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## NATIONAL PARLIAMENTS STRIVE TO CONTROL EU DECISION-MAKING

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- The Treaty of Lisbon gave national parliaments the prerogative to control certain aspects of EU decision-making directly, without the involvement of member state governments. Their main task is to ensure that the EU legislator respects the principle of subsidiarity in its work.

- National parliaments also have their domestic roles in EU affairs. Their powers vary from country to country according to the national constitutional order. Holding a government accountable remains a challenge in many EU member states.

- The diversity of national prerogatives and political cultures goes some way towards explaining why parliaments have utilized their scrutiny instruments differently. Some focus on holding their governments accountable; others take a more active part in the subsidiarity control mechanism and political dialogue with the Commission.

- No yellow or orange cards were used by national parliaments via the subsidiarity scrutiny mechanism during the first year of the Lisbon Treaty. In the framework of political dialogue, the Commission receives an increasing number of parliamentary opinions on its legislative and consultative documents each year, but many national parliaments typically submit only a few opinions while the most active parliaments send dozens.

- Such a highly unequal level of activity between national parliaments in relation to direct contacts with the Union's legislator is mainly due to domestic factors. Before long, a structured political cooperation may have to be reconsidered, especially if national parliaments are expected to jointly exercise real control over subsidiarity compliance.

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Finland's *Eduskunta* belongs to the group of national parliaments which is less active in taking part in subsidiarity scrutiny and political dialogue in order to focus on its primary task of holding the government accountable. Photo: Ville Oksanen / Flickr.com.

The Lisbon Treaty encourages national parliaments to jointly forge a new node in the EU institutional architecture. National parliaments are given the right to control certain aspects of EU decision-making without the involvement of member state governments. Most importantly, national parliaments share the responsibility for ensuring that the subsidiarity principle is respected in all legislative matters of the Union.

In order to be successful in this new endeavour, national parliaments have to follow EU policy-making carefully enough to notice when proposed EU legislation could effectively be taken at a lower level of governance. For this purpose, national parliaments are entitled to receive consultation documents and draft legislative acts, for instance, *directly* from the EU institutions.

In addition, they are invited to cooperate with the European Parliament and also to participate in treaty revision procedures, for example by designating some members of a convention that may be used to prepare a treaty amendment. What is more, the so-called general passerelle or bridging clause (48(7) TEU), which aims at changing a decision-making procedure or a voting rule without employing ordinary or simplified treaty revision procedures, cannot be used if a national parliament were to explicitly reject such a proposal. National parliaments also take part in certain evaluation and political monitoring mechanisms relating to the area of freedom, security and justice.

This much is new, but old channels of influence remain as well. The informal political dialogue known as the Barroso Initiative from 2006 will continue and allow national parliaments to express their views on the substance of policy proposals in the form of opinions. These opinions are not limited to subsidiarity scrutiny nor legal base studies, but political dialogue is the general cooperation framework between the European Commission and national parliaments.

Furthermore, national parliaments participate in the formation of national positions before meetings of the Council or the European Council. The degree of participation varies from one parliament to another and is based on national constitutional organization and practice. The current role of parliaments in domestic EU affairs is partly linked to their parliamentary traditions, namely the kind of power relations that existed between parliaments and governments in EU member states before their accession. Needless to say, these traditions and related national political cultures do not tell the whole story because EU membership and subsequent treaty reforms change traditional practices both informally and formally. In the case of the latter, national constitutions were amended in some member states during the ratification process of the Lisbon Treaty to strengthen the role of parliaments.[1]

1 Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge: Cambridge University Press, 2010, pp. 125f.

In sum, the Lisbon Treaty aimed to strengthen the role of national parliaments, but this raises the question of how this has proceeded in practice. This briefing paper looks firstly at the democratic credentials that provide the background to the treaty reform. It then discusses the variation among national models for democratic control and how this variation affects the new practice of upholding direct relations with the Union legislator. In conclusion, it is pointed out that the new prerogatives are not likely to make a great deal of difference without more structured cooperation among national parliaments.

## The search for democratic legitimacy

Until 1979 and the introduction of direct elections to the European Parliament, MEPs were appointed from among national MPs. After the electoral reform, this link between national parliaments and the EU arena was broken and national parliaments started controlling their governments domestically: national positions presented in Brussels by member state governments were supposed to have parliamentary support.

In line with practical experiences, the procedures for parliamentary scrutiny have been refined over the years, but general concern about the Union's democratic legitimacy persisted until the latest treaty revision process started with the Laeken Declaration. This declaration raised the question of whether national parliaments ought to be represented in a separate institution or whether their role should otherwise be strengthened – at least in those policy areas where the European Parliament had no competences. Alternatively, it raised the question of whether national parliaments ought to focus on ensuring the proper application of the subsidiarity principle.

The previous option of giving national parliaments a pivotal role in the EU political system derives from the notion that the European Parliament may never be able to provide the Union with democratic legitimacy due to its remoteness from domestic political arenas and voters, who cast their votes following discussions in national public spheres.[2] From this perspective, a strengthened role for national parliaments in EU policy-making represents a credible shortcut to enhanced democratic legitimacy. As the Lisbon Treaty demonstrates, the latter option of focusing on the division of competences between the EU and member states through subsidiarity control was nevertheless the chosen one. In principle, the formal prerogatives of national parliaments were duly delimited to scrutiny of the legitimate decision-making level. National parliaments were regarded as the most efficient controllers of subsidiarity because they are the most important stakeholders in this matter: the more legislation is adopted at the EU level, the fewer legislative powers national parliaments have.

The new *ex ante* scrutiny mechanism works according to the early-warning system of so-called yellow or orange cards. Consultation documents, the annual legislative programme and draft legislative acts, among others, are sent to national parliaments, the European Parliament and the Council simultaneously, either by the Commission, the European Parliament or the Council depending on which institution the documents originate from. Added to this, agendas, outcomes and, in certain cases, the minutes of the Council meetings are sent simultaneously to national parliaments and member state governments. In relation to the draft legislative acts, national parliaments then have eight weeks to get back to the institution or body where the document originated from with a reasoned opinion if the draft is considered *not* to comply with the subsidiarity principle.

Subsequently, the EU institutions "shall" in general take account of the reasoned opinions, but the draft "must" be reviewed if a sufficient number of parliamentary chambers suspect non-compliance. Depending on the policy area and decision-making procedure in question, a simple majority (orange card), one-third or one-fourth (yellow cards) of all fifty-four votes (two per member state) are required in order to enforce the draft review. An orange card applied under the ordinary legislative procedure leaves less room for the Commission to maintain the proposal because, in that case, it would be submitted to the legislator for consideration and put to the vote.

## Diverse national prerogatives and models of scrutiny

The fact that the Convention on the Future of Europe, with a large number of members coming

2 See e.g. Anand Menon and John Peet, *Beyond the European Parliament: rethinking the EU's democratic legitimacy*, Centre for European Reform, December 2010.


Portugal's *Assembleia da República* has been submitting the largest amount of opinions in the framework of political dialogue during the past couple of years. However, many of these opinions are positive. Photo: Joaquim Alves Gaspar / Wikimedia Commons.

from national parliaments, did not agree to radically strengthen the role of national parliaments can *partly* be explained by the considerable variation that still exists among national parliaments' domestic influence in EU affairs. Indeed, as prerogatives vary significantly among the 27 member states, there is no generally accepted view on how national parliaments can most effectively influence EU politics. From the perspective of diverse national constitutional orders and practices, it may either be reasonable to emphasize the direct channels of influence like the subsidiarity mechanism or to focus on steering the work of national governments.

As regards the latter focus on influencing national policy formation, all member states have made special domestic arrangements to reinforce the democratic accountability of EU affairs. The traditional characteristics of parliamentary systems have still affected the design of scrutiny models, which means that national models vary. Certainly, every member state has a chamber devoted to taking care of EU policy-making: there are 36 Committees on European Affairs in the Union's 40 parliamentary chambers, with 13 member states having a bicameral parliament. In other respects, scrutiny procedures for keeping the executive branch accountable to the legislature differ according to the national context. It is no exaggeration to say that there are 27 national models of scrutiny in the EU27.

Some scrutiny models are based on the study of EU documents. Others are labelled as mandating or procedural models, meaning that the committees are scrutinizing their governments' positions instead of EU documents.[3] In the previous case, scrutiny reserves – sometimes subject to certain time constraints – are common because the parliaments do not follow individual Council meetings. On the contrary, the latter case means that the parliament could be seen as an organic part of the policy-making cycle, in the best-case scenario only a phone call away from the government negotiating in Brussels. In addition to these two models, many systems are a specific mix of the two. In mixed systems, more informal channels are often used for the scrutiny of EU affairs.

Different ways to hold governments accountable could also be categorized according to the roles that sectoral parliamentary committees play in the system, as they can do everything from providing an opinion on request to actually turning the EU committee into a coordination body by evaluating the substantive aspects of a legislative proposal. Another differentiating factor is the nature of the legal basis for these arrangements, which varies from being statutory or even constitutional to being based on an agreement between the government and the EU

3 According to the *Eighth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny*, the COSAC Secretariat, October 2007, the Nordic and Baltic states have procedural/mandating models while, for example, the UK, France and Germany have document-based models.

committee. All in all, there is a wide selection of national democratic control mechanisms in the EU. This is not without consequences for the EU-wide instruments of influence.

### Colourful group of subsidiarity controllers

After more than a year under the Lisbon Treaty provisions, it is abundantly clear that the different positions that parliaments hold nationally affect their behaviour at the EU level. National parliaments employ both their informal right to enter into political dialogue with the Commission and their new formal right to control respect for the subsidiarity principle to varying degrees.

According to the 2009 report by the European Commission concerning the political dialogue, many national parliaments did not send any opinions, while some sent dozens. In 2010, the number of opinions increased considerably: the Commission received close to four hundred in 2010 in comparison with 250 the year before. According to preliminary statistics, the quantitative division among countries resembles the previous year, but now the most active parliament (Portugal) may actually have exceeded one hundred opinions.[4] Other active parliaments besides Portugal are the upper houses of the Czech Republic, Italy and the UK, as well as both chambers of Austria and the Swedish and Danish parliaments.

As regards the subsidiarity scrutiny mechanism, no yellow or orange cards were used by national parliaments during the first year of the Lisbon Treaty. Also within this framework, there seems to be a division between 'active' national parliaments and those parliaments that do not emphasize this mechanism in their scrutiny of EU decision-making. Interestingly, not all national parliaments delimit themselves to sending *negative* reasoned opinions, but also send what could be called *positive* reasoned opinions. In other words, national parliaments may find that the legislative proposal complies with the principle of subsidiarity, but believe that it is still worthwhile sending a reasoned opinion. In 2010, the Commission received over two hundred reasoned opinions, but only a small proportion of these were actually negative. The active national parliaments or parliamentary chambers (typically the upper houses) in terms of *negative* reasoned opinions are those from Austria, the Czech Republic, Denmark, France, Germany, Italy, Lithuania, Luxemburg, the Netherlands, Poland, Sweden and the UK.

The tendency to write even positive reasoned opinions is a somewhat imaginative move because the protocol on the application of the subsidiarity principle only acknowledges the reasoned opinion procedure with reference to the kind of *reasoned* opinions that are currently labelled negative. The new job description of a 'subsidiarity controller' is thus interpreted differently across the Union. The most active countries appear not only to consider the proper level for decision-making in line with a narrow definition of subsidiarity, but may even discuss more generally the policy proposal from a national point of view and thereby apply a broad definition of the same principle. These diverse approaches can mainly be explained by domestic factors as discussed earlier in this paper, but they also suggest weak interparliamentary coordination.

### Political cooperation to bridge national approaches

Against this background, the Lisbon Treaty provisions on national parliaments provide an example of how differently the same articles in one treaty can be applied when there is no shared view on the way to enhance democratic legitimacy in the EU. In this particular case, it is a question of how national parliaments most effectively contribute to the good functioning of the Union. EU treaties are living texts and their implementation in 27 different political contexts always implies some variation in the interpretation of their articles. Certainly, common practices need time to develop, but when it comes to national parliaments, differences in their activities have existed since the establishment of the political dialogue mechanism.

National parliaments' diverse behaviour poses both a political and a pragmatic problem. First, differences in activity levels would logically mean differences in national parliaments' political impact on legislative proposals during the policy-shaping stage. For instance, the aim of political dialogue is to make the

4 The Commission's annual report on relations with national parliaments is scheduled to be published in June and will be available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm

Union's policy initiator aware of national parliamentary positions from the very outset of the legislative process. From the perspective of equal political input, unequal records therefore appear problematic despite the fact that some national parliaments remain more passive than others out of their own 'free will'.

Second, there is a pragmatic problem to consider: the new prerogatives given to parliaments by the Treaty of Lisbon are largely meaningless if national parliaments do not make use of them in the same way. The yellow and orange card procedures only work if a critical mass of parliaments submits a negative reasoned opinion. Gaining a sufficient number of votes out of 54 to raise any card is no mean feat, especially since subsidiarity scrutiny is assigned to be carried out by forty chambers within the short eight-week deadline. Although it is possible that reasoned opinions have an indirect impact when proposals are being shaped in Brussels, their indisputable influence with an explicit guarantee in the Treaty is dependent on the successful use of yellow or orange cards.

As a consequence, the subsidiarity control mechanism is likely to work in the way it was planned to work only through interparliamentary dialogue. Without any joint efforts by national parliaments, the subsidiarity principle would need to be blatantly violated to launch a yellow or orange card procedure. This was already evidenced before the mechanism entered into force when the interparliamentary cooperation body COSAC (Conference of Parliamentary Committees for Union Affairs) organized a coordinated test drive of the new system – no card procedures were initiated even if the legislative proposals under scrutiny were chosen in advance.[5]

As long as interparliamentary cooperation remains in its current form, yellow and orange card procedures are unlikely to evolve from a hypothetical threat into a coercive tool for influence. At the moment the main platforms for interparliamentary coordination are the COSAC secretariat, which produces bi-annual reports and organizes half-yearly meetings, as well as the Network of National Parliament Representatives, which meets every Monday in Brussels. Administrative cooperation structures are therefore already in place, but the transnational political impetus to search for a common approach to the role of national parliaments appears weak. Instead, national parliaments have developed their own ways of dealing with their new prerogatives based on national perspectives on how parliaments most effectively enhance democratic legitimacy in the Union.

This is not to say, however, that subsidiarity violations are common in EU policy-making as the Commission in particular is accustomed to self-scrutiny in this regard. Also, national parliaments focus on examining legislative *proposals*, but in the case of *ex post* procedures the Court of Justice is still the final arbitrator. The subsidiarity scrutiny mechanism is nevertheless the democratically preferred way to increase EU legitimacy through national parliaments, and policy-makers have the responsibility to implement it as efficiently as possible. Judging by the diverse levels of activity displayed by national parliaments, there is a demand for more far-reaching coordination among parliaments. If there is indeed a transnationally mutual political aim to enable effective subsidiarity control, structured interparliamentary cooperation may have to be reconsidered.

5 For a more detailed analysis, see Piotr Maciej Kaczynski, *Paper tigers or sleeping beauties? National parliaments in the post-Lisbon European Political System*, CEPS Special report, February 2011.

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