BEYOND THE EARLY WARNING SYSTEM: THE REFORM OF EU GOVERNANCE AND NATIONAL PARLIAMENTS

by
Anna Vergés Bausili*

I. Introduction

The Constitutional Treaty sets the ground for the direct involvement of member state parliaments in the governance of the EU. The Constitutional Treaty also grants supervision rights for state parliaments over passerelle clauses and for decisions concerning the extension of EU powers for the attainment of Treaty objectives (Article I-18).[1] A number of provisions, such as those facilitating access to EU documentation, direct input into the Commission services, and increased transparency in the workings of the Council, facilitate parliamentary scrutiny both vis-à-vis national executives and vis-à-vis EU institutions and processes.

In addition, the Constitutional Treaty gives national parliaments new powers in the EU legislative process and by extension in the governance of the EU, namely the right to object. A standard procedure (the early warning system or EWS) allowing national parliaments to object before EU institutions on the grounds of breach of the principle of subsidiarity is introduced by the Constitutional Treaty. Despite wide-ranging practices and degrees of parliamentary scrutiny of EU matters,[2] from the date of entry into force of the Constitutional Treaty national parliaments will have the formal power to submit directly to the Commission, the Council and the European Parliament, and before legislation is adopted, *reasoned opinions* concerning insufficient observance of the principle of subsidiarity by these institutions. National parliaments will also be able to appeal *ex-post* and indirectly (i.e. via their national government) for annulment of legislative acts suspected of breaching subsidiarity. A Protocol on the application of the Principle of Subsidiarity and Proportionality annexed to the Constitutional Treaty lays down the procedure and includes detailed provisions including the obligations of the Commission to review a proposal when a sufficient number of parliaments object to a legislative

* Dr. Anna Vergés Bausili, Research Officer at The Federal Trust for Education and Research, London (http://www.fedtrust.co.uk/eu_constitution).

1 National parliaments already participate in the ratification of Treaties and accession agreements and in those decisions where the Union does not have competence - such as the ratification of financial agreements like own resources decisions.

2 The scrutiny of both arenas by national parliaments varies across the EU. For a review of the national arrangements for scrutiny see COSAC Secretariat, Report on developments in EU procedures and practices relevant to parliamentary scrutiny. Report presented to the XXXI COSAC Meeting of 19-20 May 2004, Ireland.

proposal (one third), the 6 week time limit for parliaments to submit reasoned opinions, and the number of votes for parliaments, among others.

This paper tries to assess the EWS and the new role of national parliaments in the governance of the EU. Setting aside issues regarding the relative power of different institutions and the empowerment of parliaments vis-à-vis national executives and EU institutions - which during the immediate aftermath of the signature of the Constitutional Treaty can only be a matter of speculation - this paper examines the new monitoring tasks for national parliaments in the light of the ongoing reform of European governance. It reviews the implications of the new provisions with regard to their contribution to, and impact upon, ongoing processes of review of EU governance, and looks at a number of key questions concerning the implementation of the EWS in the case of the UK. It is argued that the success of the monitoring role for parliaments will depend on the implementation of reforms at governance level, and that its significance can be evaluated in conjunction with the ongoing reform of EU governance.

To begin with, in section 2, the paper sets out very briefly a number of assumptions about the subsidiarity debate which are used in the paper and the logic of the task of monitoring it. Subsidiarity is interpreted as a principle of public administration in the context of regulatory reform. In section 3, the paper draws on developments in EU public policy and particularly on the relevance of new methods of policy design introduced by the Commission which will have an impact on the carrying out of the parliaments new responsibilities of monitoring subsidiarity. Finally in section 4, the contribution of the EWS is assessed as an additional instrument of regulatory reform and in terms of governance legitimacy.

II. Subsidiarity, 'quality' of regulation and governance legitimacy

It is hard to imagine any notion of EU terminology having been more abused by political discourse than subsidiarity. Its definition is a contested issue, and while it remains so, it has arguably been mostly shaped by the Commission and its implementation of it. Subsidiarity has gradually become anchored as a principle of public administration, part and parcel of a programme of 'quality' of EU regulation and regulatory reform.

Substantially and from a EU legal perspective, subsidiarity reflects the difficulty of delimiting powers in the EU. From a legal standpoint, subsidiarity is about the shortcomings of over-relying on the principle of conferral in a system where some powers are defined functionally; or in other words, about how to set limits to conferred powers which are functionally defined such as creating a functioning internal market. Laying out policy objectives does not equate to conferral of powers, yet where powers are defined in functional/horizontal manner, no constitutional safeguard as to what are the limits of these powers are set in the EU system - apart from questioning the legal basis of EU involvement.

The issue of delimiting EU powers has been at the top of the EU agenda from the mid 1980s: although the new approach to harmonisation by the first Delors Commission to speed up the attainment of the single market was launched with the promise of attaining the common market through non-regulative measures (namely, based on mutual recognition) the introduction of QMV for measures to realize the single market led to an exponential increase in EU regulation.[3] While unanimity was retained for extensions to new powers necessary for the realisation of common market (Article 235 at the time, now Article 308), the introduction of QMV in the harmonisation measures exposed flaws in the boundaries of competence in the Community system. Having removed the political safeguard of unanimity, the traditional view of the Court of Justice to accept extension of law-making powers[4] which were justified merely through reference to either their objective, or the willingness of all member states to extend legislative powers, became untenable, while no other legal safeguard could be resorted to.[5]

The introduction of the principle of subsidiarity by the Maastricht Treaty (1991) amounts to seeking a governance solution to the difficulties in both delimiting powers as well as re-gaining the legitimacy lost in the late 1980s. As a political safeguard to limit EU regulation, subsidiarity guides the exercise of EU powers while offering no clear legal direction in delimiting powers - since the relevant criterion for deciding which level is 'better' able to perform a given function cannot be specified by legal concepts. Subsidiarity represents a deliberate choice for an elastic and case by case consideration of legislative interventions, and thus away from the route of cataloguing 'who does what'. Although the problem of delimiting powers has a multi-level dimension in those member states were sub-national levels of government hold legislative powers, subsidiarity in the EU, rather than laying out an obligation for a thorough consideration of which tier of government is best suited to attain a given European policy goal, applies only to the EU institutions. At the governance level, principles such as 'partnership' have served to accommodate the *de facto* articulation of sub-state competence into EU governance.

The implementation of subsidiarity post-Maastricht proved unable to perform its main task of setting limits to EU regulation. Since 1992, the principle has been operationalised as the obligation for Community institutions to justify/argue EU involvement on the basis of its merits. Subsidiarity concerns the identification of the merits of EU intervention vis-à-vis national regulation, and only indirectly of de-regulation. Over the years, however, both the justifications and the enforcement of the observance of subsidiarity have been poor. Regarding the justifications, the Commission has been criticised over the years for poor examination of the merits of

3 See Joerges C., States without a Market? EIoP (Vol.1) 1997 (20).

4 For example in environmental and consumer protection. See Joerges C., States without a Market? EIoP (Vol.1) 1997 (20).

5 The competence problem is indeed a complex and multi-faceted issue. See Vergés Bausili A. Reforming Subsidiarity, 2003 for a more extensive review.

proposals and of alternatives to EU regulation. Indeed, the consideration of subsidiarity by the Commission has so far been something closer to a tautology than to a judgement being contrasted against alternative policy choices. Regarding its enforceability, although it is a justiciable principle of Community law, in practice it has largely been left 'un-enforced' both *a priori* by EU institutions and *a posteriori* by the ECJ. The EU legislature and Commission have been lax in assuming it, and the ECJ and national Constitutional Courts have been sceptical. The ECJ has avoided entering into political judgments as to which is the best policy/level of action, and has opted to rule instead on EU competence and on the correctness of the legal bases of contested legislative proposals.[6]

The Commission has indeed preferred to develop subsidiarity as a principle of regulatory quality. In other words, rather than being an outright test to set limits to EU law-making powers, subsidiarity has gradually settle as a principle of EU public policy. It has been included into the framework of a 'Better Regulation' or 'better law-making' programme and become part of a package of measures to reform the use of the law-making powers such as simplifying and reducing the volume of legislation, consolidating of secondary legislation, developing pre-legislative consultation and better-assessed proposals – all bearing a clear legitimacy-seeking purpose. In the context of regulatory reform, subsidiarity is a principle improving the 'quality' of legislation i.e. regulating better, which includes regulating where and in the degree where the EU is best at.[7]

As a principle of regulatory reform, and while the Commission's justifications of Community involvement have moved towards some increased concretisation (many would argue insufficiently), the reform of EU governance is couched in the terms of enhancing the legitimacy and the effectiveness of the EU. Indeed, the 'competence problem' in the EU has public prominence. From the late 1980s, the 'benign neglect' that EU had enjoyed from public opinion has been replaced by widespread perception of an uncontrollable EU expansion and interference, and contested legitimacy.

From this state of affairs, we look at the new role of state parliaments introduced by the Constitutional Treaty and specifically we consider the implications of the EWS in the governance of the Union, notably as a procedure which may reinforce the logic and the overall policy of regulatory reform in the EU, as an additional enforcing mechanism to this effect.

6 See de Búrca G., The principle of subsidiarity and the Court of Justice as an institutional actor, Journal of Common Market Studies (Vol. 36) 1998 (2).

7 See the Commission's Annual Reports on the implementation of the principle of subsidiarity.

III. Governance reform and the early warning system

As already stated, the Constitutional Treaty gives parliaments a specific remit in EU governance: supervising the extension to new EU powers (Article I-18), and monitoring the exercise of EU powers from a subsidiarity perspective. In both cases the procedure set out in the Protocol on the application of the Principle of Subsidiarity, the early warning procedure, applies. Thus parliaments' specific role in the governance of the Union is confined to the consideration of whether the merits of EU regulation vis-à-vis national regulation (or simply vis-à-vis no regulation) have been thoroughly observed by EU institutions. The scope of this task, and the implementation of the EWS, will be dependent on the path marked by developments in a parallel domain.

The governance reform agenda, driven by the recommendations of the Mandelkern Report and the Commission's White Paper on Governance,[8] is a multi-faceted programme of reforms in the domain of public governance, including a wide range of targets: better co-ordination of the legislative process including legislative programming, greater transparency and accessibility, use of alternatives to legislative instruments, better transposition and application of Community law, simplifying and reducing the volume of legislation, and specially for the purposes of this paper, improving the quality of regulation. By the end of 2004, this programme of regulatory and governance reform which dates back to the establishment of the Prodi Commission (2000-2004) and responds to number of policy goals related to competitiveness and economic reform made by the Lisbon European Council in March 2000 comes to its final implementation stages.

The Constitutional Treaty incorporates many of the themes and measures put together by the governance reform dossier such as mandatory pre-legislative consultations, the notions of participatory democracy and governance itself, but also refers (indirectly) to mechanisms of governance already in operation such as the use of impact assessments.[9]

One strand of governance reform is particularly relevant to the implementation of the EWS that is improving the quality of legislation and specifically the measures concerning the pre-legislative phase and law design. The Commission has proclaimed the commitment to the double goal of attaining well-assessed proposals based on effective consultations. Both aspects are not new and they have been intensified and become more concrete over the years. What is new is the

8 Mandelkern Group on Better Regulation: Final Report and Action Plan of 13 November 2001; and Commission, 'European Governance: a White Paper' of 25 July 2001 [COM (2001) 428].

9 Regarding pre-legislative consultations, the Protocol on the principle of subsidiarity annexed to the Constitutional Treaty makes provision for wide-ranging consultations before any legislative act is adopted, with the possibility of taking into account the regional and local dimension of the action envisaged (Article 2). Mandatory consultations are established in Article I.47 and referred in Article 2 of the Subsidiarity Protocol. Impact assessments are referred to in Article 5 of the Protocol on subsidiarity.

introduction of the impact assessment method as mechanism to assist policy design and to deliver those well-assessed proposals and good governance. Moreover, since 2002 and fully operational from 2004, a new method of appraising subsidiarity has been put in place by the Commission in the framework of impact assessment: subsidiarity appraisals are part of impact assessments.

Impact assessments are the new explanatory memorandums. They are transmitted as working documents together with legislative proposals to the other institutions (including national parliaments), and they are also available online.[10] Impact assessments include information on pre-proposal consultations held, and also the results obtained, the cost-benefit analyses carried out, reasons for choosing the proposed instrument (particularly with regard to the principles of subsidiarity and proportionality), and the budgetary implications of the proposal.[11] As a template, impact assessments consist of a common set of basic questions, minimum analytical standards and a common reporting format. The Commission argues that impact assessments are about trying to define better what is the impact on the stakeholders, and 'looking at subsidiarity and proportionality in a way which has never been done before'.[12] Whether impact assessments are the panacea to the long-standing flaws in justifying the observance of subsidiarity remains to be seen. What is unquestionable is that impact assessments will structure the scrutiny of subsidiarity to be performed by parliaments.

Effectively what is new in relation to the justifications on subsidiarity and merits of EU regulation existing before, is the commitment to address the following:

- A clear statement of the risk or problem being addressed and of a) why action is necessary and b) why action at that level of government is appropriate (i.e. compliance with the principle of subsidiarity);
- A description and justification of different options considered, including alternatives to regulation.

Indeed, the subsidiarity test (strictly about why an issue has to be addressed at EU level and what the value-added of Community intervention is - compared with both no-regulatory action and action by Member States), relies on the adequate consideration of a number of intertwined aspects such as the objective(s) sought, the means, and alternative options.

10 See the Commission's Impact Assessments site: http://europa.eu.int/comm/secretariat_general/impact/rep_en.htm.

11 See p. 7-8 Commission, 'Action Plan Improving and Simplifying the regulatory environment', 5 June 2002 [COM (2002) 278 final].

12 Evidence by Mr. Servoz, Head of Strategic Planning and Co-ordination Unit at the Commission General Secretariat, on the European Commission's Annual Work Programme 2004 to the European Scrutiny Committee on 19 November 2003. Evidence included in House of Commons, The European Commission's annual Work Programme for 2004. Sixth Report of Session 2003-4 (HC 42-vi).

Subsidiarity assessments are thus first made on the basis of the objective(s) to be achieved. Although subsidiarity does not concern the merit of the objective (as this is a policy matter) it addresses whether EU involvement is required and the benefits of EU action. As regards options, the principle of subsidiarity is intended to ensure that actions proposed to be undertaken at the European level are justified compared with the options available at the national level. As mentioned before, the justification of added value so far has either been equated by the EU institutions (including the Court) to a competence test, or otherwise, the reasoning on the added value of EU intervention has been tautological in the sense that it has sufficed to spell out the objective to be achieved as unachievable by national regulation alone to dismiss other policy choices, thus reducing subsidiarity to the observance of proportionality (de Búrca 1998). Thus for instance, it has sufficed to note that harmonisation cannot be attained by national regulation alone for a Commission proposal to 'pass' the subsidiarity test. Subsidiarity, understood as a test of added value, has been a unidirectional argument about identifying whether a Community initiative/action is needed to compensate for lack of results at the national level. In short, the test of added value has not sufficiently considered alternative policy choices i.e. checking that the objectives of the proposed action cannot be sufficiently achieved by member states' action in the framework of their national constitutional system and that they can therefore be better achieved by EU's action.

The introduction of impact assessments represents a new substantiation of the observance of subsidiarity by the Commission. To what extent the introduction of impact assessments will actually improve the justification and the enforceability of subsidiarity remains to be seen. A first disappointment would be if impact assessments became a mere tick box which reproduces a similar level of generalisation of past justifications of observance of subsidiarity. The elaboration of alternative policy options by the Commission will be critical. The challenge for parliaments will be to break the 'vicious circle' of establishing the merits of an objective unachievable by member states action per se without being able to challenge the merit of the objective itself. The second imponderable is the unpredictable distance between impact assessments and political discretion. Subsidiarity appraisals involve a balancing exercise of objectives and merits and the Commission does not renounce to its right of initiative and of political judgement.[13]

However, impact assessments themselves will provide parliaments with a number of concrete yardsticks to assess Commission's observance of subsidiarity. Parliaments are expected to monitor the Commission's impact assessments but also to monitor subsidiarity from governments' explanatory memorandums (where they

13 The Commission has stated that 'impact assessments are an aid to the Commission but not a substitute for political judgement. Ultimately it should help the Commission to exercise its right of initiative and to promote the Community method by means of fully informed political decisions'. See p.3. of Commission, 'Commission Staff Working Paper, Impact Assessment: Next Steps. In support of competitiveness and sustainable development', Brussels, 21.10.2004 [SEC (2004) 1377].

exist).[14] The UK Government already directs a number of questions towards the impact assessments which accompany Commission proposals. This is in order to evaluate the observance of subsidiarity regarding both the absolute need for, and the comparative benefits of EU-level regulation. It is worth quoting from the UK Government instructions in more detail:

> Determining the absolute merits (i.e. objectives of the proposed action cannot be sufficiently achieved by Member States alone, or simply whether regulation in itself is appropriate): Is the issue or problem which is being tackled in the Commission's proposal clearly identified? This should include identification of affected groups; the risks involved in the current situation; and an assessment of what would happen under a 'no policy change' scenario. Is the objective of the policy clearly identified? Are the main policy options clearly identified, including non-regulatory options? Or is the analysis only focussing on one option? Are all the options substantially analysed? This should include justification of any options discarded at an early stage; and show how subsidiarity and proportionality have been taken into account. Does the impact assessment include details on the consultation process? Has the consultation been conducted (at least) according to the minimum standards established by the Commission?
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> Determining the relative merits (i.e. objectives of the action can be better achieved by action on the part of the Community): Are the positive and negative impacts (economic, social and environmental) expected from the different options, clearly identified, and quantified wherever possible? Does the Commission's Impact Assessment explain how the policy will be implemented and monitored? Impacts Assessments should be measured against the 'no policy change' scenario; potential conflicts or trade-offs between policy areas should be described as should any particular adverse impacts on specific social groups. The Commission's Impact Assessments should also look at factors that could impact on compliance with the proposal. Does the Commission Impact Assessment explain how the policy will be implemented and monitored? Does it contain details of stakeholder consultations carried out, including how the results of the consultation influenced the shape of the proposal? Does the Impact assessment contain a clear and transparent justification of the final policy choice? [15]

Thus, as regards criteria to test the observance of subsidiarity, regulatory criteria are largely applicable to the EU context and can be used by parliaments to assess such observance. However, parliaments will have to develop scrutiny autonomy vis-à-vis EU institutions and national executives. The Commission has pledged to further develop the guidelines to assess subsidiarity and proportionality in impact assessments.[16] Parliaments are expected to review periodically the evolution and

14 Besides the actual consideration of impact assessments, firstly governments and Parliaments will monitor whether the proposals submitted by the Commission identified as significant in the Commission's Annual Work Programmes for each year are accompanied by an extended impact assessment when they are published. Secondly, as the basis on which the Commission will select the proposals for extended assessment remains unclear, governments and Parliaments are likely to test out the Commission on this aspect. See these criteria in p. 11 of the Commission's Legislative and Work Programme for 2004 [COM (2003) 645 final].

15 See: Regulatory Impact Unit, UK Cabinet Office, 'What to look for in an Extended Impact Assessment produced by the European Commission'. Cabinet Office website: http://www.cabinet-office.gov.uk/regulation/ria-guidance/content/eu-groundwork/index.asp.

16 See Commission [SEC (2004) 1377] p. 9.

level of quality of impact assessments themselves. In addition, parliaments may want to develop criteria to come to decisions on the *degree* of such observance of subsidiarity in individual proposals. The objectives sought in individual proposals are often multiple; some unproblematic in principle such as attaining legal certainty or more accessible legislation, but others may be problematic. In some cases the justification of need/merit will not be quantifiable or will be the result of a balancing exercise of pros and cons of simultaneous objectives within individual proposals. Parliaments will have to balance out simultaneous objectives in each proposal and consider the degree of observance. Furthermore, reasoned opinions may differ between parliaments across the EU.

The development of scrutiny autonomy - in an organisational sense - may be another substantial challenge for parliaments. The implementation of the EWS may require organisational reforms or the adaptation of existing practices. Some national parliaments (like the UK Parliament) already monitor the observance of subsidiarity by the EU institutions as part of their scrutiny of both EU legislation and national executives' actions at the EU level.[17] In the UK the implementation of the EWS has coincided with a broader debate on the deficiencies in the way Parliament holds to account the EU and the executive.[18] The implementation of the EWS by the UK Parliament has put a number of concrete implementation questions to resolve. Perhaps the most important one is how to come to decisions to object to individual legislative proposals, under which procedure and at which level (at Committee level or by the House as whole) - in other words, how to reach an agreement to launch a

17 In the UK the main purpose of the European Scrutiny Committee is to report to the House on the legal and political importance of each EU document and to determine which EU documents are debated. Such debates take place either in a European Standing Committee or on the Floor of the House. The Committee normally reports weekly on a range of documents when the House is sitting. The Committee also monitors business in the Council of Ministers, especially the activities of UK Ministers in the Council, and produces occasional reports on wider EU developments. Concerning the scrutiny of EU legislation, the UK parliament can flag a 'scrutiny reserve' which, in principle, is binding on government. A recent example of the resort to this scrutiny reserve (and its over-riding by Government) is the Draft EU Regulation concerning the European Agency for Safety and Health at work [COM(04) 50]. The European Scrutiny Committee regarded the content of the draft Regulation as uncontroversial, but objected to the use of Article 308 as unlawful because an alternative legal base was available (Article 137). The European Scrutiny Committee also denounced a far too 'continuous' resort to Article 308 . See http://www.publications. parliament.uk/ pa/cm200304/ cmselect/ cmeuleg/ 42-xxxii/4213.htm.

18 A Select Committee for the Modernisation of the House of Commons was appointed by the House on 16 July 2001 to consider how practices and procedures of the House should be modernised. The Modernisation Committee's work plan includes an examination of the way the Common Work and for our purposes in particular, it comprises also and inquiry into scrutiny of European matters by the Commons. The implementation of the EWS is an item included in the Modernisation Committee's remit. In addition, the House of Lords launched in Summer 2004 an Inquiry into the subsidiarity early warning system which is considering the implementation of the procedure in the UK.

sanctioning motion and which level of endorsement it would require. The range of procedural options represent trade-offs between substantial aspects, such as parliamentary autonomy vis-à-vis the government, and other very significant factors such as the weight to accord to subsidiarity opinions, time constraints and limited resources. Other implementation questions, which parliaments in other member states will also face, concern the co-ordination to be established between parliaments at different levels, that is in a bicameral system (between House of Commons and Lords in the UK case) and how to integrate the views of regional parliaments when legislative proposals concern devolved matters.[19] Finally, the degree and operation of the necessary co-ordination among member states' parliaments to ensure sufficient support for parliaments' non-binding objections (including what could be the role of COSAC) is also to be resolved.

In sum, the consideration of the EWS in connection with governance reform casts light on the implementation of the EWS: the scrutiny of national parliaments will be structured and largely dependent on the quality of impact assessments. But furthermore, the articulation of the EWS with the governance reform dossier poses the question of interpreting the contribution of the EWS in the broader context of EU governance.

IV. Conclusions on the EWS as a mechanism of EU governance

The monitoring by external actors (parliaments) of the reforms introduced in the governance of the EU are expected to provide vigilance and pressure on the commitment of EU institutions to subsidiarity and to governance reform in general. Thus from the context of the reform of EU governance, the EWS can be seen as an enforcing mechanism, notably an institutional reinforcement for the implementation of governance reform.

On the basis of the rationale for governance reform, the EWS can be interpreted as a reinforcement of the political drive of the Better regulation agenda and the corresponding Action Plan of 2002 which set out initiatives to promote effective and efficient regulation as part of the efforts of the EU institutions and member states to fulfil the Lisbon objectives by 2010. In short, the EWS can be assessed in terms of delivering regulatory reform. National parliaments have been given powers of objection through the EWS. Their powers to object on the basis of subsidiarity will ultimately be, however, a verdict on the reforms introduced by the Commission regarding quality of regulation, and by extension, EU governance.

Thus, besides the difficulties and the 'teeth' of parliamentary yellow cards, the role

19 Issues such as the level at which to establish co-operation (either at Committee level, or between Chairs of Committees), and which arrangements would ensure exchanges of information, and adequate transmission of objections from regional parliaments both in submitting reasoned opinions to EU institutions and in launching a judicial challenge.

of national parliaments can be understood beyond the confined terms of scrutiny and be assessed in the context of EU regulatory reform, but also evaluated in its contribution to EU governance and EU legitimacy. It is doubtful whether the sanctioning power of the EWS alone would prevent unnecessary, invasive or disproportionate regulation, but as argued before, the implementation of the EWS will depend on the reforms introduced by the Commission at the pre-legislative stage.

From the above follows that, normatively speaking, the EWS should be considered as a last resort mechanism, or in other words, a sanctioning mechanism to add pressure on what should be an adequate law-making process. The EWS, in either its political or judicial route, should not substitute but reinforce better regulation practices at the law-making level. The EWS, as a last resort device, should be only exceptionally used if regulatory reform, including broader consultations with stakeholders, are carried out appropriately.

This has implications for the way parliaments understand their task. As regards the implementation of the system by national parliaments, the key to the success of the EWS is an early and full involvement in the pre-legislative phase - not only the involvement of parliaments but of all stakeholders including regions ad subnational parliaments. The short period of six weeks provided in the Protocol for national parliaments to submit reasoned opinions will certainly be insufficient if involvement at the early stages of policy design i.e. at the preparation of impact assessments is not provided for.

It is too early to see how parliaments will use their powers of objection. However, the impact and the significance of the EWS will largely depend on the pre-EWS phase. The burden of the proof is thus placed on impact assessments and their potential to be either statements of impact at various levels covering minimum standards of consultation, or a laboratory of deliberative politics and *de facto* multi-level governance.[20] Impact assessments are (and were) first of all a tool for the co-ordination of different policy objectives and incorporating horizontal objectives across policy sectors. However, they can also be assessed as a tool of governance and as a potential source of governance legitimacy.[21] Thus, although strictly outside

20 As it stands the revised and re-focused list of questions to be addressed by the Commission services as regards regional impact relate (besides the familiar economic memorandums on regional socio/economic impact) to devolved implementation, notably, implementation costs such as 'the budgetary consequences of the option for public authorities at different levels of government', and the identification of 'possible difficulties in implementing policy options. Where relevant, member states will be asked to give information about problems that they would face in implementing a certain option (e.g. implications for public administrations and enforcement authorities)'.

21 The Commission understands impact assessments as 'a positive contribution to increased transparency in the Community's regulatory process', 'contributing to a culture of transparency in regulatory design and management practices', p.4 Commission [SEC (2004) 1377].

the scope of subsidiarity considerations, parliaments could consider (as the UK Government guidelines already do) whether the Commission's impact assessments contain details of stakeholder consultations carried out, including how the results of the consultation influenced the shape of the proposal. Indirectly, the EWS can be seen and valued as a legitimacy seeking scheme, namely as a mechanism reinforcing the delivery of efficient legislative outputs and good regulatory practice.