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THE EARLY WARNING SYSTEM AND ITS POTENTIAL TO REDUCE THE EU'S 'COMPETENCE CREEP' AND ITS DEMOCRATIC DEFICIT

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Review of Katarzyna Granat, *The Principle of Subsidiarity and its Enforcement in the EU Legal Order*

The Role of National Parliaments in the Early Warning System (Hart publishing, Oxford, 272 pp., £75.00)

The national parliaments of the European Union (EU) Member States have been strongly empowered with the adoption of the Lisbon Treaty. Together with the European Parliament, they are now deemed to ensure the respect of democracy within the EU (art. 10 TEU) and have been attributed a series of rights of information and other prerogatives to this end (art. 12 TEU). The most salient and frequently used of those is certainly their new capacity to control the respect of the principle of subsidiarity of the EU legislative proposals that affect areas of shared competence. In the framework of the Early Warning System (EWS), national parliaments have been given the capacity to adopt reasoned opinions if they consider that a given proposal breaches subsidiarity. Each national parliament received two votes (one per chamber in the case of bicameral parliaments). Where at least one third of the total number of votes available is in favour of a subsidiarity breach, a 'yellow card' is

triggered. By contrast, if the total amount of negative votes is one half, the threshold for an 'orange card' is attained. Thus far, no orange card has ever been shown to the European Commission, but three yellow cards have.

Katarzyna Granat's monograph presents an insightful study of this System in place since December 2009. She examines how it has been functioning until the end of 2016, and devotes particular attention to the following questions: 1. She asks how the principle of subsidiarity has been understood under Lisbon; 2. She analyses how and why national parliaments participate in the EWS and why they go beyond their 'narrow role granted by Protocol no 2' (p. 1). 3. Further to this, she seeks to determine what this all implies for the purpose of the EWS and enquires how 'the EWS contribute to limiting and reversing the "competence creep" and improving the EU's democratic credentials' (p.1). It is hereby noteworthy that K. Granat appears to assume that this objective – which motivated the introduction of the EWS in the Lisbon Treaty – has at least been partially reached.

Her enquiry is divided in two main parts, that include a total of eight chapters. The first part is dedicated to the notion of subsidiarity, the design of the EWS and its implementation at national and European levels, while the second part focuses on the content of the reasoned opinions issued by national parliaments.

The first chapter delves into the principle of subsidiarity in itself and considers it in a historical, comparative perspective that takes Germany, Canada, Switzerland and the US into account. The rationale for its introduction in the EU Treaties is also considered, alongside its evolution therein and the Court of Justice's case law.

On the other hand, Chapter 2 focuses on national parliaments and the EWS. It recalls how national parliaments' role in the Treaties has evolved over time, looks at how all EU institutions are involved in the EWS and explains what the Political Dialogue with the Commission is. It additionally shows how interparliamentary cooperation plays out in the framework of the EWS.

Chapter 3 then focuses more in detail on the EWS in itself, ie its scope and

its application so far by parliaments. It usefully analyses the scope encompassed in the reasoned opinions that have been issued so far, and comparatively reviews the three yellow cards and their meaning in terms of the efficiency of the EWS.

Chapter 4, in turn, is centered on the national level. In particular, it describes how the review of subsidiarity is conducted in the different Member States, the role constitutional courts have played and the different types of scrutiny that exist. Basing her analysis on P. Kiiver's typology (2006), K. Granat distinguishes between four types of scrutiny systems: centralised, mixed, decentralised and 'subsidiarity-focused' (p. 104). Interestingly, she finds that the type of scrutiny used is not determinant in the number of reasoned opinions adopted by the different parliamentary chambers – note also that she provides very interesting unique data to back this claim. Her conclusion is rather that what triggers reasoned opinions are the content of the proposals and their political salience (p. 121). Though this finding is most certainly sound, it could however be argued that well-defined procedures and good administrative support are pre-conditions for parliaments to be able to issue numerous reasoned opinions. This is because the EWS entails many constraints for parliaments, such as tight deadlines and a high number of proposals that need to be sifted.

Chapter 4 also looks at the national governments' involvement in the scrutiny procedure, and concludes that some room for improvement still exists six years after the entry into force of the Lisbon Treaty. It also considers the involvement of the plenary and of regional parliaments, and finds that the former is only useful under certain conditions.

Chapter 5 too considers the national level, but this time from the perspective of the political systems. It concentrates on four Member States – the UK, Germany, Poland and Belgium – and looks at national parliaments' independence vis-à-vis their governments, at how parliamentary majority and opposition influence the finding of subsidiarity breaches, and at whether the EWS allows for the expression of regional interests independently from other institutions such as the Committee of the regions. Another aspect of the analysis regards the

study of the reasons why national parliaments may decide to issue a reasoned opinion. To answer these questions, K. Granat considers the reasoned opinions adopted on proposals presented until 2016, and she makes a very valuable analysis of parliamentary majorities' and parliamentary oppositions' views in cases where a reasoned opinion was adopted, which she then compares with the respective governments' views on the affected proposals. This allows her to conclude that, as hypothesized by previous scholarly analyses, national parliaments indeed follow their governments' views in most cases, though she does show that the contrary has also happened at times. Furthermore, she provides a unique differentiation between upper and lower chambers (p. 151). On top of this, she finds a major convergence between political parties on issuing a reasoned opinion (p. 153), which indeed supports the idea sometimes put forward in the literature that a common understanding of the 'national interest' that goes beyond political cleavages exists within Member States. This chapter also examines why national parliaments issue reasoned opinions and it shows that a threat to the national interest or the redistributive effects of a proposed measure can, for instance, act as triggers. It also confirms that reasoned opinions are deemed to be 'a signal both to Brussels and to national voters' (p. 161). Moreover, this chapter rightfully concludes that therefore 'the members of national parliaments do not necessarily think in subsidiarity terms when conducting scrutiny under the EWS' (p. 161).

Chapters 6, 7 and 8 address somewhat different issues and broaden the scope of the analysis by examining the relationship between the principle of conferral and the principle of subsidiarity (6), by looking at how national parliaments have used the EWS to raise concerns about the delegation of powers in the EU (7) and by showing how proposals addressing fundamental rights issues have been examined under the EWS (8).

Chapter 6 questions whether, as claimed by some parliaments, the scrutiny of the principle of subsidiarity should start by considering whether the EU has the competence to act in the first place. To this end, K. Granat conducts a very impressive analysis of reasoned opinions and also makes the interesting observation that 'a considerable number of

reasoned opinions concern draft legislative acts based on article 114 TFEU and article 352 TFEU' (p. 174).

In the following chapter, she unveils a largely unknown aspect of the EWS, namely that national parliaments use their powers to issue reasoned opinions to 'raise concerns about the delegations contained in the legislative proposal under review that allow the Commission to adopt a delegated or implementing act' (p. 183). In this regard, she finds that this use of the EWS does not bring much added-value and that the Political dialogue would be a better-suited instrument instead.

The final chapter (8) considers the use of the EWS in scrutinising fundamental rights proposals – and looks in particular at the 'Women on board proposal to this end'. It concludes that the EWS can indeed be effectively used in this framework as well.

The conclusion provides a summary of the main findings alongside an answer to the main research questions, ie the EWS' contribution to reducing the EU's democratic deficit and its competence creep. Considering among others that the impact of the reasoned opinions is unknown, and that broadening the scope of the EWS is counterproductive, K. Granat finds that the EWS does not reinforce the weakest parliaments as had been anticipated by some. It hence has limited effectiveness in allowing national parliaments to influence EU legislation and is unlikely to provide a comprehensive remedy to the EU's democratic deficit. As to the competence creep, it is shown to be much more limited than is sometimes assumed and the limited number of yellow cards are thus no proof of the EWS's unsuitability to provide some remedy to it.

K. Granat critically examines some of the reform proposals under discussion, among which the proposal for a 'green card' and for a 'red card', which she both assesses negatively. She concludes by stating that national parliaments' means of influence in EU affairs are not limited to their power to determine the occurrence of subsidiarity breaches and that national parliaments could additionally seek to have more influence on their governments.

As is clear from the above summary, Katarzyna Granat's analysis is particularly thorough and addresses numerous aspects of the functioning

of the EWS. This new System has arguably received much scholarly attention to date – for instance, Marco Goldoni and Anna Jonsson Cornell edited a volume solely dedicated to it in 2017 (National and Regional Parliaments in the EU-Legislative Procedure Post-Lisbon The Impact of the Early Warning Mechanism, Hart publishing, Oxford). However, K. Granat manages to successfully uncover several dimensions of this issue which had thus far not been examined. For instance, the dynamics between parliaments and governments or between majority and opposition in the process of issuing reasoned opinions had not been considered in such depth. This, in fact, opens an avenue for future research: It would indeed be very interesting to conduct the reverse analysis, ie to look at those cases in which the government would have been in favour of issuing a reasoned opinion but the parliament decided not to. Similarly, it would be very valuable for other researchers to conduct an enquiry similar to the one performed by K. Granat in the context of other national parliaments. The issues considered in the last three chapters – principle of conferral, delegation of powers and fundamental rights – are also particularly original and will undoubtedly be useful for anyone looking at the EWS from now on.

These are all but few of the aspects that should invite scholars interested in parliamentary democracy within the EU to read this monograph. In fact, even if the EWS is certainly not the ‘magical solution’ to all problems, the recent set up by the European Commission of a *Task force on subsidiarity, proportionality and doing less more efficiently* certainly demonstrates the intrinsic importance of the EWS and of the (scholarly) analysis of its functioning.