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COLLECTIVE ACTION PROBLEMS INHERENT IN
THE EARLY WARNING MECHANISM:
THE CASES OF MONTI II AND EPPO

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ABSTRACT

The 2009 Lisbon Treaty introduced the Early Warning Mechanism into the EU decision-making process, giving National Parliaments the task to monitor the compliance of EU legislative proposals with the principle of subsidiarity. It is theoretically argued that in doing so, they meet a collective action problem in form of an assurance problem, meaning they only ineffectively exert their scrutiny rights. Despite these theoretical predictions, National Parliaments triggered the mechanism twice so far by issuing yellow cards on COM/2012/0130/‘Monti II’ and COM/2013/0534/‘EPP0’. Thus, this paper aims at analysing how National Parliaments managed to overcome the assurance problem in these cases. It is demonstrated that National Parliaments used to this end effective leadership and inter-parliamentary cooperation during the scrutiny period. Subsequently, four conclusions are drawn about the importance of effective leadership and inter-parliamentary cooperation, the importance of working communication links between national parliamentary administrations and politicians, the importance of early activity of Parliaments and the importance of the network of National Parliamentary Representatives for overcoming the assurance problem.

Keywords: Collective Action Problem, Early Warning Mechanism, EU Decision-Making, National Parliaments, Yellow Card

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1. INTRODUCTION

National Parliaments (NPs) have undergone a remarkable fate in the EU's institutional system. For a long time, they were considered the main losers of the European Integration process, "left behind in the rush" (Norton 1996: 192) and only indirectly involved in the process of EU policy-making. Mainly due to democratic legitimacy concerns, both politicians and academics called increasingly for NP's direct involvement at the EU level (Cooper 2013a: 538) and with the 2009 Lisbon Treaty, NPs are for the first time assigned specific roles in the main text of the Treaty. Most notably, it introduced the so-called Early Warning Mechanism (EWM), which allocates NPs the responsibility to ensure that EU legislative drafts comply with the principle of subsidiarity. In cases NPs discover a breach, a third or more in acting together can issue a "yellow card", vetting and temporarily blocking the proposal.

This new instrument has received much scholarly attention; yet, political scientists still are relatively uncertain about its impact, and little is known how NPs will actually seize this new opportunity. There is however consensus in academia that the EWM is a mechanism of collective responsibility, meaning collective mobilization is the key for the effectiveness of NPs in scrutinizing subsidiarity. Subsequently, some scholars argue that the need to act collectively makes Collective Action Theory applicable to the EWM, implying a collective action problem. Perceiving a yellow card as a collective good from the perspective of NPs, they claim that this good will only be inefficiently provided (Buzogány/Stuchlík 2011; Cooper 2013b).

Despite these gloomy predictions, NPs have "yellow carded" twice so far. In May 2012, they rejected a proposal on common EU rules to the rights to strike ("Monti II"); in October 2013 the proposal to establish a European Public Prosecutor's Office on crimes affecting the financial interests of the EU ("EPPO"). Whilst some scholars and commentators concluded that the yellow card "comes of age" and that it "marks [NPs'] arrival as serious players in how the Union is governed" (Brady 2013b), a thorough analysis of how these cards came to happen despite the above-said collective action problem is still outstanding. Thus, this paper aims at analysing *How did NPs manage to overcome the collective action problem inherent in the EWM in cases of successfully triggering a yellow card?*

By that, this paper does not intend to provide a complete picture of how these two yellow cards happened, but focuses more narrowly on the collective action problem as one of

several internal problems in the EWM and mechanisms to overcome it as the outcome of interest. Thus, neither does it aim at explaining the particular consequences of each yellow card by analysing its substantial impact on the decision-making processes. Whilst these questions have in fact not been researched so far in-depth, they would be too far-reaching for the scope of this paper and cannot be dealt with under the more narrow theoretical focus of Collective Action Theory. Furthermore, this paper will not specifically analyse the actual content of the proposals triggering a yellow card and the responding reasoned opinions; but take them into consideration in the analysis when necessary.¹ As the goal of this paper is to empirically explain a particular outcome, namely successful cases of triggering a yellow card in regard to overcoming an inherent collective action problem, broad generalizability and theory-building is not the primary research purpose. To be able to draw valid theorizable conclusions from the empirical analysis, this paper would need more variance on the outcome variable as well as more cases under investigation. Nonetheless, this paper will attempt to draw some cautiously generalizable policy recommendations for NPs under the EWM.

In order to answer the above-stated research question, this paper will first offer an overview of the EWM as a new tool for NPs and present the underlying assumptions (2.), followed by the application of Collective Action Theory to the EWM setting, substantiating the yellow card as a collective good and identifying the collective action problem at hand (3.). Subsequently, on basis of Collective Action Theory, a hypothetical story of how NPs managed to overcome the collective action problem inherent in the EWM will be developed (5.), which will guide the following empirical analysis. The latter will consist of case studies of the processes leading to the two yellow cards (6.; 7.) and conduct a comparison of these (8.). Finally, a conclusion will be drawn (9.).

2. THE EARLY WARNING MECHANISM AS A NEW TOOL FOR National Parliaments

The EWM is set out in Protocol No. 2 *On the Application of the Principles of Subsidiarity and Proportionality* and allocates NPs the responsibility to monitor the

¹For a thorough presentation and legal analysis of the reasoned opinions on Monti II, see Fabbrini/Granat 2013. A similar analysis on EPPO is still outstanding.

subsidiarity compliance of EU legislative drafts. After the submission of the draft by the proposing institution to the NPs, these have an 8-week period for their scrutiny. If an NP judges a violation of subsidiarity, it may within eight weeks send a negative reasoned opinion back to the proposing institution, stating its objections (Art. 6). In this system, each parliamentary chamber is allocated two votes (per unicameral system, one vote each in bicameral systems, Art. 7 (1)). If one third of the votes raise objections, the proposing institution must review the draft, after which it may then maintain, amend or withdraw it (yellow card, Art. 7 (2)).

By now, the EWM has been in place for about four years. Until March 2014, NPs have, with increasing activeness², in total issued 278 reasoned opinions. Two yellow cards have been triggered. On 22 May 2012, the so-called Monti II proposal (COM/2012/0130) met the necessary threshold. Whilst the Commission eventually withdrew the proposal, it argued that this was not because of a subsidiarity violation, but because of wider political opposition. On 28 October 2013, the EPPO proposal (COM/2013/0534) had received enough reasoned opinions to trigger the mechanism a second time. This time, the Commission decided to maintain the proposal, supported by the European Parliament and a number of NPs (Seimas 2014: 2f.). As of June 2014, the EPPO proposal is still under negotiation in the Council. However, the current text is partially alternative to the Commission's original text, as changes have been made aimed at reflecting previous discussions in the Council and the views of NPs manifested in their reasoned opinions (European Scrutiny Committee 2014).

The so-far use of the EWM points towards the increasing importance of the mechanisms as a tool for NPs to safeguard their influence in EU decision-making. This needs to be seen against the background of an EU policy-making process that tends to exclude NPs from decision-making. NPs have for a long time suffered from de-parliamentarization, meaning that European Integration has led to an erosion of parliamentary influence in EU policy-making (Raunio 2011: 304). With the transfer of competences to supranational EU institutions, the prerogatives of NPs were substantially reduced, whereas developments on the supranational level favoured the executive branch (O'Brennan/Raunio 2007: 1ff.).

In line with much of the recent literature on European policy-making, which is closely related to rational-choice theory (e.g. Hosli 1995; Tsebelis/Garret 2000; Thomson et al. 2006), investigating the role of NPs in this process should rely on approaches analysing the role of other actors in the policy-making process (Knutelská 2011: 331). Thus, NPs in this

² 35 reasoned opinions (2010), 65 (2011), 78 (2012) and 94 (2013).

paper are perceived as rational actors, meaning they have clearly defined preferences and display instrumental rationality, choosing the best means to maximize their utility and chances of achieving these preferences (Colman 2004: 287). As NPs in the European context are part of the EU's institutional balance, they participate in the distribution of power among all EU institutions. Hence, it can be argued that the preference of rational NPs, independent of specific policies or topics, is to safeguard their own authority in the evolving political system (Winzen et al. 2012: 2). Influence is defined as control over the outcomes of decision-making processes with the institutional power vested in the rational actor (Rasmussen 2000: 3). This background assumption also implies that NPs are unitary actors, homogeneous in regard to their desire to trigger a yellow card if they consider the subsidiarity principle violated. Yet, NPs might have own interests going beyond that.

Thus, combining these two argumentation strands of NPs as rational actors in an environment in which they are constantly losing influence, they are expected to compensate the altered power structure. "This is exactly what we observe when we study [NPs] in the process of European integration. [P]arliamentary actors as the alleged losers of the European integration [...] identify the structural disadvantages [...] and react accordingly" (Auel/Benz 2004: 2f.). Until recently, scrutinizing EU decision-making indirectly by controlling their respective national government in the Council was widely regarded as the principle channel for NPs to influence EU policy-making (Winzen et al. 2012: 6). However, research has demonstrated that it is not necessarily an effective way for NPs to safeguard the power they have been losing (for an overview Goetz/Meyer-Sahling 2008). Thus, it is to expect that NPs turn to the other available channels for doing so, namely entering the process directly on the European level by interacting with the European institutions participating in it (Knutelská 2011: 329f.). "The European level currently offers national parliaments one clearly defined legal tool, namely the early warning mechanism" (ibid.: 331).

Whilst academia and political discourse have not yet arrived at a picture of the impact of this new scrutiny mechanism (e.g. Raunio 2011; Cooper 2012; Paulo 2012), it gives NPs some autonomous functions for controlling certain aspects of EU decision-making independently of their respective governments (Lupo 2013: 10) and the possibility to directly interact with EU institutions in the EU decision-making process for the first time. It can be argued that the institutionalized voice of NPs cannot be ignored by the other participating institutions, irrespective of the later outcome of the legislative process. Without analysing the impact of the two yellow cards on the decision-making process, a first glimpse at the subsequent negotiations suggests that – admittedly or not – the objections brought forward by NPs

influenced them to a certain extent. Thus, it can be followed that NPs' negative empowerment towards EU legislation gives them a power-bargaining position in the EU decision-making process (Kaczyński 2011: 15). "Reaching a blocking majority, even if only temporarily, increases the net bargaining power for [NPs], irrespective of their preferences" (Buzogány/Stuchlík 2011: 18). This argument combined with the underlying assumption about NPs as rational actors wanting to regain influence directly at the European level leads to conclude that triggering a yellow card is not only beneficial to, but also in the interest of all NPs if they consider subsidiarity breached³. Therefore, irrespective of their actual policy preferences, they are assumed to be homogeneous in this regard, striving to make active use of the new mechanism in order to maximize their control over the outcome of EU policy-making processes.⁴

3. THE YELLOW CARD AS A COLLECTIVE GOOD AND COLLECTIVE ACTION PROBLEMS

Following this line of reasoning, it can be argued that triggering a yellow card under the EWM is a collective good for NPs (ibid.). According to Collective Action Theory, a collective good, whose production is in the common interest of a given set of individuals, has two defining characteristics: *non-excludability*, meaning it is not feasible or efficient to prevent others from consuming and benefitting from the good, and *indivisibility/jointness of supply*, meaning that the consumption of the collective good by one individual does not diminish the quality or quantity of the benefit available to others (Taylor 1987: 5f.). As a yellow card is beneficial for and in the interest of all parliamentary chambers striving for increasing control over the outcome of EU decision-making, the characteristic of indivisibility applies here, making NPs in the EWM non-rivalrous (ibid.: 7). A yellow card on an EU legislative draft can thus be assumed to be a collective good from this point of view. Furthermore, it is also non-excludable: if a yellow card is triggered, it strengthens the

³ This implies that triggering a yellow card is not a goal *eo ipso*, but rather that there have to be substantial concerns about the subsidiarity compliance of the respective legislative proposal.

⁴ This assumption represents a rather simplified picture of the various approaches and interests of NPs towards the EWM, also as it excludes individual policy preferences. However, on grounds of the afore-said theoretical assumptions, it can be argued that there is a common underlying trend among NPs to view triggering a yellow card as something beneficial for and hence in the interest of all of them.

power position of all NPs in the EU political system; no NP can be excluded from these benefits.

Thus, due to their common interest in producing the collective good, NPs are expected to engage in collective action, meaning “joint actions of a number of individuals which aim to achieve [some common] gain through co-ordination and co-operation” (Holzinger 2003: 2). “The Early Warning System is a mechanism of collective action” (Turşie/Nițu 2011: 39).

However, the provision of collective goods gives rise to *collective action problems*. “A collective action problem exists where rational individual action can lead to a strictly Pareto-inferior outcome, that is, an outcome which is strictly less preferred by every individual than at least one other outcome” (Taylor 1987: 19). Contrary to the assumption “that groups of individuals with common interests [...] act on behalf of their common interests much as single individuals [...] on behalf of their personal interests” (Olson 1971: 1), rational individuals will actually often not act to achieve common goals and thus have difficulties producing collective goods that depend upon collective contributions (Taylor 1987: 3).

While there are various types of collective action problems, the problem at hand takes the form of an assurance problem. This applies when the respective collective good is characterized by a *jointness of production*, meaning that the collective good cannot be provided by one actor alone, or only a few (Chong 1991: 13f., also Taylor 1987: 37f.). With the EWM, the Lisbon Treaty did not empower NPs individually, but collectively. It is not sufficient that one NP gives a negative reasoned opinion, but the mechanism is only triggered if a critical mass of NPs submits one (Korhonen 2011: 7). The threshold requires at least one third of all the votes allocated to the NPs for the “yellow card” procedure (Art. 7 (2) TEU Protocol 2). Thus, NPs are allowed to substantially influence the EU decision-making process only as a group (Knutelská 2011: 331).

In the assurance problem, actors have a “conditional preference for cooperation” (Elster 1979: 21), preferring to contribute to the collective good as long as the other players contribute as well. If this is not the case, defecting (not contributing) is the better strategy. Hence, the choice of individual action is subject to the action of the others. In this situation of interdependent choice, the problem is uncertainty over these actions, making defection the rational decision for the actors (Runge 1984: 162). “Players in the Assurance Game fail to coordinate because they are unsure of what the other players will do” (Lee 2012: 1145).

With several actors, an additional start-up problem arises. “Participation is preferred to inactivity under the right condition – the condition being that “enough others” also

participate to make collective action successful” (Chong 1991: 11). Due to the uncertain prospects of collective action, everybody wants to follow the lead of others to see whether successful collective action is actually likely (ibid.: 116). Theoretically, an initial critical mass of contributors can set a bandwagon process in motion, making cooperation rational for the remaining actors. However, which actor has an incentive to be the initial contributor? For NPs under the EWM, this means there are two obstacles to successfully triggering a yellow card. First, although all NPs would prefer to contribute to the process by issuing their own reasoned opinion, there is an incentive problem due to uncertainty about the actions of others and the subsequent unlikelihood of reaching the necessary threshold. Becoming engaged in the process by adopting reasoned opinions without a yellow card being triggered, thus without gaining the benefits of the collective good, would mean that an NP simply squanders valuable and scarce resources, time and energy. Hence, Collective Action Theory suggests that in this case it is rational for NPs to stay inactive in the 8-week scrutiny period and not to contribute to the collective good. Closely connected, there is a first-mover-problem. One can expect that the initial adoption of reasoned opinions in several NPs raises the level of contributions enough to create a bandwagon process, meaning that other, more reluctant NPs issue their own opinion as the likelihood of triggering a yellow card is high enough. However, the question is who those first movers are.

Despite these obstacles, two yellow cards have been triggered since the introduction of the mechanism in 2009: Monti II and EPPO. The task is now to analyse how this was possible. Thus, this paper aims at answering: *How did NPs manage to overcome the collective action problem inherent in the EWM in cases of successfully triggering a yellow card?*

4. METHODOLOGICAL CONSIDERATIONS

As the presented problem definition is based on Collective Action Theory, this paper will rely on theory-driven inductivism and derive underlying theoretical assumptions about how NPs manage to overcome the collective action problem from Collective Action Theory. These – as “a [hypothetical] story about why acts, events, structure, and thoughts occur” (Sutton/Staw 1995: 378) – will help to manage the empirical approach by providing guidance for data collection and analysis. The latter will be conducted as case studies of successful cases of collective action, triggering a yellow card: Monti II and EPPO. Both cases will first be analysed by within-case process-tracing, producing “analytical

explanations” (George/Bennett 2005: 212). These explanations build the basis for the following subsequent comparison.

The data collection of this study was done in a mixed-methods approach, with some quantitative data available from primary sources, analysed as descriptive statistics. However, most of the data is qualitative, from both primary and secondary sources. As the availability of the latter is somehow restricted due to the recentness of events, the main focus was on primary data, collected via research of relevant legal texts, official documents and primarily through interviews. More specifically, this study uses information derived from twelve interviews with key actors in the two yellow cards and the EWM more general.

5. A HYPOTHETICAL STORY OF HOW National Parliaments MANAGED TO OVERCOME THE ASSURANCE PROBLEM

Recalling, the assurance problem is rooted in the riskiness of contributing in a situation of interdependent action, uncertainty about the actions of the other players and the prospects of collective action and conditional preference for contribution. “The solution, [...] is to get each of the players to expect that the other player will [contribute]. Mechanisms which can assure each player that the other will cooperate [...] are thus central to solving the [assurance] dilemma” (Lee 2012: 1145). Crucial for overcoming the assurance problem is thus the creation of *certainty*. “Overcoming the collective action problem” in the EWM, understood as ‘triggering a yellow card’ can hence be achieved by creating certainty about the actions of the NPs in the 8-week scrutiny period regarding the issuance of reasoned opinions, which subsequently also implies certainty about the likelihood of triggering a yellow card. This will give NPs the necessary assurance that issuing their own reasoned opinion is beneficial for them, as they will not spend time, resources and energy on doing so without the likelihood of the yellow card being triggered, meaning the likelihood of befitting from the collective good. Thus, this will persuade them to participate; which eventually leads to the necessary yellow card threshold being reached.

Basically, the “[assurance problem] can be sorted out by either providing for pre-play communication [...] or if leadership emerges” (Gupta 2005: 86).

a) Pre-play Communication

“In general, coordination problems tend to be easy to solve if communication between the players is possible” (Holzinger 2012: 11). Communication does not carry influence or participation itself, but information about previous, likely and prospective choices of others (Kollock 1998: 194). “That individuals first communicate with each other about their preferences, and then each individual chooses whether to participate or not” (Chwe 1996: 2), thus gives the players a chance to remove uncertainty from the game and to coordinate on the desired outcome.

Applied to the setting of NPs under the EWM, pre-play communication is understood as Inter-Parliamentary Cooperation (IPC), which is generally the focus when analysing interactions between NPs. Its function regarding NPs is “to promote the exchange of information and best practices between [NPs] [and] to ensure effective exercise of parliamentary competences [...] in particular in the area of monitoring the [subsidiarity principle]” (Art. 1 a, b Guidelines of IPC). The most important channels of IPC in the EU are the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC)⁵, the InterParliamentary EU information eXchange platform (IPEX)⁶ and the network of National Parliamentary Representatives (NPRs) in Brussels⁷ (Knutelská 2011: 331). Thus, IPC takes place both at political and administrative level. Yet, the EWM is a political mechanism and the final decision-makers are politicians. Thus, in order to render IPC under the EWM effective, it is crucial that the information exchanged via and present at staff level reaches the political level.

Engaging in *pre-play communication* enables NPs to *exchange information* about their actions during the scrutiny period. This leads to *certainty about the actions of others and subsequently the prospects of collective action*, which is necessary for *overcoming the collective action problem*.

b) Leadership

Often, “the success of [collective action is] ascribed to the existence of effective leaders [...]” (Margetts et al. 2011: 2), who provide the necessary certainty enabling actors to converge on the action for which they have a conditional preference (Elster 1979: 83): by initiating collective action, mobilizing other actors to contribute, and subsequently setting in

⁵ A forum for exchanging information regarding EU affairs, whose meetings take place biannually, bringing together the EACs of NPs as well as members of the European Parliaments.

⁶ An internet-based platform for the electronic exchange of information between NPs and the European Parliament concerning EU affairs, especially regarding parliamentary actions under the EWM.

⁷ Officials of their respective NP building a network that has i.a. the function to ensure the informal, day-to-day information exchange between NPs, also in regard to the EWM (Neuhold/Hoegenauer 2013: 74).

motion a bandwagon process (Baland/Platteau 1996: 81, 97). Applied to the setting of NPs under the EWM, *leadership* allows for the *initiation* of the scrutiny procedure and the *mobilization* of other NPs. These lead to *certainty about the actions of others and the prospects of collective action* and can thus create a *bandwagon effect*, eventually *overcoming the collective action problem*.

In general, anyone involved might be an endogenous leader. Relaxing the assumptions about strict homogeneity of the actors, different characteristics point at some being “natural leaders” (Brandts et al. 2007: 270). *Asymmetric cost efforts*, differences in the costs of contributing to the collective good, and thus in the relative benefits from it, make some actors have lower costs. These are expected to take on leadership (ibid: 270; 274). *Preference asymmetries* imply that the production of the collective good has an additional, instrumental value for some actors. Those actors having such an extrinsic motivation (Teo/Lim/Lai 1999: 26) are expected to be “natural leaders” (Reuben 2003: 24). Applied to the setting at hand, lower cost efforts mean a higher institutional capacity for scrutinizing EU legislative proposals, whereas preference asymmetries result from the salience of EU legislative proposals in the various EU member states.

6. CASE STUDY I: MONTI II

In the following case studies, the processes leading up to the two yellow cards with relevant empirical information focusing on aspects of IPC, leadership and process dynamics will be presented first in order to provide a holistic overview over the cases. Based on these overviews, two analytical explanations will be derived about how NPs managed to overcome the assurance problem inherent in the EWM.

Subsequent to decisions by the Court of Justice of the European Union⁸, concerns were raised that in the internal market, economic freedoms might prevail over fundamental freedoms and collective action rights, such as the right to strike. Hence, the Commission decided to draft a proposal addressing these concerns and clarifying the relationship between those freedoms (Commission 2013: 7): “Proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the

⁸ C-438/05 International Transport Workers’ Federation, Finnish Seamen’s Union v Viking Line ABP and others (2007); C-341/05 Laval un Partneri Ltd. V Svenska Byggnadsarbetareförbundet and others (2007).

freedom to provide services”, short: Monti II. On 22 May 2012, this proposal triggered the first yellow card in the history of the EWM, when the necessary threshold was reached with twelve NPs issuing reasoned opinions, amounting 19 votes in total, and surpassing the necessary number by one.⁹

6.1 Process leading to the Yellow Card

The proposal was officially issued on 21 March 2012; on 27 March, the Commission sent the *lettre de saisine* to the NPs, officially notifying them, as the proposal had now been translated into all official languages, that the 8-week subsidiarity scrutiny period had started. Thus, the deadline for transmitting reasoned opinions was 22 May 2012.¹⁰

Normally, the political decision to issue a reasoned opinion is made in the responsible committee before it is actually formally adopted, usually by the plenary. As the former is the effective, yet informal decision, attention will have to be paid to both dates, with a focus on the former.

Already on 21 March, the Danish Folketing initiated its scrutiny process. Its European Affairs Committee (EAC), with the power to adopt a reasoned opinion for the whole NP, decided on 23 March to draft a reasoned opinion without having consulted the relevant sectoral committees in order to speed the process up. The political decision as to its adoption was made on 20 April, and it was formally adopted on 3 May (Cooper 2013b: 6f.). Hence, the Folketing was the first NP to make the political decision to adopt a reasoned opinion, meaning it was the initiator among all NPs. Subsequently, it took over the leadership position with the clear intention to mobilize other NPs. It raised the issue, generated a lot of early momentum, interest and awareness, and flagged Danish concerns, also by providing content (interview II, XI).

In total, twelve NPs adopted a reasoned opinion criticizing Monti II, as shown, with the dates of the political decision and the formal adoption, in *Figure 1 (Reasoned Opinions in Monti II)*: the Belgian Chambre des Représentants (BE), the Danish Folketing (DK), the Finish Eduskunta (FI), the French Sénat (FR), the Latvian Saeima (LV), the Luxembourg

⁹ The threshold back then was 18 votes, as the time was pre-accession of Croatia, and there were 27 EU member states; thus 54 votes in total.

¹⁰ All dates, unless otherwise marked, are taken from the official IPEX site for Monti II, IPEX n.d./a.

Chambre des Députés (LU), the Maltese Kamra tad-Deputati (MT), the Polish Sejm (PL), the Portuguese Assembleia da República (PT), the Swedish Riksdag (SE), the Dutch Tweede Kamer (NL) and the UK House of Commons (UK).

The order of the political decisions displays a distinct pattern: after the initiation of the process by DK, five NPs followed that had so far been rather active in issuing reasoned opinions: FR, SE, PL, UK and LU. Thus, until 14 May, “informal” reasoned opinions amounting nine votes had been issued, meaning “half-time” for triggering a yellow card one week before the deadline. The next five reasoned opinions came from NPs that are usually less active in the EWM and until then only participated in a few cases. Four of them (FI, PT, LV and MT) issued their reasoned opinions in the final week before the deadline on 22 May. As they are all unicameral NPs, representing two votes each, they increased the informal vote count on the morning of 22 May to 17, one short of a yellow card. The eleventh reasoned opinion in the early afternoon of 22 May came from BE, meaning the yellow card threshold was reached. The final NP to adopt a reasoned opinion was NL, a usually more active NP, increasing the vote number to 19.

Generally, the numbers of NPs reporting scrutinizing activity on IPEX were very high, with only nine NPs not reporting any activity (IPEX n.d./a). Those NPs either not scrutinizing at all or not issuing a reasoned opinion were mainly such that were generally not very active in the EWM and such that did not participate for internal reasons. Non-exhaustive examples include the French Assemblée Nationale, which was preoccupied with the presidential election campaign in France, the Irish Oireachtas, which was in the run-up to the referendum to the EU fiscal compact and reluctant to criticize the EU, and the Italian Houses, reluctant to criticize the proposal due to the involvement of then-prime minister Mario Monti (interview V).

The 8-week period running up to the eventual triggering of a yellow card was characterized by an exceptionally high level of IPC and information exchange among NPs (Gstrein/Harvey 2013: 55) through COSAC, IPEX and the National Parliamentary Representatives.

The 47th COSAC meeting, taking place 22-24 April 2012 in Copenhagen, coincidentally fell in the middle of the 8-week scrutiny period (COSAC n.d.). The meeting was an opportunity for the Folketing to exert its “leading function”, as it was the hosting NP with – albeit

limited – agenda-setting powers.¹¹ Whilst the proposal itself was not on the actual agenda, the Danish delegation worked informally on the margins of the meeting by approaching the other delegations and encouraging them to consider the issue (interview VII). Their draft reasoned opinion from 20 April was quickly translated into English and circulated at the meeting (Cooper 2013b: 8). Furthermore, on the side-lines, there was a meeting of likeminded NPs and quite some informal talk (interview XI), offering national MPs a forum to discuss the proposal and raise the awareness face-to-face at political level. 16 NPs state that they had exchanged information regarding Monti II at the COSAC meeting (COSAC 2013a: 31). Yet, as the meeting took place rather early during the 8-week period, not many NPs had initiated their scrutiny procedure. Thus, the main function of this IPC seems to have been to raise the awareness on the proposal and put it on the committees' agenda.

Regarding the use of IPEX, 23 NPs indicated that they had exchanged information via this platform (ibid.), with 19 NPs in total stating that this helped them in developing their own scrutiny outcome. However, some NPs reported that in Monti II, the timely uploading of information lagged behind, especially in the final days before the deadline (ibid: 32). Hence, IPEX did not play an important instrumental role in IPC leading to the yellow card as it did not contain the most up-to-date information on what was going on in the other NPs. Rather, the crucial information flow went via the NPRs.

Already on 26 March, the Danish NPR notified the other NPRs at their weekly Monday Morning Meeting that the Folketing was going to closely scrutinize Monti II for its subsidiarity compliance (Cooper 2013b: 9). Afterwards, he circulated a mail with the content of the Danish concern, asking his colleagues to disseminate this information in their capitals (interview XI) and created a document in a common computer folder, which every NPR could update with information from her/his home NP (Cooper 2013b: 9). Furthermore, generally, “the vast majority of information exchanged [...] flowed via [NPR] in Brussels” (Conlan 2013: 23), facilitating the exchange of “real-time information” about the state-of-play of the scrutiny proceedings, as NPRs are usually up-to-date regarding events in their home NP. 28 NPs had used NPRs to exchange information on the Monti II proposal, of which 26 thought this information to have been helpful in developing their scrutiny outcome (COSAC 2013a: 31). This indicates that the information exchange at staff level via NPR reached the political, decision-making level, which has been argued to be essential to render IPC in the EWM as a political mechanism effective.

¹¹ Denmark held the EU Presidency in the first half of 2012.

Thus, FI, PT, LV, MT, BE and NL as the “following NPs” report that they had both sent and received information via various channels of IPC (COSAC 2013b), claiming that the received information helped them to develop their scrutiny outcome of a reasoned opinion. Furthermore, PT was aware of the stance and actions of others NPs when deciding to issue a reasoned opinion (interview XI). BE was conscious of the significance of their vote under the EWM and the possibility of a yellow card when voting through the exchange of information (Cooper 2013b: 11). NL, the last NP to issue a reasoned opinion, did so in knowledge of the preceding Belgian reasoned opinion and that the vote count was very close to the threshold, whereas the exact number was still uncertain. The plenary voted to issue a reasoned opinion, by that overturning the previous decision of the responsible sectoral committee (ibid.: 13).

6.2 How did National Parliaments manage to overcome the Collective Action Problem?

The following section will draw on the previously developed “hypothetical story” of how NPs manage to overcome the assurance problem inherent in the EWM by focusing on the there emphasized aspects and causal mechanisms.

Inter-parliamentary information exchange, mainly via the channel of NPRs in Brussels, helped NPs compile an accurate up-to-date picture of actions in other NPs, and thus offered “a rough ‘vote count’ as the process unfolded” (Cooper 2013b: 33). Hence, when those NPs issuing a reasoned opinion in Monti II made their political decision to do so, they had a good picture about the prospects of collective action and the likelihood of triggering the yellow card. The certainty created by this was supported by the leadership role the Danish Folketing took over in the scrutiny process. Keeping the issue on the agenda and organizing the information exchange increased the likelihood that the yellow card was going to be reached, making it more beneficial for other NPs to adopt their own reasoned opinion. Providing content made it possible for other NPs to take on some substantive arguments, reducing their production costs of reasoned opinions in comparison to an isolated process. Thus, it provided incentives for other NPs, especially those with smaller institutional capacities, to issue a reasoned opinion. The Folketing can be argued to be a “natural leader” in Monti II. Generally, the political interest in the issue was big in Denmark, due to certain characteristics of the national labour model (Børsting 2012: 2) and the fact that Denmark

would have been directly affected (Hall 2012). Additionally, the Folketing has a high institutional capacity for scrutinizing EU issues (Buzogány/Stuchlík 2011: 7). Thus, it had both lower costs efforts and increased preferences for producing their reasoned opinion.

This line of argumentation is supported by the process dynamics in the scrutiny period. As the first six NPs to (politically) adopt reasoned opinions are rather active in the EWM¹², they could have been expected to issue a reasoned opinion independently of the actions of others, driven by their own internal motivations (Cooper 2013b: 10). Their opinions, representing nine votes, can be thought of as the critical mass approximating the yellow card threshold close enough to make reluctant NPs participate as the prospects of successful collective action increased, eventually overcoming the first-mover problem and launching a bandwagon process. By that, opposition to the proposal gained momentum towards the end of the period, as six further NPs joined the process, out of which five can be considered “unusual suspects”. It can be argued that these NPs joined as the imminence of a yellow card became clear, which, in many NPs, made the game change (interview XI).

Concluding, in Monti II, there was strong interplay between the two solution mechanisms NPs can apply. The Folketing exerted *leadership* that provided early momentum and mobilization of other NPs by using channels of IPC. Generally, *information exchange* between NPs was extensive, providing NPs with knowledge about the actions of others. Subsequently, NPs had *certainty* of about the vote count, meaning about the prospects of collective action. As the likelihood of triggering a yellow card had increased with five NPs providing the initial critical mass, reluctant NPs saw it in their interest to join the process – a *bandwagon process* was set in motion, eventually *overcoming the collective action problem* when the yellow card was triggered.

7. CASE STUDY 2: EUROPEAN PUBLIC PROSECUTOR'S OFFICE

Until recently, the task of prosecuting crimes affecting the EU budget had been within the exclusive competences of the member states. However, as the Commission saw them not adequately equipped and motivated to counteract such offences (Brady 2013a), it proposed the establishment of an EU level Public Prosecutor for their investigation and

¹² Indicated by the numbers of issued reasoned opinions.

prosecution: “Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office”, short: EPPO. By 23 May 2013, 13 parliamentary chambers¹³ from eleven EU member states had issued reasoned opinions reporting a violation of subsidiarity, amounting to 19 votes and exceeding the necessary yellow card threshold by five,¹⁴ triggering the second yellow card.

7.1 Process leading to the Yellow Card

Whilst the proposal for the regulation was published on 18 July 2013, the *lettre de saisine* was only sent on 21 August. As the summer break from 1 to 31 August does not count to the 8-week scrutiny period (interview XI), the deadline was 28 October. Yet, once the English wording of the draft was available (18 July), parliamentary staff started analysing it. NPs had therefore almost double the time than usually for their subsidiarity check (interview XII). Moreover, the Lisbon Treaty foresaw the establishment of an EPPO (Art. 86 TFEU) and prior to the proposal's publication, there was a lot of preparatory work from the Commission. Hence, the awareness of the issue was already raised and when published, those NPs being interested were quick to position themselves (interview XI).

On 11 September, the European Scrutiny Committee of the UK House of Commons concluded that “the EPPO proposal breaches the subsidiarity principle [...]” (European Scrutiny Committee 2013: 27). Attaching a draft reasoned opinion, the political decision to object to the proposal under the EWM was made that day, which was then formally adopted by the plenary on 22 October (House of Commons n.d.). Hence, the House of Commons was the first-mover initiating the scrutiny proceeding, and also took on a leadership role in the process (interview I). Also doing so were the Dutch NPs (ibid.). In the Tweede Kamer, the Committee on Safety and Justice issued a negative subsidiarity judgment on 2 October, which was officially approved by the plenary on 10 October (Eerste Kamer n.d.). On 8 October, the responsible sectoral committees of the Eerste Kamer, having received the opinion of the Tweede Kamer, drafted their reasoned opinion. It was formally adopted on 15 October (ibid.). These NPs engaged in lobbying, encouraged other NPs to join the scrutiny

¹³ This number perceives the Irish Oireachtas as unicameral. Technically speaking, it consists of two chambers (Dáil and Seanad), which scrutinize EU legislative proposals jointly.

¹⁴ In the sensitive area of JHA, where the EPPO proposals is set, the necessary number of NPs to issue a reasoned opinion is a quarter, meaning 14 out of 56 votes (IPEX n.d./b).

process (interview I, XI), identified the issues at stake, hence providing substantive information (interview IV, VIII), and monitored the other NPs regarding to the vote count (interview II).

In total, thirteen NPs adopted reasoned opinions, as summarized in *Figure 2 (Reasoned Opinions in EPPO)*: the Cypriot Vouli ton Antiprosopon (CY), the Czech Senát (CZ), the Dutch Eerste (NL I) and Tweede (NL II) Kamer, the French Sénat (FR), the Hungarian Országgyűlés (HU), the Irish Oireachtas (IE), the Maltese Kamra tad-Deputati (MT), the Romanian Camera Deputaților (RO), the Slovenian Državni zbor (SI), the Swedish Riksdag (SE) and the UK House of Commons (UK I) and House of Lords (UK II).

After UK I made the political decision to adopt a reasoned opinion, three generally more active NPs followed: FR and NL I and II.¹⁵ The then following four NPs are usually less active in the EWM: CZ, CY, HU, which issued its first reasoned opinion ever on EPPO, and IE (Oireachtas n.d./a; b; c). When CY made the political decision to adopt a reasoned opinion on 11 October, reasoned opinions amounting seven votes had been issued, meaning “half-time” for triggering a yellow card 2½ weeks before the deadline. The threshold of 14 votes was – informally, according to the political decision – met on 22 October, one week before the deadline, after SE on 17 October (Justitiekottet 2013), and UK II on 22 October joined the process¹⁶. Also on 22 October, the Romanian EAC saw a violation of subsidiarity, which was approved by the plenary on 23 October (Camera Deputaților n.d.). Interestingly, RO was first supposed to back the proposal, but changed its opinion in the process (interview IV). The last two NPs to make the political decision to adopt a reasoned opinion were MT on 23 October (Kamra tad-Deputati 2013: 2), by that departing both from the government’s stance and from its own previous statements (The Malta Independent 2013) and SI, where the political decision that EPPO violates subsidiarity was made between 18 October and 25 October.¹⁷ This is the first reasoned opinion SI issued in the EWM and the final one issued on the EPPO proposal.

Generally, the numbers of NPs reporting scrutinizing activity on IPEX were very high, with only ten NPs not reporting any activity (IPEX n.d./c) Those NPs either not scrutinizing at all or not issuing a reasoned opinion were mainly such that were generally not very active in the EWM and such that did not participate for internal reasons. Exemplary, the Danish

¹⁵ All dates, unless otherwise marked, are taken from the official IPEX site for EPPO, IPEX n.d./c.

¹⁶ The UK II EAC issued the draft reasoned opinion that day. Yet, as usually a sub-committee is responsible for holding the subsidiarity scrutiny (House of Lords n.d./a: 3), the informal decision that EPPO violates the subsidiarity principle had most likely been made before.

¹⁷ It was not possible for this analysis to uncover the exact date.

Folketing had an opt-out arrangement of the EPPO (interview VII), the Estonian Riigikogu was preoccupied with the upcoming national elections and the EAC did not hold meetings (interview IX), the German Bundestag was only newly constituted after the elections (interview X) and the Lithuanian Seimas was holding EU presidency and trying to stay neutral (interview III).

Regarding IPC between national MPs on the subsidiarity scrutiny of EPPO, the second COSAC meeting in 2013, taking place from 27 to 29 October, was too late to provide an exchange forum in an effective way, as the scrutiny deadline expired 28 October. However, the Interparliamentary Conference on Economic and Financial Governance of the European Union (Seimas n.d.) was held in Vilnius from 16 to 18 October. Whilst the Dutch attempted to use it as an opportunity for lobbying, it was mainly finance experts attending the conference, who did not have much to do with the area of Justice and Home Affairs (JHA). Hence, this proved not very effective (interview I). Thus, IPC on the political level organized by some kind of inter-parliamentary meeting did not take place during the subsidiarity scrutiny of the EPPO proposal.

On IPEX, 31 NPs reported scrutiny activity in regard to the EPPO proposal, out of which ten indicated per icon that they had important information to exchange. However, the platform did neither indicate likely future actions of NPs nor contain information which NPs were to which degree concerned. This kind of information was exchanged only via NPRs (interview IV).

The UK and Dutch NPRs raised their concerns in Monday Morning Meetings quite early on, organized to some extent the information exchange around the proposal, providing substantive information as to whether NPs were interested in the issue (interview II). Furthermore, they tried to encourage other NPRs to make their NPs scrutinize the proposal as well (interview VIII). In general, the exchange between NPRs was extensive (interview II, VIII), with information comprising both of state-of-play and substantive data (interview II, IV). Once the possibility of a yellow card became apparent, IPC began to intensify further. Furthermore, some NPs engaged in some kind of “vote exchange”, where on the level on NPRs, they agreed to get active in the process if some other NPs did the same (interview IV).

Research has demonstrated that, as a result of such exchange of information, primarily between the National Parliamentary Representatives, NL II, when adopting their reasoned opinion, was aware of the fact that previously, other NPs had issued such reasoned opinions

(Tweede Kamer 2013: 2); so was IE (Oireachtas n.d./a). CZ was in possession of the draft reasoned opinion of House of Commons at the time of drafting their own (interview XII) and RO was aware both of this and of the Dutch reasoned opinions (interview IV). SI, whose reasoned opinion formally triggered the threshold on 25 October, was not aware of this; yet had calculated on grounds of previous and prospective actions of other NPs that the yellow card was most likely going to be reached (Državni Zbor n.d). Whilst the information gathered at staff level did not reach the political level in some NPs, but remained unhandled at the parliamentary administrations (interview X), empirical data suggests that in those NPs that did issue a reasoned opinion, the information flow between NPRs and their respective political level worked, as the latter were aware of the actions in other NPs.

7.2. How did National Parliaments manage to overcome the Collective Action Problem?

Generally, NPs engaged in extensive information exchange regarding the EPPO proposal, both substance and state-of-play concerning, mainly via the NPRs in Brussels. Thus, IPC enabled NPs to know about the actions of other NPs and the prospects of triggering a yellow card when they made their political decision to adopt a reasoned opinion. Furthermore, engaging in “vote exchange” via NPRs not only informed other NPs about prospective actions but actively coordinated them. Hence, this increased the certainty for reluctant NPs and put their participation on a more secure footing. Effective leadership was provided by the UK and the Dutch NPs, which belonged to the first ones to issue a reasoned opinion on the EPPO proposal, taking over also a mobilization function. It can be argued that by doing so, they increased the likelihood of a yellow card and thus created some level of certainty about the successful prospects of collective action for other NPs in the scrutiny process. In both countries, the policy field of JHA is of particular interest (Broadhurst 2013; Government of the Netherlands n.d.). In the UK, the EPPO is furthermore covered by the UK opt-in arrangement in this field, meaning that the UK will not participate unless it opts in to the EU law establishing it (Broadhurst 2013). Thus, there is a certain national interest in the issue, also in forming the proposal according to national preferences. Hence, the UK and the Dutch NPs can be argued to be “natural leaders”.

Looking at the process dynamics and the launch of a bandwagon process by the provision of an initial level of certainty about the likelihood of a yellow card, a differentiated picture has

to be drawn. The first four NPs making the political decision to adopt a reasoned opinion are rather active in the EWM and can thus be argued to have made their decision irrespective of other NPs. They are followed by four “unusual suspects”, whereas the final five NPs display a mixed picture regarding activism. Hence, whilst it can be assumed that the unusual suspects were persuaded by certainty about the actions of others and the prospect of collective action to join the process or even switch their vote, the first four opinions, amounting merely four votes, did not provide the necessary critical mass. As the awareness of the issue was raised and unofficial positioning took place before the official start of the scrutiny period, the latter proved to be rather structured (interview XI). Thus, the possibility of a yellow card became clear at an early stage, and those unusual suspects joined already prior to the level of reasoned opinions actually/informally adopted reaching the critical mass. Hence, it can be argued that they did so in certainty not about the prior, but the prospective and likely actions of other NPs. Generally, in assurance problems, such non-binding and non-verifiable “cheap talk” is expected to be credible (Rabin 1990: 145). Yet, this does not mean that the yellow card was straightforward. The initiating NPs were those generally more active, and though the yellow card was not only triggered on the final day of the scrutiny period, 2½ weeks before the deadline only half the necessary votes were issued, meaning no NP could have absolute certainty about the outcome of the process. At this stage, the encouragement and coordinating function of the leading NPs became increasingly important and IPC intensified further in order to provide the necessary certainty for reluctant NPs to join the process.

Summing up, in EPPO, the awareness of the issue was raised already before the official scrutiny period started. NPs were thus quick to position themselves and engage in *information exchange*. UK and Dutch *leadership* supported this activeness. This led to a *partial bandwagon process*, initiated by four generally more active NPs. Usually less active NPs were persuaded to join the process or switch their vote by the possibility of successful collective action. The therefore necessary *certainty* was provided not only by information about previous, but also about prospective actions of other NPs, meaning the imminence of a yellow card was established rather early, *overcoming the collective action problem* by providing an initial safety-net for participation.

8. COMPARISON

The following comparison between Monti II and EPPO regarding the empirical findings and explanations about how NPs managed to overcome the assurance problem will serve as a basis for conclusions and cautious policy-recommendations reaching beyond the immediate cases under investigation. The comparison is structured by the three most important elements for the process leading to a yellow card, comprising IPC, leadership and process dynamics.

8.1 Inter-Parliamentary Cooperation

In both cases, NPs engaged in extensive IPC and information exchange. This exchange covered both substantive information and information about the state-of-play in the scrutiny proceedings in the various NPs. The former was mainly provided by the leading NPs and decreased the participation costs of other NPs as they could become “inspired” by these concerns. The latter enabled NPs to have an overall picture over the prospects of triggering a yellow card by providing a rough vote count. In both cases, the network of NPRs proved to be the crucial conduit of information, whereas neither COSAC nor IPEX were perceived as capable of delivering this information. In Monti II, however, NPs also engaged in information exchange via COSAC, due to time-concurrence. In both cases, the information gathered via exchange at staff level between NPRs reached the political decision-making level in those NPs that issued a reasoned opinion. However, in some NPs that did not participate, this was not the case and information remained unheard by the political level. Also in both cases, once the possibility of a yellow card became apparent, information exchange intensified. In EPPO, furthermore, this went beyond mere information exchange when some NPs engaged in “vote exchanging” via their NPRs.

8.2 Leadership

Both cases experienced a strong leading NP, the Danish Folketing in Monti II, and in EPPO the UK and the Dutch NPs. The Folketing was the initiating NP in Monti II; in

EPPO, the leading NPs were also among the first ones to make the political decision to adopt a reasoned opinion.¹⁸ Analysing internal reasons why these NPs might have taken over this position, it was demonstrated that in both cases, the issue at hand was of certain political weight in the respective country, meaning there were preference asymmetries due to extrinsic motivation to participate in the EWM. In both cases, the leading NPs exerted similar functions: initiating the procedure, providing early momentum and raising the awareness of the issue. The latter was more important in case of Monti II, as not many NPs had the proposal on their radar, unlike the EPPO proposals, where there was sufficient preparatory work. Furthermore, they effectively used the available channels of IPC to mobilize other NPs in the process, organizing to some extent IPC and information exchange around the respective proposal.

8.3 Dynamics

The processes leading to the two yellow cards display rather different dynamics. Whilst in EPPO, the awareness of the issue was raised already before the official scrutiny period started, in Monti II, IPC and leadership were necessary. In the latter, there is a clear-cut bandwagon process, initiated by six NPs that are generally more active in employing reasoned opinions, arguably regardless of the previous actions of others. Information exchange and leadership created incentives for more reluctant NPs to join the process by inducing certainty. In EPPO, in contrast, one can observe a “partial” bandwagon process, initiated by four more active NPs, followed by four rather inactive ones, and the final five with a mixed picture regarding their activism. Whilst the four initiating NPs did not provide the necessary critical mass to launch the bandwagon process, certainty both about the actions of other NPs and about the possibility of a yellow card was created at an early stage even before reasoned opinions were politically adopted. This was done through information exchange about likely and prospective actions, which was possible as the 8-week scrutiny period proved to be rather structured. Whilst this is not to say that in Monti II, NPs did not exchange this kind of information, empirical data suggests that it was rather actual actions than unofficial positioning creating certainty, respectively positioning took place at a later

¹⁸ Although, in EPPO, there were also other NPs entering the process at an early stage, e.g. the French Sénat, yet not taking over a leadership position.

stage in the scrutiny-period. Thus, in Monti II, the yellow card was triggered both informally and formally only on 22 May, the day of the deadline, whereas EPPO received the necessary number of opinions informally on 22 October, almost a week before the deadline on 28 October, and formally on 25 October.

8.4 Preliminary Conclusion

Both cases displayed effective leadership and the extensive engagement of NPs in IPC and information exchange. These served the same functions, eventually creating certainty about the actions of others and subsequently the prospects of triggering a yellow card. This suggests that as predicted by the hypothetical story, these mechanisms are crucial for overcoming the inherent assurance problem.

Whilst IPC did not differ regarding its intensity and substance, the cases relied to some extent on different channels. The COSAC meeting in Monti II allowed NPs to meet on the political, decision-making level, yet in the initial phase of the 8-week scrutiny period. In EPPO, IPC mainly took place at the administrative level. This leads to a cautious conclusion that IPC does not necessarily rely on inter-parliamentary meetings at political level to be effective. It has been shown that in both cases information exchanged at staff level was transferred to the political level in those NPs that issued a reasoned opinion. This was, however, not the case, in other NPs that did not adopt an opinion. Thus, it could be argued that in order to render IPC in the EWM among all NPs as a solution mechanism for the inherent assurance problem more comprehensive, this is an issue that needs to be addressed.

The main difference lies in the dynamic of the processes. Arguably, the necessary certainty for overcoming the assurance problem can be produced at an early stage in the 8-week scrutiny period not by information about previous actions of NPs, but, as in EPPO, also expectations about prospective actions. Hence, in order to avoid “drama in the last days”, it is necessary that the awareness is raised, that NPs position themselves and engage in information exchange about their stances regarding subsidiarity compliance as early as possible. Furthermore, this points towards the growing importance of the network of NPRs regarding information exchange, as it is the only source of information from which NPs can get up-to-date and informal information about prospective actions of other NPs on a regular basis.

9. CONCLUSION

The newly introduced EWM gives NPs the right to scrutinize EU legislative proposals for their compliance with the subsidiarity principle. It was demonstrated that NPs as rational actors are expected to make active use of the mechanism and perceive the possibility of triggering a yellow card as a collective good. In the production of collective goods, however, rational actors usually meet a collective action problem. The problem at hand is the so-called assurance problem, meaning NPs face two problems in the EWM: uncertainty over the other NPs' actions leads to an incentive problem for participation, and closely connected, a first-mover problem. Despite these theoretically identified problems, two yellow cards have been triggered by today: Monti II and EPPO. Hence, this paper aimed at answering *how did NPs manage to overcome the collective action problem inherent in the EWM in cases of successfully triggering a yellow card?*

In Monti II, strong leadership by the Danish Folketing and extensive IPC, delivering up-to-date information about the state-of-play in the various NPs, created the necessary certainty about the actions of other NPs and thus about the growing momentum towards a yellow card and the likelihood of successful collective action. Enough NPs issuing their reasoned opinions irrespective of the number of previous actions of other NPs created a critical mass which made it beneficial for reluctant NPs to join in a bandwagon process.

EPPO saw strong leadership by the UK and Dutch NPs, and extensive IPC, leading to the above-said necessary certainty. However, the dynamics proved to be different: Due to quick positioning and engagement in information exchange, collective action of NPs proved to be structured and the imminence of a yellow card became apparent at an unusually early stage. Thus, certainty providing an incentive for reluctant, usually less active NPs to join the process was not only produced by actual actions, but also by likely and prospective ones. This was supported by a partial bandwagon process and led to the avoidance of "drama in the last days".

From the comparison, four main conclusions that are cautiously, contingently generalizable can be drawn.

- Certainty, leadership and IPC seem crucial for overcoming the assurance problem. On a more practical note, this suggests that NPs striving to make the EWM effective ought to actively engage in and foster IPC and encourage strong leadership. The

latter most effectively is provided by an NP in whose country the issue at hand has a strong political weight.

- NPs have different channels of IPC at their disposal. Even though politicians met face-to-face only in Monti II, IPC proved to be effective both times in those NPs issuing a reasoned opinion. Hence, it is not necessarily important that politicians themselves engage in information exchange, but that the information reaches the political, decision-making level one way or the other. Practically, whilst this was not a problem in those NPs issuing a reasoned opinion in the two cases, this points more generally towards the necessity of improving communication links between political and administrative level in regard to the EWM, as inter-parliamentary meetings on political level rarely coincide with the 8-week scrutiny period.
- It is not only information about previous and actual actions of other NPs that produces certainty, but also about prospective and likely actions as necessary incentives for reluctant NPs to join collective action. Practically, this means in order to overcome the collective action problem, NPs ought to position themselves early on in the scrutiny period and inform other NPs quickly about their likely actions regarding the proposal at hand.
- Furthermore, the only channel of IPC that is on a regular basis able to deliver informal information about the strength of subsidiarity concerns in each NP and thus about the likelihood of it issuing a reasoned opinion is the network of NPRs. Hence, NPs ought to make active use of this network in regard to the EWM and strive at making it even more efficient and coherent.

As the scope of the analysed researched question in this paper was limited to analysing NPs overcoming the collective action problem inherent in the EWM, a task for further research might be to analyse how the two yellow cards came about more generally, relative to other identified inherent problems in the EWM. That might either be done, like this paper, by applying within-process tracing or by comparing them to cases where NPs failed to trigger a yellow card. The latter approach might also have given value-added to this paper, by comparing successful to unsuccessful cases of NPs overcoming the assurance problem in the EWM. Yet, whilst success is easily definable by a triggered yellow card, failure of collective action would imply a) a violation of subsidiarity, b) no triggered yellow card. As the question of subsidiarity compliance is sufficiently a puzzle to politicians and academia, a case study comparing cases with a variant outcome was

beyond the scope of this study. However, further research might provide raster to conduct this kind of research. Further research might also take into consideration the impact of iteration of the subsidiarity scrutiny process on the assurance problem and the creation of certainty ¹⁹ as well as the question whether certainty cannot only be transferred within each single scrutiny process, but also from one yellow card to the next²⁰. Whilst this has to some extent been researched (Pintz 2014: 30-34), an in-depth analysis is still outstanding.

¹⁹ Collective Action Theory argues that the repetition of collective action has an impact on the likelihood of the actors overcoming the collective action problem, as iteration allows for "the introduction of time and a rudiment of social interaction in [...] collective action" (Udehn 1993: 244). As NPs scrutinize every single EU legislative proposal for subsidiarity compliance, repeated infinitely, it can be argued that the EWM in fact is characterized by the aspect of iteration.

²⁰ As suggested by Cooper, who argued that "the fact that a yellow card has happened once changes the common perception of its likelihood, which could permanently shift NPs' incentives to take part" (Cooper 2013b: 19).

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Figure 1: Reasoned Opinions in Monti II

NP	Date of Political Decision	Date of Formal Adoption	Votes	Number of Reasoned Opinions 2009-2012/Total
DK	20 April	3 May	2	6/7
FR	25 April	22 May	1	14/18
SE	26 April	11 May	2	34/49
PL	27 April	11 May	1	10/12
UK	9 May	21 May	1	7/14
LU	14 May	15 May	2	14/17
FI	15 May	15 May	2	2/3
PT	15 May	18 May	2	2/3
LV	18 May	21 May	2	1/2
MT	21 May	22 May	2	3/8
BE	22 May	22 May	1	4/5
NL	22 May	22 May	1	10/15

Data from IPEX, Cooper 2013b: 31f. and Seimas 2014: 2f.

Figure 2: Reasoned Opinions in EPPO

NP	Date: Political Decision	Date: Formal Adoption	Votes	Number of Reasoned Opinions 2009-2013/Total
UK I	11 September	22 October	1	12/14
NL II	2 October	10 October	1	15/15
FR	3 October	28 October	1	18/18
NL I	8 October	15 October	1	10/10
CZ	8 October	9 October	1	2/2
CY	11 October	18 October	2	3/3
HU	14 October	21 October	2	1/1
IE	16 October	23 October (Dáil), 24 October (Seanad)	2	4/4
SE	17 October	23 October	2	48/49
UK II	22 October	28 October	1	5/5
RO	22 October	28 October	1	7/7
MT	23 October	28 October	2	8/8
SI	25 October	25 October	2	1/1

Data from IPEX, Seimas 2014: 2f. and the websites of parliamentary chambers

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