

Subsidiarity and the division of power in the European Union: When do national parliaments send reasoned opinions?

by **Martijn Huysmans**



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Abstract

With the entry into force of the Treaty of Lisbon, national Parliaments obtained a direct role in the legislative process of the European Union (EU). When the Commission releases a legislative proposal, each national Parliament has eight weeks to issue a Reasoned Opinion stating that the draft violates the EU principle of subsidiarity. This article discusses the adoption of this so-called Early Warning System, its features and its effectiveness, and then studies empirically when national Parliaments send Reasoned Opinions. A within-between panel regression covering all 28 EU countries for 2010-2016 leads to novel findings on the issuance of Reasoned Opinions. In particular, public Euroscepticism does not lead to statistically significantly more Reasoned Opinions as argued in the literature. However, there is a strongly significant across-country effect of having a more Eurosceptic Parliament.

Keywords: European Union, Subsidiarity, Federalism, Division of competences

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Introduction

Subsidiarity is a fundamental principle in the division of competences between the European Union (EU) and its Member States. While it is a somewhat ambiguous concept open to interpretation and politicization (Begg et al., 1993; Føllesdal, 1998; Van Hecke, 2003; Van Kersbergen & Verbeek, 2007), its definition in Article 5(3) of the Treaty on European Union implies that political action should be left to the Member States unless action at the EU level would be more effective.¹

Since the Treaty of Rome, the EU has evolved towards a quasi-federal system (Pollack, 2000). Over time, the increasing centralization caused a backlash, which explains the success of those pushing for the inclusion of the principle of subsidiarity in the Maastricht Treaty. When the ratification of the Maastricht Treaty proved difficult, the inclusion of subsidiarity was one of its selling points (Cass, 1992).

In terms of economic theory, the political concept of subsidiarity can be interpreted as embodying the basic ideas of the literatures on fiscal federalism (Oates, 1972) and the size of nations (Alesina & Spolaore, 1997; Tullock, 1969). In this literature, a tradeoff is identified between economies of scale and preference heterogeneity. While bigger jurisdictions generate economies of scale in the provision of public goods and dealing with externalities, they may also reduce citizens' welfare because of increases in preference diversity over centralized policies.

When considering federal countries and (quasi-)federal systems such as the EU, economic theory on the size of nations suggests that the central level should only be responsible for policy areas

¹ The Article reads “the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States”. It is reproduced in its entirety in the Appendix.

with high economies of scale and low heterogeneity of preferences. For instance, given the high heterogeneity of preferences and low economies of scale, one would expect cultural and linguistic competencies to be left to lower levels of government.

In light of this logic, the EU seems to be both relatively active in areas where perhaps it should not be, such as agriculture, but also relatively inactive in areas where it actually should be, such as defense (Alesina, Angeloni, & Schuknecht, 2005). While the former problem could be dubbed excessive centralization, the latter could be qualified as failed collective action (Olson, 1974). This article focuses on the EU doctrine of subsidiarity as a means to address the first problem.

The risk of excessive centralization is discussed extensively in the literature on federalism (Apolte, 1997; Bednar, 2011; Begg et al., 1993; Buchanan, 1995; Vaubel, 1996). To protect against it, safeguards may be put in place such as establishing a parliamentary chamber in which each of the constituent parts of the federation is represented. Examples of such upper chambers include the United States Senate or the German Bundesrat. In the EU, the Council fulfills this role since all Member State governments are represented there. In this light, the direct involvement of national Parliaments on top of national governments can be seen as a further safeguard against excessive centralization.

With the Treaty of Lisbon, national Parliaments obtained a right to review the Commission's proposals in the light of the principle of subsidiarity. If they feel a proposal violates the principle, they can send a Reasoned Opinion to the Commission. Because this review happens at the initial stages of legislation, the procedure is called the Early Warning System (EWS). This article presents novel findings regarding when national Parliaments send Reasoned Opinions under the EWS.

Compared to the literature, the present study extends the time period under study by two years to 2010-2016. It also extends the geographical coverage from the EU-27 to the EU-28 by including Croatia. Using this larger dataset, the main contribution of this article is twofold. First, building on the methodological contributions of Bell & Jones (2015), it separates longitudinal within-country effects from cross-sectional across-country effects. Second, it shows that while Eurosceptic Parliaments are significantly more likely to send Reasoned Opinions, Parliaments do not respond in a statistically significant way to fluctuations in public Euroscepticism.

The remainder of this article is structured as follows. First the adoption of the EWS at the European Convention and Lisbon is discussed, together with its main features. The next section presents a qualitative discussion of the effects of the EWS. The third section provides an overview of the nascent empirical literature on Reasoned Opinions, and establishes hypotheses for further empirical testing in the fourth section. The final section concludes.

The adoption and features of the Early Warning System

After its introduction by the Maastricht Treaty of 1992, many citizens and EU actors believed that the principle of subsidiarity required stricter policing. While the public had become more Eurosceptic, the pace of integration had not really slowed down (Pollack, 2000; Toshkov, 2011). Relatedly, calls of a democratic deficit in the EU continued to abound (Follesdal & Hix, 2006) in spite of criticism on this notion by some scholars (Crombez, 2003). Some actors even proposed to introduce an exhaustive competence catalogue to delineate exactly the competences of the EU (Swenden, 2004).

In this context of rising Euroscepticism and talk about a democratic deficit, most delegates at the 2002-2003 Convention on the Future of Europe looked favorably upon proposals to give national

Parliaments (NPs) a role in policing the principle of subsidiarity (Cooper, 2006; European Convention, 2003; House of Lords, 2003). The details of the proposed Early Warning System were described in a new version of the *Protocol on the application of the principles of subsidiarity and proportionality*, annexed to the draft Constitution prepared by the European Convention. The relevant provisions are in Articles 5 and 6 of the Protocol, reproduced in the Appendix.

Per Article 5, the EWS would give NPs 6 weeks to vet Commission proposals in areas of shared competence.² Each national parliamentary chamber would then be able to issue a Reasoned Opinion (RO) if it felt a proposal did not comply with the principle of subsidiarity. In terms of consequences, Article 6 of the Protocol described what is known as the yellow card (although the Treaty does not mention this term). In order to determine whether a proposal would receive a yellow card, ROs issued by unicameral NPs would count as two votes, while ROs issued by single chamber of bicameral NPs would count as one vote. If the ROs represented at least one third of all the votes, the Commission would have to review its proposal.

At first sight, the proposed yellow card procedure seems to give significant formal power to the NPs. However, it requires only that the Commission review its proposal, which does not imply an obligation to actually revise it. Indeed, per Article 6 “the Commission may decide to maintain, amend or withdraw its proposal”. The only real constraint on the Commission would be that it

² Under the principle of conferral, the EU only has the competences conferred to it by its Member States. In areas of exclusive competence, the Member States have delegated all of their powers to the EU. These include notably trade and the Single Market. In contrast, in areas of shared competence both the Member States and the EU are able to legislate. The principle of subsidiarity only relates to areas of shared competence.

would have to give reasons for its decision, and that a case could be taken to the European Court of Justice for ex-post judicial review.

In summary, the draft Constitution prepared by the European Convention in 2003 provided for an Early Warning System involving national Parliaments in the EU's legislative procedure. In the proposed system, NPs would be able to issue Reasoned Opinions stating that a legislative proposal violated the principle of subsidiarity. If one third of parliamentary chambers issued ROs, the Commission would have to review – but not necessarily modify – its proposal.

This victory for NPs, albeit a small one, was likely due at least in part to representatives of NPs being present at the European Convention. Indeed, from the transcripts of the plenary discussions and amendments regarding the EWS, it is clear that in general delegates of NPs were much more supportive of it than delegates of governments or the European Parliament.³ In turn, the decision to have delegates from NPs present at the Convention can likely be explained by calls from the general public to address the EU's alleged democratic deficit.

Although the draft Constitution was signed by the Intergovernmental Conference of June 2004, its entry into force was prevented by failed referenda in France and the Netherlands. Hence the EWS only took effect on December 1, 2009 when the Lisbon Treaty of 2007 came into force. The Lisbon version of the EWS, reproduced in the Appendix, is very similar to the system proposed by the Convention. It has a scrutiny period of eight weeks instead of six, and an orange card on top of the yellow card (Barrett, 2008).

³ For a summary of the amendments, see document CONV 610/03. The verbatim transcripts of the plenary meetings of October 4, 2002, March 18 and June 5, 2003 were obtained by the author from the Transparency Unit of the European Parliament after a request under the right of access to documents.

While the yellow card is triggered by one third of the votes, the orange card requires a simple majority of votes and applies only to proposed legislative acts under the ordinary legislative procedure.⁴ In terms of implications, an orange card is not much more stringent than a yellow card. The Commission may still decide to maintain its proposal, although if it does it needs to give a Reasoned Opinion for this decision. This opinion is then forwarded to the European Parliament and the Council, which may force the Commission to drop the proposal by simple majority respectively 55% of Council votes. The relevant articles are reproduced in the Appendix.

Given the relatively innocuous nature of the yellow and orange cards, those favoring decentralization in the EU have advanced proposals to further strengthen the EWS. In particular, in the months preceding the UK's June 2016 referendum on the decision to exit the EU, it negotiated a red card procedure that would have been introduced had the UK voted to remain. Under this procedure, if a threshold of 55% of NP votes was reached, the Commission would be forced to withdraw its proposal directly.

While the red card presented a significant step-up from the yellow and orange cards, appraisal of the procedure was lukewarm given the high threshold of 55% of the votes. Since parliaments' preferences typically do not diverge dramatically from their governments, the expectation was that "any proposal that would be blocked by the new procedure would have been blocked in the Council anyway" (Hagemann, Hanretty, & Hix, 2016).

⁴ Per Article 7(2), the threshold for a yellow card is lowered to one quarter for legislation proposed "on the basis of Article 76 of the Treaty on the Functioning of the European Union on the area of freedom, security and justice".

The effects of the Early Warning System

Since the EWS came into effect in December 2009, only three yellow cards have been triggered.⁵

In addition, only one of the related proposals was retracted by the Commission. In 2012, the Commission retracted the Monti II proposal related to the freedom of establishment and the freedom to provide services after it received a yellow card with 12 ROs and 19 votes (Cooper, 2015). While the proposal was retracted, the Commission claimed the reason behind the retraction was a lack of support in the Council and the European Parliament, not an infringement on subsidiarity. In 2013, the Commission's proposal for a European Public Prosecutor's Office (EPPO) received a yellow card with 13 ROs and 18 votes, but was maintained.⁶ In 2016 the Commission maintained its proposal for a revision of the posted workers Directive after it received a yellow card with 14 ROs and 22 votes. No orange card has been triggered so far.

These statistics have contributed to a perception that the EWS is ineffective.

There are two main arguments against the perception that the EWS is ineffective because so few yellow cards have been issued. First, a low number of ROs and yellow cards could actually mean that the EWS is very effective, because the Commission is so afraid of receiving a yellow card that it effectively restrains itself to never propose legislation that is not in compliance with the principle of subsidiarity. Of course, the strength of this first defense is limited by the Commission's maintaining its proposals after two out of three yellow cards.

⁵ Before the accession of Croatia in July 2013, 18 votes out of 54 were needed to trigger a yellow card. The total of 54 votes was composed of 14 unicameral parliaments with two votes, and 26 chambers of bicameral parliaments with one vote. Since the accession of unicameral Croatia, 19 votes out of 56 are required.

⁶ Since this proposal was in the area of freedom, security and justice, only one quarter or 14 votes out of 56 were required for a yellow card.

Actual yellow cards aside, in its annual reports on subsidiarity and proportionality the Commission does give concrete examples of how it “has examined subsidiarity and proportionality in its impact assessments, reorienting or abandoning its proposals as a result” (European Commission, 2008: 4). Before taking office, the Juncker Commission “undertook to place subsidiarity at the heart of the European democratic process”, and in 2015 “put forward a limited number of new initiatives and announced the withdrawal of a large number of pending proposals” (European Commission, 2016: 2).

A second defense of the EWS focuses on its indirect effects. Rather than seeing the EWS as a failed mechanism to give NPs a veto against Commission proposals, this line of reasoning sees it as a way of enhancing the dialogue between the public, NPs and the Commission. According to scholars advocating this view, the EWS has forced the Commission to provide stronger justification for its proposals (Kiiver, 2012), given NPs means and incentives to pay more attention to EU affairs (Miklin, 2017), and moved the EU’s legislative process on the way from a confrontational logic to one of argument and constructive debate (Cooper, 2006).

To conclude this section, it is safe to say that opinions on the effects of the EWS differ. In order to assess its impact more rigorously, a credible counterfactual of the Commission’s proposal behavior in the absence of the EWS would be needed. Given the difficulties inherent in establishing such a counterfactual, this article moves away from trying to gauge the EWS’ effects directly, and instead focuses on when NPs send Reasoned Opinions.

When do national Parliaments send Reasoned Opinions?

Building on a short review of the relevant empirical literature, this section develops hypotheses regarding when national Parliaments are more likely to issue a Reasoned Opinion.

A first important factor which may affect the number of ROs is the difference in parliamentary procedures across Member States. Auel, Rozenberg, & Tacea (2015) develop a measure of parliamentary strength, and study the link with several measures of parliamentary activity. Their measure uses data from the project Observatory for Parliaments after the Lisbon Treaty (OPAL) on three dimensions: access to information, information-processing capacities, and enforcement instruments. Covering all 40 chambers⁷ of EU national Parliaments over the period 2010-2012, their sample has a total of 161 ROs.

For most of their activity measures, Auel, Rozenberg, & Tacea (2015) find a positive correlation between institutional strength and activity at the chamber level. For instance, the correlation between their OPAL measure of institutional strength and debating on European affairs is $\rho = 0.3$. Regarding the EWS, they argue, two competing hypotheses seem plausible. On the one hand institutionally strong chambers of Parliament can be expected to make active use of the EWS by issuing many ROs. On the other hand, institutionally weak chambers of Parliament may issue more ROs in order to compensate for their lack of alternatives. However, in the sample the correlation is close to zero (0.05), supporting neither hypothesis and prompting further testing.

Gattermann & Heffler (2015) extend the period under study to 2010-2013 and conduct a more fine-grained analysis by considering individual draft legislative acts. With 411 draft legislative acts and 40 chambers, their sample consists of 16,440 dyads. Since NPs issued only 268 ROs in the sample, Gattermann & Heffler use a rare events logit regression (King & Zeng, 2001). They find that NPs are significantly more likely to issue a Reasoned Opinion if a minority government

⁷ Until July 2013, when Croatia joined, the EU had 27 Member States. Of these, 14 have a unicameral parliament, and 13 a bicameral parliament, resulting in a total of 40 chambers. With the addition of unicameral Croatia, the EU-28 counts 41 chambers.

is in place, if the Parliament is polarized on EU integration, if sectoral committees rather than only European Affairs Committees are allowed to draft ROs, and if other NPs have issued ROs.

While Williams (2016) extends the analysis by another year to cover 2010-2014, the number of observations in his study is significantly lower at 320. On the one hand, he considers only the 33 directly elected chambers minus Croatia. On the other hand, he groups all draft legislative acts per European semester, of which he covers 10. His main finding is a positive relationship between public Euroscepticism and the number of ROs issued by NPs in the following semester. In addition, he finds a positive effect of GDP per capita and of being an upper chamber on the number of ROs.

Hypotheses for further testing

In the institutional setup of the EU, the prime channel of representation for the interests of Member States is the Council. Without agreement from the Council (typically by Qualified Majority Voting), no legislative proposal can be adopted. However, in the Council only the governments of each Member State are represented. Hence in a given Member State, the more the Parliament differs from the government, the more it may fear that the government will not defend its interests in the Council. In response, Parliaments may send a RO on subsidiarity to try and have their interests heard by the Commission directly.

A directly testable implication of this reasoning is that minority governments – i.e. those with coalitions representing less than half of parliamentary votes – are more likely to send ROs, as already found by Gattermann & Heffler (2015).

H1. Chambers of Parliaments represented by minority governments are more likely to send ROs.

As stated before, there is a big difference in strength across parliamentary chambers. The simplest hypothesis related to institutional strength would be that institutionally strong chambers send more ROs. Alternatively, weak chambers may seek to compensate for their weakness by sending more ROs. For instance, some chambers enjoy so-called mandating rights (Karlas, 2012): they can legally bind their governments to specific actions, such as voting against a legislative proposal from the EU Commission. One could imagine that chambers with such mandating rights do not need to send ROs to make their voices heard. However, given the very small but positive correlation found by Auel, Rozenberg, & Tacea (2015), the former hypothesis will be favored for now.

H2. Institutionally strong chambers of Parliaments are more likely to send ROs.

Comparing upper and lower chambers (e.g. the Italian Senate versus the Chamber of Deputies), Williams (2016) found that directly elected upper chambers are more likely to send ROs. While he attributes this finding to their desire to exploit the (typically more limited) rights that they have, which would contradict the previous hypothesis, it could also be due to the fact that upper chamber in many countries simply have more time for debate and reflection.

H3. Upper chambers are more likely to send ROs.

Williams (2016) found a statistically significant relationship between public Euroscepticism and the number of ROs sent in the next European semester. This is the next hypothesis to be tested. An important side note here is that Williams did not distinguish between different types of Euroscepticism proposed in the literature, such as hard and soft Euroscepticism (Taggart & Szczerbiak, 2004) or EU-pessimism (not liking the current EU setup) and Europhobia (being against European integration in general) as proposed by Kopecký & Mudde (2002). To avoid

problems with the operationalization of the variable, this study sticks to the simple one-dimensional conceptualization of Williams, and measures public Euroscepticism using the same data from Eurobarometer.

H4. Parliaments facing more public Euroscepticism are more likely to send ROs.

While Williams (2016) suggests that MPs are responsive to interim fluctuations in public Euroscepticism, the analysis does not control for MPs' Euroscepticism and the changing composition of NPs through elections. The present study aims to overcome this limitation by testing the following novel hypothesis.

H5. More Eurosceptic Parliaments are more likely to send ROs.

Data and results

This section presents the data and the results of a logistic regression analysis to test the hypotheses derived above.

As in Gattermann & Heffler (2015), the unit of analysis is the chamber-proposal dyad. Over the period 2010-2016, a total of 629 draft legislative proposals and 427 Reasoned Opinions were registered in the Annual Protocol 2 Statistics 2010-2017 (European Parliament, 2017). With 40 chambers and 629 proposals, the total number of observations would be 25,160. Including Croatia as of 2014 brings the total number of chambers to 41 and of observations to 25,359 (there were 199 proposals in the period 2014-2016).

Variable definitions and descriptive statistics

The dependent variable of interest, “RO”, is a dummy variable which takes the value 1 if a chamber issued a Reasoned Opinion on a proposal, as registered in the Annual Protocol 2 Statistics (European Parliament, 2017).⁸ Otherwise it is equal to 0.

H1 is about minority governments. The variable “Minority_Govt” is 1 when a minority government was present in the country of the relevant chamber at the time of the 8-week scrutiny deadline of the relevant proposal. A minority government is present if the ruling coalition has less than half of the seats in (the lower chamber of) Parliament. Information on cabinet seat shares was obtained from the ParlGov dataset (Döring & Manow, 2016).

Two different variables will be used to test H2 regarding institutional strength. The first variable, “Mandating”, is 1 for chambers with mandating rights and 0 otherwise. This data was obtained from Karlas (2012) for all countries but Croatia. Since Croatia does not have mandating rights it is 0 for observations regarding Croatia. The second variable, “OPAL”, takes the more comprehensive institutional strength scores from Auel, Rozenberg, & Tacea (2015). This score is not available for Croatia.

To test whether upper chambers are more likely to send ROs as per H3, the variable “Upper” was coded 1 for upper chambers and 0 for lower chambers. Information on the chambers of national Parliaments can be retrieved from the EU Interparliamentary Exchange platform at www.ipex.eu.

⁸ The two chambers of the Spanish and Irish Parliaments always issue their Reasoned Opinions jointly. Hence a Reasoned Opinion from the Spanish/Irish Parliament is coded as a 1 for both the Spanish/Irish lower chamber and the Spanish/Irish upper chamber.

The main conclusion of Williams (2016) is that chambers of Parliament send more ROs when public Euroscepticism (i.e. people having a negative image of the EU) is higher. To test H4, the variable “EU_Neg_Image” is replicated and extended from the same Eurobarometer data. This variable is equal to the fraction of people in the country who, in the latest Eurobarometer survey prior to the EWS deadline for a given proposal, say the EU conjures up a negative image.⁹ As in Williams, the variable is lagged with respect to the dependent variable because the prior Eurobarometer survey is used.

H5 is a novel hypothesis. Rather than focusing on public Euroscepticism, it concerns the Euroscepticism of members of national Parliaments. The variable “Parl_Anti_EU” is constructed by using data from the ParlGov dataset (Döring & Manow, 2016). Specifically, it is the seat-weighted Euroscepticism of the parties in Parliament.¹⁰

In addition to variables related to the hypotheses, the regression will control for two important concerns. First, there is likely to be a very high level of heterogeneity across draft legislative proposals which cannot be coded in a straightforward manner. For instance, a key characteristic that one cannot observe directly is whether a proposal actually violates the principle of subsidiarity. However, it seems reasonable to assume that by including the variable “RO_Others”, which measures how many other chambers have issued ROs on a given proposal, a large part of the unobserved heterogeneity at the proposal level can be controlled for.

⁹ The exact question asked is: “In general, does the European Union conjure up for you a very positive, fairly positive, neutral, fairly negative or very negative image?”. As in Williams (2016), public Euroscepticism is measured by adding the proportion of respondents answering “fairly negative” or “very negative”.

¹⁰ Euroscepticism is defined based on the ParlGov variable “EU_anti_pro” as follows: Euroscepticism = (10 - EU_anti_pro)/10. EU_anti_pro is a score on a 10-point scale of how much a given party is in favor of the EU, with a score of 10 being maximally in favor, and a score of 0 being maximally Eurosceptic.

Another reason to include the variable RO_Others, is that chambers may coordinate their efforts. By aligning first on which proposals to send ROs about, they may be able to trigger more yellow and orange cards.

A second control variable is GDP/capita, measured in thousands of euros as “GDP_PC”. Since chambers of Parliament of countries with higher levels of GDP/capita are likely to have more resources (Williams, 2016), and are more likely to be net contributors to the EU, it is important to control for this variable as well.

In addition to the variables RO_Others and GDP_PC, it may be important to control for the topic area of the legislative proposal. To this end, the categorical variable “Topic” codes the topic area of the proposal according to the European Parliament (European Parliament, 2017).

Descriptive statistics for the dependent variable, the six independent variables and the two control variables are provided in Table 1. A correlation table is provided in the Appendix. The highest correlation, taking a value of only 0.40, is between EU_Neg_Image and Parl_Anti_EU. There is hence no direct concern related to multicollinearity.

Table 1. Descriptive statistics

Variable	N	Min	Max	Average	Source of underlying data
RO	25,359	0	1	0.02	European Parliament (2017)
Minority_Govt	25,359	0	1	0.20	Parlgov (Döring & Manow, 2016)
Mandating	25,359	0	1	0.12	Karlas (2012)
OPAL	25,160	0.16	0.84	0.49	Auel, Rozenberg, & Tacea (2015)
Upper	25,359	0	1	0.32	EU Interparliamentary Exchange (IPEX)
EU_Neg_Image	25,359	0.05	0.59	0.24	Eurobarometer
Parl_Anti_EU	25,359	0.08	0.53	0.28	Parlgov (Döring & Manow, 2016)

RO_Others	25,359	0	14	0.63	European Parliament (2017)
GDP_PC	25,359	5.15	94.05	26.6	Eurostat
Topic	25,359	n.a.	n.a.	n.a.	European Parliament (2017)

An overview of the 629 legislative proposals and 427 ROs by Topic is provided in Figure 1. There is significant variation in both the number of proposals and the number of ROs across topics. However, the ratio between the two does not vary drastically, except for an outlier in Women’s Rights and Gender Equality. The biggest topic, Economic and Monetary Affairs, had 102 proposals and 70 ROs. The smallest topic, Constitutional Affairs, had only 1 proposal and 0 ROs.

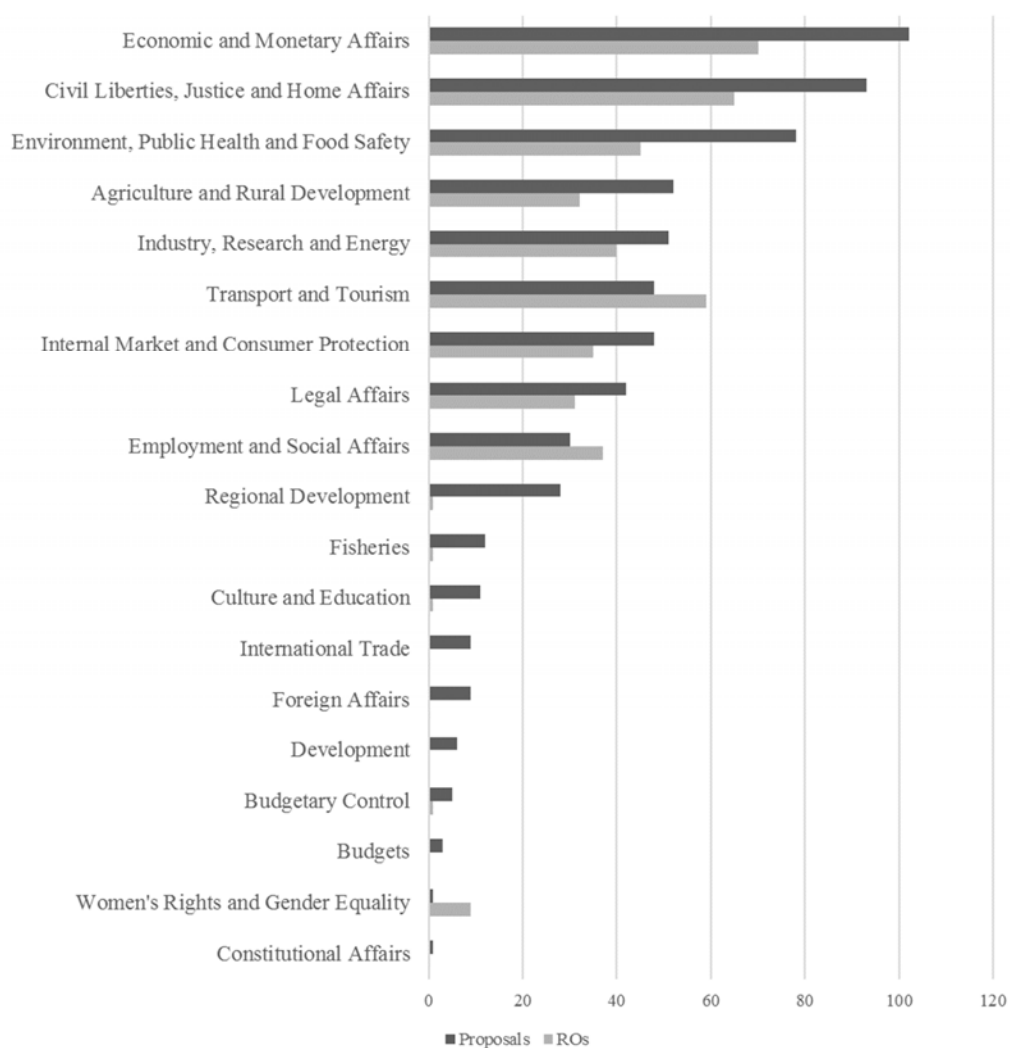


Figure 1. Number of legislative proposals and ROs by topic area.

The number of ROs by country varies widely. As shown in Figure 2, over the period 2010-2016 Sweden sent 62 ROs, while Slovenia sent only 1. A more detailed table with the number of ROs per chamber and the correlations between upper and lower chambers within countries is provided in the Appendix. The Appendix also provides a correlation table of ROs across countries, excluding Croatia. The highest correlations tend to occur among Central and Eastern European countries. Of the 702 country pairs, only 8 have a correlation of 0.5 or higher. Of these, 6 are among pairs out of the Czech Republic, Hungary, Romania and Slovakia.

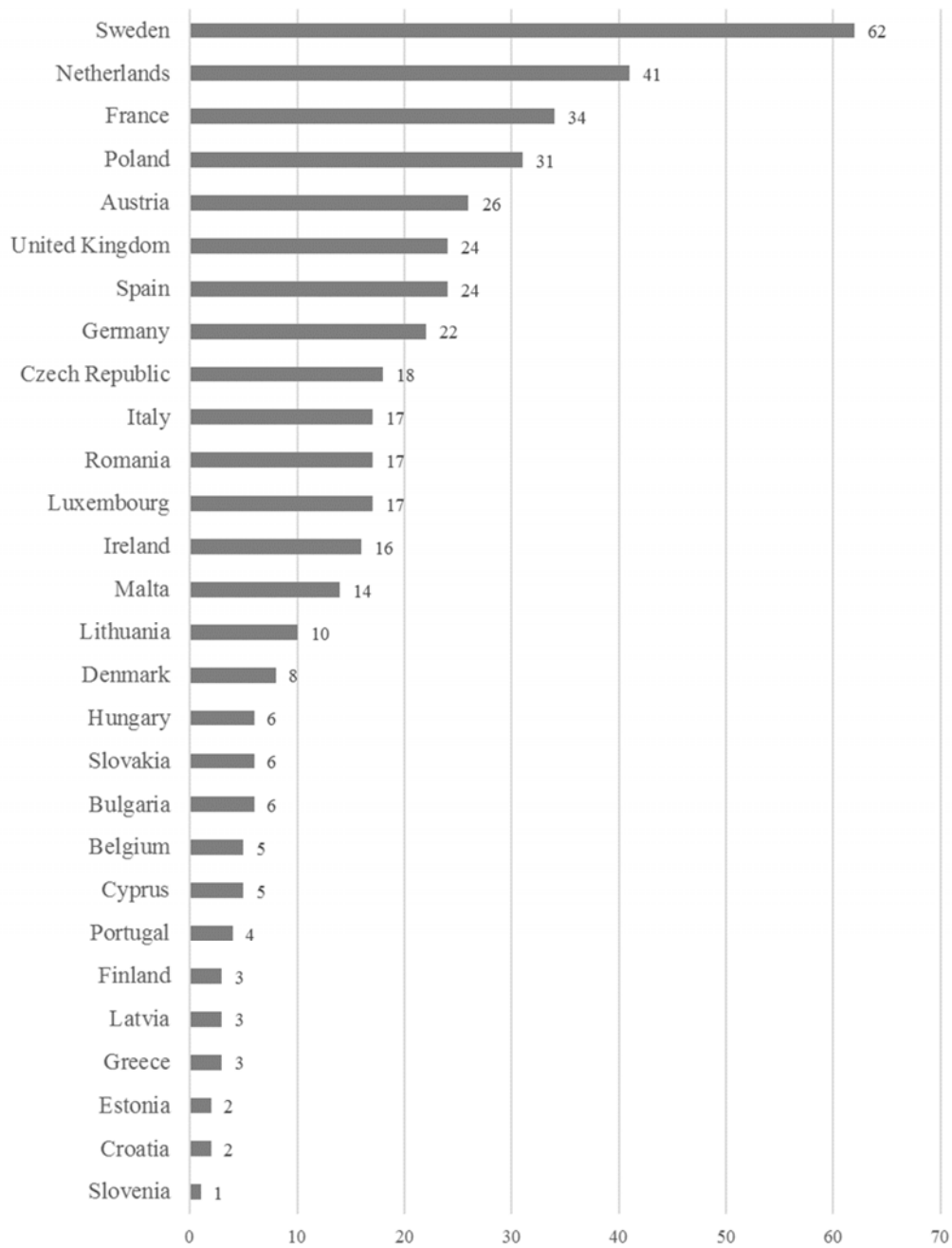


Figure 2. Number of Reasoned Opinions by Country.

Methods and results

Since each chamber of Parliament is observed for a number of consecutive legislative proposals, the data has a panel structure (where the legislative proposals can be interpreted as the time dimensions). The full panel, which includes Croatia as of 2014, is unbalanced. However, since

the OPAL variable is not available for Croatia, regressions including the OPAL variable will exclude Croatia and hence use a balanced panel.

Regarding the analysis of panel data, there is a long-standing debate on the use of fixed effects and random effects modeling (Bell & Jones, 2015; Clark & Linzer, 2015; Wooldridge, 2010). Often, scholars regard the fixed effects approach as more rigorous, and only use the random effects approach if a Hausman (1978) specification test results negative.

Building on Mundlak (1978), Bell & Jones (2015) developed a new approach. With this approach, one can disentangle the so-called within and between effects. The within effect of a variable is the effect of over-time variations in that variable for a given unit in the panel. Put more simply, the within effect is the longitudinal effect. Conversely, the between effect of an independent variable is the effect of variations in the variable across units in the panel. Again, put more simply, the between effect is the cross-sectional effect.

In a traditional fixed effects regression, all time-invariant variables are discarded and only the within effects are estimated. Conversely, in a traditional random effects regression the within and between effects are implicitly assumed to be identical, and if this is not the case the estimated coefficients “will be uninterpretable weighted averages” of the two effects (Bell & Jones, 2015: 137).

The within-between estimator of Bell & Jones (2015) can be operationalized by running a random effects regression after a simple data transformation. The transformation concerns those variables for which one wants to estimate the within and between effects separately. For each such variable, two new variables need to be constructed: one measuring the average over time for each unit of the panel, and one measuring the variation over time. For each panel unit (in our case

the parliamentary chambers), this second variable is constructed by simply subtracting the average over time from the original variable. The correlation between these transformed variables is reported in the Appendix.

Using this procedure, the variables “EU_Neg_Image” and “Parl_Anti_EU” were each transformed into two new variables: “AvgNeg_Image”, “DeavgNeg_Image”, “AvgAnti_EU” and “DeavgAnti_EU”.

The dependent variable RO measures whether a chamber of Parliament issued a Reasoned Opinion on a given proposal. Since this outcome is dichotomous, logistic regression will be used. To test the hypotheses H1-H5, a logistic panel regression was conducted on the variables listed in Table 1, after substituting the transformed variables. Note that the variables have all been defined such that the hypotheses correspond to positive coefficients.

The results of this regression are reported in Table 2. While Model 1 tests H2 using the Mandating variable, Model 2 uses the more comprehensive OPAL variable (but excludes Croatia). Models 3 and 4 include dummy variables for the topic area. They drop proposals in topic areas that have no ROs because these would have been predicted perfectly.¹¹

¹¹ These topic areas are: International Trade, Foreign Affairs, Development, Budgets, and Constitutional Affairs.

Table 2. Within-between logistic panel regression on the number of Reasoned Opinions.

Logistic panel of RO	Model 1	Model 2	Model 3	Model 4
Minority_Govt	0.548*** (0.197)	0.560*** (0.196)	0.563*** (0.190)	0.572*** (0.191)
Mandating	0.036 (0.337)		0.042 (0.334)	
OPAL		1.721 (1.149)		1.705 (1.137)
Upper	0.496* (0.281)	0.588** (0.237)	0.490* (0.278)	0.582** (0.235)
AvgNeg_Image	-2.566* (1.506)	-1.858 (1.628)	-2.534* (1.513)	-1.837 (1.639)
DeavgNeg_Image	1.922 (1.192)	1.950 (1.197)	1.729 (1.213)	1.767 (1.212)
AvgAnti_EU	3.749*** (1.390)	2.649* (1.399)	3.696*** (1.379)	2.605* (1.389)
DeavgAnti_EU	-0.592 (2.485)	-0.551 (2.491)	-0.915 (2.549)	-0.884 (2.548)
RO_Others	0.399*** (0.021)	0.398*** (0.021)	0.413*** (0.019)	0.413*** (0.019)
GDP_PC	0.017*** (0.006)	0.015*** (0.005)	0.017*** (0.006)	0.015*** (0.005)
Topic dummies	No	No	Yes	Yes
Constant	-6.273	-6.941	-5.961	-6.618
N	25,359	25,160	24,231	24,040
Clusters (chambers)	41	40	41	40

Robust standard errors clustered at the chamber level in brackets. * $p < 10\%$, ** $p < 5\%$, *** $p < 1\%$

The results for H1-H3 are broadly consistent with those found in the literature. Using an extended dataset, H1 is confirmed more strongly than by Gattermann & Heffler (2015): Parliaments with minority governments are significantly more likely to issue ROs. Like Auel, Rozenberg, & Tacea

(2015), this study cannot confirm H2 regarding institutional strength, although the signs of the coefficients of both Mandating and OPAL are consistent with the hypothesis that stronger chambers of Parliament send more ROs. As in Williams (2016), H3 is supported since upper chambers are found to be significantly more likely to issue ROs.

The main contribution of this article lies in the results for H4 and H5. By using a larger dataset, the within-between methodology (Bell & Jones, 2015), and by controlling for Euroscepticism in the parliament, novel results are obtained. Unlike Williams (2016), this study does not find support for H4, which holds that Parliaments facing more public Euroscepticism are more likely to issue ROs.

While the within effect of public Euroscepticism (corresponding to the transformed variable *DeavgNeg_Image*) is positive, it is not statistically significant at the 10 percent level. The between effect (*AvgNeg_Image*), measuring differences across parliaments, even has a negative sign and is significant at the 10 percent level in models 1 and 3. This indicates that when comparing different Parliaments and controlling for all the other variables in the regression, those in countries with higher levels of public Euroscepticism would actually be less likely to issue ROs.

A novel hypothesis, H5 holds that more Eurosceptic Parliaments are more likely to issue ROs. Looking at the within effect (*DeavgAnti_EU*), this hypothesis would not be supported. However, the between effect (*AvgAnti_EU*) is significantly positive.

Considering jointly the effects of the variables related to H4 and H5, the conclusion seems to be the following: controlling for Euroscepticism of the elected parliament, public Euroscepticism has no significant influence on the likelihood of Parliaments to issue ROs. Conversely, while

fluctuations over time in the Euroscepticism of Parliaments have no influence either, Parliaments with high average levels of Euroscepticism are more likely to issue ROs. This suggests that the optimism of Williams (2016) regarding short-term political responsiveness warrants caution: based on the evidence presented here, Parliaments do not respond to fluctuations in Euroscepticism with more or less ROs. However, the evidence does suggest that over time, in countries where the public elects Eurosceptic parliaments, more ROs are issued.

The interpretation that more ROs are issued in countries with Eurosceptic parliaments is consistent with a notable difference between model 1 and model 2. When using the comprehensive OPAL score of parliamentary strength as in model 2, the effect of AvgAnti_EU is no longer statistically significant at the one percent level but only at the ten percent level. A plausible explanation is that, over time, Eurosceptic parliaments make sure that they obtain a more comprehensive set of formal rights, and thus a higher OPAL score. If this is the case, the positive coefficient of OPAL would actually be due at least in part to historical Euroscepticism of the Parliament.

The two control variables, RO_Others and GDP_PC are statistically significant at the one percent level in all regressions. This confirms the expectation that parliamentary chambers are more likely to issue ROs when other chambers have done so as well, either because of unobserved heterogeneity at the proposal level or for reasons of coordination. Also as expected, chambers from countries with higher levels of GDP per capita are more likely to issue ROs. This may be because they have more resources, or because they tend to be net contributors to the EU budget and hence want to limit the number of new initiatives.

Robustness

Since the main new findings relate to H4 and H5, i.e. public and parliamentary Euroscepticism, it is important to assess the robustness of these findings. In particular, one could wonder if the negative finding for H4 (public Euroscepticism) holds up if the variables related to parliamentary Euroscepticism are dropped. Similarly, one could wonder if the positive finding for H5 (parliamentary Euroscepticism) holds up if the variables related to public Euroscepticism are dropped. The results of the corresponding regressions are reported in the Appendix. They confirm that the results pertaining to H4 and H5 are indeed robust to dropping the variables related to H5 and H4 respectively.

Another potential concern is that NPs may be more or less likely to send ROs depending on events such as the 2010 Eurozone crisis. However, as reported in the Appendix, including fixed effects for each of the years in the period 2010-2016 does not materially alter the results.

Conclusion

This article investigated the Early Warning System in the EU. Designed during the 2002-2003 European Convention and having taken effect with the Lisbon Treaty in December 2009, the system gives national Parliaments a right to review the Commission's draft legislative proposals in the light of the subsidiarity principle. This principle, which featured prominently in the Maastricht Treaty in response to concerns over excessive centralization and a democratic deficit in the EU, establishes a presumption in favor of political action at the Member State level.

Under the EWS, chambers of national Parliaments can send Reasoned Opinions to the Commission if they find that a proposal violates subsidiarity. If one third of chambers issue a Reasoned Opinion, a yellow card is triggered. In case a simple majority of chambers is reached,

an orange card is triggered. Both cards require the Commission to review its proposal. However, both also allow the Commission to maintain its proposal unaltered if it gives reasons why.

Opinions regarding the effects of the EWS differ. However, it is clear both from the Treaty text and its history of use that the EWS does not in any way give national Parliaments veto power against the Commission's proposals. Since 2010, only 427 ROs and three yellow cards have been issued, and the Commission maintained its proposal for two out of the three yellow cards. On the other hand, the Commission does claim that it has refocused and reduced the volume of proposals. It also seems clear that the EWS and the political dialogue between the Commission and national Parliaments have increased the volume and quality of the debate between them.

Since it is hard to establish a credible counterfactual against which to evaluate the effects of the EWS, this article has focused on an empirical study of when national Parliaments actually issue Reasoned Opinions. Compared to the literature, it significantly extends the time period under study to 2010-2016. It also extends the geographical coverage from the EU-27 to the EU-28 by including Croatia as of its accession. Taking the chamber-proposal dyad as the unit of analysis, this brings the total number of observations to 23,359, with ROs being issued for 427 of these.

The results for the first three hypotheses developed in this article strengthen the findings of the existing literature. First, chambers of Parliaments with minority governments are significantly more likely to issue ROs. This is intuitive as ROs offer dissenting Parliaments a means to bypass their minority governments represented in the Council. Second, while it seems plausible that institutionally strong chambers of Parliament would send more ROs, there is no statistically significant support for this (although the relevant coefficients do have a positive sign). Third, upper chambers of bicameral Parliaments are found to be significantly more likely to send ROs.

This may be because they want to exploit their typically limited competences, or simply because they have more time than lower chambers.

The main contribution of this article lies in the results for its last two hypotheses. By using a larger dataset, the within-between panel methodology (Bell & Jones, 2015), and by controlling for Euroscepticism in the parliament, novel results are obtained regarding Euroscepticism and the issuance of ROs. In particular, contrary to the findings of Williams (2016), public Euroscepticism is found to have no statistically significant effect on the issuance of ROs. Rather, Euroscepticism in the parliament is found to have a statistically significant impact.

In conclusion, while this article confirms most of the findings in the nascent empirical literature on the issuance of ROs, it suggests that optimism regarding short-term political responsiveness warrants caution: based on the evidence presented here, Parliaments do not respond to fluctuations in Euroscepticism with more or less ROs. However, the evidence does suggest that in countries where the public elects Eurosceptic parliaments, more ROs are issued.

As the EWS ages and more data becomes available, the hypotheses formulated in this article should be further tested and refined to shed more light not only on when NPs issue ROs, but also why they do.

In particular, given that ROs and yellow cards do not seem to have a directly observable strong effect on the Commission, the reasons for Parliaments to invest resources in issuing ROs should be studied in more detail. This is especially true since the present study does not find the issuance of ROs to be a response to high levels of public Euroscepticism, which one would have expected if ROs were simply a matter of position-taking vis-à-vis domestic audiences. Furthermore, this study finds some evidence that Parliaments with mandating rights over their governments issue

more rather than less ROs. This calls into question the argument that ROs are used by Parliaments without mandating rights to constrain their governments in some alternative way.

If Parliaments apparently do not issue ROs to constrain the Commission, nor to placate domestic Eurosceptic audiences, nor to constrain their governments, then the question why they do issue them becomes all the more pressing. An obvious answer would be that they issue them simply because they feel that they must – the “logic of appropriateness” at work (Cooper, 2006; March & Olsen, 2004). However, for those of us brought up with rational choice theory, the idea that parliamentarians would neglect their self-interest entirely in pursuit of their duty, as noble as that may be, seems worthy of further investigation to say the least.

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Appendix

Excerpt from the Treaty on European Union, as amended by the Treaty of Lisbon

Article 5(3)

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

Article 5(4)

Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties”.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

Protocol on the application of the principles of subsidiarity and proportionality

Article 5

Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to

appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimized and commensurate with the objective to be achieved.

Article 6

Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

If the draft legislative act originates from a group of Member States, the President of the Council shall forward the opinion to the governments of those Member States.

If the draft legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the opinion to the institution or body concerned.

Article 7

1. The European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, shall take account of the reasoned opinions issued by national Parliaments or by a chamber of a national Parliament.

Each national Parliament shall have two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote.

2. Where reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the draft must be reviewed. This threshold shall be a quarter in the case of a draft legislative act submitted on the basis of Article 76 of the Treaty on the Functioning of the European Union on the area of freedom, security and justice.

After such review, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.

3. Furthermore, under the ordinary legislative procedure, where reasoned opinions on the noncompliance of a proposal for a legislative act with the principle of subsidiarity represent at least a simple majority of the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the proposal must be reviewed. After such review, the Commission may decide to maintain, amend or withdraw the proposal.

If it chooses to maintain the proposal, the Commission will have, in a reasoned opinion, to justify why it considers that the proposal complies with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinions of the national Parliaments, will have to be submitted to the Union legislator, for consideration in the procedure:

(a) before concluding the first reading, the legislator (the European Parliament and the Council) shall consider whether the legislative proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national Parliaments as well as the reasoned opinion of the Commission;

(b) if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration.

Excerpt from the Draft Constitution

Protocol on the application of the principles of subsidiarity and proportionality

Article 5

Any national Parliament or any chamber of a national Parliament of a Member State may, within six weeks from the date of transmission of the Commission's legislative proposal, send to the Presidents of the European Parliament, the Council of Ministers and the Commission a reasoned opinion stating why it considers that the proposal in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

Article 6

The European Parliament, the Council of Ministers and the Commission shall take account of the reasoned opinions issued by Member States' national Parliaments or by a chamber of a national Parliament.

The national Parliaments of Member States with unicameral Parliamentary systems shall have two votes, while each of the chambers of a bicameral Parliamentary system shall have one vote.

Where reasoned opinions on a Commission proposal's noncompliance with the principle of subsidiarity represent at least one third of all the votes allocated to the Member States' national Parliaments and their chambers, the Commission shall review its proposal. This threshold shall be at least a quarter in the case of a Commission proposal or an initiative emanating from a group of Member States under the provisions of Article III-165 of the Constitution on the area of freedom, security and justice.

After such review, the Commission may decide to maintain, amend or withdraw its proposal. The Commission shall give reasons for its decision.

Correlation table

Table 3. Correlations between the regression variables

correlations	RO	Minority_Govt	Mandating	OPAL	Upper	EU_Neg_Image	Parl_Anti_EU	RO_Others	GDP_PC
RO	1.00								
Minority_Govt	0.03	1.00							
Mandating	0.00	0.04	1.00						
OPAL	0.04	-0.03	0.34	1.00					
Upper	0.02	-0.10	-0.09	-0.22	1.00				
EU_Neg_Image	0.02	-0.21	-0.33	-0.05	0.06	1.00			
Parl_Anti_EU	0.03	-0.10	-0.25	0.29	0.00	0.40	1.00		
RO_Others	0.25	-0.00	-0.00	-0.00	-0.00	0.02	0.00	1.00	
GDP_PC	0.04	-0.04	-0.25	0.14	0.03	0.25	0.28	0.00	1.00

Reasoned Opinions by chamber

Table 4. Reasoned Opinions by chamber and correlations between lower and upper chambers (1 = lower, 2 = upper)

Country	Chamber	ROs	Chamber corr.
Sweden	SE	62	Unicameral
France	FR2	31	0.20
Austria	AT2	23	0.23
Netherlands	NL1	23	0.78
Netherlands	NL2	18	0.78
Poland	PL2	17	0.51
Luxembourg	LU	17	Unicameral
United Kingdom	UK1	16	0.52
Poland	PL1	14	0.51
Malta	MT	14	Unicameral
Germany	DE2	13	0.36
Spain	ES1	12	1.00
Spain	ES2	12	1.00
Italy	IT2	12	0.12
Lithuania	LT	10	Unicameral
Romania	RO2	9	0.23
Czech Republic	CZ2	9	0.55
Germany	DE1	9	0.36
Czech Republic	CZ1	9	0.55
Romania	RO1	8	0.23
Denmark	DK	8	Unicameral
Ireland	IE2	8	1.00
United Kingdom	UK2	8	0.52
Ireland	IE1	8	1.00
Slovakia	SK	6	Unicameral
Hungary	HU	6	Unicameral
Bulgaria	BG	6	Unicameral
Italy	IT1	5	0.12
Cyprus	CY	5	Unicameral
Portugal	PT	4	Unicameral
Latvia	LV	3	Unicameral
France	FR1	3	0.20
Finland	FI	3	Unicameral
Greece	EL	3	Unicameral
Austria	AT1	3	0.23
Belgium	BE1	3	0.00
Belgium	BE2	2	0.00
Estonia	EE	2	Unicameral
Croatia	HR	2	Unicameral
Slovenia	SI1	1	n.a.
Slovenia	SI2	0	n.a.
Total		427	

Correlation across countries

Table 5. Across-country correlations in ROs, 2010-2016 (Croatia excluded).

	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK	
AT	1.0																											
BE		1.0																										
BG			1.0																									
CY				1.0																								
CZ					1.0																							
DE		0.3				1.0																						
DK							1.0																					
EE			0.3					1.0																				
EL									1.0																			
ES										1.0																		
FI		0.5									1.0																	
FR						0.3						1.0																
HU								0.3					1.0															
IE														1.0														
IT									0.3						1.0													
LT																1.0												
LU																0.3	1.0											
LV		0.3						0.4	0.4			0.3						1.0										
MT								0.3						0.5				0.3	1.0									
NL				0.4				0.3						0.4						1.0								
PL					0.3											0.3	0.3	0.3			1.0							
PT								0.3	0.3		0.3							0.3	0.3			1.0						
RO			0.3		0.5			0.3					0.6			0.3				0.4			1.0					
SE							0.3							0.3					0.3	0.3				1.0				
SI				0.4										0.4	0.4				0.3						1.0			
SK			0.3		0.5			0.3					0.5							0.3		0.5				1.0		
UK																							0.3	0.3		1.0		

For readability, only correlations below -0.2 and above 0.2 are displayed. Correlations of 0.5 or more are highlighted in bold.

Correlation between dependent variable and transformed variables

Table 6. Correlation between dependent variable and transformed variables.

correlations	RO	AvgNeg_Image	DeavgNeg_Image	AvgAnti_EU	DeavgAnti_EU
RO	1.00				
AvgNeg_Image	0.01	1.00			
DeavgNeg_Image	0.01	-0.00	1.00		
AvgAnti_EU	0.03	0.51	0.00	1.00	
DeavgAnti_EU	0.01	0.00	-0.05	0.00	1.00

Robustness checks

Only public Euroscepticism and only Parliamentary Euroscepticism

Table 7. Within-between logistic panel regression of RO.

Logistic panel of RO	Only Public Euroscepticism	Only Parliamentary Euroscepticism
Minority_Govt	0.508*** (0.178)	0.468** (0.183)
Mandating	-0.021 (0.345)	0.124 (0.323)
Upper	0.459 (0.308)	0.456 (0.288)
AvgNeg_Image	-0.618 (1.714)	
DeavgNeg_Image	1.902 (1.218)	
AvgAnti_EU		2.754** (1.373)
DeavgAnti_EU		-0.853 (2.509)
RO_Others	0.399*** (0.021)	0.401*** (0.212)
GDP_PC	0.019** (0.007)	0.014** (0.007)
Constant	-5.681	-6.537
N	25,359	25,359
Clusters (chambers)	41	41

*Robust standard errors clustered at the chamber level in brackets. *p<10%, **p<5%, ***p<1%*

Table 8. Within-between logistic panel regression on the number of Reasoned Opinions, with Year fixed effects.

Logistic panel of RO	Model 1	Model 2
Minority_Govt	0.550*** (0.188)	0.564*** (0.190)
Mandating	0.035 (0.336)	
OPAL		1.725 (1.150)
Upper	0.496* (0.283)	0.589** (0.239)
AvgNeg_Image	-2.559 (1.562)	-1.834 (1.682)
DeavgNeg_Image	1.792 (1.531)	1.813 (1.543)
AvgAnti_EU	3.746*** (1.374)	2.653* (1.395)
DeavgAnti_EU	-0.839 (2.852)	-0.923 (2.844)
RO_Others	0.396*** (0.396)	0.394*** (0.021)
GDP_PC	0.016*** (0.016)	0.014*** (0.005)
Year dummies	Yes	Yes
Constant	-6.258	-6.936
N	25,359	25,160
Clusters (chambers)	41	40

Robust standard errors clustered at the chamber level in brackets. *p<10%, **p<5%, ***p<1%

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