

THE ROLE OF NATIONAL PARLIAMENTS IN VERIFYING THE COMPLIANCE WITH THE PRINCIPLES OF PROPORTIONALITY AND SUBSIDIARITY

Dragoş – Adrian BANTAŞ*

Abstract

The decision-making process of the European Union is a particularly complex one and its democratic legitimacy has almost always been a preoccupation for the citizens involved in European affairs, researchers, practitioners of Union law and, ultimately, political decision-makers. Today, after an evolutionary process that began, we could say, along with the Single European Act and, as the entire union construction, is still underway, this legitimacy is ensured in a multi-level organized system. One of these, alongside the European Parliament, is represented by national parliaments. This role is regulated in detail by the provisions of the Protocols No. 1 and 2. Practically, according to Protocol No. 1, the National Parliaments have the right to receive information about the content and the effects of the institutions issuing the draft normative acts. The obligation to transmit the documents that are necessary for the exercise of their control is a prerequisite for it, since no effective control can be exercised without knowing its exact subject. In Protocol No. 2, on the other hand, the concrete mechanisms of the National Parliaments' control over the compliance with the aforementioned principles are regulated, consisting in the issuing of reasoned opinions and, in extreme cases, in the action before the Court of Justice of the European Union. We will further discuss these matters in the present study.

Keywords: European Union, legislative procedure, Commission, Council, European Parliament, draft, act, legislative, national parliaments, subsidiary, opinion.

1. Introductory considerations.

As we have stated in the previous lines, the democratic legitimacy of the European Union's decision-making process comes from, in our opinion, the existence and the cumulated action of several levels of representation. One of these is, of course, the European Parliament.

In this regard, Article 10 of the Treaty on European Union states that "*citizens are directly represented at Union level in the European Parliament*"¹, while Article 14 of the same Treaty stipulates that "*the European Parliament shall be composed of the representatives of the Union's citizens*"²

Therefore, as nationally, the Parliaments of the Member States are the representative bodies of the citizens of those states, at the Union level, this role is fulfilled by the European Parliament, without this state of affairs showing any incompatibility with the national level. In practice, we can speak, as in the case of European citizenship, of a complementary representation at another level and not of an exclusion of national representation.

Moreover, this also results from the role played by the sources of primary law of the European Union, and here we refer in particular to Treaties of the national parliaments of the Member States.

Thus, the same Article 10, which we have just referred to, also refers to national Parliaments, recalling that the representatives of the Member States' governments, meeting within the Council, "*are democratically accountable either before national parliaments or to their citizens*"³. In fact, this seems natural, given the tradition of parliamentary control over the executive, as embodied by the Romanian Constitution⁴.

Moreover, National Parliaments, says art. Article 12 of the TEU, actively contribute to the smooth functioning of the Union, in a variety of ways, among which "by being informed by the Union institutions and by receiving notifications of Union's legislative act drafts in accordance with the Protocol on the role of national parliaments in the European Union, by compliance with the principle of subsidiarity, in accordance with the procedures laid down in the Protocol on the application of the principles of subsidiarity and proportionality, through the participation within the area of freedom, security and justice in the mechanisms for assessing the implementation of Union policies within this area, and by engaging in Europol's political control and in evaluating Eurojust's activities, by participating in the procedures for revising the Treaties, by being informed of applications for membership in the Union, and by participating in inter-parliamentary cooperation between national parliaments and the European

* PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: adrian.bantas@gmail.com.)

¹ The Treaty on European Union, consolidated version, available at www.eur-lex.europa.eu, accessed 25.01.2018, art. 10.

² Idem, art. 14.

³ Idem, art. 10.

⁴ See, in this respect, the provisions of Chapter IV of the Romanian Constitution, entitled *Raporturile Parlamentului cu Guvernul* and not only.

Parliament, in accordance with the Protocol on the role of national parliaments in the European Union⁵.”

Of course, the picture that appears to us today, before our eyes, has not been present since the beginning of the European construction, but is the result of successive reforms, as we have previously said. In this regard, Professor Augustin Fuerea states that "in relation to legislative activity, the European Parliament has evolved over time, from a consultative perspective, but also from the point of view of cooperation with the Council, the co-decision respectively, by the Council. Its evolution is due to the manifested trend, in the sense of the transition from the elitist institutions (the Council, the Commission) to the institutions that have the most democratic legitimacy consistency (European Parliament, European Council), given by the existing rapprochement between the European citizen's vote and those who of course, make up these institutions (European parliamentarians), plus heads of state and / or government)⁶.”

Therefore, the above picture depicts the multi-level democratic legitimacy of the European Union's decision-making process. Next, however, we will briefly refer to the principles of proportionality and subsidiarity, with their main characteristics. We will also briefly address the role of national parliaments in controlling the application of these principles without, for the time being, addressing concrete control mechanisms, their analysis being reserved for a subsequent section.

2. Principles of subsidiarity and proportionality. Overview on the role of national parliaments.

Fundamental references to how to exercise the competences of the European Union, the principles of proportionality and subsidiarity introduced in the Treaties on the occasion of the Single European Act and the Maastricht Treaty, have in the meantime benefited from a gradual deepening of their content, in order to better implement and control their observance.

In this regard, Professors Craig and Burca report how in 1992 the Heads of States and Governments, meeting in the European Council at Edingurgh, drafted a series of guidelines on the application of the principles of subsidiarity and proportionality, which in their turn, underpinned the development of an inter-institutional agreement with the same field, so that, on the occasion of the Treaty of Amsterdam, their provisions could be incorporated into primary law by

virtue of a Protocol attached to that Treaty. This protocol, without insisting on the definitions of the mentioned principles, details how to apply and diminish the inconsistency between the two principles⁷, which can be seen in a close relationship, as will be explained hereinafter.

On the occasion of signing the Treaty of Lisbon, the Protocol I have referred to is being replaced, the same authors report, with a new, shorter Protocol, which focuses rather on the mechanism for controlling their observance, but the Commission further assumes, observance of those contained in the old Protocol, recommending the same to the other institutional actors⁸.

Summarizing the content of these principles, we can say, in accordance with the specialty doctrine, that they only recommend legislation when necessary and, when considered as such, instruments with a higher degree of generality will be preferred, to the detriment of concrete ones (directives instead of regulations, framework directives instead of concrete ones).

In conclusion, according to the same Craig and Burca, the principles of subsidiarity and proportionality suggest a departure from hierarchical governance at the level of the European Union, and they also fulfill the broader aim of ensuring that the Union "does not unnecessarily regulate⁹.”

In particular, according to Article 5 of the Treaty on European Union, "pursuant to the principle of subsidiarity, in the areas not of its exclusive competence, the Union shall intervene only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States. neither at central level nor at regional and local level, but due to the dimensions and effects of the envisaged action, can be better achieved at Union level¹⁰.” With regard to the principle of proportionality, according to the same Art. 5 TEU, "Union action, in its content and form, does not go beyond what is necessary to achieve the objectives of the Treaties¹¹.” In fact, the Treaty which we specifically referred to expressly states that "the institutions of the Union shall apply the principle of subsidiarity in accordance with the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with the principle of subsidiarity in accordance with the procedure laid down in that Protocol¹².”

The same idea is also reiterated in the Treaty on the Functioning of the European Union, Article 69 of which insists on the fact that "*National Parliaments ensure, with regard to the legislative proposals and*

⁵ The Treaty on European Union, consolidated version, available at www.eur-lex.europa.eu, accessed 25.01.2018, art. 12.

⁶ Augustin Fuerea, *Legislativul Uniunii Europene – între unicameralism și bicameralism*, in the Dreptul magazine, no. 7/2017, pp.187-200.

⁷ Paul Craig, Grainne de Burca, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, Sixth Edition, Hamangiu Publishing House, Bucharest, 2017, p. 192.

⁸ Idem, p. 193.

⁹ Craig, de Burca, op.cit, pp.192-193.

¹⁰ The Treaty on European Union, consolidated version, available at www.eur-lex.europa.eu, accessed 25.01.2018, art. 5

¹¹ Idem, art. 5.

¹² Idem, art. 5.

initiatives presented in chapters 4 and 5 (chapters entitled "Judicial cooperation in criminal matter" and "Police cooperation" in Title V - "Area of freedom, security and justice" – s.n.) observance of the principle of subsidiarity, in accordance with the Protocol on the application of the principles of subsidiarity and proportionality¹³."

Therefore, we note, and we find it very important, that even under this title of the Treaty on the Functioning of the European Union, which may require special decision-making procedures (e.g. Article 83 (1), third sentence, Article 83 (2), Article 86, Article 87 (3), Article 89), observance of the principles of subsidiarity and proportionality is considered by the authors of the Treaties as important as in other matters, and the role of National Parliaments is the established one.

Moreover, even in the case of the procedure provided under art. 352 TFEU¹⁴, the Treaty explicitly lays down the obligation on the Commission to "*draw national Parliaments' attention to the proposals based on this Article*"¹⁵, precisely so that they can exercise their legal prerogatives to control compliance with the principle of subsidiarity.

After these references to the content of the principles of subsidiarity and proportionality, we continue our approach by exposing the proper mechanisms to control compliance, as set out in Protocols no. 1 and 2, attached to the Treaties.

3. Control of compliance with the principles of subsidiarity and proportionality. Contributions of national parliaments.

Moving to the actual analysis of the provisions of Protocols 1 and 2, it seems important to underline the fact that Protocol No. 1 begins by enshrining the obligation for the Commission to transmit to the National Parliaments a series of documents, such as the Commission's consultation documents (green books, white books and communications), the "*annual legislative schedule*", but also "*any other legislative programming or political strategy instrument*." As regards the timing of their transmission, for consultation documents, it coincides with their

publication, while the documents subsequently listed are transmitted to national Parliaments "*simultaneously with their transmission to the European Parliament and the Council*"¹⁶.

Furthermore, Protocol No. 1 enshrines, in its Article 2, the obligation to submit to the national parliaments the drafts of "*legislative acts addressed to the European Parliament and the Council*"¹⁷, also defining the notion of legislative act draft by "*proposals of the Commission, initiatives of a group of Member States, initiatives of the European Parliament, requests from the Court of Justice, recommendations of the European Central Bank and requests from the European Investment Bank to adopt a legislative act*"¹⁸."

As to the addressee of the obligation to transmit drafts of legislative acts to the national Parliaments, Article 2 distributes this obligation as follows: the Commission is responsible for transmitting the drafts issued by it (at the same time as transmitting it to the European Parliament), the European Parliament is responsible for the transmission to the national Parliaments of the projects emanating from this institution, while the Council is responsible for transmitting to the national Parliaments the projects issued by a "*group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank*"¹⁹."

Practically, so far, we can see that Protocol no. 1 ensures that important documents that can impact on the process of law-making at the Union level are transmitted to national Parliaments, whatever their nature, and without being limited to drafts of legislative acts.

Further on, the same Protocol anticipates some aspects that will be further detailed in Protocol No. 2. More specifically, Article 3 provides for the possibility for national Parliaments to submit to the President of the European Parliament, the Presidency of the Council and the President of the Commission reasoned opinions "*on the conformity of a draft of legislative act with the principle of subsidiarity*"²⁰." In this article we find some important procedural issues. For example, it is stipulated that if the legislator is a group of Member States, the President of the Council shall transmit the

¹³ The Treaty on the Functioning of the European Union, consolidated version, available at www.eur-lex.europa.eu, accessed 25.01.2018, art. 69

¹⁴ Article 352 TFEU reads as follows: 1. Where action by the Union proves necessary in the policies defined in the Treaties in order to achieve one of the objectives set out in the Treaties without their being required to do so, The Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt appropriate measures. Where those provisions are adopted by the Council in accordance with a special legislative procedure, it shall act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament. 2. The Commission, in the framework of the procedure for reviewing the subsidiarity principle referred to in Article 5 (3) of the Treaty on European Union, draws the attention of national parliaments to proposals based on this Article. 3. Measures based on this Article may not entail harmonization of the laws, regulations and administrative provisions of the Member States where the Treaties exclude such harmonization. 4. This Article may not be used to achieve the objectives of the common foreign and security policy and any act adopted pursuant to this Article shall comply with the limits laid down in the second paragraph of Article 40 of the Treaty on European Union.

¹⁵ The Treaty on the Functioning of the European Union, consolidated version, available at www.eur-lex.europa.eu, accessed 25.01.2018, art. 352.

¹⁶ *Protocol No. 1 on the role of national parliaments in the European Union*, published in the Official Journal of the European Union C 326/203, available at www.eur-lex.europa.eu, accessed 26.01.2018, art. 1.

¹⁷ *Idem*, art. 2.

¹⁸ *Idem*.

¹⁹ *Idem*.

²⁰ *Idem*, art. 3.

reasoned opinion or advice to the governments of the Member States concerned", whereas, if the issuer is the Court of Justice, the European Central Bank, The European Investment Bank, again the President of the Council shall "*forward the reasoned opinion or advice to the institution or body concerned*"²¹.

Therefore, the first way in which national Parliaments can act to verify compliance with the principles of subsidiarity and proportionality is this reasoned opinion.

From a procedural point of view, they have at their disposal, for action, an eight-week period set by Article 4 of Protocol No. 1. The term shall begin to run from the date on which "*the draft is made available to the national parliaments in the official languages of the European Union*"²² and, after its passing, the draft is "*entered on the Council's provisional agenda for adoption or in order to adopt a position in a legislative procedure*"²³.

After the agenda of the Council meetings has been established, and after deliberation within them, the agenda, and the minutes of the meetings, are also sent to the national Parliaments and to the governments of the Member States. Practically, we find that National Parliaments are informed throughout the decision-making process, from the issuance of the project to the adoption of a decision regarding it. They are also informed if the European Council discusses the adoption of decisions to implement qualified majority voting in an area where unanimity is required or the transfer of areas subject to special legislative procedure within the scope of the ordinary legislative procedure. In turn, the Court of Auditors has the obligation to submit its annual report to national Parliaments, once they have been forwarded to the European Parliament and the Council.

Another aspect worthy of mention is that contained in Title II of Protocol no. 1. It establishes inter-parliamentary cooperation, organized by the European Parliament and national Parliaments. The Protocol also encourages national Parliaments to make, when necessary, their Union's specialized bodies' conferences, which may submit its conclusions to the European Parliament, the Council and the Commission, and may also provide a framework for the exchange of good practices. The same Title II of Protocol no. 1 explicitly encourages the Conference of the above-mentioned parliamentary bodies to also discuss matters of Foreign and Common Security Policy, including its Common Security and Defense component. Although they are consultative in nature, such debates may prove useful, especially in the context of the development of the new Consolidated Cooperation in Defense sector.

If, until now, we have seen that, at the general level of the Union decision-making process, national Parliaments are informed of the most important programmatic documents and drafts of legislative acts issued by the Union institutions and that they can issue consultative opinions on observance (or not) of the principles of subsidiarity and proportionality and also that the Member State Parliaments are informed throughout the main course of the projects concerned and are also encouraged to cooperate as effectively as possible in Protocol No. 2, we find out the concrete ways of applying the control of observance of the mentioned principles.

Thus, after, in Article 1, the said Protocol establishes that each institution (of the European Union) is the recipient of the obligation to observe the principles contained in Article 5 TEU, it goes to the concrete procedural provisions.

In particular, according to Article 2 of the said Protocol, the drafts of legislative acts begin with a series of consultations, under the coordination of the Commission, which take into account, in particular, the "*regional and local dimension of the actions envisaged*."²⁴ Mentioning these levels appears to us to be natural, as it is precisely the possibility of achieving, under better conditions, the purpose of the action envisaged within them, would make Union intervention no longer necessary. The consultation stage is, in our opinion, mandatory, the mentioned article excluding it only in case of an exceptional urgency and under the condition of motivation.

Further on, Protocol No. 2 maintains the definition given by Protocol no. 1 of the drafts of legislative acts, but also the recipients and the content of the obligation to transmit the projects to the National Parliaments, adding, this time, the obligation of the institutions to also submit to the National Parliaments the drafts of the amended legislative acts. We therefore conclude that a change in the content of a draft of a legislative act entails the obligation to refer it back to the National Parliaments.

Also, Article 4 of Protocol No. 2 also adds the obligation to refer to the national Parliaments the legislative resolutions of the European Parliament and the positions of the Council since their adoption²⁵.

From Article 5 of Protocol no. 2, the essential provisions regarding the obligation to motivate the compliance of the drafts of the legislative acts with the principles of subsidiarity and proportionality are underlined. This obligation falls under the responsibility of the issuer of the act from the interpretation of this article and is executed, inter alia, by the preparation of a letter, named by the specialists as the Subsidiarity File.

²¹ Idem.

²² Idem, art. 4.

²³ Idem.

²⁴ *Protocol No. 2 on the role of national parliaments in the European Union*, published in the Official Journal of the European Union C 326/203, available at www.eur-lex.europa.eu, accessed 26.01.2018, art. 2.

²⁵ Idem, art. 4.

It should, according to the mentioned article, “contain elements to allow the assessment of the financial impact of the project in question and, in the case of a directive, the assessment of its implications for the regulations to be implemented by the Member States, including regional legislation, as the case may be.”²⁶ In order to facilitate their control, “the reasons which lead to the conclusion that a Union’s objective can be better achieved at Union level are based on qualitative indicators and, whenever possible, on quantitative indicators.”²⁷ Nevertheless, “drafts of legislative acts also take account of the need to ensure that any financial or administrative obligation falling upon the Union, national governments, regional or local authorities, economic operators and citizens is as small as possible and proportionate to the envisaged objective”²⁸. Therefore, the authors of the treaties seem to have pursued the fact that the subsidiarity file will motivate the observance of this principle as much as possible, and not only in general terms, because the general formulations do not allow effective control, or that is the purpose of this protocol.

Furthermore, Article 6 of Protocol No. 2 repeats the eight-week deadline for national parliaments to send their reasoned opinions on non-compliance with the principle of subsidiarity to the Commission, the Parliament or the Council. Unlike Protocol No. 1, in the case of Protocol No. 2, to the previous provisions are added those regarding the situation in which the national Parliaments have a bicameral structure (each Chamber may issue its own opinion) and the one in which a Member State has a structure in which there are regional Parliaments (these will be consulted by the National Parliaments / Chambers, if applicable).

Further on, Article 7 of Protocol No. 2 provides that the institutions which the draft of legislative act originates from “shall take into account the reasoned opinions of the national parliaments or a chamber of one of these national parliaments”²⁹, but this must not necessarily entail compliance with the opinion received.

Also, from the same article we find out that each national parliament has, in the procedure that we will describe below, two votes, which are distributed either entirely in the case of the Unicameral Parliaments, or by one vote of each Chamber, in the case of bicameral ones.

From now on, there are more possibilities opening up.

The first of them takes into account the case where “reasoned opinions on non-compliance by a legislative project with the subsidiarity principle represent **at least one third** of the total votes allocated to national parliaments”³⁰, in which case the draft of the legislative act should be re-examined. If the project is based on art. 76 of TFEU³¹, the threshold shall be **one quarter** of the total votes available. This stage is called, in the specialized doctrine and in the public references on this subject, as “yellow card”. At this time, three possibilities are also open, in which case the issuing institution may decide “either to maintain the project, either to modify it or to withdraw it”³², motivating the adopted decision.

The second possibility concerns the situation in which the draft of the normative act **occurs** in one of the **areas** that are subject to the **ordinary legislative procedure**. In such a case, “where reasoned opinions on a draft of a legislative act’s failure to comply with the principle of subsidiarity represent **at least a simple majority** of the votes allocated to national parliaments (...), the project must be re-examined”³³. At this point, three possibilities are also opened: the Commission (because it has the legislative initiative under the ordinary legislative procedure) can maintain, amend or withdraw its proposal, provided that the principle of subsidiarity is upheld in the case of maintaining the proposal. This motivation takes the form of a motivated opinion, which will be further important. This stage is also known as the “orange card”.

Once the procedure has reached this point, the reasoned opinion, together with the opinions issued by the national Parliaments, are referred to the “Union legislative body” (in Article 7), which the authors of the treaties recognize as being formed by the **European Parliament and the Council**. This (the legislative body) has, in turn, two possibilities. Thus, only in the first reading, on the basis of the opinions of the Parliaments and of the Commission’s opinion, the Parliament and the Council will be able to examine “the compatibility of the legislative proposal with the principle of subsidiarity”³⁴. The second possibility may take place “where, with a 55% majority of the members of the Council or a majority of the votes cast in the European Parliament, the legislative authority considers that the legislative proposal is incompatible with the principle of subsidiarity”³⁵, in which case it will no longer be examined.

²⁶ Idem, art. 5.

²⁷ Idem.

²⁸ Idem.

²⁹ Idem, art. 7.

³⁰ Idem.

³¹ „The acts referred to in Chapters 4 and 5 and the measures referred to in Article 74 which provide for administrative cooperation in the areas referred to in these Chapters shall be adopted: (a) on a proposal from the Commission; or (b) at the initiative of a quarter of the Member States.”

³² Protocol No. 2 on the role of national parliaments in the European Union, published in the Official Journal of the European Union C 326/203, available at www.eur-lex.europa.eu, accessed 26.01.2018, art. 7.

³³ Idem.

³⁴ Idem.

³⁵ Idem.

Therefore, according to the provisions analyzed so far, the role of the National Parliaments provided for in Protocol No. 2 may be to issue reasoned opinions on non-compliance with the principle of subsidiarity, and if their total reaches the level required by the Protocol for each situation, they are forwarded to the issuing institutions and, ultimately, to the legislative body, acting according to the mechanisms provided by the same Protocol.

Further on, according to art. 8 of Protocol no. 2, National Parliaments may, if they consider it necessary, bring actions (for annulment) before the Court of Justice under the provisions of Article 263 TFEU through the Governments of the Member States.

Finally, Article 9 of Protocol No. 2 enshrines the right of national Parliaments, along with that of the European Council, the Council and the European Parliament, to receive an annual report from the Commission on compliance with Article 5 of the TEU, and so on observance of the principle of subsidiarity.

Further on, it is not without meaning to consider the activity of the Chamber of Deputies and the Senate of Romania regarding the issuance of reasoned opinions on the drafts of legislative acts of the European Union in accordance with the provisions of Protocol No. 2, as previously exposed.

4. Motivated opinions issued by the Chamber of Deputies and the Senate of Romania in accordance with the procedures established by Protocol No.2

According to the Annual Reports issued by the Commission regarding the observance of the principle of subsidiarity, in 2010, the Chamber of Deputies and the Senate of Romania did not issue reasoned opinions in accordance with the procedure provided by Protocol no. 2.

The report for 2011, however, states that, this time, the Chamber of Deputies and the Senate have each issued a number of two reasoned opinions.

One of them concerned the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base, registered under number COM (2011) 121. Unlike the Chamber of Deputies, however, the Senate considered that this project did not violate the principle of subsidiarity. As a result, the Commission received the reasoned opinion of the Chamber of Deputies, this one representing one vote, in accordance with the provisions of Protocol no. 2.

The other reasoned opinion issued by the Chamber of Deputies in 2011 concerned the initiative on Further Activity and Surveillance of Credit Institutions, Insurance Undertakings and Investment Companies in a Financial Conglomerate, COM (2011) 453.

In the same year, the Senate issued reasoned opinions on initiatives on the Temporary reintroduction of border control at internal borders in exceptional circumstances, COM (2011) 560 and Jurisdiction, applicable law, recognition and enforcement of judgments in registered partnerships, COM (2011) 127³⁶.

The following year, in 2012, the Chamber of Deputies and the Senate did not issue reasoned opinions³⁷, but in 2013 the Chamber of Deputies issued such an opinion on the Proposal for a Regulation establishing the European Public Prosecutor's Office (COM (2013) 534), *the Proposal for a Directive on the approximation of the laws, regulations and administrative provisions of the Member States relating to the manufacture, presentation and sale of tobacco and related products* (COM (2012) 788), *and the Senate on the Proposal for a Regulation on the European Union Railway Agency and repealing Regulation (EC) No 881/2004* (COM (2013) 27), *Proposal for a Directive on railway safety* (COM (2013) 31) *and the Proposal for a Regulation on the promotion of free movement of persons and businesses by simplifying the acceptance of certain official documents in the European Union and amending Regulation (EU) No. 1024/2012* (COM (2013) 228³⁸).

In 2014, the Chamber of Deputies and the Senate did not issue reasoned opinions on non-compliance with the principle of subsidiarity, which is in fact the general downward trend in the number of such opinions, 2014 bringing only 22 such documents³⁹.

A year later, however, the Chamber of Deputies issued a reasoned opinion on the Proposal for a Regulation of the European Parliament and of the Council establishing a transfer mechanism in the event of a crisis and amending Regulation (EU) no 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (COM (2015) 450), of the total of 8 such opinions issued at Union level⁴⁰.

As regards the year 2016, the proposal for a Directive amending Directive 96/71 / EC of the European Parliament and of the Council of 16th of December 1996 concerning the posting of workers in

³⁶ Data extracted from the Commission's Report on Subsidiarity and Proportionality, COM (2012) 373, Brussels, 10.07.2012.

³⁷ According to the data presented in the Annual Report on Subsidiarity and Proportionality of 2012, COM(2013) 566 final, Brussels, 30.7.2013, available at www.eur-lex.europa.eu, accessed 27.01.2018.

³⁸ According to the data presented in the Annual Report on Subsidiarity and Proportionality of 2013, COM(2014) 506 final, Brussels, 05.08.2014, available at www.eur-lex.europa.eu, accessed 27.01.2018.

³⁹ According to the data presented in the Annual Report on Subsidiarity and Proportionality of 2014, COM(2015) 315 final, Brussels, 30.07.2015, available at www.eur-lex.europa.eu, accessed 27.01.2018.

⁴⁰ According to the data presented in the Annual Report on Subsidiarity and Proportionality of 2015, COM(2016) 469 final, Brussels, 15.07.2016, available at www.eur-lex.europa.eu, accessed 27.01.2018.

the framework of the provision of services (COM (2016) 128) has received one opinion on the Proposal for a Regulation laying down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a Member State and a Senate, Member States by a third-country national or a stateless person (recast) (COM (2016) 270). They also coincided with a substantial increase in the number of reasoned opinions issued, reaching 74⁴¹.

We can consider, in the light of those shown above, that the Romanian legislature understood and assumed the role enshrined in Protocol No. 2, using the mechanisms provided by it whenever it deemed necessary.

5. Conclusions

Although the effectiveness of the mechanisms provided by Protocol No. 2 may be, and has been, in some cases, challenged, certain concrete results have been achieved in the course of the not very long time that has elapsed since the entry into force of its provisions.

Thus, at the end of 2017, a number of three reasoned opinions reached the required number of votes for the review to be necessary. Specifically, the first "yellow card" concerned the proposal for a European Commission regulation on the exercise of the right to take collective action in the context of freedom of establishment and freedom to provide services, in which case the national parliaments' votes in the sense of non-compliance with the principle of subsidiarity reached the number of 19 of the total of 54 available. As a result, the Commission withdrew its proposal but did not accept that the principle of subsidiarity had been

breached. The second "yellow card" targeted the proposal to set up a European Prosecutor's Office, this time totaling 18 votes. However, the Commission has decided to maintain the proposal, not accepting that the principle of proportionality has been breached. As for the third "yellow card", it targeted the proposal to revise the Posting of Workers Directive, and this time the Commission also not accepting to review its proposal. As regards judicial review, the Court has highlighted the need to comply with the obligation to state reasons for observing the principle of subsidiarity, but acknowledged the broad margin of appreciation enjoyed by the issuing institutions (for example in Cases C-84/94 and C-233/94)⁴². Also, in Case C-547/14, Philipp Morris, the Court insisted on verifying that "if the Union legislator could, on the basis of sound data, assume that the objective of the proposed action could be better achieved at Union level⁴³".

Therefore, although it does not grant a right of veto to national parliaments, which, we believe, would be detrimental to the Union's legislative capacity, and although it does not provide for spectacular mechanisms at the fingertips of national parliaments, the treaties and protocols analyzed still co-opt them into the Union's decision-making process, which is likely to strengthen its democratic legitimacy. Moreover, as Professor Augustina Dumitrascu says, "*national parliaments must be careful not to engage in a systematic opposition*", as "*this approach would be contrary to the spirit of the early alert mechanism, which is, on the contrary, to fostering information and their positive association with the construction of a Europe closer to its citizens*⁴⁴". However, the effective results of the control on observance of subsidiarity principle as regulated by the provisions under consideration depend very much on the capacity and willingness of Member States' Parliaments to use them, or this remains to be measured in the future.

References

- Craig, Paul; de Burca, Grainne, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, Sixth Edition, Hamangiu Publishing House, Bucharest, 2017
- Dumitrascu, Augustina, *Dreptul Uniunii Europene și specificitatea acestuia*, Universul Juridic, Bucharest, 2012
- Fuerea, Augustin, *Legislativul Uniunii Europene – între unicameralism și bicameralism*, in *Dreptul* magazine, no. 7/2017
- *Protocol No. 1 on the role of national parliaments in the European Union*, published in the Official Journal of the European Union C 326/203, available at www.eur-lex.europa.eu
- *Protocol No. 2 on the role of national parliaments in the European Union*, published in the Official Journal of the European Union C 326/203, available at www.eur-lex.europa.eu
- Raffaelli, Rosa, *Principiul subsidiarității*, www.europarl.europa.eu, 10/2017
- Commission report on subsidiarity and proportionality, COM (2012) 373, Brussels, 10.07.2012
- *Annual Report on Subsidiarity and Proportionality*, 2012, COM(2013) 566 final, Brussels, 30.7.2013, available at www.eur-lex.europa.eu

⁴¹ According to the data presented in the Annual Report on Subsidiarity and Proportionality of 2016, COM (2017) 600 final, Brussels, 30.06.2016, available at www.eur-lex.europa.eu, accessed 27.01.2018.

⁴² Rosa Raffaelli, *Subsidiarity principle*, www.europarl.europa.eu, 10/2017, accessed 27.01.2018.

⁴³ Ibidem.

⁴⁴ Francois-Xavier Priollaud, David Sirtzky, *Le traite de Lisbonne. Commentaire, article par article, des nouveaux traites europeens (TUE et TFUE)*, La Documentation Francaise, Paris, 2008, p.430, apud Augustina Dumitrascu, *The Law of the European Union and its Specificity*, The Universe Juridic, Bucharest, 2012, p.71.

-
- *Annual Report on Subsidiarity and Proportionality*, 2013, COM(2014) 506 final, Brussels, 05.08.2014, available at www.eur-lex.europa.eu
 - *Annual Report on Subsidiarity and Proportionality*, 2014, COM(2015) 315 final, Brussels, 02.07.2015, available at www.eur-lex.europa.eu
 - *Annual Report on Subsidiarity and Proportionality*, 2015, COM(2016) 469 final, Brussels, 15.07.2016, available at www.eur-lex.europa.eu
 - *Annual Report on Subsidiarity and Proportionality*, 2016, COM(2017) 600 final, Brussels, 30.06.2017, available at www.eur-lex.europa.eu
 - *The Treaty on European Union*, consolidated version, published in the Official Journal of the European Union C 326/203, available at www.eur-lex.europa.eu
 - *The Treaty on the Functioning of the European Union*, consolidated version, published in the Official Journal of the European Union C 326/203, available at www.eur-lex.europa.eu