

Working Paper Series

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**THE PRINCIPLE OF SUBSIDIARITY IN THE  
NETHERLANDS AND ROMANIA. A  
COMPARATIVE ASSESSMENT OF THE OPINIONS  
ISSUED UNDER THE EARLY WARNING  
MECHANISM**

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# ABSTRACT

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*The aim of this working paper is to provide a thorough analysis of how the principle of subsidiarity is understood, interpreted, and applied in two different Member States, via the Early Warning Mechanism procedure.*

*In the first part, the legal political debate surrounding the principle of subsidiarity and the Early Warning Mechanism is addressed. The conclusions show that both the subsidiarity principle and the Early Warning Mechanism are volatile concepts which hold both legal and political characteristics.*

*The empirical assessment shows an overview of patterns followed by the chambers of the two national parliaments across a period of 10 years. A comparison is also made with regard to the content of several (reasoned) opinions in order to provide insight in how the two Member States understand and apply the principle of subsidiarity.*

*Perhaps unsurprisingly, the procedure of sending reasoned opinions via the EWM, the choice of the proposals which will be scrutinized under a subsidiarity test, the content of the opinions, the document and argumentation style of the two Member States, and the understanding of subsidiarity are different in the Netherlands and Romania. The differences lie mainly in way of interpretation, as the Netherlands show a tendency to interpret the principle as a Legal-Rule, while Romania sees it as a more elastic concept with political connotations.*

Keywords: *Subsidiarity principle, Early Warning Mechanism, national parliaments, Treaty of Lisbon, political dialogue*

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## INTRODUCTION

The European Union is a complex *sui generis* international construction within which the political, judicial, economic, and social dimensions are being developed constantly. In this construction, the principle of subsidiarity was introduced as a tool to control and balance the distribution of powers, where the competences are shared between the Union and the Member States.

The definition which the EU provides for the principle of subsidiarity, in article 5 TEU and Protocol 2 annexed to the Treaty of Lisbon, has been proven to be insufficiently clear. Thus, in the understanding of the Member States, the principle of subsidiarity can have several meanings – philosophical, political, and legal – which overlap and complement each other. This plurality of meanings renders the application of the principle difficult, also because of the fact that the heterogeneous Member States and their dissimilar forms of governance play a role in how the principle is understood and applied across the Union.

This principle is, undoubtedly, one of the fundamental principles underpinning the European Union, and a means by which the respect of the values and objectives of the Union are achieved. Even more so, in the context of a Union which sets out to bring together the people of Europe and not create an alliance of states, the principle finds further justification as it ensures that the level chosen for action is the one closest possible to the individuals. Because of this, with the coming into force of the Treaty of Lisbon, an Early Warning Mechanism was put in place in order to ensure that the principle of subsidiarity is respected throughout the European law-making process. Under this mechanism, the national parliaments are allowed to issue reasoned opinions when they suspect a subsidiarity breach concerning the legislative proposals put forward (usually) by the European Commission in a domain of non-exclusive competence. This is the single most important development for national parliaments since their contribution was first recognised in Declaration 13 of the Treaty of Maastricht. The introduction of the Early Warning Mechanism marks a culmination of a sequence of Treaty reforms that addressed the principle of subsidiarity and the involvement of national parliaments in EU law-making.

There are plenty of voices who rose the concern of legitimacy of the EU decision making process<sup>1</sup>. The need for the involvement of the National Parliaments in the EU decision making process was observed long before the introduction of this Mechanism. Joseph Weiler noted that the "*only formal way in which accountability could be ensured would be by tight ex ante control by national parliaments on the activities of ministers in Community fora*".<sup>2</sup> Therefore, the Early Warning Mechanism was introduced in order to answer the cries of lack of democratic legitimacy and to ensure the 'reparliamentarisation' of the Union.

This paper sets out to analyse how the principle of subsidiarity is understood, interpreted and applied in two different Member States, via the Early Warning Mechanism. The following question will thus be answered: *how is the principle of subsidiarity understood across the Union, particularly in two fundamentally different states: The Netherlands – a founding Member State – and Romania – a relatively recent Member State?*

The reasoning behind the choice of the countries for this comparative research is twofold. Firstly, it is undoubted that vast works have been written with regard to the application and understanding of this principle in western countries, however, the states which arrived with 'the last train'<sup>3</sup> into the European Union are still relatively untouched and in dire need of assessment. For this reason, Romania was picked. Secondly, while it is true that a research based just on Romania might have sparked academic interest, I considered that a comparative assessment would be a more interesting work, simply because there are solid arguments to expect different results. The two Member States chosen for this thesis can be considered as opposites in many aspects. On the one hand The Netherlands is a progressive western country whose development has not been hindered since the Second World War. On the other hand, Romania – situated at the other end of the Union – is an eastern country which was part of the communist block until 1989 and is still struggling to make up for the development stagnation which occurred in the late communist years. These factors, among others, influence the perception of the two states on both the European principles and the Union itself.

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<sup>1</sup> For example: D. Beetham, and C. Lord, (1998) *Legitimacy and the European Union*. London: Longman; A. Follesdal, (2006) 'The Legitimacy Deficits of the European Union', *Journal of Political Philosophy*, 14 (4), 441–68; S. Hix, (2008) *What's Wrong with the European Union and How to Fix It*. Cambridge: Polity Press; C. Lord, (2004) *A Democratic Audit of the European Union*. Basingstoke: Palgrave Macmillan; G. Majone, (1998) 'Europe's Democratic Deficit', *European Law Journal*, 4 (1), 5–28; A. Moravcsik, (2002) 'Reassessing Legitimacy in the European Union', *Journal of Common Market Studies*, 40 (4), 603–24; F.W. Scharpf, (1999) *Governing in Europe*. Oxford: Oxford University Press; V. A. Schmidt, (2006) *Democracy in Europe*. Oxford: Oxford University Press;

<sup>2</sup> Weiler, Joseph H.H. "*The transformation of Europe*", *Yale Law Journal*, Vol. 100, 1991: 2430 and 2473.

<sup>3</sup> At the time of Romania's accession to the EU, when Bulgaria also joined, Romanian academics were describing it as a 'last train' into the European Union.

In order to answer the above question this paper sets out to first briefly outline the legal political debate which surrounds the principle of subsidiarity and the Early Warning Mechanism (2). Subsequently, I will look into the structures of the two national parliaments under assessment, and the procedures use in relation to the Early Warning Mechanism (3). Following that, based on a template put forth by Ian Cooper I will present the patterns which the two Parliaments followed in their appraisal of respect of the principle of subsidiarity (4). The question to be answered in this part is *what is the procedure the four parliamentary chambers follow in the task of subsidiarity scrutiny and how did this evolve over the past 10 years?* Lastly, I will compare the content of several (reasoned) opinions in order to provide insight in *how the two Member States understand and apply the principle of subsidiarity* (5). The concluding remark will seek to prove that the differences lie mainly in the way of interpretation, as the Netherlands show a tendency to interpret the principle as a Legal-Rule, while Romania sees it as a more elastic concept with political connotations (6).

## **2.1 The legal-political debate on the principle of subsidiarity**

The principle of subsidiarity carries along with it a political-legal debate. Part of the difficulty with subsidiarity operating as a regulatory principle is that it does not have a normative definition, as outlined above. Depending on the context this principle can be seen as a political one or as a binding rule of law. Furthermore, the explanation of the principle provided by Article 5 of the TEU is a vague formulation, open to various interpretations. On the one hand, it has been argued that the incorporation of the principle within the Treaties has elevated it to the rank of a legal principle. On the other hand, Kiiver states that “[t]he principle is not strictly legal but bears political implications, and moreover it has distinct anti-federalist connotations.”<sup>4</sup> De Búrca, comes as a pacificator and describes the principle of subsidiarity as both political and legal, but at the same time acknowledges the principle as having a philosophical basis that does not allow for categorisation.<sup>5</sup>

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<sup>4</sup> Philipp Kiiver, *The National Parliaments in the European Union: A Critical View on EU Constitution-Building* (Kluwer Law International, 2006) 157–158

<sup>5</sup> Gráinne de Búrca, *Reappraising Subsidiarity's Significance after Amsterdam* (Jean Monnet Working Paper 7/99, Harvard Law School, 2000) 3.

Clearly the principle of subsidiarity bears both a legal and a political meaning. Nonetheless, it can also be more broadly understood as “*part of a language which attempts to articulate and to mediate, albeit within this particular geographical and political context, some of the fundamental questions of political authority, government and governance which arise in an increasingly interlocking and interdependent world*”.<sup>6</sup> Thus, the principle of subsidiarity can, without reserves, be categorised as both a legal and political principle. After all, as Ian Cooper expressed: “*it takes two to tango*”.<sup>7</sup>

## **2.2 The legal-political-political debate on the Early Warning Mechanism**

By way of reason, concluding from the previous section, if the principle whose respect is ensured by this mechanism is torn between legal and political meanings, the mechanism itself follows the same destiny. So, *is the Early Warning Mechanism essentially a legal or a political procedure?*

I would like to refer here to the approach put forward by Ian Cooper in his paper which focuses on this question.<sup>8</sup> He constructed his own typology of approaches to the EWM, appreciating that rather than having merely two approaches, legal and political, it is more useful to conceive of three: one legal approach and two political. This is relevant in light of my research question, as the categorisation put forward by Ian Cooper will be used later on as a template against which I will assess several opinions issued by the Romanian and the Dutch Parliaments.

The proposed three approaches are: Legal Rule-Following, Political Bargaining, and Policy Arguing. Each of them entails a different interpretation of the subsidiarity principle, its relationship with other related principles, and its normative implications.

Within the first approach, the Legal Rule-Following, subsidiarity is a (quasi-)legal rule and the purpose of the EWM is to enable the EU to legislate in a manner that complies with it. The practical requirements of subsidiarity are definite, the principle is clearly delineated from

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<sup>6</sup>Michelle Evans, Dr, *The Principle of Subsidiarity in European Union Law: Some Comparisons with Catholic Social Teaching*, (The Journal of Catholic Social Thought and Secular Ethics, 2013) 63.

<sup>7</sup> I. Cooper, *Is the Subsidiarity Early Warning Mechanism a Legal or a Political Procedure? Three Questions and a Typology* (Robert Schuman Centre for Advanced Studies Research, 2016) 32.

<sup>8</sup> Ian Cooper, *Is the Subsidiarity Early Warning Mechanism a Legal or a Political Procedure? Three Questions and a Typology* (Robert Schuman Centre for Advanced Studies Research, 2016).

the related principles of conferral, proportionality, policy effectiveness, and political expediency. In this approach, because of the narrowly-defined subsidiarity principle, the Commission exerts internal expertise in determining its requirements, and in practice it will be a rare occurrence for there to be an EU legislative proposal that violates it, and it would come in relation to a manifest error in the Commission's reasoning. In this approach, national parliaments act solely in an individual capacity and do not form a collective, and if a yellow card occurs it will not be the result of interparliamentary coordination but merely "*a coincidental sum of unrelated events.*"<sup>9</sup>

The second proposed approach is the Political Bargaining. Here, subsidiarity is an elastic concept with no fixed meaning, and it can be employed to justify almost any position in favour of or in opposition to EU action in a given circumstance. This means that it is not possible to differentiate between subsidiarity and the related principles of conferral, proportionality, and policy effectiveness. Also, national parliaments seek to build a coalition of chambers in opposition, with the aim of gathering enough votes under the EWM to achieve a yellow card or an orange card.

The third proposed approach is Policy Arguing. In this approach subsidiarity is neither definite nor elastic, but rather ambiguous. In relation to the related principles it is "*neither neatly separable nor indistinguishable from them; rather, it remains a distinct concept, but it overlaps heavily with the related principles of conferral, proportionality and policy effectiveness.*"<sup>10</sup> According to this approach, reasoned opinions can raise concerns in order to fundamentally challenge the justifications put forward by the Commission.

In conclusion to this debate, and as this paper will further show, a general legal or political approach is not consistent throughout the Union, nor within a national parliament. It is common for the two chambers of one Parliament to interpret the same proposal in different ways.

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<sup>9</sup> P Kiiver, *The National Parliaments in the European Union: A Critical View on EU Constitution-Building*, (The Hague: Kluwer Law International, 2006) 162, 164; I. Cooper, *Is the Subsidiarity Early Warning Mechanism a Legal or a Political Procedure? Three Questions and a Typology* (Robert Schuman Centre for Advanced Studies Research, 2016) 20.

<sup>10</sup> I. Cooper, *Is the Subsidiarity Early Warning Mechanism a Legal or a Political Procedure? Three Questions and a Typology* (Robert Schuman Centre for Advanced Studies Research, 2016) 22.

### 3. The parliaments of the Netherlands and of Romania

Nicola Lupo categorizes national Parliaments as a “*somewhat numerous <family> of institution*”<sup>11</sup> composed of heterogeneous members. The distinctions lie at a quantitative and qualitative level and are rooted in century-old traditions. It, therefore, makes sense that the way in which the Early Warning Mechanism is used within each national Parliament is influenced by the characteristics of each of the Parliaments.

As such, before diving into the assessment of the reasoned opinions issued on the basis of Protocol 2 attached to the Treaty of Lisbon by the two Member States under discussion, I believe it necessary and relevant to grant a piece of attention to their national parliaments. In this sense, I wish to first discuss their structures, relationship to EU affairs, European legislation scrutiny, procedure of issuing of reasoned opinions, and perception of the EWM.

#### 3.1 The Dutch Parliament

The Netherlands is a constitutional monarchy and a parliamentary democracy with a moderate degree of decentralisation. The country is decentralised into 12 provinces which have their own regional parliaments on the European mainland and a number of overseas territories with a special status. The Netherlands was part of the European Union, and its predecessors – the European Communities – since the beginning, being one of the founding Member States.

The Dutch Parliament is bicameral, the two chambers are referred to as the *Eerste Kamer der Staten-Generaal* (the Senate) and the *Tweede Kamer der Staten-Generaal* (the House of Representatives). Elections for the members of the Parliament are held every four years but each chamber follows different procedures in this sense. The members of the *Eerste Kamer* are elected by members of the provincial councils, using a proportional system, based on open party lists. For membership of the *Tweede Kamer*, direct elections are held using a system of proportional representation with an open party list.<sup>12</sup>

This parliament, known as the States General (Dutch: *Staten Generaal*) originated in the 15<sup>th</sup> century as an assembly of all the provincial states of the Burgundian Netherlands. The States

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<sup>11</sup> Nicola Lupo, *National and Regional Parliaments in the EU Decision-Making Process, after the Treaty of Lisbon and the Euro-Crisis*, (Perspectives on Federalism, Vol. 5, Issue 2, 2013) 9.

<sup>12</sup> Anna Lena, *The Dutch Parliament and EU Affairs: Decentralizing Scrutiny* by Anna Lena Hogenauer, 256, in C. Heffler, C. Neuhold, O. Rozenberg, J. Smith, *The Palgrave Handbook of National Parliaments and the European Union*, (Palgrave Macmillan, 2015)

General was divided into a Senate and a House of Representatives in 1815, with the establishment of the Kingdom of the Netherlands. Constitutionally, all functions of the parliament are given to both houses, except for the rights of initiative and amendment, which only the *Tweede Kamer* has.

The Tweede Kamer is the stronger chamber of the Dutch Parliament. While both chambers are involved in law-making and have budgetary powers and the right to conduct inquiries, only the Tweede Kamer has the right to initiate and amend legislation. The Eerste Kamer meets only once a week (on a Tuesday). Because of this the Eerste Kamer is referred to as a “*part-time parliament*”.<sup>13</sup>

In connection with the relationship with the EU the Dutch constitution is relatively ‘easy going’. While it does not mention the Union explicitly, it does contain articles on international treaties which apply to EU affairs.<sup>14</sup> These provisions state that law-making and juridical competences can be transferred to international organisations, but parliamentary approval is required for this.<sup>15</sup>

The individual relationships of the two chambers with regard to EU affairs are regulated in the Standing Orders of the two chambers. As far as the Tweede Kamer is concerned, the Standing Orders guiding it stipulate the existence of a permanent committee for EU affairs and mention the right of Dutch members of the European Parliament to attend and participate in the meetings of the Tweede Kamer. The Standing Orders of the Eerste Kamer make no reference to the EU, although there is a memorandum that sets out the approach to EU affairs since the Lisbon Treaty.<sup>16</sup>

Because it is the stronger chamber, I will first discuss the scrutiny of EU affairs of the Tweede Kamer der Staten-Generaal. Generally, all legally binding decisions have to be taken in the plenary. However, when it comes to the scrutiny of EU affairs the procedure has been refined in such a way that now it is mostly done by the committees. More importantly, this

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<sup>13</sup> Anna Lena, *The Dutch Parliament and EU Affairs: Decentralizing Scrutiny* by Anna Lena Hogenauer, 258, in C. Heffler, C. Neuhold, O. Rozenberg, J. Smith, *The Palgrave Handbook of National Parliaments and the European Union*, (Palgrave Macmillan, 2015)

<sup>14</sup> Article 91 and 92 of the Dutch Grondwet (Constitution).

<sup>15</sup> If an international treaty departs from the provisions of the Grondwet, a two-thirds majority is required in each chamber before it can be ratified.

<sup>16</sup> Anna Lena, *The Dutch Parliament and EU Affairs: Decentralizing Scrutiny* by Anna Lena Hogenauer, 256, in C. Heffler, C. Neuhold, O. Rozenberg, J. Smith, *The Palgrave Handbook of National Parliaments and the European Union*, (Palgrave Macmillan, 2015)

refinement has led to the rise of importance of sectoral committees in the hands of which the responsibility of EU affairs has been decentralised.<sup>17</sup>

The discussion on the Dutch Tweede Kamer can be quite extensive, however, due to the topic limitations of this paper I will confine myself to mentioning only relevant aspects. The procedure followed is as follows: The Tweede Kamer systematically analyses the Work Programme of the European Commission for the coming year in order to identify its priorities. The above-mentioned sectoral committees scrutinise the part of the programme which affects them and the European Affairs Committee together with the cabinet member assigned to EU affairs discuss the document and create a list of priorities which is later adopted in the plenary. Since 2010, so after the entry into force of the Lisbon Treaty, this list also refers to the proposals with regard to which the chamber wishes to conduct the subsidiarity test. Overall the approach is selective as the following chapter will prove.<sup>18</sup>

The Eerste Kamer of the Dutch Parliament follows a similar pattern. Formal resolutions and opinions can only be adopted in the plenary and sectoral committees are responsible with the selection of priorities based on the Commission Work Programme. It is relevant to mention here that the (limited) staff of the Eerste Kamer is managing an extensive website on EU affairs – EuropaPoort. Here the procedure followed by the Eerste Kamer for monitoring the compliance with the principles of subsidiarity and proportionality is extensively described and made available to the public.<sup>19</sup>

Even before the entry into force of the Treaty of Lisbon, the Dutch Parliament has been gathering experience in conducting subsidiarity tests on EU legislative proposals through its participation in the Political Dialogue and the Conference of Parliamentary Committees for Union Affairs (COSAC). Under the national procedure, the Parliament receives from the government a so-called BNC-fiche (*Beoordeling Nieuwe Commissievoorstellen*) which contains the Government's assessment of the European legislative proposal within six weeks of its publication. This facilitates the work of the committees. If a proposal needs a subsidiarity test, the BNC-fiche must be sent within three weeks. Under the provision of Protocol 2 annexed to the Lisbon Treaty, the national parliaments must adopt a reasoned

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<sup>17</sup> Anna Lena, *The Dutch Parliament and EU Affairs: Decentralizing Scrutiny* by Anna Lena Hogenauer, 258, in C. Heffler, C. Neuhold, O. Rozenberg, J. Smith, *The Palgrave Handbook of National Parliaments and the European Union*, (Palgrave Macmillan, 2015)

<sup>18</sup> Anna Lena, *The Dutch Parliament and EU Affairs: Decentralizing Scrutiny* by Anna Lena Hogenauer, 258, in C. Heffler, C. Neuhold, O. Rozenberg, J. Smith, *The Palgrave Handbook of National Parliaments and the European Union*, (Palgrave Macmillan, 2015)

<sup>19</sup> See for more detail [https://www.eerstekamer.nl/eu/begrip/english\\_3](https://www.eerstekamer.nl/eu/begrip/english_3)

opinion within eight weeks and, naturally, it can happen that the BNC-fiches arrive late. Because of this the two chambers, and particularly the better staffed Tweede Kamer, gather additional information on the background and context of each proposal, and the positions of other Member States with regard to the Proposal.<sup>20</sup>

In the beginning the Dutch reasoned opinions issued by the civil servants were regarded as “*highly legalistic and resembled the kind of quality control that an independent advisory body can provide.*”<sup>21</sup> However, over time the civil servants have changed their ways and now present a balanced advice, leaving the choice of argument to politicians, rendering the process politicised and turning the reasoned opinions into instruments to support or undermine a policy.<sup>22</sup> This can be viewed as the result of the rise in popularity of Eurosceptic parties in the Netherlands.

Lastly, with regard to the Early Warning Mechanism, the Dutch Parliament considers it to be an opportunity for greater involvement of national parliaments, despite the dependency on other parliaments.

### **3.2 The Romanian Parliament**

Romania has a semi-presidential constitutional system in which the national parliament is characterised as a perfect or symmetric bicameralism. Administratively, the country is divided into 41 counties. This Member State joined the European Union in 2007, however the request for accession was made as soon as 1995. Discussions about the status of Romania within the European Union can be extensive, however for the purpose of being on point I will continue to assess the structure of the national parliament, its relationship with EU affairs, the scrutiny of EU legislation, the procedures for issuing reasoned opinions and the perception of the EWM.

The Romanian Parliament was established in 1858 – 1859 and was the institution through which democratic governance was achieved. As a whole, the parliamentary political regime ensured the democratic exercise of fundamental freedoms, which is obviously an inherent

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<sup>20</sup> Anna Lena, *The Dutch Parliament and EU Affairs: Decentralizing Scrutiny* by Anna Lena Hogenauer, 258, in C. Heffler, C. Neuhold, O. Rozenberg, J. Smith, *The Palgrave Handbook of National Parliaments and the European Union*, (Palgrave Macmillan, 2015)

<sup>21</sup> P. Kiiiver, *Natrionale Parlamenten en Europese Wertgeving: De Staten-Generaal als de Raad van State van Europa*, (RegelMat, 2010) 200.

<sup>22</sup> Anna Lena, *The Dutch Parliament and EU Affairs: Decentralizing Scrutiny* by Anna Lena Hogenauer, 261, in C. Heffler, C. Neuhold, O. Rozenberg, J. Smith, *The Palgrave Handbook of National Parliaments and the European Union*, (Palgrave Macmillan, 2015)

function of parliamentary legislature.<sup>23</sup> After 1944, under the pressure of communist forces, the parliament was reorganised into a single legislative body (the Assembly of Deputies) and in 1948 it was changed into the Marea Adunare Națională (the Great National Assembly) which was a merely formal body, completely subordinated to the power of the Romanian Communist Party. After the Romanian Revolution of December 1989, the road was open for Romanians to restore an authentic pluralistic electoral democracy which respected human rights, and observed the separation of powers and the rulers' responsibility before representative bodies.

As mentioned before, the national parliament of Romania is bicameral. Both the lower chamber (Camera Deputaților) and the second chamber (Senatul) are elected under the same electoral rules and have the same prerogatives and functions. Romania's institutional setting provides for a strong parliament and a high degree of institutional stability. However, there is critique with regard to the size of the legislature. Being a representative body, the number of the members should be determined proportionally with the population of the country. Thus, and according to relevant doctrine,<sup>24</sup> the number of the members of the lower chamber should not exceed – in theory – 272. In reality this number is 378<sup>25</sup> in the lower chamber, and 176 in the Senate.

The Romanian Constitution contains a separate article referring to the integration in the European Union. This provision mentions that, in line with the Treaties, some attributions will be transferred to the Union institutions through a law which must be adopted by the Parliament.<sup>26</sup>

While other national parliaments have been working on regaining their legislative powers through various institutional reforms and by setting up different procedures to scrutinise the governments in the EU decision-making process, the Romanian Parliament has fallen behind and does not seem to mind it.<sup>27</sup> Even more so, before 2011 there was a complete absence of such control of government policies on EU affairs.

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<sup>23</sup> M.A. Apostolache, *Rolul parlamentelor naționale în elaborarea și aplicarea dreptului european* (Ed. Universul Juridic, 2013) 17.

<sup>24</sup> A. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, (Yale University Press, 1999).

<sup>25</sup> This number is real on the date of 31<sup>st</sup> of May 2016 and it does not include the number of Deputies who have ended their mandate early. For more information <http://www.cdep.ro/pls/parlam/structura2015.de?idl=1>

<sup>26</sup> Constituția României Articolul 148.

<sup>27</sup> Angela Tacea, *The Slow Adaptation of a New Member State: The Romanian Parliament and European Integration*, 615, in C. Heffler, C. Neuhold, O. Rozenberg, J. Smith, *The Palgrave Handbook of National Parliaments and the European Union*, (Palgrave Macmillan, 2015)

Each of the Chambers has, since 2011, a European Affairs Committee. Among other tasks, these committees scrutinise EU draft legislative acts, together with other standing committees, or alone. With regard to the procedure for adopting reasoned opinions, we can observe a striking difference between the two chambers. Thus, while the Senate has to vote on the reasoned opinions in a plenary session, the Camera Deputaţilor can adopt one without the involvement of the plenary. This of course affects the number of plenary meetings held by the two chambers.

An important mention in this chapter is the Directorate for Community Law of the department of Parliamentary studies and Community law (the Directorate). This is a body which offers support to the Camera Deputaţilor on EU affairs, and it was created in 2009 as a consequence of the Lisbon Treaty. A similar, slightly smaller body also exists within the Senate.

The procedure for subsidiarity checks is as follows: after the chambers receive the referral letters initiating the eight-week procedure, these letters are registered at the Directorate. Every Monday the Directorate prepares a list of all draft legislative acts, modified draft legislative acts, and consultation papers received from EU institutions, and forwards it to the Standing Bureau,<sup>28</sup> the European Affairs Committee, and selected standing committees. The standing committees play an advisory role and must send a draft reasoned opinion to the EAC within a tight deadline. The final opinion is adopted by the EAC. This is forwarded to the Standing Bureau, which decides either to submit it to vote in the plenary, or to directly send it to the government and to the EU institutions. Within the Senate, the procedure follows the same steps with the exception that each opinion must be voted on in the plenary.

In general, the Romanian parliamentarians consider the Treaty of Lisbon to be a good thing, but that it has not brought about a real change in the national situation. They consider it to have had more of a symbolic effect rather than a concrete one. Therefore, even though the Treaty of Lisbon offers national parliaments an opportunity to be more engaged in EU affairs, the involvement of the Romanian Parliament seems to be still in the slow process of adapting to the new multi-level governance mechanisms, learning the new scrutiny practices.<sup>29</sup>

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<sup>28</sup> The Standing Bureau (Biroul Permanent) is a parliamentary collective elected body that leads and organises the work of the chambers. One exists within each chamber and they consist out of the President of each chamber, four vice presidents, four secretaries, and four questers.

<sup>29</sup> Angela Tacea, *The Slow Adaptation of a New Member State: The Romanian Parliament and European Integration*, 630, in C. Heffler, C. Neuhold, O. Rozenberg, J. Smith, *The Palgrave Handbook of National Parliaments and the European Union*, (Palgrave Macmillan, 2015)

From this, and also from the most recent COSAC reports it is clear that the Romanian parliamentary chambers do not – as of yet – have a defined approach to subsidiarity scrutiny. Additionally, in the past few years Romania’s political class has suffered changes and even criminal chargers, which caused a political turmoil – destabilising the trust of the citizens. As a result, the members of Parliament are not working in an organised manner.

## **4. (Reasoned) opinions in the Netherlands and Romania**

### **4.1 Reasoned opinions from 2006 until 2016**

For the analysis that follows, all opinions available on the website of the European Commission were taken into account, so both reasoned opinions and letters sent as participation to the Political Dialogue.<sup>30</sup> The reason behind this, is that both kinds of letters offer insight on how the national parliaments under assessment understand and apply the principle of subsidiarity. As mentioned earlier in this paper, all the 252 opinions assessed were analysed on the basis of Ian Cooper’s template which categorises opinions as Legal-Rule Following, Political Bargaining and Policy Arguing. The opinions that did not fit into these three categories are marked under an extra *other* category, which includes favourable opinions, letters mentioning concerns, comments or suggestions which are unrelated to subsidiarity, and letters which request more information from the Commission. The reason why so many opinions are simply categorised under *other* is that because the purpose of this paper is to observe the way in which the two national parliaments are applying the principle of subsidiarity under Protocol 2, and the letters sent as participation to the Political Dialogue do not (for the most part) fit any of the categories in the proposed template. Naturally, some opinions (so not reasoned opinions) refer to the national parliaments’ interpretation of the principle of subsidiarity, and those have been taken into account. The replies from the Commission are also presented here, however in a non-critical manner, and only for the purpose of providing the complete circle of dialogue: Commission proposal – national parliaments’ opinion – Commission reply.

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<sup>30</sup> All the opinions analysed as part of this research were taken of the European Commission’s website, which, according to the Secretariat General of the Commission, host all opinions the Commission receives. They can be found at the following link [http://ec.europa.eu/dgs/secretariat\\_general/relations/relations\\_other/npo/index\\_en.htm](http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm)

## 4.2 Subsidiarity scrutiny before Lisbon

Prior to the entry into force of the Treaty of Lisbon, national parliaments exercised their role in the scrutiny of compliance with the principles of subsidiarity and proportionality in EU legislative proposals in accordance with Article 5 of the Treaty establishing the European Community, Protocol No. 9 on the Role of National Parliaments in the European Union annexed to the TUE and the Treaties establishing the Communities, and Protocol No. 30 on the Application of the Principles of Subsidiarity and Proportionality annexed to the TEC. Protocol No. 9 conferred a special role in the application of the principle of subsidiarity on the Conference of Community and European Affairs Committees (COSAC), which could address to the European Parliament, the Council, and the Commission *any contribution which it deems appropriate on the legislative activities of the Union, notably in relation to the application of the principle of subsidiarity*.

Based on this, and according to the information available on the European Commission's website, in the years before the Lisbon Treaty, the Dutch Parliament made use of these provisions and sent several opinions to the Commission on legislative proposals. We can observe that over the period of 4 years the Netherlands gave a negative review with regard to subsidiarity for only three Commission proposals.<sup>31</sup>

In this pre-Lisbon era the Dutch, most often, sent either joint opinions, or separate ones using identical argumentation. From the data available for these years, slight but decisive patterns in the practice of the two Dutch chambers can be observed. Firstly, both chambers of the Dutch Parliament were involved, with the Tweede Kamer being more active. Secondly, there already is a tendency to interpret the principle of subsidiarity as a legal rule. Over the following years this tendency will strengthen.

As regards the Romanian Parliament, even though Romania became a member of the European Union before the Treaty of Lisbon, it did not participate in the pilot tests organised in the framework of COSAC.

The pre-Lisbon period is not an essential part in this research, however, it stands to show the incipient way of reasoning and understanding of the subsidiarity principle under the

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<sup>31</sup> See in this sense Tables 1 to 4.

provisions of the Amsterdam Protocol, and this is an analysis which quantitatively serves the overall assessment from the conclusions of this chapter.

#### 4.1.2. Subsidiarity scrutiny after Lisbon

Starting in 2010 the provisions of Protocol No. 2 of the Treaty of Lisbon are fully into place and the gears of the Early Warning Mechanism are set into motion. The national parliaments are responsible for subsidiarity checks of the European legislative proposals.

There was a spike in the activity of the Romanian parliamentary chambers' activity compared to the pre-Lisbon period. While they did not send reasoned opinions, we can observe an increase in participation to the Political Dialogue as the Senate of the Romanian Parliament sent 25 letters in 2010, 7 of these letters are sent jointly with the Chamber of Deputies. In comparison, and during the same time frame, both Dutch chambers issued a total of 7 opinions (out of which 2 were reasoned opinions). Again, the tendency of the Dutch Parliament's chambers to interpret the principle of subsidiarity as a Legal-Rule following principle is obvious. However, compared to the total number of letters sent by the Dutch in 2009, which is 23, the States General sent a smaller number of opinions – 7 – in 2010.

Out of all the opinions sent for proposals from 2010, one in particular catches the eye. In December 2010 the Commission made a proposal for a Council Decision addressed to the French Republic.<sup>32</sup> A decision which is of course fully binding only for the Member States to whom it is addressed, nonetheless this did not stop the Romanian Senate from issuing an opinion stating that the proposal is *“compliant with the subsidiarity and proportionality principles, taking into consideration that the target cannot be reasonable (sic) reached by the Member States by themselves and does not exceed what is necessary to achieve this objective.”* This could be interpreted as an overzealous action on the part of the Romanian Senate, however, a counter-logical deduction can be made based on the fact that it appears that the Senate issued opinions on all proposals on the table at that time.

Come 2011, both countries appear to have been more involved in comparison with the previous year.<sup>33</sup> The Netherlands stagnated at a total number of under 10, while Romania issued its first reasoned opinions as part of the EWM procedure, and a high number of letters

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<sup>32</sup> Proposal for a Council Decision amending Decision 2004/162/EC as regards the products that may benefit from exemption from or a reduction in dock dues, COM/2010/0749 final, available at [http://ec.europa.eu/dgs/secretariat\\_general/relations/relations\\_other/npo/docs/romania/2010/com20100749/com20100749\\_senat\\_opinion\\_en.pdf](http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/romania/2010/com20100749/com20100749_senat_opinion_en.pdf)

<sup>33</sup> See table 5.

in the interest of the Political Dialogue – 48. It is important to mention here that starting 2011, the Romanian Parliament has a European Affairs Committee, which can explain the increased number of letters.

Many of the opinions issued by Romania are favourable opinions. The interesting aspect which arises from the reading of the opinions issued in 2011 is that the two Romanian chambers seem to develop individual drafting styles. While the opinions of the Senate are (almost) at all times clear, short, and to the point, the letters of the Chamber of Deputies are often very extensive. What's more, the Chamber of Deputies was beginning to send letters which have a confusing structure, though they contain generally a single article, which enclose (more often than not) favourable comments on the proposal.<sup>34</sup> By the end of 2011 it became clear that Romania is actively participating in the Political Dialogue as it sent a multitude of letters containing comments, remarks, and recommendations.

Starting with this year, the opinions of the Dutch chambers seemed to involve the political colours of the Parliament more and more. For example, in one opinion the Senate structured the letter into general parliamentary remarks and questions from the VVD party.<sup>35</sup> The Legal-Rule following interpretation of the principle of subsidiarity is still very noticeable in the opinions of the Dutch Parliament.

In 2012 both Member States issued few opinions, situation which could be explained by the fact that both countries had parliamentary elections that year. Nonetheless, the data serves to further<sup>36</sup> cement the findings from the previous years. The Netherlands continued to give short and clearly structured Legal Rule-Following opinions, while the Romanian chambers still seemed to be in search of a consistent style of drafting. This year's data again serves to show how the Dutch understood the application of the principle of subsidiarity.

In 2013 both Member States were moderately involved in the Political Dialogue, as well as the EWM. The Netherlands sent a total of 15 opinions, and Romania 31.<sup>37</sup>

Romania seemed to take the role of a grammar and semantics teacher as it sent several opinions correcting the text or formulation of the proposal.<sup>38</sup> The Netherlands continued to

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<sup>34</sup> For example the opinion sent by the Chamber of Deputies on the proposal for a Regulation of the European Parliament and of the Council on a European Union Programme for Social Change and Innovation, COM/2011/0609 final - 2011/0270 (COD), available only in Romanian at: [http://ec.europa.eu/dgs/secretariat\\_general/relations/relations\\_other/npo/docs/romania/2011/com20110609/com20110609\\_deputatilor\\_opinion\\_ro.pdf](http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/romania/2011/com20110609/com20110609_deputatilor_opinion_ro.pdf)

<sup>35</sup> VVD is a liberal party in the Netherlands.

<sup>36</sup> See Table 6.

<sup>37</sup> See Table 7.

send clear opinions, however, this year we notice a variation in argumentation, as they sent an equal number of Legal-Rule following opinions, Political Bargaining opinions, and Policy Arguing opinions.

More importantly, the majority of the proposals on which both Member States issued opinions are from 2013. These will be assessed in detail in the following chapter.

In 2014 the Netherlands showed slim participation (2 opinions) to the Political Dialogue or EWM. Romania remained active, but only in the Political Dialogue, as it did not send any reasoned opinions.<sup>39</sup>

In 2015 Romania continued to be active in the Political Dialogue (32 opinions), and the Netherlands made a small contribution also (2 opinions).<sup>40</sup>

Relating to the content of the opinions, the structure of the opinions issued by the Romanian Senate are starting to follow the complexity of the opinions issued by the Chamber of Deputies. This is an unfortunate development as this new style is harder to read.<sup>41</sup>

A change also occurred in the style of the opinions issued by the Dutch House of Representatives. By now the opinions were dissecting the proposals and presenting votes attributed to political parties.<sup>42</sup> Following this change the Netherlands went on to send opinions which interpret the principle of subsidiarity in a political way, rather than legal.

For 2016, according to the data available on the website of the European Commission, the Netherlands has not, as of yet, issued any opinions.<sup>43</sup> Romania on the other hand has already contributed with a number of 15 opinions.<sup>44</sup>

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<sup>38</sup> For example: last point of the opinion on the Proposal for a Directive of the European Parliament and of the Council concerning measures to ensure a high common level of network and information security across the Union, COM/2013/048 final - 2013/0027 (COD), available at: [http://ec.europa.eu/dgs/secretariat\\_general/relations/relations\\_other/npo/docs/romania/2013/com20130048/com20130048\\_senat\\_opinion\\_en.pdf](http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/romania/2013/com20130048/com20130048_senat_opinion_en.pdf)

<sup>39</sup> See Table 8.

<sup>40</sup> See Table 9.

<sup>41</sup> For example: the opinion issued by the Romanian Senate on the Draft amending budget n° 1 to the general budget 2015 accompanying the proposal for a Regulation of the European Parliament and of the Council on the European fund for strategic investments and amending regulations (eu) n°1291/2013 and (eu) n°1316/2013, com/2015/011 final available at: [http://ec.europa.eu/dgs/secretariat\\_general/relations/relations\\_other/npo/docs/romania/2015/com20150011/com20150011\\_senat\\_opinion\\_en.pdf](http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/romania/2015/com20150011/com20150011_senat_opinion_en.pdf)

<sup>42</sup> For example: the opinion issued by the Dutch House of Representatives on the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, COM/2015/0671 final - 2015/0310 (COD) available at: [http://ec.europa.eu/dgs/secretariat\\_general/relations/relations\\_other/npo/docs/netherlands/2015/com20150671/com20150671\\_tweedekamer\\_opinion\\_en.pdf](http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/netherlands/2015/com20150671/com20150671_tweedekamer_opinion_en.pdf)

<sup>43</sup> Data available on the Commission website on the 4th of July 2016.

<sup>44</sup> See Table 10.

### 4.1.3. Chapter conclusions

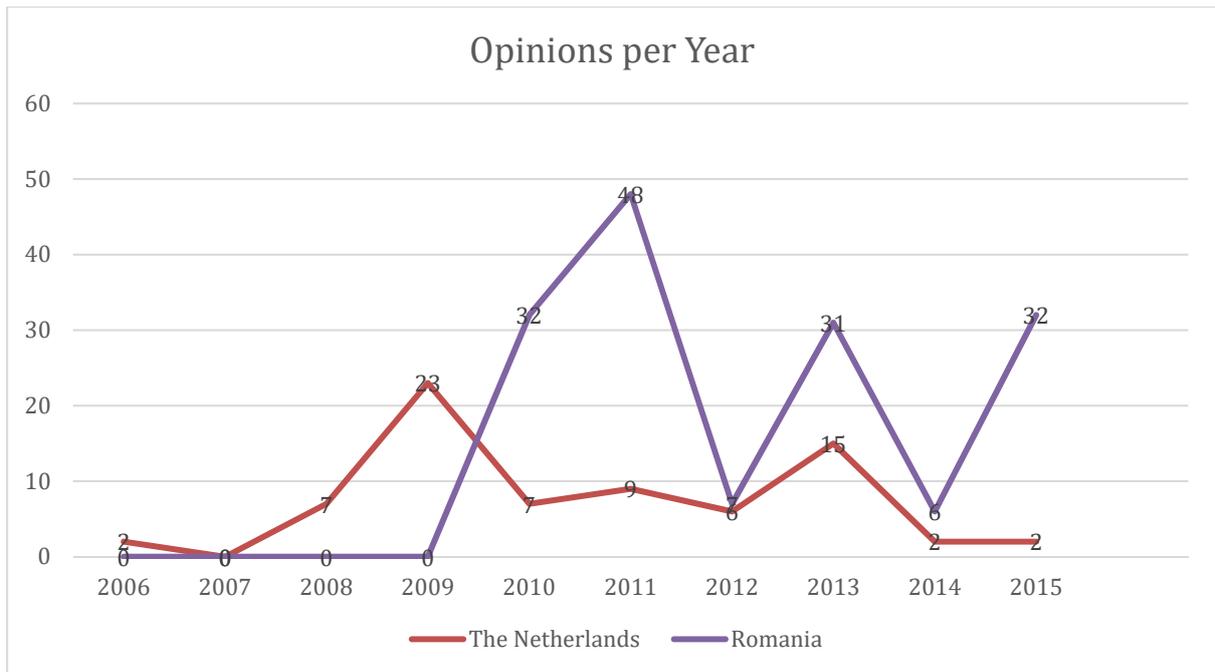
For a general comprehension of the understanding of the principle of subsidiarity and its application in the Netherlands and Romania, it is important to look at all the numbers explained and detailed above.<sup>45</sup> Thus, over the course of 10 years, we can observe patterns in the argumentation put forward by the legislators of the two Member States.

Firstly, from the Netherlands we can observe a distinguishable pattern of interpreting subsidiarity as Legal Rule-Following, pattern which is showing a slight tendency of switching to a political way of interpretation, however the data available is not sufficient enough to be conclusive. The Legal-Rule Following method of interpreting the principle of subsidiarity as such was obvious even before the Treaty of Lisbon. However, it must be mentioned that when it was necessary, the Dutch did not abstain from breaking their pattern and advocated differently depending on their stance on the Commission proposal. The numbers speak for themselves: a total of 16 opinions in the Legal-Rule following category, 4 in the Political Bargaining one, and 7 in Policy Arguing. Moreover, the data shows that in the past 10 years the Netherlands contributed with 49 opinions sent as participation to the Political Dialogue. The total number of reasoned opinions sent by the Netherlands is 21.

Romania on the other hand does not generally follow the Legal-Rule approach as often as the Netherlands. Numbers show that for the most part the opinions issued by the Romanian legislator pertain to the Political Bargaining category, however, the Legal-Rule approach is not far behind. Moreover, Romania is clearly more involved in the Political Dialogue having sent 172 letters in this sense, more than 3 times as many as the Netherlands. However, the number of reasoned opinions sent is lower than in the Netherlands, as Romania sent a total of 15 reasoned opinions.

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<sup>45</sup> See Table 11.



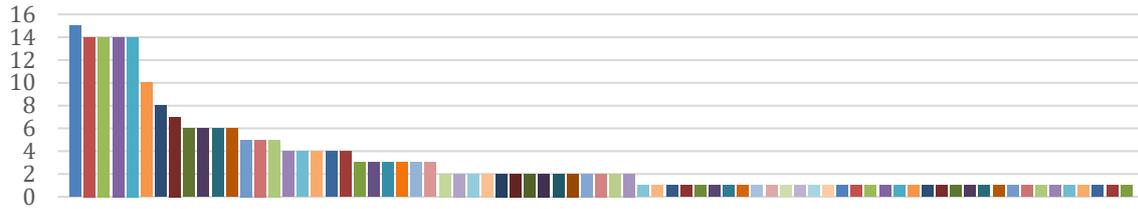
*Chart 1: Opinions issued by the Netherlands and Romania over the period 2006-2015<sup>46</sup>*

For the purpose of a complete comparison of the number of (reasoned) opinions issued in the past 10 years, I have put together the above chart. This shows more clearly the quantitative differences of (reasoned) opinions sent by the Netherlands and Romania. It is evident that, on average, Romania is more involved in the Political Dialogue.

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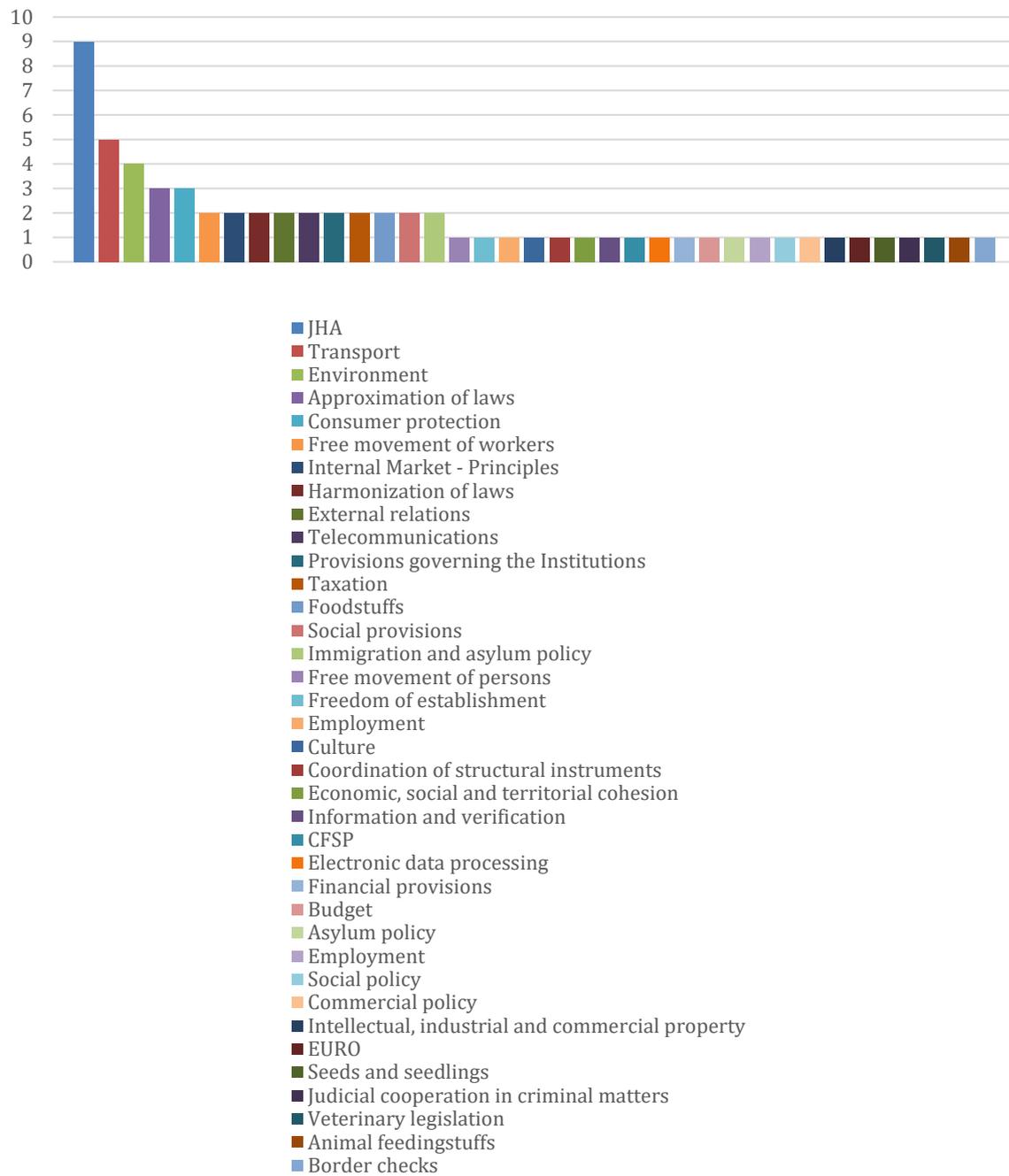
<sup>46</sup> The data from 2016 is not taken into consideration in this chart as it is not complete.

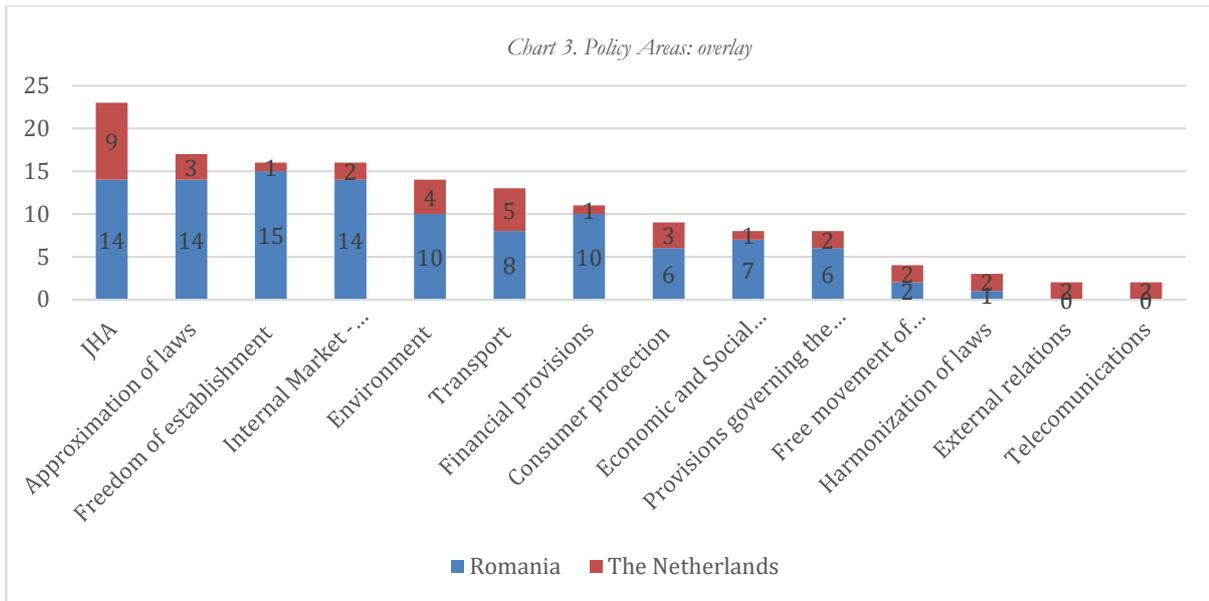
Chart 2: Policy areas of the proposals for which Romania sent the most opinions



- Freedom of establishment
- JHA
- Internal Market - Principles
- Approximation of laws
- Environment
- Financial provisions
- Transport
- Economic, social and territorial cohesion
- Consumer protection
- Provisions governing the Institutions
- EMU
- Taxation
- Free movement of persons
- Trans-European networks
- AFSJ
- Telecommunications
- Agricultural structures
- Technical Barriers
- Social provisions
- Energy
- Free movement of capital
- Economic policy
- Agriculture and Fisheries
- Freedom of establishment
- Asylum policy
- Immigration and asylum policy
- Free movement of workers
- Employment
- Information and verification
- Budget
- Economic and monetary policy
- Provisions governing the Institutions
- Regional policy
- Agricultural structural funds
- Common organization of agricultural markets
- Foodstuffs
- Fisheries policy
- European social fund (ESF)
- European Regional Development Fund (ERDF)
- Border checks
- Culture
- Citizenship of the Union
- Small and Medium Enterprises
- Harmonization of laws
- Coordination of structural instruments
- CFSP
- Free movement of capital
- Own resources
- European Agricultural Guidance and Guarantee Fund (EAGGF)
- Industry
- Nuclear common market
- Milk Products
- Information and verification
- Regional policy
- French overseas departments
- Intellectual, industrial and commercial property
- Wine
- Employment
- Cohesion fund
- European Development Fund - EDF

Chart 3: Policy areas of the proposals for which the Netherlands sent the most opinions





The charts above show from which policy areas the most proposals are scrutinised. In this sense for Romania the top 5 policy areas are Freedom of establishment, Justice and Home Affairs, Internal Market Principles, Approximation of laws, and Environment. So, a generally high consideration for proposals relating to the Internal Market and its principles. For the Netherlands, the top 5 are Justice and Home Affairs, Transport, Environment, Approximation of laws, and Consumer Protection. Significantly different policy areas are considered by the Dutch. Of course, this number is also influenced by the total number legislative proposal issued for each policy areas, but for the purpose of this comparative paper, these two charts are relevant as they show the different approaches of the two Member States.

## **5. Comparative content analysis of reasoned opinions issued by both Member States on the same legislative proposal**

From the pool of Commission proposals and the respective reasoned opinions and Political Dialogue opinions issued by the two countries under assessment, I have selected a number of nine proposals for which both countries issued reasoned opinions and/or opinions.<sup>47</sup> This number allows for a qualitative content analysis. The approach used for this assessment follows the following structure: for each proposal, I will present the scope of each proposal and subsidiarity

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<sup>47</sup> For the sake of accuracy of the research it should be mentioned that the number of proposal on which both countries issued opinions (not reasoned opinions) is actually 15, however, the proposals which received opinions outside the scope of Protocol 2 will not be taken under assessment as the comments and observations contained in them are not related to the principle of subsidiarity.

compliance justification put forward by the Commission, next I will present, in a critical way, the opinions issued by the parliamentary chambers of The Netherlands and Romania, followed by the replies from the Commission. The opinions will be further categorised based on Ian Cooper's template. References will also be made to Cygan's interpretation of the steps necessary for the correct application of the principle of subsidiarity.

### **5.1. Proposal for a Regulation of the European Parliament and the Council concerning the European Network and Information Security Agency (ENISA) – 2010**

The first proposal assessed is a recast of the Council Regulation (EC) No. 44/2001 on Jurisdiction and the recognition and enforcement of judgements in civil and commercial matters – also referred to as the Brussels I Regulation.<sup>48</sup>

The Commission justifies that the proposal is consistent with the subsidiarity principle arguing in the proposal that *“the abolition of exequatur<sup>49</sup> cannot be achieved by the MS because the procedure has been harmonized by Regulation Brussels I and can therefore, only be amended by way of a regulation”*. The Commission goes on to argue that only legislation at European level can create a level playing field, as the effect of national legislation is limited by the territoriality principle, concluding that action at EU level is therefore necessary.

With regard to this proposal the two chambers of the Dutch Parliament sent a joint Legal-Rule Following reasoned opinion in which they checked the proposal for compliance with the principle of subsidiarity and proportionality. The two chambers declared that they encountered issues regarding this compliance. They argued that the proposal offers insufficient benefits in relation to parts already regulated in a broader international context, implying that the proposal could have a restrictive impact on other international instruments and is, thus, incompliant with the principle of subsidiarity. Interestingly enough, this is the full argumentation the Netherlands provides in this case, as it does not indicate which international convention it refers to. Objectively speaking, in order for the Commission to fully and correctly understand the stance of national parliaments on subsidiarity checks, the chambers issuing the opinions should provide for a more detailed – but to the point – argumentation of their views.

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<sup>48</sup> A summary of the Brussels I Regulation can be found here: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A133054>

<sup>49</sup> Exequatur, is a concept specific to the private international law and refers to the decision by a court authorising the enforcement in that country of a judgment, arbitral award, authentic instruments or court settlement given abroad.

Understandably, the reply from the Commission focuses on this “*international context*” mentioned by the two Dutch chambers. It points out that under the auspices of The Hague Conference on Private International Law there is no convention which generally covers the free circulation of judgements in the area of civil and commercial matters. It continues to argue that under such circumstances it needs to ensure the equal access to justice in the Union for citizens and businesses. This comes as a consequence of the reasoned opinion being unspecific.

What can be observed here is that the argumentation laid forward by the Dutch Parliament, according to which this proposal is not compliant with the principle of subsidiarity, is thin and not supported by factual information. Because of this, the Commission was put in the situation in which it had to verify itself the vague information provided in the reasoned opinion.

From the other (geographical) end of the Union, the Romanian Parliament also issued an opinion on this proposal, through its Senate, and concluded that the proposed legislation was in line with the subsidiarity principle. Thus, the Romanian Senate considered the proposal to be compliant with the subsidiarity and proportionality principles, arguing that the objective of facilitating cross-border litigation and the free circulation of judgements in the EU cannot be reasonably achieved by the Member States themselves.

Although the Romanian Senate issued a favourable opinion with regard to this proposal we can notice that it also made sure to provide an – albeit short – argumentation for it.

From this first analysis, we can observe that on the one hand the argumentation style of the two Dutch chambers is unsatisfying, while the Romanian Senate provided clear argumentation even if the opinion was in favour of the proposal.

## **5.2. Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime – 2011**

The next proposal is in the area of Justice and Home Affairs. Over the past decade, the European Union and other parts of the world have seen an increase in serious and organised crime such as human or drug trafficking. As a response to the threats posed by serious crime and terrorism, correlated with the abolition of the internal border controls under the Schengen Border Convention, the EU adopted measures for the exchange of personal data between law enforcement and other authorities. Although these measures have proven useful, they tend to focus on data

relating to persons who are already suspected, i.e. persons who are “known” to law enforcement authorities.

Based on these facts the Commission put forward this proposal which would help Member States collect, process and exchange PNR data in order to avoid security gaps. In this sense, the Commission argues that action at EU level will help to ensure harmonised provision on safeguarding data protection in the Member States. The Commission ends the subsidiarity compliance justification by stating that since the objectives of this proposal cannot be sufficiently achieved by Member States, and be better achieved at Union level, the EU is both entitled to act and better placed to do so than the Member States acting independently.

In reaction to this proposal the Dutch Eerste Kamer sent an opinion (not a reasoned opinion) expressing concerns mainly related to the compliance with the proportionality principle. Nonetheless with regard to subsidiarity the Eerste Kamer has questions regarding the added value of Union action (efficiency criterion) in combating terrorism and serious crime. In this sense, it asks the Commission to substantiate this added value and explain the part played by PNR data in the prosecution of such crime. Thus, proving that the subsidiarity justification provided for by the Commission proved insufficient for the Eerste Kamer.

With regard to these two questions the Commission gives a brief reply explaining that the use of PNR data would enable law enforcement authorities to address the threat of serious crimes and terrorism from a different perspective than through the processing of other categories of personal data. As regards the first question the Commission does not give concise argumentation.

The Romanian Senate issued an opinion on this proposal, however, unlike the Dutch Eerste Kamer it had no comments and considered the proposal to be in line with the principle of subsidiarity. However, it did find proportionality related issues.

From the opinions sent to this proposal by the two Member States under discussion we can observe for the first time a similar interpretation. Both Member States express concerns related to the compliance with the subsidiarity principle, however neither issue reasoned opinions under the provisions of Protocol 2.

### **5.3. Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances – 2011**

With regard to this proposal the Commission mainly justifies the need for Union action by referring to the need of a common response to situation seriously affecting the public policy or internal security of the EU or of one of the Member States by allowing for the reintroduction of border controls at internal borders in exceptional circumstances but without jeopardising the principle of free movement of persons. The new regulation proposes that the decision to reintroduce controls at the internal borders shall be taken by the European Commission, following a request by a Member State.

The two chambers of the Dutch Parliament once again sent a joint Legal Rule-Following opinion and they note from the beginning that the proposed regulation implies a shift of power from Member States to the European Commission as far as the reintroduction of controls at the internal borders in exceptional cases.<sup>50</sup> They show that, based on Treaty articles, the proposal is in breach of the principle of subsidiarity. In this sense, they invoke articles 72 of the TFEU which provides that any measure adopted under the Title of the Area of Freedom Security and Justice “*shall not affect the exercise of responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of national security*”. Additionally, article 4 paragraph 2 of the TEU states that “*the Union shall respect the essential state functions, including territorial integrity of the state, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of the Member States.*” In essence, sustaining that the responsibility criterion is not respected.

On the basis of the mentioned articles, the Eerste Kamer and the Tweede Kamer conclude that they have objections concerning the shift of power of decision to the European Commission, underlining that according to the Treaties this competence lies with the Member States.

While slightly more detailed and substantiated, this reasoned opinion issued jointly by the two chambers of the Dutch Parliament still has room for improvement. It is of course proper to justify an opinion based on a legal text, however, the mere copying of that text into the opinion does not constitute argumentation. In this sense, it would be beneficial – again for the sake of proper and correct understanding – for the Dutch chambers to put more emphasis on the solid argumentation of their reasoned opinions.

The reply sent by the Commission in response to this is extensive. It starts by pointing out that since the Schengen area is a benefit shared by the whole of the EU, any decisions affecting this

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<sup>50</sup> For the sake of completion, it is important to mention that in the Schengen Border Code, according to article 23, a Member State may, by way of exception, in the event of a serious threat to the public order or internal security, in accordance with the procedure from article 24, or, in urgent cases in accordance with the procedure from article 24, again introduce border controls at the internal borders for a period of at most 30 days or for the foreseeable duration of the threat if this continues for more than 30 days.

benefit should be taken at EU level rather than by the Member States individually. The Commission goes on to emphasise that the free movement of people in the Schengen area is one of the most important and tangible results of the EU integration process. It also underlines that it fully respects the sovereign responsibility of Member States with regard to the maintenance of law and order and the safeguarding of internal security, and is convinced that this proposal is fully consistent with that sovereign competence. Moreover, the Commission counters the argument put forward by the Dutch Parliament referring to the Treaty articles by pointing out that the same articles make clear that the development of an area without internal frontiers, which must ensure the free movement of persons, is an EU competence.

Another interesting last argument put forward by the Commission is that decisions on the reintroduction of controls at internal borders have far reaching human and economic consequences, the impact of which is felt beyond the territory of a specific Member State. Thus, the proposed mechanism should ensure that decisions on the reintroduction of internal border controls are taken in a consistent manner across the Union, on the basis of the same criteria, and that the possibility to resort to such exceptional measures is not abused.

Interestingly enough, the negative – Political Bargaining - reasoned opinion issued by the Romanian Senate refers exactly to the last aspect mentioned in the last argument used by the Commission in its reply to the Dutch reasoned opinion, and – inadvertently – counters it. The Romanian Senate refers to the Report of the Commission to the European Parliament and the Council regarding the application of Title III of the Regulation (CE) No. 562/2006 which concluded that the Member States had not made excessive use of the reintroduction of controls at the internal borders, stating in essence that the necessity requirement is lacking from the Commission proposal. Moreover, it points out that according to legal text into force (it does not mention which texts exactly) the European Commission does not have enough time and information to issue an opinion in such cases.

Therefore, and given the fact that the Commission itself also laid down that the measure of reintroduction of the internal border controls is satisfyingly achieved by Member States, the Romanian Senate concludes that the respect of the subsidiarity principle is not observed.

Additionally, for the first time the opinions of the Netherlands and Romania present a similarity. The Romanian Senate has, aside from the arguments above, also invoked the same Treaty articles as the Dutch Parliament in its own reasoned opinion.

Lastly, the Romanian Senate states that, according to the aims established by the proposal, the Member States may act alone to attain them in an appropriate form, emphasising that “*community action*”<sup>51</sup> is not motivated as regards to the present proposal.

Disappointingly however, the Commission decided to not look into the well-structured arguments of the Romanian Senate and replied with a letter containing the exact same text as the one used in the reply to the Dutch Parliament. Though it can be said that this act of the Commission serves to further confirm that for the first time, the two legislators had similar opinions with regard to a Commission legislative proposal.

From these opinions, we can once again observe the insufficient argumentation style adopted by the Dutch and the detailed and thoroughly researched opinion issued by the Romanian Senate.

#### **5.4. Proposal for a Regulation of the European Parliament and of the Council on the European Globalisation Adjustment Fund (2014 - 2020) – 2011**

We move on to the next Commission proposal on which both the Dutch and the Romanian Parliaments issued opinions. This proposal aims to ensure that the European Globalisation Adjustment Fund (EGAF) continues to operate in the following programming period, in line with the basic principles laid down for the MMF 2014 – 2020.<sup>52</sup>

The Commission considers that the objectives of demonstrating solidarity at Union level in exceptional circumstances to that part of the workforce that has been negatively impacted by globalisation, a sudden crisis, or trade agreements, cannot be sufficiently achieved by Member States alone. It considers that these objectives can be better achieved at Union level taking into account that the EGF is an expression of solidarity across and between Member States.

As far as subsidiarity justification is concerned, the Commission concludes that the proposed regulation will contribute to making the objective of Union solidarity in exceptional circumstances more tangible for that part of the labour force affected in particular, and for the Union citizens in general.

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<sup>51</sup> In Romania it is still fairly common to refer to Union matters as “Community matters”.

<sup>52</sup> The Multiannual Financial Framework (MFF) of the European Union, also called the financial perspective, is a seven-year framework regulating its annual budget. It is laid down in a unanimously adopted Council Regulation with the consent of the European Parliament. The financial framework sets the maximum amount of spendings in the EU budget each year for broad policy areas (“headings”) and fixes an overall annual ceiling on payment and commitment appropriations. For more information [http://ec.europa.eu/budget/biblio/documents/fin\\_fw1420/fin\\_fw1420\\_en.cfm](http://ec.europa.eu/budget/biblio/documents/fin_fw1420/fin_fw1420_en.cfm)

To this, the Dutch Parliament once again sent a joint reasoned opinion from both its chambers, using the Legal Rule-Following approach, in which it declares that it considers that the European Commission has not adequately demonstrated that the proposal complies with the principle of subsidiarity. In the view of the Dutch Parliament, the responsibility of providing support to employees who have been made redundant (or threatened with the possibility of same) should lie primarily with the Member States (responsibility criterion). They consider that the only argument advanced by the European Commission, on the basis of Article 175 paragraph 3 TFEU, that solidarity cannot be achieved at Member State level, is insufficient, has not been properly developed, and is therefore not convincing. The two chambers conclude that the proposal has *“insufficient added value in comparison with other European instruments, and with regard to national responsibilities and efforts”*, so they state, in essence, that the efficiency criterion is not met. But once again, the Dutch argumentation is lacking as it does not fully explain this last point. In reply to this, the Commission decides to further explain the impact and the provisions of the proposed regulation. It underlines that it is up to Member States to decide whether to apply for EGF funding as well as which redundant workers should be targeted, which measures to implement, and at what cost to the budget. In any case, Member States implement the measures in accordance with their own legislation, procedures, and rules. Furthermore, the Commission agrees that responsibility for providing support for workers made redundant lies primarily with the Member States, and clarifies that the EGF intervention criteria are defined so as to ensure that it could be applied only to major cases of EU level importance. On a perhaps ironic note, the Commission mentions that The Netherlands is among the countries that have introduced the highest number of applications to the EGF.

Romania sent an opinion on this proposal (thus, not a reasoned opinion, even though it is sent on the basis of Protocol 2) in which it encourages this proposal and declares its support. No reference is made to any possible infringement of the subsidiarity principle and this opinion was sent outside the 8-week deadline.

### **5.5. Proposal for a Directive of the European Parliament and of the Council establishing a framework for maritime spatial planning and integrated coastal management – 2013**

The next proposal, and its reasoned opinions, are without a doubt interesting. The proposal was put forward as a result of consultations with interested parties and an impact assessment

which supported a common approach for implementing maritime spatial planning in EU waters, bearing in mind the particularities of each region. The proposed directive establishes a framework for maritime spatial planning and integrated coastal management in the form of a systematic, coordinated, inclusive, and trans-boundary approach to integrated maritime governance.

The Commission, in its subsidiarity justification, appreciates that the added value of EU action is to ensure and streamline Member State action on maritime spatial planning and integrated coastal management to guarantee consistent and coherent implementation across the EU, and to ensure a framework for cooperation between Member States on maritime spatial planning and integrated coastal management that share marine regions and sub-regions. Similarly, cross-border cooperation on maritime spatial planning and integrated coastal management in EU marine regions and sub-regions is essential as marine ecosystems, fishing grounds, marine protected areas, as well as maritime infrastructures run across national borders.

Both chambers of the Dutch Parliament issued a Politically Bargaining reasoned opinion, however this time they sent separate documents. Interestingly enough, the argumentation for the lack of compliance of the proposal with the principle of subsidiarity is identical. The Dutch consider that the Commission has not adequately demonstrated that the efficiency criterion has been met, in other words that there is added value of European-level obligations in the field of maritime spatial planning and integrated coastal management in comparison to the current coordinated action undertaken between Member States with shared sea or coastal areas. As per usual, the Dutch opinions fail to provide further detailed argumentation.

Unsurprisingly, the reply from the Commission comes in the same form for the two Dutch chambers. Moreover, and in line with the opinions, the Commission gives an unsatisfying clarification of what it considers to be the added value of Union action in the case of this proposal: *“[t]he proposed directive would deliver added value by enabling Member States to reach minimum commonalities to allow cross-border cooperation, and to contribute in time to the implementation of related legislation.”*

Contrastingly to the simplistic opinion issued by the Dutch Parliament, the Romanian Senate decided to send a baffling letter. Entitled “opinion,” it gives the impression that it is not sent under the procedure envisioned by Protocol 2, however, textually, it mentions that it is issued as a result of a subsidiarity check performed in accordance with the provisions of the mentioned protocol.<sup>53</sup> The particular characteristics of this opinion lie in the fact that the Romanian Senate expresses its views in the form of a correction document in which it states that the proposed Directive would

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<sup>53</sup> The date of issue of the opinion is later than the 8 week deadline so for the purpose of this research this opinion was not taken into account as a reasoned opinion.

comply with the principle of subsidiarity if the textual amendments proposed in the opinion are adopted. It is interesting to note the odd approach to point out subsidiarity issues. At a closer glance, it can be noticed that the proposed amendments are unrelated to the subsidiarity principle. For example, the first amendment refers to a mere wording correction, which upon further inspection is not necessary.<sup>54</sup> The remaining amendments, which for the sake of keeping to the point will not be detailed here, as they are not related to subsidiarity issues, and merely refer to minor textual amendments.

In line with the oddness surrounding this proposal and its reasoned opinions, the reply from the Commission to the Romanian Senate presents itself the same. And by “the same” it should be understood that textually the reply is almost identical to the one sent to the Dutch chambers.

We start to notice the variance of styles and content that an opinion can have. Granted, the reasoned opinions could all be placed in a limited number of categories, however placing all the Political Dialogue opinions into specific categories would be a hard and time demanding task.

## **5.6. Proposal for a Regulation of the European Parliament and of the Council on measures to reduce the cost of deploying high-speed electronic communications networks – 2013**

For this next proposal, the Commission justifies its compliance with subsidiarity in a very extensive and highly technical, detailed, manner – which is justified by the object of the proposal. Succinctly put, the proposed regulation is necessary at the level of the Union in order to improve conditions for the establishment and functioning of the internal market in order to, among others, remove external barriers in the internal market, stimulate ubiquitous broadband coverage (which is a precondition for the Digital Single Market), ensure equal treatment, and non-discrimination of undertakings etc.

Contrastingly to the highly detailed and specific subsidiarity compliance argumentation put forward by the Commission, the Dutch Tweede Kamer issues (again) a thin, one-paged, Political Bargaining reasoned opinion in which – almost solemnly by now – it declares that it is of the opinion that the Commission “*fails to sufficiently justify the added value*” of a European approach,

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<sup>54</sup> The Romanian Senate suggests the following text change: “The provisions of this Directive shall be without prejudice to Member State competences for country planning and urbanism.” The original text of the article being: “The provisions of this Directive shall be without prejudice to Member State competences for town and country planning.” Could it be that the Senate misread?

pointing again to the unfulfillment of the efficiency criterion. It continues to briefly sustain this opinion by arguing that “*successful deployment of high-speed networks in several Member States shows that it is possible to take necessary measures without European legislation*”, showing that the proposal does not fulfil the necessity requirement. Consequently, concluding that the proposal would lead to unnecessary administrative costs. Interestingly, and unsatisfyingly, the Commission did not send a reply in this case.

The Romanian Senate sent an opinion on this proposal. Just like the one previously discussed, this is also entitled “opinion,” even if it is sent on the basis of Protocol 2, and it presents a positive subsidiarity check. This opinion also contains several observations (unrelated to subsidiarity concerns), to which the Commission replies.

We can observe by now that more often than not the Commission replies to almost all opinions – which in the light of the Political Dialogue is a positive approach. However, it does happen relatively often that the Commission sends the same reply to different national parliaments, leaving some opinions – the thoroughly researched and properly reasoned ones – without a much deserved personalised reply.

### **5.7. Proposal for a Regulation of the European Parliament and of the Council on the production and making available on the market of plant reproductive material (plant reproductive material law) – 2013**

The Commission proposes this regulation based on the Treaty provisions related to the Common Agricultural Policy (CAP). The objectives of this policy are to increase agricultural productivity, to ensure a fair standard of living for the agricultural community, to stabilise markets, to assure the availability of supplies, and to ensure that supplies reach consumers at reasonable prices. The Commission points out that to a very large extent all fields of agricultural activity, as well as ancillary activities, have been regulated at EU level, concluding that legislation in this case is predominantly a role for the institutions of the EU.

The Dutch Tweede Kamer issues a negative, Legal Rule-Following, reasoned opinion to this proposal, arguing that the European Commission provided “*insufficient corroboration of the benefits of a European approach*” again referring to the efficiency criterion.

In reply, the Commission states that the proposal fully complies with the principle of subsidiarity, as it aims at ensuring informed choices for all users of plant reproductive material, and high

quality of that material throughout the market chain. The Commission also points out that the proposal is supported by the result of an impact assessment based on extensive consultation with Member States and stakeholders.

The Romanian Senate issues an opinion in which it states that it sees no subsidiarity problems with this proposal, and that it is in full compliance with the principle. It does, however, make unrelated observations, to which the Commission later replies.

### **5.8. Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office – 2013**

We thus arrive at the most important proposal of those addressed – proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office – which triggered the second Yellow Card, as 14 national parliaments transmitted reasoned opinions to the Commission, amounting to 18 votes.

This particular proposal is based on Article 86 of the TFEU. According to the first paragraph of that provision, *“[i]n order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament”*. The second paragraph of that provision defines the responsibility of the European Public Prosecutor's Office as follows: *“[t]he European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences”*. Finally, the third paragraph of Article 86 of the Treaty defines the substantive scope of the regulations to be adopted pursuant to it: *“[t]he regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions”*.

Within the proposal, the Commission argues that *“[t]here is a need for the Union to act because the foreseen action has an intrinsic Union dimension. It implies Union-level steering and*

*coordination of investigations and prosecutions of criminal offences affecting its own financial interests.”* It goes on to formalistically state that, in accordance with the subsidiarity principle, this objective can only be achieved at Union level by reason of its scale and effects. Additionally, it argues that in *“the present situation, in which the prosecution of offences against the Union’s financial interests is exclusively in the hands of the authorities of the Member States is not satisfactory and does not sufficiently achieve the objective of fighting effectively against offences affecting the Union budget.”*

The Dutch Tweede Kamer first sent a Legal Rule-Following reasoned opinion, in which it deviated from its usual subject line “reasoned opinion (subsidiarity),” and instead used “reasoned opinion (breach of subsidiarity).” The Tweede Kamer states that the majority of its members are of the opinion that the proposal is in conflict with the principle of subsidiarity. It explains that, according to this principle, the EU should only take action if this is more effective than action taken at national level, so if Member States are not sufficiently able to achieve the objectives of the proposed actions. It continues with its by now classic line, that the Commission fails to sufficiently justify the added value of a European approach in this case (efficiency criterion). While it endorses the importance of effectively combatting fraud with EU means, it considers criminal law to be primarily of national competence. Concluding that, in order to achieve effective combatting of EU fraud, the European Commission must optimise the existing mechanism of Eurojust, and the European Anti-Fraud Office (OLAF).

The Eerste Kamer also sent a reasoned opinion which is textually identical to that of the Tweede Kamer, adding only one extra paragraph on the practical reality of financial crimes (because they virtually never stand on their own, but are generally a combination of different branches of law) and how this would generate complex issues.

The European Commission initially responded with a Notification to all national parliaments (in November 2013). This Notification set out reasons as to why the parliaments’ objections regarding subsidiarity are unfounded. A letter to each separate Parliament or House considered the objections submitted which, according to the European Commission do not relate to subsidiarity and fall outside the field of application of the subsidiarity control mechanism. With this opinion, the Commission apparently deviates from the position of 2009 that the limitations of the subsidiarity principle are extremely difficult to define.

The website of the European Commission also made an extra document available – a general position paper from the Tweede Kamer. Here, important points are extensively presented. The Tweede Kamer again underlines the breach of the subsidiarity principle, and points out several crucial points in this regard, more precisely: investigation and prosecution regarding fraud is

(primarily) the responsibility of national authorities; the power to investigate and prosecute criminal offences which damage the financial interests of the Union are insufficiently defined, making it impossible to determine the scale of a breach of sovereignty (legality principle); democratic control of the investigative and prosecution authorities must be possible. The proposed assessment by the European Parliament on the basis of an annual report is inadequate; as the actual investigation and prosecution actions (and trial) are carried out in the Member State itself, these actions should be democratically controlled by bodies in the relevant Member State; with the aid of Eurojust and OLAF the investigation and prosecution of fraud affecting EU funds can also be organised without an EPPO; the intended objective – the effective combat of fraud with EU funds.

Based on this general position the Tweede Kamer sent an official reply to the above-mentioned Commission notification. From the beginning the wording of the letter expresses the disappointment of the Tweede Kamer towards the Commission's action.<sup>55</sup> Subsequently, the Eerste Kamer sent a letter informing the Commission that it supports the content of the letter of the Tweede Kamer.

Furthermore, the Chair of the standing committee Immigration and Asylum/Justice and Home Affairs, and the Chair of the standing committee of Security and Justice also sent an extensive letter with comments and questions concerning the yellow card procedure.

As a reply, the European Commission sent a brief letter to the Eerste Kamer in which it addresses several issues. It emphasises that the provisions of Protocol 2 “do not foresee any automaticity as

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<sup>55</sup> To prove this disappointment, I have selected the following quotes from the reasoned opinion: “The House of Representatives regrets the European Commission's decision not to consider the yellow card sufficient reason to review the commission proposal. This decision is based on the finding that many of the arguments put forward by the national parliaments do not concern the subsidiarity of the proposal to establish the European Public Prosecutor's Office. Your conclusion that the proposal is consistent with the subsidiarity principle, and should therefore remain in place and unaltered, means that the European Commission does not consider the arguments that do relate to subsidiarity to be grounded.”, “Having heard this line of argumentation, the House of Representatives invited European Commissioner Reding to come to the Netherlands to explain the decision. The House of Representatives was disappointed that this invitation was turned down, particularly in view of the fact that she has since been to the Netherlands. A visit to the House of Representatives could have been arranged during this trip; this is a question of priorities. Alternatively, a delegation from the House of Representatives would have been more than willing to meet the European Commissioner in Brussels.”, “The House of Representatives thinks that the refusal to take action on the yellow card is based on a misinterpretation of the articles and protocols regarding the role of national parliaments in European policymaking, as laid down in the Treaty of the Functioning of the European Union, and is not consistent with the letter from the President of the European Commission Barroso of 1 December 2009 regarding the implementation of these Treaty provisions.”, “We therefore consider this a missed opportunity on the part of the European Commission.”, “The House of Representatives had the impression that the European Commission's initial reaction to the yellow card was hasty and barely considered. The indignation of the parliaments concerned is therefore entirely understandable.”, “It goes without saying that any refusal to act on a yellow card, even if considered appropriate, should be based on arguments and substantiated considerations of these arguments. Creating the impression that things may have proceeded differently in this case does not do the European Commission any credit.”, “It is our view that the way in which the European Commission has handled this particular yellow card may have undermined faith in the yellow card procedure as a whole, and therefore in cooperation within the European Union.”

*to the response of the commission to a yellow card,”* and it explains that it carried out “a very thorough and detailed review of the proposal” in light of the arguments related to subsidiarity raised by the national parliaments, and that the result of this comprehensive review was that the Commission decided to maintain its proposal, and continue with the legislative process.

The Romanian Parliament did not have such complex contact with the European Commission regarding this proposal. In a first phase, the Chamber of Deputies issued a negative Legal-Rule following reasoned opinion arguing– though not as clearly as the Tweede Kamer – that the proposal is not compliant with the principle of subsidiarity. Substantially, the arguments used by the Chamber of Deputies are similar to the ones used by the Dutch Parliament, and refer to the lack of added value of EU action (the efficiency criterion), and also that the optimal use of European coordination mechanisms in criminal field already in place has not been completely achieved yet.

The Romanian Senate, on the other hand, gave a favourable reasoned opinion from the beginning. In reply to the communication from the Commission COM (2013) 8051 final the Romanian Chamber of Deputies recognises in principle the validity of the European Commission's arguments for maintaining the proposal on the establishment of the European Public Prosecutor’s Office with the observations and recommendations made in this opinion. Understandably, in its reply the Commission showed that it was pleased by this.

As a short conclusion to the assessment of this proposal, I believe it is important to take a broader look at the Early Warning Mechanism as a whole and agree that “*[t]his second yellow card finally and undoubtedly proves the efficiency of the Early Warning Mechanism, in spite of the fact that it is only the second card ever triggered.*”<sup>56</sup> Moreover, the reaction of so many national parliaments proved interest and participation. We observed that in this case the procedure did not involve just an opinion and a cold reply from the Commission, but also a subsequent layer of letters and opinions. It can be said that a real dialogue has been established.

### **5.9. Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1829/2003 as regards the possibility for the Member States to restrict or prohibit the use of genetically modified food and feed on their territory – 2015**

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<sup>56</sup> Diane Fromage, *The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member States Parliaments?*, (Yearbook of European Law; 2015) 21.

The Commission argues in this last proposal assessed that “[t]he current Union legal framework fully harmonises the authorisation procedure of GMOs and GM food and feed and allows Member States to adopt measures restricting or prohibiting the use of GMOs and GM food and feed only under the conditions set out in that legal framework. Currently, that framework contains limited possibilities for Member States to express other considerations than those associated with the safety of the product, outside their vote in the committees.” The Commission considers that this proposal will change this situation as it enabled Member States to adopt on their territory measures to restrict or prohibit the use of GMO’s or GM food and feed, based on legitimate considerations other than those linked to the safety of the products provided that those measures are in line with EU law.

The Political Bargaining reasoned opinion of the Tweede Kamer reveals that this parliament chamber considers this proposal to not comply with the principle of subsidiarity, arguing that it provides the Member States with insufficient room for a national prohibition of GMO’s, adding that given the fact that GMO’s are a sensitive issue for the public, a careful consideration of this issue with the accompanying room for a deviating national course, is considered desirable. In addition to the role and position of the Member States in the proposal, the Tweede Kamer considers the continuance of the current procedure, whereby the decision to authorise GMOs is handed back to the European Commission in the absence of a qualified majority, to be an example of undemocratic decision-making at the European level (responsibility criterion).

We can observe here that, by now, the Tweede Kamer changed the internal procedure through which it issues reasoned opinions. By now the opinions are dissecting the proposals and present the votes casted on them by the political parties.

In reply to this, the Commission sent a letter in which it expresses that it considers that granting Member States the possibility to take their own decisions at national level on the basis of compelling grounds, other than those linked to the risk assessment of GMOs, “*will allow these Member States to better reflect their national concerns, and at the same time will alleviate the tensions surrounding the EU decision-making process on GMOs.*” It goes on to explain that such a possibility is provided by the Treaty on the Functioning of the European Union (TFEU), since its Article 36 and related case-law of the Court of Justice of the EU allow derogations from the single market rules when justified by compelling grounds or overriding reasons of public interest. Moreover, the Commission notes that the proposal does not transfer the entire competence to decide on GMO authorisation to Member States. It only provides a possibility for Member States to adopt measures restricting or prohibiting the use of genetically food and feed on their territory,

after the EU authorisation has been issued. Therefore, the proposal does not affect the elements of the GMO authorisation which are better addressed at EU level, such as the assessment by the European Food Safety Authority and the principle of a risk management decision which is taken at EU level on the basis of this assessment.

Additionally, the Commission also underlines that the procedure which is followed for the authorisation of GMOs and which allows the Commission to adopt a decision in the absence of a qualified majority in favour or against the draft decision was agreed upon by the European Parliament and the Council, adding that this procedure is applied in many other areas of EU law without controversy as to its democratic nature.

Romania issues a favourable opinion with regard to this proposal, considering it in compliance with the principle of subsidiarity.

## **6. CONCLUSION**

### **6.1. Conclusions for content assessment**

In this chapter I presented and assessed several opinions (and reasoned opinions) issued by the national parliaments of the two Member States under discussion, in order to provide a clear understanding of how each chamber understands and applies the principle of subsidiarity.

### **6.2. Conclusions**

After addressing the nature of the principle of subsidiarity and the mechanism which ensures its respect, this paper set out to determine the differences relating to the understanding of the principle and its application via the EWM in two Member States – the Netherlands and Romania.

Perhaps unsurprisingly, the procedure of sending reasoned opinions via the EWM, the choice of the proposals which will be scrutinised under a subsidiarity test, the content of the opinions, the document and argumentation style of the two Member States, and the understanding of subsidiarity are different in the Netherlands and in Romania.

In the interest of clarity, I have put together the following overview which summarises the characteristics of the opinions issued by each chamber individually. Thus, on a general level we

can observe similarities between the two parliamentary chambers of each Member States, but on a national level there are dissimilarities between the two chambers.

#### **The Eerste Kamer**

- Generally follows a Legal-Rule following approach
- Regularly uses the same wordage in the letters
- Often does not provide sufficient argumentation
- Seldom refers to legal texts (Treaties, or other legislation)
- Keeps the same structure of the letters throughout the years
- Is generally critical with regard to the efficiency criterion and the necessity requirement
- Often sends joint opinions with the Tweede Kamer

#### **The Tweede Kamer**

- Generally, follows a Legal-Rule following approach
- Regularly uses the same wordage in the letters
- Often does not provide sufficient argumentation
- Seldom refers to legal texts (Treaties, or other legislation)
- Very often sends letters with further questions or requesting more clarifications from the Commission with regard to the proposals
- Is generally critical with regard to the efficiency criterion and the necessity requirement
- Often sends joint opinions with the Eerste

#### **The Senat**

- Uses the Political-Bargaining approach
- Very often sends favourable opinions
- Provides proper argumentation
- When needed drafts highly researched opinions
- Is clear and to the point
- Has an inconsistent structure and drafting style throughout the years
- Is generally critical with regard to the responsibility requirement
- Rarely sends joint opinions with Camera Deputaților

#### **The Camera Deputaților**

- Legal-Reasoning approach
- Often sends favourable opinions
- Generally, has extensive argumentation – though it is seldom not to the point
- Often refers to legal texts (Treaties, other legislation, even national legislation)
- Sometimes sends letters which are too extensive and hard to follow
- Is generally critical with regard to the efficiency criterion
- Rarely sends joint opinions with the Senate

Kamer

- Has a general template for the drafting of the opinions<sup>57</sup>.

When comparing the connection and approach of the two chambers on national levels, we can observe that the two Dutch chambers present several similarities between them, often send joint opinions and seldom have different points of view. Romania on the other hand has parliamentary chambers which do not often see eye to eye, and often send different opinions. More importantly, the Eerste Kamer and the Tweede Kamer seem to follow, for the most part, the same Legal-Rule Following approach, while in Romania there is not, as of yet, a fully contoured preferred approach. Perhaps these differences can be explained by the fact that the Dutch MPs are less critical than the Romanians as they send fewer opinions and only disagree if the proposal is highly intrusive. Moreover, these differences can also be explained by the fact that the Netherlands tends to interpret the principle in a Legal-Rule following approach which, as illustrated by the Romanian case, allows a more restrictive margin than a more political interpretation does.

As far as the structure of the opinions is concerned, some critique must be directed to both chambers of the Romanian Parliament. The vast majority of opinions issued by them are too complex and extensive and too often do not relate with subsidiarity.

With regard to the content of the opinions, all four could suffer improvements. On the one hand the Dutch chambers fail to substantially support their arguments, and on the other hand, the Romanian chambers should point their focus more towards subsidiarity and less towards the wording of the proposals.

Overall, one significant similarity between the chambers of the two Member States can be observed, and that is the fact that they are both concerned with the efficiency criterion, and the responsibility criterion as far as the application of the principle of subsidiarity is concerned.

As regards the content of the opinions and the understanding and application of the principle of subsidiarity, my research showed that this can vary greatly throughout the years and from one

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<sup>57</sup> 24<sup>th</sup> Bi-annual Report of COSAC on EU Practices and Procedures.

chamber to another. While the Dutch chambers usually lack proper argumentation and issue short opinions, Romania sends extensive and complex opinions which do not necessarily relate to subsidiarity. However, patterns can be observed and thus, my research shows that the Netherlands has a distinct and personal way of interpreting the principle of subsidiarity in its opinions, by using the Legal Rule-Following approach and focusing most on the efficiency criterion. In Romania, a concrete pattern is not yet noticeable as both the Legal Rule-Following approach and the Political Bargaining approach have been used the most. This can, generate the conclusion that Romania understand the principle of subsidiarity in a more elastic way than the Netherlands.

In this regard, however, only one chamber of each of the Parliaments supports the idea of entrusting an COSAC with the task of issuing informal guidelines on how to draft reasoned opinions and contribution in the context of political dialogue – the Chamber of Deputies and the Tweede Kamer. The Eerste Kamer considers the provisions of the Protocol and the Treaty to be sufficiently clear, while the Romanian Senate did not comment on the question, but it did declare that the creation of a standard form for drafting the opinions would be too restrictive<sup>58</sup>.

It is interesting to note that all four parliamentary chambers assessed in this paper declared in the 22<sup>nd</sup> Biannual COSAC Report that they consider the subsidiary checks to have had a positive impact on the good functioning of the Union<sup>59</sup>. Therefore, they have acknowledged the effectiveness of the Early Warning Mechanism. However, all chambers have expressed that they are in favour of the introduction of the so called ‘green card’, proving that they feel the need for more involvement on the part of National Parliaments.

Nonetheless, one big question arose after my research on the principle of subsidiarity and the Early Warning Mechanism: *are the reasoned opinions reasoned enough?* More often than not the argumentation to prove that the proposal is not compliant with the principle of subsidiarity are one or maybe two sentences long. If an opinion which simply states that the proposed legislation is not compliant because “the Commission failed to sufficiently justify the added value” is enough to be taken into account for the EWM, then doesn’t this procedure turn into a forum in which national parliaments simply vote on the proposals, and ignore the provision of Article 6 of Protocol No. 2 which clearly provide for the need of a reasoned opinion?

And on a more general note, while my paper proves that there is no consensus on the understanding and application of the subsidiarity principle between the Netherlands and Romania, perhaps a similar research of all Member States would be welcomed. It would point out all the differences and the results could be to try to even out the discrepancies. This line of thought is also

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<sup>58</sup> 23<sup>rd</sup> Bi-annual Report of COSAC on EU Practices and Procedures.

<sup>59</sup> 22<sup>nd</sup> Bi-annual Report of COSAC on EU Practices and Procedures.

taken into consideration by COSAC as the majority of the chambers of the National Parliaments would welcome the idea of issuing informal guideline for reasoned opinions and contribution in the context of political dialogue. While this comparative assessment provides interesting results, it has no further application value as the pool of subjects assessed is too small, in this sense an EU wide assessment would be more valuable.

## ANNEX

2006	Legal Rule Following	Political Bargaining	Policy Arguing	Other	Total
<b>The Netherlands</b>					
Eerste Kamer	0	0	0	1	1
Tweede Kamer	0	0	0	1	1
<b>Romania</b>					
Senat	0	0	0	0	0
Camera Deputaților	0	0	0	0	0

*Table 1: Overview of the opinions sent by the Netherlands and Romania in 2006*

2008	Legal Rule Following	Political Bargaining	Policy Arguing	Other	Total
<b>The Netherlands</b>					
Eerste Kamer	1	0	0	2	3
Tweede Kamer	1	0	0	4	4
<b>Romania</b>					
Senat	0	0	0	0	0
Camera Deputaților	0	0	0	0	0

*Table 2: Overview of the opinions sent by the Netherlands and Romania in 2008*

<b>2009</b>	<b>Legal Rule Following</b>	<b>Political Bargaining</b>	<b>Policy Arguing</b>	<b>Other</b>	<b>Total</b>
<b>The Netherlands</b>					
Eerste Kamer	1	0	0	10	9
Tweede Kamer	1	0	0	13	14
<b>Romania</b>					
Senat	0	0	0	0	0
Camera Deputaților	0	0	0	0	0

*Table 3: Overview of the opinions sent by the Netherlands and Romania in 2009*

<b>2010</b>	<b>Legal Rule Following</b>	<b>Political Bargaining</b>	<b>Policy Arguing</b>	<b>Other</b>	<b>Total</b>
<b>The Netherlands</b>					
Eerste Kamer	2	0	0	1	3
Tweede Kamer	1	0	0	3	4
<b>Romania</b>					
Senat	0	0	0	25	25
Camera Deputaților	0	0	0	7	7

*Table 4: Overview of the opinions sent by the Netherlands and Romania in 2010*

2011	Legal Rule Following	Political Bargaining	Policy Arguing	Other	Total
<b>The Netherlands</b>					
Eerste Kamer	1	0	2	1	4
Tweede Kamer	2	0	1	2	5
<b>Romania</b>					
Senat	1	1	0	14	16
Camera Deputaților	1	0	0	31	32

*Table 5: Overview of the opinions sent by the Netherlands and Romania in 2011*

2012	Legal Rule Following	Political Bargaining	Policy Arguing	Other	Total
<b>The Netherlands</b>					
Eerste Kamer	1	0	0	4	5
Tweede Kamer	1	0	0	0	1
<b>Romania</b>					
Senat	0	0	0	3	3
Camera Deputaților	0	0	0	4	4

*Table 6: Overview of the opinions sent by the Netherlands and Romania in 2012*

2013	Legal Rule Following	Political Bargaining	Policy Arguing	Other	Total
<b>The Netherlands</b>					
Eerste Kamer	1	1	1	3	6
Tweede Kamer	2	2	2	3	9
<b>Romania</b>					
Senat	0	2	0	13	15
Camera Deputaților	0	0	0	16	16

*Table 7: Overview of the opinions sent by the Netherlands and Romania in 2013*

2014	Legal Rule Following	Political Bargaining	Policy Arguing	Other	Total
<b>The Netherlands</b>					
Eerste Kamer	0	0	0	0	0
Tweede Kamer	1	0	1	0	2
<b>Romania</b>					
Senat	0	0	0	0	0
Camera Deputaților	0	0	0	6	6

*Table 8: Overview of the opinions sent by the Netherlands and Romania in 2014*

2015	Legal Rule Following	Political Bargaining	Policy Arguing	Other	Total
<b>The Netherlands</b>					
Eerste Kamer	0	0	0	0	0
Tweede Kamer	0	1	0	1	2
<b>Romania</b>					
Senat	0	0	0	13	13
Camera Deputaților	0	0	0	19	19

*Table 9: Overview of the opinions sent by the Netherlands and Romania in 2015*

2016	Legal Rule Following	Political Bargaining	Policy Arguing	Other	Total
<b>The Netherlands</b>					
Eerste Kamer	0	0	0	0	0
Tweede Kamer	0	0	0	0	0
<b>Romania</b>					
Senat	0	1	0	7	8
Camera Deputaților	1	0	0	6	7

*Table 10: Overview of the opinions sent by the Netherlands and Romania in 2016<sup>60</sup>*

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<sup>60</sup> Data available on the Commission website on the 4th of July 2016.

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