Act.

<sup>46</sup> Art 10 b of the Czech Constitution.

<sup>47</sup> L Pitrová and M Coxová, 'Parliamentary Control of EU Decision-making in the Czech Republic' in O Tans, C Zoethout, J Peters (eds), *National Parliaments and European Democracy. A Bottom-up Approach to European Constitutionalism* (Europa Law Publishing 2007) at 207.

<sup>48</sup> *ibid* at 215.

<sup>49</sup> So-called 'Lisbon Amendment' to the Act on the Rules of Procedure of the Chamber of Deputies and of the Senate of the Czech Republic (Act No. 162/2009 Col.).

<sup>50</sup> See M Hrabálek and A Strelkov, 'The Czech Parliament and European Integration' in C Heffler, Ch Neuhold, O Rozenberg, J Smith (eds) *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave 2015) at 501.

<sup>51</sup> Czech Constitutional Court, Pl. ÚS 19/08: Treaty of Lisbon I, para. 140.

<sup>52</sup> See however that other authors identify the Czech system as centralised:

[http://www.houseofrepresentatives.nl/sites/www.houseofrepresentatives.nl/files/news\\_items/engaging\\_with\\_europe\\_management\\_report\\_2nd\\_edition.pdf](http://www.houseofrepresentatives.nl/sites/www.houseofrepresentatives.nl/files/news_items/engaging_with_europe_management_report_2nd_edition.pdf). The Czech scrutiny system is similar to that of the Polish Senat; although it is dominated by the EAC, the standing committees might also be consulted. See also Granat n 32.

Institute proposes documents for scrutiny and the chair of the EAC does the final selection.<sup>53</sup> For the selected document, the government submits its opinion to the EAC that is next a basis for deliberation in the committee.<sup>54</sup> The EAC can also forward the draft EU act to a standing committee.<sup>55</sup> An expert of EU Unit prepares for the rapporteur an analysis of the scrutinised proposal.<sup>56</sup> The rapporteur together with the expert draft a resolution on the proposal, which includes a reasoned opinion.<sup>57</sup> On the basis of the obtained information, the EAC can take a resolution on issuing a reasoned opinion that counts as an opinion of the whole chamber if not sent for the approval to the plenary.<sup>58</sup> The reasoned opinion is then sent by the president of the chamber to the government, the Senát and to EU institutions.<sup>59</sup>

In the Senát, the EAC chairman together with the Head of the EU Unit and the committee's advisor select EU documents for scrutiny from the weekly overview prepared by that Unit and appoints a rapporteur for the chosen piece of legislation.<sup>60</sup> The EAC may request information on the proposal at stake from the government within 14 days.<sup>61</sup> In addition the EAC may ask a standing committee to submit its opinion on the proposal under consideration within an agreed time limit.<sup>62</sup> The member of the EU Unit prepares an analysis for the EAC.<sup>63</sup> The Committee rapporteur assisted by the advisor to the Committee and expert from EU Unit drafts a resolution on the proposal incorporating a subsidiarity assessment; if a breach is confirmed a reasoned opinion is prepared.<sup>64</sup> Having obtained the draft resolution, the EAC decides either only to take note of the proposal or to refer it to the plenary not later than three days before the elapse of the eight-week deadline set by Protocol No.2.<sup>65</sup> If approved, the President of the Senát forwards the reasoned opinion directly to EU institutions.<sup>66</sup>

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<sup>53</sup> Hrabálek and Strelkov n 50 at 496.

<sup>54</sup> §109a(1) and (2) Rules of Procedure.

<sup>55</sup> §109a(2) Rules of Procedure. However, the opinion of the standing committee is not binding for the EAC. See Hrabálek and Strelkov n 50 at 497.

<sup>56</sup> Scrutiny of documents coming from the European Union and monitoring compliance with the principle of subsidiarity at <http://www.ipex.eu/IPEXL-WEB/parliaments/institution/czpos.do>.

<sup>57</sup> *ibid.*

<sup>58</sup> §109a(4) Rules of Procedure.

<sup>59</sup> §109a(6) Rules of Procedure.

<sup>60</sup> §119d(1) Standing Rules of the Senát. See also information on the website of the Senát:

[http://www.senat.cz/senat/evropa/vybory\\_a\\_plenum/index-eng.php?ke\\_dni=8.5.2015&O=10](http://www.senat.cz/senat/evropa/vybory_a_plenum/index-eng.php?ke_dni=8.5.2015&O=10). This procedure is not exclusively for subsidiarity issues. See 'Scrutiny of documents coming from the European Union and monitoring compliance with the subsidiarity principle' at <http://www.ipex.eu/IPEXL-WEB/parliaments/institution/czsen.do>.

<sup>61</sup> §119d(3) Standing Rules of the Senát.

<sup>62</sup> §119d(4) Standing Rules of the Senát. The involvement of standing committees is higher in the Senát than in the chamber. See Hrabálek and Strelkov n 50 at 497.

<sup>63</sup> See 'Scrutiny of documents coming from the European Union and monitoring compliance with the subsidiarity principle' at <http://www.ipex.eu/IPEXL-WEB/parliaments/institution/czsen.do>.

<sup>64</sup> *ibid.*

<sup>65</sup> §119f(2) and (3) Standing Rules of the Senát.

<sup>66</sup> §119i(1) Standing Rules of the Senát.

### Assessment of the functioning of the EWM by the parliaments

Since the entry into force of the Lisbon Treaty until the end of 2014, the parliaments under analysis have participated in the EWM and the ‘Barroso initiative’ to a different extent as presented in the table below. In addition, the Polish Sejm participated in the first ‘yellow card’ on the Monti II proposal,<sup>67</sup> while the Czech Senát contributed to the second one, on the EPPO proposal.<sup>68</sup>

	Polish Sejm	Polish Senat	Czech Poslanecká sněmovna	Czech Senát
Reasoned opinion	12	11	3	4
Opinion under Barroso initiative	10	23	28	219

Source: Own compilation on the basis of 2010-2014 Commission Annual Reports on Relations between the European Commission and National Parliaments.

Despite the fact that the parliamentary chambers under analysis have been active in the EWM to different extents, they share a rather negative assessment of the functioning of the EWM.<sup>69</sup> The chairman of the Senat’s EAC in its evidence to the UK House of Lords noted a set of problems.<sup>70</sup> First, he raised the question of common definition of subsidiarity and its political character, which leads to an overly narrow scope of reasoned opinions. Second, the chairman underlined that the eight-week deadline to submit a reasoned opinion does not take relevant parliamentary breaks such as end of term into account. Third, the lack of common interests of parliaments on EU policies was raised as a weakness of the EWM.

Moreover, the parliaments under comparison negatively assess the Commission’s replies to reasoned options. In the view of the Polish Senat’s EAC chairman, the Commission answers with a delay and neglects the views of national parliaments.<sup>71</sup> The views expressed by the Sejm’s representative seem compatible with that of the Senat with regard to the impact of the reasoned

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<sup>67</sup> Polish Sejm, Reasoned Opinion of 11.05.2012 on COM (2012) 130.

<sup>68</sup> Czech Senát, Reasoned Opinion of 9.10.2013 on COM (2013) 534.

<sup>69</sup> See however that the Czech Poslanecká sněmovna labels the EWM a ‘great tool’ for national parliaments Czech Poslanecká sněmovna in Annex to the 23<sup>rd</sup> Bi-annual Report of COSAC at 115.

<sup>70</sup> Mr Edmund Wittbrodt, Chairman of the European Affairs Committee, Senat, Poland in House of Lords European Union Committee Report HL 151 of Session 2013-14, The Role of National Parliaments in the European Union, Written evidence at 312ff.

<sup>71</sup> *ibid.*



opinions.<sup>72</sup> In the same vein, the Czech Senát suggests that the Commission should monitor and disclose the impact of the EWM on the legislative procedure.<sup>73</sup>

With a view to improve the functioning of the EWM, in May 2015, preceding the COSAC meeting, the Polish Sejm organised a working group meeting with an aim to improve the ‘yellow card’ procedure.<sup>74</sup> The discussion focused on the involvement and cooperation by national parliaments with regard to the Commission Work Programme; inclusion of the proportionality principle under the EWM; timing and quality of Commission’s replies and the extension of submissions deadline from eight to twelve weeks.

Finally, the Czech Poslanecká sněmovna and the Senát, as well as the Polish Sejm support the introduction of a new ‘green card’, which would build on the existing ‘Barroso initiative’ allowing parliaments to make constructive suggestions regarding policy or legislative proposals to the Commission without amending the Treaty.<sup>75</sup> In fact, the Czech Senát supported the first ‘green card’ on the reduction of food waste within the EU, put forward by 16 other chairpersons of committees of national parliaments.<sup>76</sup>

### **Reasoned opinions**

This section deals with the content of the reasoned opinions of Czech and Polish parliaments with the aim to highlight the questions raised under the EWM. First, the chambers conduct subsidiarity scrutiny which consists of two aspects: the material and the procedural dimensions of the principle of subsidiarity.<sup>77</sup> In accordance with Article 5(3) TEU the material dimension of subsidiarity might be reviewed in the *national insufficiency test* and the *comparative efficiency test* by Schütze. Under the first test the Union shall act ‘only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States’ which means that a Member State has ‘inadequate means at its disposal for achieving the objectives of the proposed action.’<sup>78</sup> The second test permits the Union to act when the objectives of the proposed action

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<sup>72</sup> Mr Andrzej Gałażewski, Vice Chairman of European Union Affairs Committee, Sejm, Poland in House of Lords European Union Committee Report HL 151 of Session 2013-14, The Role of National Parliaments in the European Union, Written evidence at 310.

<sup>73</sup> Mr Miroslav Krejča, Chairman of the Committee on European Affairs, The Senát, Parliament of Czech Republic in House of Lords European Union Committee Report HL 151 of Session 2013-14, The Role of National Parliaments in the European Union, Written evidence at 105.

<sup>74</sup> See [http://oide.sejm.gov.pl/oide/en/index.php?option=com\\_content&view=article&id=14900&Itemid=946](http://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=14900&Itemid=946).

<sup>75</sup> Annex to the 23<sup>rd</sup> Bi-annual Report of COSAC at 115, 128, 451 (no reply from the Polish Senat). See also chapter by Hettne in this Volume.

<sup>76</sup> 220<sup>th</sup> Resolution of the Czech Senát of 12.08.2015, on the joint letter of members of parliaments of EU member states to the European Commission (so-called “green card”) on food waste. For the proposal see the joint letter of 22.07.2015 from the members of parliamentary committees to the President of the Commission available at <http://www.parliament.uk/documents/lords-committees/eu-select/green-card/green-card-on-food-waste.pdf>.

<sup>77</sup> A Estella De Noriega, *The EU principle of subsidiarity and its critique* (Oxford University Press 2002) at 105.

<sup>78</sup> K Lenaerts, ‘Subsidiarity and Community competence in the field of education’ 1 Columbia Journal of European Law (1994) 22.

can rather ‘by reason of the scale or effects of the proposed action, be better achieved at Union level.’ To put it differently, the EU should not act ‘unless it could *better* achieve the objectives of the proposed action.’<sup>79</sup>

In response to a Commission proposal regarding the management of copyrights in musical works, the Polish Sejm in its material subsidiarity control put forward that the Member States themselves may achieve the objective of transparent management within the EU internal market, as it is already happening in Poland and the Commission did not prove that EU action in this respect would be more effective.<sup>80</sup> Subsidiarity is similarly understood in the lower Czech chamber, which argued with regard to the Commission proposal for the third-country seasonal workers directive that seasonal work can be dealt with by existing legislation and an EU action has no added value.<sup>81</sup> In the understanding of the Polish Senat the subsidiarity principle can be breached when a proposal does not contain a supranational element and there is no need for harmonization.<sup>82</sup> In some cases, the chambers assess only the fulfilment of the national insufficiency test. For example, the Czech Senát indicated with regard to the Commission proposal initiating the Eurojust reforms that the current systems of member states could be improved leading to a better functioning of the regulation already in place.<sup>83</sup>

In addition, the substantive assessment of the subsidiarity principle was followed by the procedural scrutiny connected with the ‘onus to justify’ legislative proposals which rests on EU institutions.<sup>84</sup> Specifically, national legislatures check whether the Commission has justified the compatibility of proposed legislation with the subsidiarity principle.<sup>85</sup> The Czech Senát and to a large extent the Polish chambers found this type of subsidiarity breach in a number of proposals.<sup>86</sup> For example the Czech Senát opined that the Commission did not substantiate the proposed Eurojust reforms from the perspective of their compliance with the subsidiarity principle.<sup>87</sup>

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<sup>79</sup> R Schütze, *From dual to cooperative federalism: the changing structure of European law* (Oxford University Press 2009) at 250.

<sup>80</sup> Polish Sejm, Reasoned Opinion of 12.10.2012 on COM (2012) 372.

<sup>81</sup> Czech Poslanecká sněmovna, Reasoned Opinion of 7.10.2010 on COM (2010) 379. For the Czech Senát see Reasoned Opinion of 9.10.2013 on COM (2013) 534.

<sup>82</sup> See Polish Senat, Reasoned Opinion of 21.10.2010 on COM (2010) 379.

<sup>83</sup> Czech Senát, Reasoned Opinion of 9.10.2013 on COM (2013) 535.

<sup>84</sup> G De Búrca, ‘Re-appraising subsidiarity’s significance after Amsterdam’ *Harvard Jean Monnet working paper series* <<http://jeanmonnetprogram.org/archive/papers/99/990701.html>>, 8.

<sup>85</sup> See X Groussot and S Bogojević, ‘Subsidiarity as a Procedural Safeguard of Federalism’ in L Azoulai (ed), *The question of competence in the European Union* (Oxford University Press 2014) at 235.

<sup>86</sup> See Sejm Reasoned Opinion of 12.10.2012 on COM (2012) 372 and Sejm Reasoned Opinion of 13.01.2012 on COM (2011) 560. See also in Sejm Reasoned Opinion of 25.11.2010 on COM (2010) 537 and also in Sejm Reasoned Opinion of 25.11.2010 on COM (2010) 539, Sejm Reasoned Opinion of 4.03.2011 on COM (2010) 799; Sejm Reasoned Opinion of 3.02.2011 on COM (2010) 728, Polish Senat Reasoned Opinion of 9.01.2013 on COM (2013) 614.

<sup>87</sup> Czech Senát, Reasoned Opinion of 9.10.2013 on COM (2013) 535.

The reasoned opinions of the Polish and Czech chambers focus on a number of relevant issues in the Commission proposals, going beyond the assessment of the subsidiarity principle. While the question on whether national parliaments should apply a broad scrutiny of Commission proposals that steps beyond their competence to monitor subsidiarity compliance indicated in Protocol No. 2 is currently under discussion in national parliaments and EU legal scholarship alike, for descriptive purposes the issues raised by the Czech and Polish parliaments in their reasoned opinions are discussed below.<sup>88</sup> These include the evaluation by the chambers under analysis of the legal basis and proportionality of Commission proposals as well as criticism of delegations of executive powers upon the Commission and the standards of protection of fundamental rights included in the Commission proposals (Czech chambers exclusively).<sup>89</sup>

The assessment of the legal basis of Commission proposals is connected with the close links of the principle of conferral to the principle of subsidiarity, both anchored in Article 5 TEU.<sup>90</sup> It is argued that ‘if the Union already fails the competence test, a subsidiarity test even if conducted cannot possibly be positive.’<sup>91</sup> Within the Czech and Polish legislatures under analysis, the reasoned opinions of the Polish Sejm exemplify such scrutiny. For example, in its reasoned opinion on the Common Consolidated Corporate Tax Base stated that the EU lacks competence of direct taxation and the proposal was wrongly based on Article 115 TFEU.<sup>92</sup> Hence, in the view of the Sejm, ‘exceeding competences conferred on the Union must be considered an infringement of the principle of subsidiarity.’<sup>93</sup> The chamber drew a similar conclusion in the case of the Commission proposal establishing an EU legal framework for determining jurisdiction and the law applicable to the property consequences of registered partnerships stating that the issue at stake belongs to the area of substantive family law and would, as a result,

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<sup>88</sup> See Twenty-third Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny (6.05.2015) at 29 ff; Folketing, European Affairs Committee, 23 Recommendations to strengthen national parliaments in the changing European governance (January 2015); F Fabbrini and K Granat, ‘Yellow Card, but No Foul’: The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike, 50 *CML Rev* (2013) 115; M Goldoni, ‘The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation’, 9 *European Constitutional Law Review* (2014) 98; M Bartl, ‘The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit’ 21 *European Law Journal* (2015) 23.

<sup>89</sup> For a detailed analysis of the content of the reasoned opinions of the Polish parliament see also C Mik, K Kuszel, M Zreda, ‘Parlamenty narodowe wobec zasady pomocniczości w świetle prawa i praktyki Unii Europejskiej’, BAS, Prace Studialne, nr 18/12/2014 at 95 available at [http://orka.sejm.gov.pl/WydBAS.nsf/0/DA2934F5B0C605DBC1257DB200459923/\\$file/Parlamenty\\_wobec\\_pomocniczosci.pdf](http://orka.sejm.gov.pl/WydBAS.nsf/0/DA2934F5B0C605DBC1257DB200459923/$file/Parlamenty_wobec_pomocniczosci.pdf).

<sup>90</sup> P Craig, *EU administrative law* (Oxford University Press 2010) at 40.

<sup>91</sup> Ph Kiiver, *The early warning system for the principle of subsidiarity: Constitutional theory and empirical reality* (Palgrave 2012) at 99. In contrast Judge Thomas Von Danwitz concludes that subsidiarity cannot settle the question of competence, even though that question might be related to the more general idea of subsidiarity. See T von Danwitz, ‘Subsidiaritätskontrolle in der Europäischen Union’ in K Hansmann K-P Dolde, S Paetow, E Schmidt-Assmann (ed), *Verfassung-Umwelt-Wirtschaft Festschrift für Dieter Sellner zum 75 Geburtstag* (Beck 2010) at 40.

<sup>92</sup> Polish Sejm, Reasoned Opinion of 13.05.2011 on COM (2011) 121.

<sup>93</sup> *ibid.*

introduce partnerships to the Polish legal order that currently does not provide for this type of institution.<sup>94</sup>

Third, the compatibility of the Commission proposals with the proportionality principle was a crucial issue in some of the reasoned opinions.<sup>95</sup> Such an assessment requires an evaluation of the necessity of a measure, its adequacy to achieve a desired goal and its conciliation with competing interests.<sup>96</sup> Both Polish chambers included an assessment of the proportionality principle in their reasoned opinions. Accordingly, the Polish Sejm assessed the Commission ‘Women on boards’ proposal as being in breach with the proportionality principle, since ‘it would suffice to adopt EU-wide measures aimed at standardizing the criteria of appointing members of company boards, without the need to establish binding parities.’<sup>97</sup> Similarly, the Czech Poslanecká sněmovna opined that binding quotas for women on boards are a ‘measure of last resort.’<sup>98</sup> Moreover, the Polish Senat indicated that the benefits of maritime spatial planning and integrated coastal management that one of the Commission proposals obliged member states to conduct was ‘disproportionately low’ as compared to their costs from a view point of promoting the maritime and coastal activities.<sup>99</sup> In the same vein, the Czech Senát argued that fulfilling the objective of increased recycling rates by the Commission proposal on waste management is not attainable taking into account its time and costs.<sup>100</sup>

Next, EU draft legislative acts conferring upon the Commission powers to adopt delegated or implementing acts in accordance with Articles 290 and 291 TFEU were a subject of scrutiny in reasoned opinions.<sup>101</sup> Both the Polish chambers and the Czech Poslanecká sněmovna often disapprove of such delegations of power to the Commission provided for in the draft legislative acts assessed under the EWM.<sup>102</sup> For example, the Czech Poslanecká sněmovna argued against the scale of delegations in the proposed tobacco products directive.<sup>103</sup> Similarly, the Polish Sejm and Senat in a series of reasoned opinions highlighted problems with the delegations of the basic draft legislative act. Specifically, they criticised a wide scope of powers delegated on the

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<sup>94</sup> Polish Sejm, Reasoned Opinion of 27.05.2011 on COM (2011) 127. See also Polish Sejm, Reasoned Opinion of 4.01.2013 on COM (2012) 614 and Reasoned Opinion of 10.10.2012 on COM (2012) 369 where it indicates the ‘faulty legal basis’ of the Commission proposal, but outside of the subsidiarity violation.

<sup>95</sup> For relationship between subsidiarity and proportionality principles see A G Toth, ‘The principle of subsidiarity in the Maastricht Treaty’ 29 *CML Rev* (1992) 1079, 1083.

<sup>96</sup> A Stone Sweet and J Mathews, ‘Proportionality balancing and global constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 72.

<sup>97</sup> Polish Sejm, Reasoned Opinion of 4.01.2013 on COM (2012) 614.

<sup>98</sup> Czech Poslanecká sněmovna, Reasoned Opinion of 6.12.2012, COM (2012) 614.

<sup>99</sup> Polish Senat, Reasoned Opinion of 23.04.2013 on COM (2013) 133.

<sup>100</sup> Czech Senát, Reasoned Opinion of 1.10.2014 on COM (2014) 397.

<sup>101</sup> R Schütze, ‘‘Delegated’ Legislation in the (new) European Union: A Constitutional Analysis’ 74 *Modern Law Review* (2011) 661.

<sup>102</sup> Such an assessment under the EWS is wide spread under the EWM. See C Moury, A Heritier and K Granat, ‘The Contest for Power in Delegated Rule-Making’ in C Bergström and D Ritleng (eds) *Law-Making by the EU Commission: The New System for Delegation of Powers* (OUP 2016 forthcoming).

<sup>103</sup> Czech Poslanecká sněmovna, Reasoned Opinion of 24.01.2013 on COM (2012) 788, point 2.

Commission;<sup>104</sup> the unclear choice between delegations by means of delegated or implementing acts;<sup>105</sup> the lack of an indication of the objectives, content, scope and duration of delegated power;<sup>106</sup> delegation of regulatory powers with regard to essential elements of the proposal by means of delegated acts;<sup>107</sup> and the subject matters that the Commission aims at tackling by means of delegated acts.<sup>108</sup>

Although fundamental rights have found a prominent position in Article 6 TEU in the EU, national parliaments negatively assess their safeguards.<sup>109</sup> This is especially visible in the reasoned opinions of the Czech chambers which raised the question of fundamental rights protection offered by Commission proposals. The Czech Senát underlined in its reasoned opinion that the European Public Prosecutor's Office (EPPO) regulation violates fundamental rights guaranteed by the Czech constitutional system and by the ECHR (and in the view of the chamber, in consequence, violates also the Charter of Fundamental Rights). Especially problematic were the right to a lawful judge due to the EPPO's choice of the competent court and the right to fair trial due to single-instance procedures and lack of appeal procedures against the EPPO decisions.<sup>110</sup> In turn the Czech Poslanecká sněmovna argued that the EU might also propose standards that are too high. Specifically, the chamber opined that the Commission proposal on third country seasonal workers would raise the standard of social rights of the workers from third countries beyond that offered to the EU citizens in cases where transitional periods apply.<sup>111</sup>

Finally, in their content the reasoned opinions of the Czech Poslanecká sněmovna are rather succinct as compared to the upper chamber's opinions that contain many more comments on the substance of the proposals. The Polish Sejm also offers some general comments on the proposals, as for example with regard to the proposal 'on clinical trials on medicinal products for human use' where the chamber indicated its reservations about the 'general concept' of the proposal since it concerns 'matters of strictly national character and of the ethical aspects of the clinical trial'.<sup>112</sup>

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<sup>104</sup> Polish Sejm, Reasoned Opinion of 25.11.2010 on COM (2010) 537 and of 4.03.2011 on COM (2010) 799.

<sup>105</sup> Polish Sejm, Reasoned Opinion of 25.11.2010 on COM (2010) 539.

<sup>106</sup> Polish Sejm, Reasoned Opinion of 4.02.2011 on COM (2010) 738.

<sup>107</sup> Polish Senat, Reasoned Opinion of 4.02.2011 on COM (2010) 738 and on COM (2010) 799.

<sup>108</sup> Polish Sejm, Reasoned Opinion of 25.11.2010 on COM (2010) 539; Polish Senat, Reasoned Opinion of 25.11.2010 on COM (2010) 537 and of 25.11.2010 on COM (2010) 539.

<sup>109</sup> R Schütze, 'Three 'Bills of Rights' for the European Union' 30 *Yearbook of European Law* (2011) 131.

<sup>110</sup> Czech Senát, Reasoned Opinion of 9.10.2013 on COM (2013) 534.

<sup>111</sup> Czech Poslanecká sněmovna, Reasoned Opinion of 22.09.2010 on COM (2010) 379. See in the same vein the Polish Senat, Reasoned Opinion of 21.10.2010 on COM (2010) 379.

<sup>112</sup> Polish Sejm, Reasoned Opinion of 10.10.2012 on COM (2012) 369.

## Debates and votes under the EWM

This section studies the debates in the parliamentary committees or plenary sessions and the voting patterns for all the reasoned opinions issued by the Polish and the Czech parliaments. The aim is to uncover whether the respective parliamentary chambers gained some independence from their governments under the EWM and whether there is a party division on issuing a reasoned opinion.

### Parliament's independence from Government's views under the EWM

The first issue to consider is the extent to which under the EWM the Czech and Polish parliamentary chambers act independently from their respective governments. This challenge is based on the assumption that it is rather improbable that a national parliament's majority would take a different position from that of the government on the issue of subsidiarity.<sup>113</sup> The analysis of the debates in the EACs and the plenary debates in Poland and in the Czech Republic shows a different state of affairs in each of the Member States under analysis despite the fact that both depict a consensus model with executive power-sharing in broad coalition cabinets as opposed to the Westminster model characterized by concentration of executive power in one-party and the government dominant vis-à-vis the parliament.<sup>114</sup>

In the Czech Poslanecká sněmovna and the Senát, the position of the government and of the parliament with regard to subsidiarity tends to be the same.<sup>115</sup> However in Poland, the chambers disagreed with the government on a number of occasions. Specifically, this was the case in the Sejm with regard to the Commission proposal on Common Consolidated Corporate Tax Base;<sup>116</sup> on clinical trials on medicinal products for human use,<sup>117</sup> on the management of copyrights in

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<sup>113</sup> F C Mayer, 'Competences-Reloaded-The Vertical Division of Powers in the EU and the New European Constitution' 3 *International Journal of Constitutional Law* (2005) 493, 502. In addition, de Wilde argues that '[g]overnment frequently cajole their backbenchers into supporting them using the possible loss of a parliamentary majority as a threat. Given such a situation, it seems unlikely that parliament will send a reasoned opinion to the Commission without the consent of its government.' See P de Wilde, 'Why the Early Warning Mechanism does not Alleviate the Democratic Deficit' OPAL Online Paper Series <[http://www.opal-europe.org/index.php?option=com\\_content&view=article&id=76&Itemid=108](http://www.opal-europe.org/index.php?option=com_content&view=article&id=76&Itemid=108)> at 9.

<sup>114</sup> A Lijphart, *Patterns of Democracy, Government Forms in Thirty-Six Countries* (Yale University Press 2012). See also the chapter by Cygan in this Volume who points out the relatively more important ministerial accountability in comparison to the EWM.

<sup>115</sup> For Poslanecká sněmovna: Minister of Labour and Social Affairs, EAC meeting of 6.12.2012; Minister of Agriculture Czech, EAC meeting of 24.01.2013; For Senát: See Minister of Interior, Stenographic record of 23rd Senát meeting Parliament of the Czech Republic (The first day of the meeting - 22. September 2010) and in the reasoned opinion itself on COM (2010) 379; Minister of Justice Czech Parliament, the Senát 9th term Stenographic record of the 14th meeting of the Senát on COM (2013) 534 and 535; Minister of Industry and Trade Czech Parliament, the Senát 9th term Stenographic record of the 25th meeting of the Senát (the first day of the meeting - Oct. 1, 2014).

<sup>116</sup> COM (2011) 121. According to the government the directive will resolve transparency issues. See Pełny zapis przebiegu posiedzenia Komisji do Spraw Unii Europejskiej, 26.09.2012, p. 5.

<sup>117</sup> COM (2012) 369. Sprawozdanie Stenograficzne z 23. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 10.10.2012, p. 8.

musical works.<sup>118</sup> Both the Sejm's and the Senat's position differed from that of the government regarding the issuing of the reasoned opinion on the 'Women on Boards' proposal.<sup>119</sup> In addition, for a number of early Commission proposals the government did not deliver any opinion on subsidiarity either in the proceedings before the Sejm or the Senat.<sup>120</sup> The Polish government itself gave a plausible explanation of the different views on subsidiarity. Specifically, during the Sejm debate on the Commission regulation on clinical trials on medicinal products for human use, the representative of the government justified the support for the draft proposal by stating that '[the government] does not want to be seen as blocking all the [EU] initiatives.'<sup>121</sup> This explanation might apply also to the other cases of disagreement between the government and parliament on issuing a reasoned opinion.<sup>122</sup> Nonetheless, it also underlines that the Polish parliament, and especially the Sejm, has gained some independence under the EWM.

In contrast to that, in the Czech Republic, the views of the government and the chambers overlapped in all cases where the reasoned opinion was issued.<sup>123</sup> Interestingly, this was the case also with regard to the EPPO and Eurojust reform proposals, when the Social Democrats had the majority in the Senát while the government was conservative.<sup>124</sup>

### **Unanimity on issuing the reasoned opinions**

Second, this chapter studies whether the decision to conduct a subsidiarity review through the EWM echoes divisions between the parliamentary majority (coalition) and the minority (opposition) or whether issuing a reasoned opinion is a unanimous decision.

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<sup>118</sup> COM (2012) 372. Sejm, Sprawozdanie Stenograficzne z 23. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 11.10.2012, p. 243.

<sup>119</sup> COM (2012) 614. Sejm, Sprawozdanie Stenograficzne z 31. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 03.01.2013, p. 86. The government's representative stated that the position of the government is favourable to the aim of the directive, but the way to achieve this aim should be more flexible. No stance on subsidiarity. See Sprawozdanie Stenograficzne z 25. Posiedzenia Senatu, 9.01.2013, p. 151.

<sup>120</sup> COM (2010) 799: The government does not assess subsidiarity, but expressed criticism with regard to merits similarly to the parliament. See Sejm Biuletyn z posiedzenia Komisji do Spraw Unii Europejskiej, 18.02.2011; COM (2010) 537 & COM (2010) 539: The government did not take a specific stance on subsidiarity, yet criticised the lack of precision of delegation. Sejm, EAC, 05.11.2010, Biuletyn Nr 4349/VI; COM (2010) 728: No position of the government on subsidiarity, but it seconds the EU Affairs Committee in the criticism of extensive implementation powers to the Commission. Sejm, EAC, 21.01.2011, p. 7; COM (2010) 745: Not specified. Senat, Zapis Stenograficzny, Wspólne posiedzenie Komisji Rolnictwa i Rozwoju Wsi oraz Komisji Spraw Unii Europejskiej, 3.02.2011.

<sup>121</sup> In response, one of the MPs proposed that a reasoned opinion should change the future position of the government. See Pełny zapis przebiegu posiedzenia Komisji do Spraw Unii Europejskiej, 29.08.2012, p. 12.

<sup>122</sup> See opinions mentioned fn 114-117 above.

<sup>123</sup> COM (2010) 379: Minister of Interior, Stenographic record of 23rd Senate meeting Parliament of the Czech Republic (The first day of the meeting - 22. September 2010); COM (2012) 614: Minister of Labour and Social Affairs, Czech Chamber of Deputies EAC meeting of 6.12.2012; COM (2012) 788: See the Reasoned Opinion of 24.01.2013 of the Czech Poslanecká sněmovna; COM (2014) 397: Minister of Industry and Trade, Czech Parliament, Stenographic Record 25th meeting of the Senate (1st day meeting - 01.10.2014).

<sup>124</sup> Minister of Justice Czech Parliament, the Senát 9th term Stenographic record of the 14th meeting of the Senát (the first day of the meeting - October 9, 2013).

During the votes on the reasoned opinions in the EAC of the Czech Poslanecká sněmovna, the deputies took the resolution to issue a reasoned opinion on the third country seasonal workers proposal and on the tobacco products directive unanimously (with some of the members abstaining),<sup>125</sup> while there was more contestation on ‘Women on Boards.’<sup>126</sup> The analysis of voting procedures on the reasoned opinions in the Czech Senát indicates that there is rather a consensus among the senators that the reasoned opinion should be put forward to the Commission. More specifically, the parties on both sides of the political spectrum broadly accepted the reasoned opinions.<sup>127</sup> One explanation of this situation could be that EU issues are no longer as divisive as before accession and are nowadays more technical than strategic.<sup>128</sup>

In the same vein, a noticeable convergence between the coalition and opposition can be found in both the Sejm and the Senat.<sup>129</sup> In principle, when the governing coalition proposes a reasoned opinion, it passes through the chambers. In contrast, it is harder for the parliamentary opposition to succeed in the subsidiarity review. For example, the reasoned opinion sponsored by one of the opposition parties (PiS) regarding the Commission proposal for the programme FISCUS supporting cooperation between tax and customs authorities of the Member States failed to get sufficient support.<sup>130</sup>

Although there seems to be a major convergence of views between the political parties with regard to subsidiarity violations regardless of the fragmentation of the domestic party system, visibly some cases display the right-left cleavage.<sup>131</sup> The party positions on specific policy issues tend to play a role in the question whether to issue a reasoned opinion in the lower chambers of the member states under analysis.<sup>132</sup> In consequence, the parliamentarians follow their general party programme, rather than the specific party stance on EU affairs.

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<sup>125</sup> On COM (2010) 379: Poslanecká sněmovna EAC, meeting of 7.10.2010, Votes 6-0-0. On COM (2012) 788: Poslanecká sněmovna, EAC meeting of 24.01.2013, Vote 7-0-1.

<sup>126</sup> Poslanecká sněmovna, EAC meeting of 6.12.2012, Vote 7-2-3 (2 disagreed, 3 abstained).

<sup>127</sup> On COM (2010) 379: 23<sup>rd</sup> meeting, resolution of Senát of 22.09.2010, vote no 562, 44 of ODS, ClubTop9 and some of ČSSD were in favour of the reasoned opinion and 10 abstained (ČSSD and one independent - main argument was protection of third country nationals). On COM (2013) 534 and COM (2013) 535 14th meeting of the Senát of 9.10.2013, 50 in favour and 4 abstained (mostly ODS) and 48 in favour, 5 abstain (mostly ODS); On COM (2014) 397 25<sup>th</sup> meeting, 1.10.2014, 52 in favour and 3 abstain (mostly ODS).

<sup>128</sup> Hrabálek and Strelkov n 50 at 496. Hrabálek and Strelkov put this forward as an argument why it is almost always the EAC taking binding resolutions for the Chamber in EU affairs. This is in contrast to the Senát where the State plenary acts as a ‘gatekeeper’ especially when the chairmanship in the EAC was of different political colour than the majority in the Senát.

<sup>129</sup> For the purposes of the study on the Polish parliament, I disregarded single votes of MPs or Senators that were not in favour of issuing a reasoned opinion.

<sup>130</sup> Proposal for a Regulation of the European Parliament and of the Council establishing an action programme for customs and taxation in the European Union for the period 2014-2020 (FISCUS) and repealing Decisions N°1482/2007/EC and N°624/2007/EC, COM (2011) 607. See Sejm, Sprawozdanie Stenograficzne z 5. Posiedzenia Sejmu, 13.01.2012, p. 237 ff.

<sup>131</sup> In addition, the socio-economic cleavage is visible in other member states. See Granat n 32.

<sup>132</sup> This outcome contrasts with the findings of the study by Gattermann and Hefftlér, who argue that ‘the traditional conflict along the left-right lines ‘hardly matters for the subsidiarity review.’ See K Gattermann and C Hefftlér,



In the first example, in the Sejm, the Democratic Left Alliance, a party in favour of the introduction of partnerships into the Polish legal order, did not support the reasoned opinion on the Commission proposal on the property consequences of registered partnerships with an objective to enable management and division of property of such couples. The party argued that ‘it is in line with the plans or program of the SLD that supports the legalisation of partnerships in Poland.’<sup>133</sup> The second instance of a right-left division took place in the Sejm and in the Czech Poslanecká sněmovna. On the Polish side, the majority of the governing coalition and the conservative MPs of the parliamentary opposition (PiS, SP) supported the reasoned opinion, against the Commission’s proposal introducing gender quotas on non-executive boards of companies. In contrast, the liberal opposition (SLD, Ruch Palikota) resisted the issuing of a reasoned opinion in this case, highlighting the need for gender equality on boards and the absence of national measures in this respect.<sup>134</sup> Interestingly, the case of the ‘Women on boards’ proposal was also the only case showing a lack of unanimity in the Czech parliament, beyond the cases where some MPs and senators abstained.<sup>135</sup> The Social Democrats and the communist party MPs who welcomed the Commission proposal underlined the existing inequalities between men and women in labour relations and remuneration in the Czech Republic.<sup>136</sup>

Finally, it has to be emphasized that the cleavages are less visible in the Senates of the parliaments under analysis. This might be connected to the higher levels of politicization of the lower chambers relative to the upper chambers.

### Assessment

In summary, the comparison between the Polish and Czech parliaments along the lines of the ‘most similar cases’ model suggests several plausible explanations (both structural and procedural) for the different approaches they adopt in their scrutiny of the subsidiarity principle, without identifying a strong single causal mechanism.

First, a structural argument have been made that the particular activity of the Czech Senát, the extensive participation in the ‘Barroso initiative,’ and more recently the participation in the first

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‘Political Motivation and Institutional Capacity: Assessing National Parliaments’ Incentives to Participate in the Early Warning System’ OPAL Online Paper Series No. 15/2013 at 17. Although the reasoned opinions described in this chapter have been issued and hence the cleavage did not impact on the number of issued reasoned opinions, the analysis of the parliamentary debates shows that arguments along right-left division are in fact present in the debates of EU legislative proposals.

<sup>133</sup> Own translation. Sejm, Sprawozdanie Stenograficzne z 93. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 25.05.2011, p. 92.

<sup>134</sup> Sejm, Sprawozdanie Stenograficzne z 31. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 03.01.2013, p. 83. Vote: Sejm, Sprawozdanie Stenograficzne z 31. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 04.01.2013, p. 133. See that a number of the governing majority MPs abstained, probably from the more liberal wing; still enough MPs supported the reasoned opinion.

<sup>135</sup> The MPs that voiced their support for the proposal came from KCSM and CSSD.

<sup>136</sup> Poslanecká sněmovna, EAC meeting of 6.12.2012, Vote 7-2-3 (2 disagreed, 3 abstained).

‘green card’, is due to the relative weakness of that chamber in the parliamentary system, which the Senát aims to counter by establishing a strong profile on EU affairs.<sup>137</sup> In the same vein, the upper chambers in other examples of asymmetric bicameralism discussed in this volume, such as the French Sénat, see the EWM as an avenue to enhance its role in the national system.<sup>138</sup> In addition, even in the symmetric Italian bicameralism the Senato takes a more active role both under the EWM and in the ‘Barroso initiative’ in the face of possible constitutional reforms diminishing its role and a more general trend of strengthening of the upper chambers by the Lisbon Treaty reforms.<sup>139</sup> Whilst all these explanations are plausible, it is worth noting that the Polish Senat is subject to a similar asymmetry as the Czech and French upper chambers and nonetheless chooses to pursue a different, more balanced route. Thus, the Czech and other examples do not alone warrant inference of causality.

A second group of arguments focuses on the political stance of parties in power towards European integration, pointing out that a particularly Europhile party may prefer to pursue dialogue through the ‘Barroso initiative’ over a possible confrontation with the Commission through formally issued reasoned opinions. In particular, Hrabálek and Strelkov argue that the Czech Social Democratic party may want to protect its credibility at EU level.<sup>140</sup> Visibly, in the Czech lower chamber, all the reasoned opinions to date have been issued by the governing conservative coalition. In addition, the perception of the EWM as a Eurosceptic tool is evident also in France (low number of reasoned opinions and high number of ‘Barroso initiative’ opinions in the pro-European French Assemblée nationale in contrast to the traditionally more Eurosceptic Sénat).<sup>141</sup> A similar analysis of pro-European behaviour can be conducted for the parties in power in Poland and, however, offer different results. Since 2007 the Civic Platform, which is seen as a Europe-friendly party, has controlled both houses of parliament, but this situation did not prevent it from actively making its case through issuing reasoned options. The approach taken by the EU-friendly parliamentary majority might hence not be decisive for the participation in the EWM.

Third, procedural aspects of the EWM may play a crucial role in different levels of participation of parliaments: the national scrutiny procedures for the EWM and the eight-week constraint for submission of the reasoned opinions. Since the EWM procedures at the national level are similar in the Czech and the Polish chambers (centralised and mixed) this aspect seems not to play a role for their activity.<sup>142</sup> Due to the cycles of parliamentary work and not very frequent EAC’s

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<sup>137</sup> Hrabálek and Strelkov n 50 at 503. For possible explanations of the activity of upper chambers, including the Czech Senát under the EWM, see M Romaniello, ‘Assessing Upper Chambers’ Role in the EU Decision-Making Process’, Luiss Guido Carli School of Government Working Paper Series 26/2015 at 15.

<sup>138</sup> See Chapter by Tacea on the French Parliament in this Volume.

<sup>139</sup> See Chapter by Lupo on the Italian Parliament in this Volume.

<sup>140</sup> Hrabálek and Strelkov n 50 at 504.

<sup>141</sup> See Chapter by Tacea on the French Parliament in this Volume.

<sup>142</sup> In contrast, Lupo shows that the different procedures in the Italian chambers (especially their ‘kick off’) influence the number of reasoned opinions issued. See the chapter by Lupo in this Volume.

meetings the participation in the EWM might be impaired.<sup>143</sup> For example, the Czech Senát adopted a reasoned opinion on the right to strike proposal and on the proposal for recovery and resolution of credit institutions which however were not submitted within the eight weeks period.<sup>144</sup> In contrast the ‘Barroso political dialogue’ allows for a flexible submission of contributions. The eight-week deadline in the EWM seems less problematic for the Polish parliament. The EAC committees meet regularly, in addition, the reasoned opinions are voted on in the plenary and an evident case where the reasoned opinion was not agreed to was due to the lack of support rather than lack of time. Yet, the wish to increase the time available for drafting the reasoned opinions has also been voiced by the Polish parliament.<sup>145</sup>

## Conclusion

This chapter presented the functioning of the EWM in the Czech Republic and in Poland. In these two relatively recent new EU Member States the position of the parliament in the constitutional system is similar, since they represent the unequal bicameralism model. The powers of the legislatures in the Czech Republic and in Poland in EU affairs were also strengthened with the entry into force of the Lisbon Treaty. Accordingly, the Czech and the Polish chambers rely to a large extent on the EACs for the subsidiarity scrutiny. Due to these similarities, the Czech and the Polish parliaments could be perceived as two peas in a pod. Surprisingly, their activity under the EWM is very different. The Polish Sejm and the Senat have issued around a dozen of reasoned opinions each, while their Czech counterparts remained rather quiet in this procedure. Moreover, the Czech Senát relied much more on the ‘Barroso initiative’ becoming one of the most active parliaments EU-wide in this respect. The aim of this chapter was hence to explore the possible reasons for this discrepancy.

The chapter has first studied the content of the reasoned opinions that the Czech and the Polish parliaments issued since the entry into force under the second Barroso Commission which covered the period since the entry into force of the Lisbon Treaty until December 2014. The reasoned opinions show that both parliaments apply a rather generous reading of the EWM under Protocol No. 2. They assess the material and procedural aspects of the subsidiarity principle, in addition to the assessment of the legal basis and proportionality of Commission proposals. Moreover, the Polish parliament’s focus is also on the legal basis of proposals and conferrals of the delegated and implementing power to the Commission while the Czech parliament emphasised the fundamental rights questions raised by the proposed draft acts.

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<sup>143</sup> Hrabálek and Strelkov n 50 at 502.

<sup>144</sup> Czech Senát, Reasoned Opinion of 14.06.2012 on COM (2012) 130 and Reasoned Opinion of 25.10.2012 on COM (2012) 280. Senator Miroslav Krejča indicated these cases during the sitting of the Senát of 9.10.2013, Stenographic record of the 14th meeting of the Senát (the first day of the meeting - October 9, 2013).

<sup>145</sup> See n 70.

The analysis of the debates and of the voting on the reasoned opinions in the Czech and Polish parliaments has offered some more insights in the application of the EWM in both Member States. In Poland and in the Czech Republic, the political parties usually vote unanimously that a reasoned opinion should be issued. However, some right-left political cleavages are visible in the debates under the EWM. The in-depth study of the EWM in Poland and the Czech Republic shows also that beyond the unequal number of the reasoned opinions issued by the chambers, there is a visible difference in the relationship vis-à-vis the government. Specifically, in a number of cases the Polish Sejm has issued a reasoned opinion although the government did not establish a subsidiarity violation by the Commission proposals at stake. It was hence argued that the chamber became more independent from the government under the EWM than the Senat or the Czech chambers.

Finally, the chapter attempted to give some explanation to the dissimilar application of the subsidiarity scrutiny in the two ‘most similar cases’. First, the argument that the Czech Senát has built a strong profile in the ‘Barroso initiative’ due to its generally rather limited competences in the Czech bicameralism was rejected since the Polish Senat has the same position as its Czech counterpart and did not take a matching approach under the EWM. Second, the case that a pro-European stance of political parties bars the parliament from issuing a reasoned opinion does not offer an explanation for the differentiated functioning of the EWM in Poland and the Czech Republic. Visibly, the Polish Euro-friendly coalition parliament, in contrast to the Czech parliament, did not limit its participation under the EWM. Lastly, the concerns of the parliaments with the eight-week limit for submitting the reasoned opinions and its interplay with the agenda of the parliament might offer some, however, probably not the only explanation to the activity of the EWM in Poland and the Czech Republic.