Why David Cameron's 'red card' plan for national parliaments won't work

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David Cameron has committed the UK to renegotiating its membership of the European Union if he wins a majority at the next British general election. As **Andrew Duff** *writes, one of the key elements of this reform package will likely be to elevate the role of national parliaments in the EU's legislative process. He argues that such a proposal should be rejected on both theoretical and practical grounds, given that the current subsidiarity early warning mechanism is already working well.*

As the UK stumbles towards the referendum on its renegotiated terms of EU membership, the demands David Cameron is about to make on his partners become clearer. One of those, of which much noise will be made, concerns the role of national parliaments in the scheme of things. Put simplistically, and in football jargon, the Conservatives are gearing up to demand that the House of Commons should gain the power to wave a 'red card' against EU laws it deems not to like.

It is worth, then, examining the current system of national parliamentary involvement in EU affairs, introduced under the Treaty of Lisbon, in both theory and practice. By way of pre-legislative scrutiny, each chamber of a national parliament has eight weeks in which to raise a reasoned opinion stating why the draft in question does not comply with the principle of subsidiarity. Originally a feature of Christian theology, transmogrified into Europe's federal constitutional order subsidiarity means that the Union must choose to act in the areas where its competences are shared with its states 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States … but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'.

UK PM David Cameron and European Council President Herman van Rompuy Credit: President of the European Council (Creative Commons BY NC ND)

To check compliance with subsidiarity, each parliament has two 'votes' (divided in eleven bicameral parliaments between the two chambers). The European Commission must review the draft law if, as a general rule, there are a third of the votes (19) against it, and must then explain why it decides to maintain, amend or withdraw the draft. This is known colloquially as the 'yellow card'. Where half the votes (28) are cast against the proposal, the Commission, if it maintains the draft, must send to the legislature (Council and European Parliament) a formal justification of its compliance with the principle of subsidiarity which shall be considered and voted on before the first reading stage of the ordinary legislative procedure. In this case, the 'orange card', the measure can be scuppered in the Council by 55 per cent of the member states (16) or by a simple majority of MEPs. In the worst of all worlds, the 'red card', any national parliament may trigger an action in the European Court of Justice via its national government on grounds of infringement of the principle of subsidiarity.

The Tory proposal, it seems, will aim to deepen the tint of orange to red – or, as William Hague says, to provide a red card 'to give national parliaments the right to block legislation that need not be agreed at European level'. But what would this achieve? To date, there have been very few formal objections by national parliaments to draft laws. In fact, since the entry into force of the Treaty of Lisbon in 2009, there have been 452 draft legislative acts, eliciting no more than 277 'reasoned opinions' of objection from the 39 possible sources. The requisite majority for a yellow card has been reached only twice, and for an orange card never.

The first yellow card, in 2012, was on the Monti II proposals to regulate the relationship between the freedom to provide services and the fundamental right of workers to go on strike. Most of the objections from national parliaments questioned the competence of the EU to regulate the right to strike under the legal base of Article 352 TFEU when Article 153 would seem to prohibit such a thing. The Commission argued that it was seeking to codify judgments of the European Court of Justice which say that the EU can act to ensure that collective action does not impede the operation of the single market. The Commission insisted that EU regulation is necessary according to the principle of subsidiarity where member states cannot agree to settle a cross-border dispute. Nevertheless, faced with political opposition in both Council and Parliament, the Commission withdrew the Monti II proposal – thereby, unfortunately, leaving the deliberation of the matter entirely in the hands of the courts.

The other yellow card, last year, was raised against the establishment of the European Public Prosecutor, despite the fact that specific provision is made for just such a thing in the Lisbon treaty. (In this case, because the measure concerns sensitive justice policy, the quota needed was one quarter instead of one third of the votes.) In a lengthy riposte, which national parliaments would do very well to digest, the Commission argues robustly that not only is national state action against financial crime indeed insufficient, but also that EU level action promises real added value.

The Commission points to a lack of continuity, equivalence and efficacy in enforcement action taken among member states and to the absence of a common EU prosecution policy. It insists that OLAF, the EU's anti-fraud office, is limited to administrative and not criminal investigation and in any case is not a prosecution authority. Likewise, the agency powers of Europol and Eurojust are limited to coordinating national authorities, and lack the capacity to act directly against those who jeopardise the financial interests of the Union.

A draft EU directive proposed by the Commission to harmonise substantive criminal law in this area is a complement to, but not a substitute for the creation of the new mechanism of EU public prosecutor. A common EU policy, claims the Commission, will prevent criminals from exploiting loop-holes and reveal their cross-border links; it will expedite court procedures, raise judicial standards and encourage best practice. In short, the Commission demonstrates the Union's competence and capability in the matter of protecting its own financial interests, and establishes convincingly why the proposed action is both proportionate to the nature of the problem and supportive of the subsidiarity principle.

Eurosceptics grumble that the Lisbon subsidiarity early warning mechanism is not working well because it has been so little used. They say that eight weeks is too short a time for national parliaments to take a view, that the thresholds are too high and that the large-scale use of delegated acts obscures the real nature of proposed legislation.

Others can make the point that, on the contrary, the system works well enough: neither the Commission nor the Council and European Parliament seem tempted to ignore subsidiarity. The current early warning mechanism acts as an effective deterrent. Indeed, it is because such pains are taken to ensure that subsidiarity is respected that there have been so few 'reasoned opinions'. While questions can be and are raised about the quality, wisdom or direction of this or that EU law, there is no evidence that the EU institutions are acting *ultra vires* and that the Union is acting improperly.

There is more widespread criticism that the force of EU legislation is disproportionate to the scale of the problems addressed, but here the wide variety of national legislative practice confronts the EU legislators with the need to take complex judgements about the size of the sledgehammer relative to that of the nut to crack. While harmonising law across the EU in the interests of maintaining the single market may be an irrelevance to one member state, it will be vital to another. Setting norms, lifting standards, improving monitoring and transparency, replacing 28 disparate national laws with one coherent regime is what the EU is for – and, on the whole, does well. Delegation of executive powers to the Commission to implement EU law lightens the overall legislative burden. And to build more delay into EU law making, which is seldom quick, would be in nobody's best interest. Certainly the system can still be improved at all levels: if national parliaments were to pay more attention to the Commission's consultative processes – green papers and the like – they would be more influential and less frustrated by the inalienable fact that they are not and

can never become a formal part of the EU legislature.

Waving subsidiarity cards is only one, and possibly the least important of the functions of national parliaments in the context of the European Union. The main job of national MPs is to scrutinise and hold to account their national government ministers and officials for their performance in the Council, the second chamber of the EU legislature, and also their prime ministers in the institution of the European Council. Moreover, national parliaments are now heavily engaged in a whole raft of cooperation with the European Parliament, the first chamber of the EU legislature. Specific arrangements for joint parliamentary dialogue have been put in place for foreign and security policy, for internal security issues, and for the 'European semester' on economic and monetary affairs. These interparliamentary activities take time, resources and energy: most national parliaments are already stretched to cope at all with the growing EU dimension of their work.

The proposal of the Eurosceptics that national parliaments should be given an even larger role in EU affairs is as outrageous in theory as it is unworkable in practice. The direct affront to the powers of the European Parliament, and the deliberate undermining of its legitimacy, are obvious. Grandstanding at Westminster against an overweening Brussels is all very well on ideological grounds, but completely spurious in terms of making the EU work better for British interests.

The UK government may sometimes regret the loss of its veto power in the Council, but it would be foolish to engineer its reintroduction through the backdoor in the hands of the House of Commons. A veto by one national parliament would certainly lead to retaliatory vetoes being wielded by another national parliament. And how could the Council of the European Union work as a more efficient legislator if its decisions were to be countermanded by the very same national MPs to whom it is already responsible? What system of parliamentary government could have three legislative chambers?

These Tory card tricks are spurious, and need to be exposed.

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Note: This article gives the views of the author, and not the position of EUROPP – European Politics and Policy, nor of the London School of Economics.

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