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## NATIONAL PARLIAMENTS' 3<sup>RD</sup> YELLOW CARD – A PRELIMINARY ASSESSMENT

**Valentin Kreilinger**

Research Fellow at the Jacques Delors Institut – Berlin



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*On 10 May 2016 national parliaments, mainly from Central and Eastern European countries, managed to trigger a “yellow card” that forces the European Commission to reconsider its proposal to revise the Posted Workers Directive. In a preliminary assessment, Valentin Kreilinger answers eight questions on proposal, procedure and precedents.*

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**National parliaments from 11 member states submitted “reasoned opinions” that raise subsidiarity concerns about a revision of the Posted Workers Directive. It is too early to say how the Commission will react, but this “yellow card” will lead to tensions between old and new member states, between national parliaments and EU institutions – and it could affect the British referendum on EU membership.**

## **1. What did the European Commission propose?**

On 8 March 2016 the European Commission proposed a revision of the Posted Workers Directive on workers who are being sent to another country by their employers for working there on a temporary basis. These workers are currently covered by social security rules in their country of origin. In countries with high wages, employers can therefore usually pay lower wages to these posted workers than to local ones.

The proposal tries to clarify employment conditions for posted workers, including the obligation to pay the minimum wage in the country to which workers are posted. It reflects Jean-Claude Juncker’s pledge of “the same pay for the same job at the same place” that he made in his State of the Union speech in September 2015.

## **2. How does the “yellow card” procedure work?**

In the so-called Early Warning Mechanism, which entered into force with the Lisbon Treaty in 2009, a national parliament can send a “reasoned opinion” to the European Commission in case of subsidiarity concerns about a legislative proposal. If one third of national parliaments think that a particular legislative matter should better be regulated at national level (and not EU level), the threshold for a “yellow card” is reached. In bicameral systems each chamber has one vote, while in unicameral systems the national parliament has two votes.

## **3. The threshold for a “yellow card” has been reached. What happens now?**

It is not yet clear whether the Commission's proposal will fail. There is no obligation for the Commission to take the concerns into account (and withdraw the legislative proposal) when a “yellow card” is triggered. The Commission must now decide whether it amends, withdraws or maintains the proposal to revise the Posted Workers Directive, but any decision must be justified. In the European Parliament, the Socialists and Democrats Group, for instance, stands firm-

ly behind the Commission and rejected the national parliaments' call on the Commission to withdraw the revision of the directive.

Only if more than half of national parliaments had raised subsidiarity concerns, they would have reached the threshold for an “orange card”. In that case, a qualified majority in the Council or a simple majority in the European Parliament would have been sufficient to force the Commission to withdraw its proposal.

#### **4. Why is this only the 3rd “yellow card” that has reached the threshold?**

Since the Lisbon Treaty added this mechanism for subsidiarity control in 2009, a “yellow card” has only been triggered twice and the threshold for an “orange card” has never been reached. One reason for the low number of cards are difficulties to reach the threshold within the current timeframe of eight weeks.

In addition to that, the activity of national parliaments in the Early Warning Mechanism varies largely. National parliaments send on average 1.29 reasoned opinions per year. From 2010 to 2014, the Swedish Riksdag submitted 50 reasoned opinions while the parliaments of Estonia, Hungary and Slovenia each only sent one reasoned opinion to Brussels.

#### **5. In the two previous cases, what did the European Commission do?**

The first “yellow card” was triggered on 22 May 2012. It concerned the Proposal for a Council regulation on the exercise of the right to take collective action (Monti II). 12 national parliaments (representing 19 votes) submitted a “reasoned opinion” and the Commission withdrew the proposal, but rejected the subsidiarity concerns.

On 28 October 2013 the second “yellow card” was triggered on the proposal for a Council regulation on the establishment of the European Public Prosecutor’s Office (EPPO). 14 national parliaments (18 votes) submitted a “reasoned opinion” to the Commission – which decided to maintain the proposal.

## **6. Why is the “yellow card” on the Posted Worker Directive a particularly significant case?**

Among the 11 national parliaments that submitted reasoned opinions on the Posted Worker Directive (Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia) all except Denmark are from Central and Eastern Europe. This means that a “regional block” of national parliaments managed to establish closer coordination around one specific topic with shared preferences. Coordination between national parliaments in the Early Warning Mechanism considerably helps to reach the threshold. If they exchange information and know beforehand which dossiers other parliaments are examining due to possible subsidiarity concerns (as it was the case with the Posted Workers Directive), this could lead to more cooperation in other areas.

## **7. What does this mean for the role of national parliaments in the EU?**

The issue of the Posted Workers Directive is a test for the relationship between national parliaments and the European Parliament that has often been characterized by conflict rather than cooperation. And if the European Commission decides to maintain the proposal, it would seriously damage its relationship with national parliaments that it has sought to improve.

The principle of strengthening national parliaments in the EU’s legislative process has attracted a lot of attention. Equally or possibly more important, however, is to strengthen their role in EU Economic Governance and thus redirecting national parliaments’ priorities for involvement in EU affairs. David Cameron’s idea to give national parliaments a “red card” became part of the settlement that was agreed at the meeting of the European Council in February 2016. It is an example of the emphasis on the legislative process, even if the “red card” will only have a limited effect on EU decision-making and would, if already in place, only have affected two per cent of votes in the EU Council of Ministers.

## **8. Will this “yellow card” have an impact in the British referendum campaign?**

It is important to distinguish politics and the EU institutional system: The “yellow card” on the Posted Workers Directive could turn out to be political dynamite. Migration and social dumping from Central and Eastern European countries have been a major issue in the referendum cam-

paign. In a broader perspective, David Cameron had indeed set his hopes on strengthening the 28 national parliaments and transforming them into a powerful collective actor at the EU level. This has happened in the case of the Posted Workers Directive, but not in the direction that had been politically intended by the British Prime Minister.

